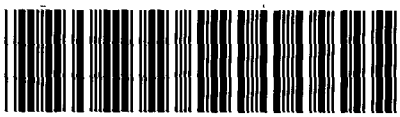

Control Number: 45624

Item Number: 448

Addendum StartPage: 0

**Hernandez, Nancy** 45624

**From:** Journeay, Stephen
**Sent:** Monday, March 27, 2017 10:49 AM
**To:** agency_req_rep@oag.texas.gov
**Cc:** Hubenak, Priscilla; Preister, David; Billings-Ray, Kellie (Kellie.Billings-Ray@oag.texas.gov); Secord, Linda; Journeay, Stephen; Hernandez, Nancy; Garcia, Desiree; Pemberton, Margaret; Commissioners Offices
**Subject:** Request representation related to PUC Docket No. 45624; Southern Cross Transmission v. PUC
**Attachments:** 45624_Southern Cross v PUC.pdf



Mr. Jim Davis, Deputy, Attorney General for Civil Litigation

Re: Southern Cross Transmission, LLC v. PUC, No. D-1-GN-17-000192

Dear Mr. Davis:

The Public Utility Commission of Texas was served with a citation in the above referenced cause number on March 23, 2017. This letter is to request representation by the Attorney General in this matter. A copy of the petition and citation is attached.

This lawsuit relates to 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.

This petition was filed on January 17 but was not served on the commission until last week. In the intervening time, the commission granted rehearing in this matter and recently issued a new order. Motions for rehearing on the new order are due by April 10, and we would expect an appeal of that order also.

If you need further information, please call me at 512-936-7215

Stephen Journeay, Director

Commission Advising and Docket Management
Public Utility Commission of Texas

stephen.journeay@puc.state.tx.us
stephen.journeay@puc.texas.gov

(512) 936-7215
(512) 936-7208 (fax)



448

# CITATION

THE STATE OF TEXAS

**CAUSE NO. D-1-GN-17-000192**

SOUTHERN CROSS TRANSMISSION LLC , Plaintiff

vs.

PUBLIC UTILITY COMMISSION OF TEXAS , Defendant

TO: PUBLIC UTILITY COMMISSION OF TEXAS
BY SERVING ITS EXECUTIVE DIRECTOR BRIAN LLOYD (EXECUTIVE DIRECTOR)
1701 NORTH CONGRESS
AUSTIN, TEXAS 78701

DELIVERED THIS 23 DAY OF MAR 2017
CARLOS B. LOPEZ
CONSTABLE, PCT.5, TRAVIS COUNTY, TEXAS
BY: _____ DEPUTY

Defendant, in the above styled and numbered cause:

**YOU HAVE BEEN SUED.** You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 A.M. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you.

Attached is a copy of the PLAINTIFF'S ORIGINAL PETITION of the PLAINTIFF in the above styled and numbered cause, which was filed on JANUARY 17, 2017 in the 126TH JUDICIAL DISTRICT COURT of Travis County, Austin, Texas.

ISSUED AND GIVEN UNDER MY HAND AND SEAL of said Court at office, March 23, 2017.

REQUESTED BY:
MARNIE ANN MCCORMICK
PO BOX 1149
AUSTIN, TX 78767-1149
BUSINESS PHONE: (512)744-9300 FAX: (512)744-9399

Velva L. Price
Travis County District Clerk
Travis County Courthouse
1000 Guadalupe, P.O. Box 679003 (78767)
Austin, TX 78701

PREPARED BY: ERICA SALINAS

-- - -- - -- - -- - -- - -- **RETURN** -- - -- - -- - -- - -- - --

Came to hand on the _____ day of _____, _____ at _____ o'clock ___M., and executed at _____ within the County of _____ on the ___ day of _____, _____, at _____ o'clock ___M., by delivering to the within named _____, each in person, a true copy of this citation together with the PLAINTIFF'S ORIGINAL PETITION accompanying pleading, having first attached such copy of such citation to such copy of pleading and endorsed on such copy of citation the date of delivery.

Carlos B. Lopez
Constable Pct. 5, Travis County, Texas

Service Fee: $ _____

_____
Sheriff / Constable / Authorized Person

Sworn to and subscribed before me this the

By: _____

___ day of _____, _____

_____
Printed Name of Server

_____
Notary Public, THE STATE OF TEXAS

_____ County, Texas

**D-1-GN-17-000192** CONSTABLE **P01 - .000049977**

☐ Original ☐ Service Copy

CAUSE NO. D-1-GN-17-000192

| | | |
|---|---|---|
| SOUTHERN CROSS TRANSMISSION LLC, Plaintiff | § | IN THE DISTRICT COURT OF |
| v. | § | TRAVIS COUNTY, TEXAS |
| PUBLIC UTILITY COMMISSION OF TEXAS, Defendant. | § | 126TH JUDICIAL DISTRICT |

# ORIGINAL PETITION OF SOUTHERN CROSS TRANSMISSION LLC

TO THE HONORABLE DISTRICT COURT:

Southern Cross Transmission LLC ("SCT") seeks judicial review of a final order of Defendant, the Public Utility Commission of Texas ("Commission"), in its Docket No. 45624. This Original Petition is filed pursuant to sections 2001.171 and 2001.176 of the Texas Government Code and pursuant to section 15.001 of the Texas Utilities Code, the Public Utility Regulatory Act (PURA). Although the Commission has issued an order stating that it grants rehearing in Docket No. 45624 and appears to contemplate further action in that docket, SCT files this petition as a precautionary measure in the event that order is not effective to extend the statutory deadline for judicial review of that docket.

## I. Discovery Plan

This is a suit for judicial review of an agency order. No discovery is anticipated.

## II. Parties

SCT is a limited liability company organized under the laws of the state of Delaware. SCT intervened in Commission Docket No. 45624 on February 25, 2016. SCT's intervention was granted on March 15, 2016, and SCT participated as a party to the proceeding.

The Commission is a state agency charged with responsibility for the regulation of electric utilities, as defined in and provided for under PURA, and may be served pursuant to Rule 106(a)(1) of the Texas Rules of Civil Procedure and 16 Texas Administrative Code § 22.22(a) by service on Brian H. Lloyd, Executive Director of the Commission, at 1701 N. Congress Ave., Austin, Texas 78701.

Parties to Commission Docket No. 45624, in addition to SCT and Commission Staff, are listed in Appendix A to this petition. SCT will provide copies of its petition to these parties consistent with the requirements of Texas Government Code section 2001.176(b)(2).

## III. Jurisdiction and Venue

The Commission issued its Order in Docket No. 45624 on September 8, 2016. SCT and another party timely filed motions for rehearing on October 3, 2016. *See* Tex. Gov't Code Ann. § 2001.146(a). Per Texas Government Code section 2001.146(c), the Commission was required to act on the motions for rehearing not later than the 55th day after its order was signed, or the motions would be overruled by operation of law. *Id.* § 2001.146(c). Section 2001.146(e) of the same statute, however, authorizes a state agency to extend the time "for taking agency action under this section," subject to certain limitations. *Id.* § 2001.146(e). One of those limitations is that "[a]n extension may not extend the period for agency action beyond the 100th day after the date the decision or order that is the subject of the motion is signed." *Id.* The statute further provides "[i]n the event of an extension, a motion for rehearing is overruled by operation of law on the date fixed by the order or, in the absence of a fixed date, the 100th day after the date the decision or order that is the subject of the motion is signed." *Id.* § 2001.146(f).

On October 28, 2016, within the 55-day period following September 8, 2016, the Commission signed an order extending the time to act on the motions for rehearing "to the

maximum extent allowed by law." On December 1, 2016, the Commission issued an "Order Granting Rehearing." The Order stated that it did not grant any particular party's motion for rehearing but did "grant rehearing to reconsider its decision." That same day, the Commission issued a separate order requesting briefing on some of the issues raised in the motions for rehearing. As of the date this petition is being filed, the Commission has not issued any further order in the case. December 17, 2016 (a Saturday) was the 100th day after the September 8, 2016 order was signed.

The provisions of the Texas Administrative Procedure Act setting these deadlines and authorizing the Commission to extend the time to act under them were amended in 2015. The scope and interplay of the provisions have not yet been subject to extensive judicial analysis. The Commission apparently construes Texas Administrative Procedure Act section 2001.146 as authorizing it to retain jurisdiction over the case beyond the 100th day after its initial order was signed, so long as the Commission grants rehearing within the 100-day period. But to the extent the Administrative Procedure Act required the agency to grant a particular party's motion for rehearing (and not simply "grant rehearing to reconsider its decision") or to issue any new decision within 100 days of its initial decision, the agency's initial decision arguably became final on the 100th day after it was signed.

SCT understands that as of the date this petition is being filed, the Commission intends to continue exercising jurisdiction over Docket No. 45624. SCT does not oppose the Commission's apparent construction of Texas Government Code section 2001.146. However, in an abundance of caution, SCT is compelled to file this petition to preserve its rights to challenge the Commission's September 8, 2016 order in the event that order is in fact the final order in Docket No. 45624. To the extent the September 8, 2016 order is the final order in Docket No.

45624, SCT is aggrieved by it and has fully exhausted its administrative remedies. In the event SCT's October 3, 2016 motion for rehearing was overruled by operation of law on or about December 17, 2016, this petition is timely filed within 30 days of that event. In that circumstance, the Court has jurisdiction over this suit pursuant to PURA section 15.001 and Texas Government Code Chapter 2001, Subchapter G, and venue is mandatory in Travis County pursuant to Texas Government Code section 2001.176(b)(1).

## IV. Errors of the Commission

Commission Docket No. 45624 was initiated to address the City of Garland's application to amend a Certificate of Convenience and Necessity for the Rusk to Panola Double-Circuit 345-kV Transmission Line in Rusk and Panola Counties. In its September 2016 Order in Docket No. 45624, the Commission approved the City of Garland's application subject to multiple conditions and requirements, many of which directly limited and conditioned the rights of SCT and its customers to participate in the ERCOT-controlled market. The Commission's decision is arbitrary and capricious, not supported by substantial evidence, affected by error of law, at odds with its precedent and statutory authority, an abuse of discretion, and confiscatory. The Commission's errors are detailed in SCT's Motion for Rehearing, Initial Brief on Rehearing, and Reply Brief on Rehearing, which are attached to this petition as Exhibits B, C, and D, respectively. All of the errors alleged in SCT's Motion for Rehearing and briefs on rehearing are incorporated herein by reference *except* the allegation that the September 8, 2016 order conflicts with FERC's orders in FERC Docket No. TX11-1-000. The allegation that the September 8, 2016 order conflicts with FERC's orders in FERC Docket No. TX11-1-000 is not presented for adjudication in this lawsuit, but might be presented to FERC at an appropriate time.

## V. Reservation

SCT has also filed a complaint in the United States District Court, Western District of Texas, concerning one of the errors in the Commission's September 8, 2016 order because that error raises a question of federal law. Specifically, SCT's federal complaint raises the allegation that the Commission's September 8, 2016 order violates the Commerce Clause of the U.S. Constitution. Consistent with federal precedent, SCT hereby reserves that issue for adjudication by the federal court. *See New Orleans Public Serv., Inc. v. Council of the City of New Orleans,* 491 U.S. 350, 357-58 (1989); *see also England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 420-21 (1964). SCT does not intend to litigate this federal law-based contention in this Court unless it is not adjudicated by the federal court.

## VI. Conclusion

SCT respectfully requests that the Court reverse the Commission's decision in the particulars set forth herein, render judgment on the issues of law raised by SCT, and remand this cause to the Commission for further proceedings consistent with the Court's opinion and judgment. SCT requests recovery of its costs and such other and further relief to which it may show itself justly entitled.

Respectfully submitted,

**DUGGINS WREN MANN & ROMERO, LLP**

By: */s/ Marnie A. McCormick*

Marnie A. McCormick
State Bar No. 00794264
mmccormick@dwmrlaw.com
P. O. Box 1149
Austin, Texas 78767-1149
(512) 744-9300
(512) 744-9399 *fax*

**ATTORNEY FOR SOUTHERN CROSS TRANSMISSION LLC**

## CERTIFICATE OF SERVICE

I certify that on the 17th day of January 2017, the foregoing document was electronically filed with the Clerk of the Court using the electronic case filing system of the Court, and that a true and correct copy was served on the following lead counsel for all parties listed below via certified mail, return receipt requested:

**Public Utility Commission of Texas**

Landon Lill
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711-3326

**CenterPoint Energy Houston Electric LLC**

Stephanie Bundage
1111 Louisiana Street
Houston, Texas 77002

Dane McKaughan
Todd Kimbrough
Greenburg Traurig
300 W. 6th Street, Suite 2050
Austin, Texas 78701

**Electric Reliability Council of Texas, Inc.**

Chad V. Seely
Nathan Bigbee
Jennifer N. Littlefield
7620 Metro Center Drive
Austin, Texas 78744

**Panola Landowners Group**[1]

Jo B. Campbell
P.O. Box 154414
Waco, Texas 76715

**Texas Industrial Energy Consumers**

Phillip G. Oldham
Katie Coleman
Michael McMillin
Thompson & Knight LLP
98 San Jacinto Boulevard, Suite 1900
Austin, Texas 78701

**City of Garland**

Kerry McGrath
Duggins Wren Mann & Romero, LLP
PO Box 1149
Austin, Texas 78767

[1] Members of the Panola Landowners Group include: Jeb James, Thomas and Beverly Patten, Justin Wagstaff, Joe Beard, Billy Broadaway, Denese McDaniel-Toler, Sandra Stein, Sharon Kirchner, Meredith Ingram-Gautier, Weldon Gray, Elizabeth Lane, William Wood, Betty Lou Wood, Jimmy D. Hutchison, W M Living Trust, Esther B. Holmes Family LP, Mary Lillibridge, Brian Lillibridge, Michael Lillibridge, Johnny Holmes, Jason Spiller, Jason Heinkel, Carl Carswell, Jr. Riley Boothe, Tom and Joan Williams, Billy Langford, Dennis Mark Langford, Stephen Langford, Vickie Langford Lacy, Joy Gibbs, Julia H. Greggs, Tiffany and Stephen Hull, David Langford, Jim Holder, Bobby Mihlhauser, Craig Gibbs, Francis G. Gil Barker, John Carroll, Gloriann Spiller, Ruth Stephens, Fannie Watson, Clarence C. Baldwin Estate, Danny Milam, and Charles N. Spears.

**Luminant Generation Company LLC and Luminant Energy Company LLC**

Kirk D. Rasmussen
Emily Jolly
Enoch Kever PLLC
5918 W. Courtyard Drive, Suite 500
Austin, Texas 78730

**JoAnn Miller**

JoAnn Miller
5418 Chaparral Drive
Waco, Texas 76710

**East Texas Area Council Boy Scouts of America**

James S. Robertson, Jr.
Council Attorney
PO Box 7339
Tyler, Texas 75711-7339

**Sylvia Hunt**

Sylvia Hunt
600 Milam Court
Irving, Texas 75038

**Deep East Texas Electric Cooperative Inc.**

Mark Davis
Russell Parish
Holland & Knight, LLP
111 Congress Avenue, Suite 540
Austin, Texas 78701

**Sherri Waters**

Sherri Waters
202 Clear Creek Drive
Texarkana, Texas 75503

**Panola Harrison Electric Cooperative, Inc.**

Mark Davis
Russell Parish
Holland & Knight, LLP
111 Congress Avenue, Suite 540
Austin, Texas 78701

**NRG Companies**

Mark Walker
NRG Energy, Inc.
300 West 6th, Suite 1600
Austin, Texas 78701

**Rusk County Electric Cooperative, Inc.**

Mark Davis
Russell Parish
Holland & Knight, LLP
111 Congress Avenue, Suite 540
Austin, Texas 78701

**Texas Competitive Power Advocates**

Lindsey Hughes
Executive Director
1001 Congress Avenue, Suite 450
Austin, Texas 78701

**Southwestern Electric Power Company**

Jerry Huerta
Senior Counsel
400 W. 15th Street, Suite 1520
Austin, Texas 78701

**Clive Fields**

Clive Fields
3299 FM 699
Carthage, Texas 75633

**Larry Fields**

Larry Fields
PO Box 129
Carthage, Texas 75633

*/s/ Marnie A. McCormick*
Marnie A. McCormick

## APPENDIX

A. List of Additional Parties to Docket No. 45624
B. Southern Cross Transmission LLC's Motion for Rehearing dated October 3, 2016
C. Southern Cross Transmission LLC's Initial Brief on Rehearing dated December 14, 2016
D. Southern Cross Transmission LLC's Reply Brief on Rehearing dated December 28, 2016

**APPENDIX A**
**(List of Additional Parties to Docket No. 45624)**

The City of Garland
CenterPoint Energy Houston Electric, LLC
The Electric Reliability Council of Texas (ERCOT)
Jeb James
Texas Industrial Energy Consumers
Thomas and Beverly Patten
Luminant Generation Company, LLC and Luminant Energy Company, LLC
Justin Wagstaff
Joe Beard
East Texas Area Council, Boy Scouts of America
Deep East Texas Electric Cooperative
Sandra Stein
Billy Broadaway
Sharon Kirchner
Panola-Harrison Electric Cooperative, Inc.
Denese McDaniel-Toler
Meredith Ingram-Gautier
Rusk County Electric Cooperative, Inc.
William Wood
Betty Lou Wood
Elizabeth Lane
Weldon Gray
Joann Miller
Jimmy D. Hutchison
WM Living Trust
Esther B. Holmes Family, LP
Sylvia Hunt
Sherri Waters
Jason Heinkel
Tiffany and Stephen Hull
Stephen Hull
Carl Carlswell, Jr.
David Langford
Riley Boothe
Jim Holder
Tom and Joan Williams
Bobby Mihlhauser
Dennis Mark Langford
Vickie Langford Lacy
Craig Gibbs
Joy Gibbs
Francis G. Gil Barker
Julia H. Greggs

NRG Companies
Southwestern Electric Power Company
Texas Competitive Power Advocates
John Carroll
Michael Lillibridge (individually, and on behalf of WM Living Trust)
Johnny Holmes
Jason Spiller
Gloriann Spiller
Fannie Watson (individually, and on behalf of the Estate of Clarence C. Baldwin)
Ruth Stephens (individually, and on behalf of the Estate of Clarence C. Baldwin)
Charles Spears
Larry W. Fields
Clive W. Fields
Brian Lillibridge (on behalf of Esther B. Holmes Family LP)
Mary Lillibridge (individually, and on behalf of Esther B. Holmes Family LP)
Billy Langford
Danny Milam
Stephen Langford

# APPENDIX B

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

RECEIVED
2016 OCT -3 PM 2:21
PUBLIC UTILITY COMMISSION
FILING CLERK

| | | |
|---|---|---|
| **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** |

# MOTION FOR REHEARING OF SOUTHERN CROSS TRANSMISSION LLC

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**SOAH DOCKET NO. 473-16-2751**
**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** |

**MOTION FOR REHEARING**
**OF SOUTHERN CROSS TRANSMISSION LLC**

TO THE HONORABLE PUBLIC UTILITY COMMISSION OF TEXAS:

Southern Cross Transmission LLC (SCT), pursuant to the Administrative Procedure Act, Tex. Gov't Code §§ 2001.145 and 2001.146 and PUCT Proc. Rule 22.264 timely files this, its Motion for Rehearing (Motion) of the Commission's Final Order dated September 8, 2016. In support of its Motion, SCT respectfully shows as follows:

## EXECUTIVE SUMMARY

In two amendments to the Public Utility Regulatory Act (PURA) in 2015, the legislature required persons, including electric utilities and municipally owned utilities, to obtain a Certificate of Convenience and Necessity (CCN) to interconnect a facility that allows power to be imported into or exported out of the ERCOT grid. Recognizing that SCT had already obtained an order from FERC directing Garland to interconnect the SCT Project and Oncor and CenterPoint to provide transmission service, the legislature included a provision requiring the PUCT to approve Garland's CCN within 185 days from filing and allowed the Commission to prescribe reasonable conditions to protect the public interest that are consistent with SCT's FERC interconnection order. The legislature did not expand the Commission's authority in the new amendments to PURA, and any condition the Commission imposes in its order granting Garland's application for a CCN must therefore be authorized by other PURA provisions.

SCT is a FERC-regulated interstate transmission company that does not and will never own facilities in Texas. The SCT Project is a 400-mile HVDC transmission line that will interconnect with Garland's facilities at the Texas state line bordering with Louisiana. SCT's

sole business will be to own and operate an interstate transmission line, and it will not engage in energy transactions across the SCT DC Tie.

The Commission's authority over SCT is limited. SCT is not and will never be subject to the Commission's jurisdiction as an electric utility, transmission service provider (TSP), or buyer or seller of electricity within Texas under PURA. Once SCT becomes a market participant and executes a market participant agreement with ERCOT, SCT will be bound to follow the ERCOT protocols generally applicable to ERCOT market participants and specifically applicable to operators of DC Ties. The Commission can enforce rules and orders relating to the reliability of the ERCOT grid, including the ERCOT protocols, and it can resolve disputes between ERCOT and SCT. The Commission can impose administrative penalties for violations of PURA or a Commission rule or order. However, no provision of PURA authorizes the Commission to impose costs directly on SCT as has been ordered in the instant case.

Without regard to the Commission's lack of statutory authority to impose costs on SCT, its final order is erroneous for numerous other reasons. As discussed more fully below, the Commission's key errors include:

- The Commission's decision to directly assign costs to SCT is an impermissible burden on interstate commerce and contravenes the FERC's directive that ERCOT transmission owners provide transmission service to users of the SCT DC Tie at rates that are just and reasonable and not unduly discriminatory.
- The Commission's decision to directly assign transmission upgrade costs to SCT and users of its DC tie is contrary to PURA § 35.004 (requiring the use of the postage stamp method to recover transmission costs) as well as unreasonably discriminatory under PURA §§ 39.001 and 39.203.
- The Commission's decision to directly assign transmission upgrade costs to SCT or the users of the SCT DC Tie failed to articulate a rational connection between its decision and the evidence relevant to the ALJs' findings of fact that it modified, deleted, or added, as required by PUCT Substantive Rule 22.262 and Government Code section 2003.049(h).
- The Commission's decision to directly assign ancillary service costs associated with the Garland project or the Southern Cross DC tie to SCT and entities using the SCT tie is contrary to PURA §§ 35.004, 39.001, and 39.203, which require that transmission service be provided at reasonable prices with terms and conditions that are not discriminatory or anticompetitive.

- The Commission's absolute prohibition against any utility's recovering costs related to the Rusk substation (and its decision to instead impose those costs on SCT) in the absence of a request for cost recovery and without determining whether such a request meets statutory standards for cost recovery constitutes a deprivation of due process and a taking of property for public use without just compensation in violation of both the Texas and U.S. Constitutions. It is also contrary to the fundamental ratemaking principles in PURA.
- The Commission's decision to require that SCT obtain "all necessary regulatory approvals in Louisiana" before Garland can seek condemnation in Texas is not supported by substantial evidence—in fact, there is no evidence—in the record.

For the foregoing reasons—as well as the fact that in several instances the Commission's order is arbitrary, capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion—SCT respectfully requests that the Commission modify, correct, and reform its decision so that SCT's rights are not substantially prejudiced.

**I. Point of Error No. 1: The Commission's decision to (a) allocate costs to SCT, (b) directly assign incremental and ancillary service costs to imports and exports over the SCT tie, and (c) prohibit utility recovery of costs associated with the Garland project or the SCT DC Tie discriminates against interstate commerce. (Order at 3, Findings of Fact 42A, 44A, 48B, 59, 62, 70, 70A, 83A, 91A, 107, 119, 119A-119E, Ordering Paragraphs 33, 34, 35, and 42)**

Where Congress has power over interstate commerce under Article 1 of the United States Constitution, by implication, states may not discriminate against interstate commerce nor may they unduly burden interstate commerce. This well-established doctrine is known as the dormant Commerce Clause. To determine whether a state agency order violates the dormant Commerce Clause, a court first determines whether the order discriminates on its face against interstate commerce.[1] In this context, "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. Discriminatory laws motivated by simple economic protectionism are subject to a virtually *per se* rule of invalidity, which can only be overcome by a showing that there is no other means to advance a

[1] *United Haulers Ass'n, Inc. v. Oneida Herkimer Solid Waste Management Authority*, 550 U.S. 330, 331 (2007) (citations and internal quotation marks omitted).

legitimate local purpose.[2] A finding that an order constitutes "economic protectionism" may be made on the basis of either discriminatory purpose or discriminatory effect.[3]

The following ordering paragraphs in the order impose discriminatory costs on SCT:

OP 31. Prohibits any utility from recovering in cost of service any costs related to the Rusk or Panola substations or the Rusk-to-Panola line.

OP 32. Requires SCT to pay all ERCOT costs for studies, protocol revisions, and other activities required by the SCT project.

OP 33. Imposes on SCT any additional costs due to the SCT project, including transmission upgrade costs, ancillary services costs, and costs of negotiating coordination agreements.

OP 34. Assigns to exports over the SCT Tie any incremental transmission and ancillary services costs required to support exports.

OP 35. Prohibits any utility from recovering in cost of service any costs associated with the SCT project.

Imposing the above costs on flows over the SCT DC Tie will artificially raise the cost of exports and imports, lower the potential margin on them, and place QSEs scheduling those flows at a competitive disadvantage. The order makes no findings of fact to support the above ordering paragraphs, which allocate costs to Southern Cross without a determination of the net economic benefits of the DC Tie project. The Commission has not imposed such costs on the existing DC ties.

In its discussion, the Commission notes that "existing regulatory requirements, protocols, and standards are inadequate to deal with the import and export of power at the levels proposed by Southern Cross Transmission."[4] The Commission then concludes that it is in the public interest to immediately begin the process of updating rules, protocols and standards to ensure that "cost responsibilities are properly placed on market participants."[5] Without any additional explanation, the Commission next concludes that "the public interest demands that ERCOT ratepayers should not bear any of the costs associated with this transmission line or the Southern

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[2] *Id.*

[3] *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984).

[4] Order at 2.

[5] Order at 2-3.

Cross DC tie."[6] The Commission has failed to provide any lawful reason for these conclusions, which unreasonably discriminate against interstate commerce.

## II. Point of Error No. 2: The Commission's decision to assign costs to SCT exceeds its statutory authority and is inconsistent with SCT's FERC interconnection order. (Order at 3, Findings of Fact 42A, 44A, 48B, 59, 62, 70, 70A, 83A, 91A, 107, 119, 119A, 119B, Ordering Paragraphs 33, 34, 35, and 42)

The Commission has no statutory authority to impose costs on SCT, which is not and will never be either an electric utility as defined in PURA § 31.002 or a buyer or seller of electricity in ERCOT regulated under PURA. Although PURA § 37.051(c-2) authorizes the Commission to impose reasonable conditions to protect the public interest, the provision does not implicitly expand the Commission's regulatory authority. There must be specific express authority in PURA for any conditions imposed.[7]

Nothing in PURA authorizes the Commission to assign any of the following cost responsibilities to SCT, which is not and will never be a user of the ERCOT transmission system:

- ERCOT studies, protocol revisions, and any other ERCOT activities provided in Ordering Paragraph No. 33;
- Transmission upgrade costs, ancillary service costs, and the cost of negotiating and executing any coordination agreement as provided in Ordering Paragraph No. 34;
- Any incremental transmission and ancillary services costs required to support imports and exports as provided in Ordering Paragraph No. 35; or,
- The use of the ERCOT transmission system as provided in Ordering Paragraph No. 42.

All of the Commission's authority to impose costs on entities is expressly limited to entities specified in PURA. SCT does not fall within any class of such entities.

Indeed, FERC has exclusive jurisdiction to allocate transmission costs to SCT. The Commission's order presumably would require Texas electric utilities to recover intrastate transmission costs through interstate rates charged to entities using SCT's tie, which is contrary

[6] Order at 3.

[7] *Public Util. Comm'n v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 316 (Tex. 2001) (holding that an agency may not exercise what is effectively a new power or a power contradictory to the statute on the theory that such a power is expedient for administrative purposes).

to the exclusive authority of FERC under section 212 of the Federal Power Act to approve interstate transmission rates. The Commission's order therefore conflicts with the limitation in PURA § 37.051(c-2) requiring that its conditions be consistent with SCT's FERC interconnection order.

**III. Point of Error No. 3. The Commission's decision to directly assign transmission upgrade costs to SCT is contrary to the limitations on the recovery of transmission service costs mandated by PURA § 35.004 and is arbitrary and capricious. (Order at 3, Findings of Fact 59, 119B, 59, Ordering Paragraphs 34 and 42)**

PURA § 35.004(d) provides that the price of wholesale transmission services within ERCOT shall be based on the postage stamp method, under which a transmission-owning utility's rate is determined based on ERCOT utilities' combined annual cost of transmission divided by ERCOT's total demand. Under this provision, the cost of transmission upgrades in ERCOT is required to be included in postage stamp transmission rates that are allocated to each utility based on its share of ERCOT's total demand. Substantive Rule 25.192 implements this requirement. The Commission's decision to directly assign transmission upgrade costs to SCT and/or to entities using the SCT tie is fundamentally inconsistent with and contrary to the postage stamp method required by PURA § 35.004(d).

Directly assigning transmission upgrade costs to SCT and/or entities using the SCT tie would also double-charge and double-recover transmission costs under the current rules, since the cost of using the ERCOT system will already be charged to and recovered from load served by import and export transactions over the SCT tie under the postage stamp method. Import transactions over the SCT tie will serve ERCOT load, and under the postage stamp method the cost of ERCOT transmission for those transactions is already properly allocated to and collected from the ERCOT loads that benefit from the transactions.[8] Substantive Rule 25.192(e) and (f) already specifically assign ERCOT transmission costs to DC tie export transactions and credit the revenues back to ERCOT load. SCT's uncontroverted evidence shows that such export tariff transactions over the SCT tie will produce more than $60 million annually in contributions to ERCOT transmission costs.[9] Assigning transmission upgrade costs to SCT and/or to entities

[8] Imports over the SCT tie will generally serve ERCOT loads at a lower cost than native generation, assuming the transactions are economically rational.

[9] SCT Ex. 3 (Wolfe Direct) at Exhibit EW-2, p. 3.

using the SCT tie—in addition to the charges under the Commission's existing transmission cost recovery rule—would double charge and double recover transmission costs. That result is contrary to PURA § 35.004 and arbitrary and capricious.

**IV. Point of Error No. 4: The Commission's decision to directly assign incremental transmission costs to imports and exports over the SCT DC Tie is contrary to the postage stamp method mandated by PURA § 35.004(d) and Substantive Rule 25.192. (Order at 3, Finding of Fact 119C, Ordering Paragraph 35)**

Ordering Paragraph 35 requires that incremental transmission service costs required to support imports or exports over the SCT DC Tie be assigned directly to those imports or exports. The practical effect of this requirement is to include the costs in the rates charged to the Qualified Scheduling Entities (QSEs) that schedule flows over the SCT DC Tie.

As explained in Point of Error No. 2, however, section 35.004(d) of PURA mandates the postage stamp method of pricing transmission service. Under that provision, a TSP's rate must be based on the ERCOT utilities' combined annual costs of transmission-owning utilities divided by the total demand in ERCOT. Substantive Rule 25.192(c) prescribes the FERC expense accounts and plant accounts that are included in the transmission cost of service used to set each TSP's rate according to the postage stamp method. The direct assignment of incremental transmission service costs to QSEs pursuant to Ordering Paragraph 35 violates both section 35.004(d) and Substantive Rule 25.192.

**V. Point of Error No. 5: The Commission's decision to directly assign transmission upgrade costs to SCT is contrary to the limitations in PURA § 39.203(e), which authorizes the Commission to require an electric utility or transmission and distribution utility to construct or enlarge facilities. (Order at 3, Findings of Fact 59, 119B, Ordering Paragraph 34)**

Ordering Paragraph 34 requires SCT to bear the cost of any transmission upgrades associated with the Garland project or the SCT DC Tie. Such a requirement falls completely outside the framework established by the legislature for the construction and recovery of the cost of transmission facilities by utilities to ensure safe and reliable service and to reduce transmission constraints within ERCOT.

Ordinarily, necessary transmission system upgrades are identified by a TSP or through the ERCOT planning process, and a TSP files an application pursuant to Chapter 37 of PURA, requesting Commission approval of the proposed transmission line. Alternatively, if no utility

requests authorization to build facilities deemed necessary, section 39.203(e) provides that the Commission may require "an electric utility or a transmission and distribution utility" to construct the facilities. Either way, the cost of such facilities would be included in the utility's rate base pursuant to Substantive Rule 25.192(c), subject to the Commission's approval in the utility's next rate case. Assigning transmission upgrade costs to SCT—which is neither an electric utility nor a transmission and distribution utility in Texas under PURA—violates this regulatory scheme. Furthermore, there are no provisions in PURA or Commission rules that specifically authorize the Commission to order SCT or any other entity to bear the cost of transmission facilities constructed or upgraded by an electric utility, transmission and distribution utility, or anyone else.

The framework under PURA and Rule 25.192(c) is clear: TSPs may apply for authority to construct necessary facilities, or, if no utility applies, the Commission has express authority to order a TSP or a distribution utility to construct the facilities. In either event, the reasonable cost of such facilities is recoverable only through rates by the utility that constructed them. The Commission may not require SCT to pay for facilities constructed by another utility.

**VI. Point of Error No. 6: The Commission failed to articulate a rational connection between the facts and its decision to require SCT to bear all costs associated with the Garland project and the SCT DC Tie. (Order at 3, Findings of Fact 42A, 44A, 48B, 62, 70, 83A, 91A, 107, 119–119E, Ordering Paragraphs 32–36 and 42)**

On page 3 of the order, the Commission determined that "the public interest demands" that ERCOT ratepayers not bear any costs associated with the Garland project or the DC Tie. In addition, the Commission modified, deleted, and added to the ALJs' findings of fact and ordering paragraphs to assign the costs to SCT. In each of the findings, the Order simply recites that it is "reasonable, protective of the public interest, and consistent with the FERC Order that . . . ." The Order does not explain the rationale for or identify any evidentiary support for any of the findings of fact that it modified, deleted, or added requiring SCT to bear the costs.

The Commission's ultimate findings that it is reasonable, in the public interest, and consistent with the FERC order to require SCT to bear all costs associated with the Garland project and the SCT DC Tie are not sufficient to support its order. Because these findings recite only statutory standards, the Commission is required to support them with underlying findings. Tex. Gov't Code § 2001.141(d); *CenterPoint Energy Entex v. Railroad Commission*, 213 S.W.3d

364, 370-71 (Tex. App.—Austin 2006, no pet.). There are no such underlying findings in the Commission's order.

In addition, the order is flawed because it does not identify any rational connection between the facts and the Commission's decision. There is a disconnect between the evidence and the Commission's determination, without an explanation, that SCT should bear all costs associated with the Garland project and the SCT DC Tie. Moreover, the Commission cannot marshal the facts in evidence to support its preferred end result. Indeed, the ALJs concluded that there is insufficient evidence to support imposing the costs on SCT.[10] It is arbitrary and capricious for an agency to fail to make apparent a rational connection between the facts and its decision.[11]

## VII. Point of Error No. 7: The Commission's decision to require SCT to pay all costs of ERCOT activities required by the Garland project or the SCT DC Tie is not rationally based on the evidence. (Order at 3, Findings of Fact 42A, 44A, 48B, 62, 70, 83A, 91A, 107, 119, 119A, Ordering Paragraphs 33 and 34)

Staff presented no evidence to support its recommendation that SCT be required to bear the cost of ERCOT studies and modifications to its rules, procedures, and processes. As noted above, the ALJs found there is an insufficient record to support imposing the costs on SCT, noting that ERCOT may determine that SCT's claimed benefits are not overstated.[12] Significantly, the ALJs also concluded that that there are reasons *not* to impose such costs on the company (namely, that doing so would create incentives for opposing parties to create obstacles to resolving the matter at ERCOT).

The Commission nevertheless ordered SCT to pay all these costs. The Commission erred by making findings that are not reasonably supported by the evidence.[13]

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[10] PFD at 50.

[11] *Flores v. Employees Retirement System*, 74 S.W.3d 532, 542 (Tex. App. Austin 2002), pet. denied (*Flores*).

[12] PFD at 50.

[13] *Flores*, 74 S.W.3d at 541.

## VIII. Point of Error No. 8: The Commission's requirement that SCT bear ERCOT's costs associated with the Garland project and the SCT DC Tie violates PURA § 39.151(e), which requires that ERCOT charge wholesale buyers and sellers a reasonable and competitively neutral administration fee to fund its budget. (Order at 3, Findings of Fact 42A, 44A, 48B, 62, 70, 83A, 91A, 107, 119, 119A, Ordering Paragraphs 33 and 34)

The Commission determined that SCT should bear costs incurred by ERCOT for studies, protocols, operating guides, and system changes associated with the Garland project and the SCT DC Tie. To implement this decision, the Commission modified, deleted, and added findings of fact and ordering paragraphs to require SCT to bear such costs. In doing so, the Commission exceeded its statutory authority to impose charges to fund activities such as these, which are properly included in ERCOT's budget.

The legislature prescribed a method by which ERCOT's budgeted activities are to be funded. Section 39.151(e) of PURA provides that "the commission shall authorize [ERCOT] to charge to wholesale buyers and sellers a system administrative fee, within a range determined by the commission, that is reasonable and competitively neutral to fund [ERCOT's] approved budget." Substantive Rule 25.363, which implements this statutory provision, requires ERCOT to maintain a standard chart of accounts and submit annual budgets for approval. PURA and the rule thus require that the system administrative fee be set to fund ERCOT's approved budget. PURA specifies that the fee is to be collected from wholesale buyers and sellers—a class of market participants that does not include SCT.[14] In addition, the system administrative fee must be "reasonable and competitively neutral." The Commission's requirement that SCT bear costs not imposed on existing DC ties necessarily fails that test.

Under Substantive Rule 25.363(g), ERCOT may charge reasonable user fees for services it provides to a market participant or other entity. The costs imposed by the Commission's order, however, are not for services ERCOT would provide to SCT. Moreover, it has not been ERCOT's practice to charge individual market participants for costs such as the cost of bylaw and protocol revisions, contract negotiations, and the studies that the Commission has ordered SCT to pay. Rather, ERCOT has paid for such activities out of its approved budget. The

[14] Pursuant to ERCOT's current fee schedule, the system administration fee is charged to all QSEs—including those scheduling flows over the SCT DC Tie—based on load represented.

Commission's special assessment in this case is inconsistent with the Commission's rule and the method prescribed by the legislature and therefore exceeds the Commission's statutory authority.

**IX. Point of Error No. 9: The Commission violated SCT's due process rights by failing to give proper notice to SCT that it would require SCT to bear the costs of ERCOT activities required by the Garland project or the SCT DC Tie. (Order at 3, Findings of Fact 42A, 44A, 48B, 62, 70, 83A, 91A, 107, 119, 119A, Ordering Paragraphs 33 and 34)**

As noted in Point of Error No. 8, the Commission's current rules and the current practice at ERCOT would not require SCT to bear the cost of ERCOT activities required as a result of the Garland project and the SCT DC Tie. The imposition of these costs is therefore a departure from the Commission's previous practice, and SCT had no notice that the Commission might impose these costs on it. The preliminary order, in which the Commission specified the issues to be addressed in the hearing, did not raise the issue of requiring SCT to bear the costs of these ERCOT activities.

An agency must respect the due process rights of parties in contested cases.[15] Parties are deprived of procedural due process when an agency adopts a new policy in the course of a contested case hearing without giving the parties pre-hearing notice.[16] Furthermore, an agency must explain its reasoning when it departs from its earlier policy or appears to be inconsistent in its determinations.[17] In this case, the Commission's failure to give proper notice violates SCT's due process rights.

**X. Point of Error No. 10: The Commission's decision to allocate costs to SCT and directly assign incremental transmission and ancillary service costs to imports and exports over the SCT DC Tie is discriminatory in violation of PURA § 39.001(c). (Order at 3, Findings of Fact 42A, 44A, 48B, 59, 62, 70, 70A, 83A, 91A, 107, 119, 119A-119E, Ordering Paragraphs 33, 34, 35, and 42)**

When the Texas Legislature passed SB7 in 1999 restructuring the electric industry in Texas, it specifically found that electric services and their prices should be determined by customer choices and the normal forces of competition. The Legislature included the fundamental tenet that regulatory authorities—which includes the Commission—may not

[15] *Oncor Elec. Delivery Co. v. Public Util. Comm'n*, 406 S.W.3d 253, 268 (Tex. App.—Austin 2013, no pet.) (*Oncor*).

[16] *Oncor*, 406 S.W.3d at 269.

[17] *Oncor*, 406 S.W.3d at 267.

discriminate against any participant or type of participant in the competitive market. See PURA §39.001(a) and (c). Consistent with this legislative mandate, the costs of transmission upgrades are paid by all load on an equitable basis through postage stamp rates under PURA § 35.004(d). None of these costs are assigned based on the source of the supply.

The SCT DC Tie will be located outside of Texas. SCT will connect to the ERCOT grid at the Texas-Louisiana border and will be a market participant in ERCOT, but it will not itself use the ERCOT grid. By imposing specific transmission costs on SCT and/or QSEs using the SCT tie, the Commission will treat SCT and those QSEs unfairly and unequally relative to the existing DC ties or those engaged in transactions over the existing DC ties. The Commission has here allocated costs to SCT and directly assigned incremental and ancillary service costs to it. However, the Commission has not directly assigned transmission costs to the existing DC tie, the existing most severe single contingency (MSSC), or any individual market participant, but instead assigns them to the loads that directly benefit from such transmission infrastructure and ancillary services.

Ordering SCT to pay all costs incurred by ERCOT and to pay for the use of the ERCOT grid is discriminatory. The Commission does not directly assign such cost responsibility to any other individual market participants. Indeed, the Commission has never imposed such costs on the existing DC ties or on entities using those ties. As a result, the Commission's decision to assign costs to SCT and the QSEs importing and exporting over the SCT DC Tie violates PURA § 39.001.

## XI. Point of Error No. 11: The Commission's decision to allocate costs to SCT based in part on export flows across the SCT DC Tie violates Substantive Rule 25.192(e). (Order at 3, Finding of Fact 70A, Ordering Paragraphs 35 and 42)

Operating paragraphs 34 and 42 implement the Commission's Finding of Fact 70A to require that all flows across the SCT DC Tie be accounted for in order to ensure that SCT "pays for its use of the ERCOT grid." As noted above, SCT will not use the ERCOT grid. In addition, requiring SCT to pay for transmission service to export power from ERCOT violates Substantive Rule 25.192.

Rule 25.192(e) specifies that transmission charges for exports of power from ERCOT be assessed in accordance with its provisions and with ERCOT protocols. Paragraph 25.192(e)(3) of

the rule clearly makes the entity that schedules an export (normally, a QSE) solely responsible for paying transmission service charges:

> Rule 25.192(e)(3): The DSP or an entity scheduling the export of power over a DC tie is solely responsible to the TSP for payment of transmission service charges under this subsection.

Since a DSP or exporting QSE will be solely responsible for paying transmission service charges, the Commission may not make SCT pay the charges without violating its own substantive rule. Texas courts have made it clear that an agency is bound to follow its own rules.[18]

## XII. Point of Error No. 12: The Commission's decision to directly assign ancillary service costs to SCT and entities using the SCT DC Tie is unreasonably prejudicial, discriminatory, and anticompetitive in violation of PURA § 35.004(e). (Order at 3, Finding of Fact 119C, Ordering Paragraphs 34 and 35)

Section 35.004(e) of PURA requires the Commission to ensure that ancillary services are available at "reasonable prices with terms and conditions that are not unreasonably preferential, prejudicial, discriminatory, predatory, or anticompetitive." In addition, it provides that ERCOT's "acquisition of generation-related ancillary services on a nondiscriminatory basis on behalf of entities selling electricity at retail" meets the requirements of the subsection.

The Commission's decision to directly assign ancillary service costs to SCT and/or to entities using the SCT tie is contrary to PURA § 35.004(e) for two reasons. One, the decision establishes ancillary service terms and prices that are unreasonably prejudicial, discriminatory, and anticompetitive. And two, direct assignment of ancillary service costs to SCT or to entities using the SCT tie is inconsistent with the method established in § 35.004(e) for ancillary services procurement and assignment in ERCOT.

### A. Direct Assignment is Unreasonably Prejudicial, Discriminatory, and Anticompetitive

To order that ERCOT ratepayers should not bear any of the costs of additional ancillary services and that SCT and entities using its DC Tie must pay all of the costs is discriminatory because the Commission does not assign such cost responsibility to any other market participants—including the existing DC ties or the existing most severe single contingency—for

[18] *Flores*, 74 S.W.3d at 542.

the ability to participate in the ERCOT market. QSEs importing or exporting power over the SCT DC Tie will pay for their use of the ERCOT system in accordance with current statutes, rules, and ERCOT protocols. The Commission's decision is prejudicial and anticompetitive because the additional ancillary services costs imposed on exports and imports over the SCT DC Tie will make them more expensive relative to flows entirely within ERCOT or over the existing DC ties.

The Commission's differential treatment of flows over the SCT DC Tie will thus artificially raise the costs of those flows, incrementally lower the potential margin on those imports and exports, and place QSEs scheduling the flows at a competitive disadvantage relative to QSEs negotiating sales or purchases of power entirely within ERCOT or over other DC ties. The Commission's imposition of ancillary service costs on QSEs using the SCT DC Tie will discriminate against SCT and those QSEs.

B. Direct Assignment is Inconsistent with the Method Established in § 35.004(e) for Ancillary Services Procurement and Assignment in ERCOT

PURA § 35.004(e) prescribes the method for ensuring the nondiscriminatory acquisition of ancillary services by ERCOT on behalf of entities selling electricity at retail. The Commission's order directly assigning specific ancillary services costs to SCT and/or to entities using the SCT tie does not comply with this statutorily-prescribed method for ancillary services procurement and assignment in ERCOT.

Historically, the Commission and ERCOT have complied with § 35.004(e) by assigning the costs of ancillary services to QSEs based on their load-ratio share, and DC tie exports have been allocated their proportionate share of the costs. *See* ERCOT Protocol 4.2.1.2(1). Assigning such responsibility based on each QSE's share of ERCOT's total load (plus load served by DC tie exports), the method complies with the statutory requirement to acquire such services on behalf of entities selling electricity at retail, because the QSEs represent the retail entities for which ancillary services are acquired and to which ancillary services responsibility is properly assigned.

However, the Commission's order to directly assign certain ancillary service costs to SCT or to entities using the SCT tie does not comply with the statutory requirement. SCT will provide only transmission services, and will not buy or sell electricity in ERCOT or be

represented by QSEs buying or selling electricity in ERCOT. The assignment of ancillary services cost responsibility to SCT is plainly inconsistent with § 35.004(e). Assigning specific ancillary services costs to entities transacting over the SCT tie (in addition to the share of those costs already assigned to such entities under ERCOT protocols) would also be inconsistent with the statutory mandate.

**XIII. Point of Error No. 13: The Commission erred in deciding that all costs related to the Garland Project or the SCT DC Tie that would otherwise be borne by ERCOT ratepayers shall instead be borne by SCT because the Commission failed to cite permissible grounds and state its reasons for changing the ALJs' proposed findings of fact and conclusions of law. (Order at 3, Findings of Fact 42A, 44A, 48B, 59, 62, 70, 70A, 83A, 91A, 107, 119, 119A-119E, Ordering Paragraphs 32, 33, 34, 35, and 42)**

The ALJs concluded that the record evidence does not resolve the issue of whether ERCOT ratepayers will derive sufficient benefits from the Garland project and the SCT DC Tie that would justify their paying for any resulting system upgrades.[19] Moreover, they concluded that the disagreement in this case over highly technical facts and potential discrepancy in facts requires that the issue be resolved by experts at ERCOT rather than here.[20] The ALJs therefore found that (1) ERCOT should first assess the benefits from the SCT DC Tie, and then (2) the Commission and ERCOT should decide whether the current method of recovering transmission costs should be amended or upgrade costs should instead be assigned to SCT and entities using the SCT DC Tie.[21] Without discussing the evidence or otherwise justifying its rejection of the ALJs' findings, the Commission order modified, deleted, and added to the ALJs' findings of fact to instead directly assign costs to SCT.

Texas Government Code section 2003.049(g) specifies the following conditions under which it is permissible for the Commission to change an ALJ's finding of fact or conclusion of law:

> [T]he commission may change a finding of fact or conclusion of law made by the administrative law judge or vacate or modify an order issued by the administrative law judge only if the commission:
>
> (1) determines that the administrative law judge:

[19] PFD at 45, Proposed Finding of Fact 57.

[20] PFD at 40–46.

[21] PFD, Proposed Findings of Fact 58 and 59.

(A) did not properly apply or interpret applicable law, commission rules or policies, or prior administrative decisions; or

(B) issued a finding of fact that is not supported by a preponderance of the evidence; or

(2) determines that a commission policy or a prior administrative decision on which the administrative law judge relied is incorrect or should be changed.

In addition, section 2003.049(h) requires that the Commission "state in writing the specific reason and legal basis for its determination under Subsection (g)." Substantive Rule 22.262 echoes these limitations. The Commission must therefore articulate in writing why it changes proposed findings of fact and conclusions of law.

The Commission does not cite any of the permissible grounds under the statute for changing the findings of fact and conclusions of law regarding the costs of ERCOT activities and costs related to any system upgrades, etc. required to accommodate the Garland project and the SCT DC Tie. Indeed, the Commission gave *no* substantive explanation of its reasons for changing the ALJs' contrary proposed finding of fact that the record does not support such a finding. In addition, the Commission simply ignored the ALJs' supporting discussion of the findings of fact in the proposal for decision. The Commission's order violates both its own rule and Texas Government Code section 2003.049, which this agency is bound to follow.[22]

**XIV. Point of Error No. 14: The Commission's decision to prohibit any utility from recovering any costs related to the SCT DC Tie or the Garland Project (including the Rusk substation) violates the postage stamp method mandated by PURA § 35.004(d). (Order at 3, Findings of Fact 119D and 119E, Ordering Paragraphs 32 and 36)**

Ordering Paragraph 32 prohibits any utility from recovering in its transmission cost of service costs related to the Rusk or Panola substations. The practical effect of this prohibition is to deny Oncor the right to recover the cost of the Rusk substation in its rates. SCT will pay the cost of Rusk substation because it has a contractual obligation to reimburse Oncor for any costs of the substation that are not recoverable in rates. Ordering Paragraph 36 prohibits any utility (which includes Oncor) from recovering costs associated with the Garland Project or the SCT DC Tie. It thus precludes the recovery of costs covered by Ordering Paragraph 32 plus any other costs associated with the project.

[22] *Flores*, 74 S.W.3d at 542.

Substantive Rule 25.192—which implements the postage stamp method mandated by PURA § 35.004(d)—specifies the costs that are to be included in ERCOT transmission cost of service for the purpose of setting rates for transmission service. By excluding costs that would otherwise be included in the calculation of Oncor's transmission cost of service, the Commission violates both the substantive rule and the statute.

**XV. Point of Error No. 15: The Commission erred in its decision to prohibit any utility from recovering any costs related to the SCT DC Tie or the Garland Project (including the Rusk substation) because did not adequately explain its decision or provide a rational connection between its decision and the facts. (Order at 3, Findings of Fact 119D and 119E, Ordering Paragraphs 32 and 36)**

Ordering Paragraph 32 prohibits any utility from recovering in its transmission cost of service costs related to the Rusk substation. The practical effect of this prohibition is to deny Oncor the right to recover the cost of the Rusk substation in its rates. Ordering Paragraph 36 prohibits any utility from recovering costs associated with the Garland Project or the SCT DC Tie. The Commission reversed the findings of the ALJs without explanation other than to state that it is reasonable, in the public interest, and consistent with FERC Order that no utility recover any costs associated with Rusk substation. In so doing, the Commission failed: (1) to make required underlying findings of fact as required by Texas Government Code section 2001.141(d); (2) to provide a rational connection between its decision and the evidence, as required by the principles articulated in *Flores*;[23] and (3) to articulate the specific reasons it changed the ALJs' proposed findings and conclusions on this issue, as required by Texas Government Code section 2003.049.

**XVI. Point of Error No. 16: The Commission's decision to prohibit any utility from recovering any costs related to the Rusk substation constitutes a deprivation of property without due process in violation of the Fourteenth Amendment of the United States Constitution and article 1, section 19 of the Texas Constitution. (Order at 3, Findings of Fact 119D and 119E, Ordering Paragraphs 32 and 36)**

The due process clause of the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 19, of the Texas Constitution provide a guarantee of fair procedure. The due process clauses also proscribe arbitrary state action. The Commission's Order denying utility recovery of the cost of the Rusk substation without a hearing violates these guarantees.

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[23] 74 S.W.3d 532.

Oncor is not a party to this proceeding. Pursuant to a lawful order of the FERC, Oncor is obligated to provide transmission service for the SCT Project, which will require it to construct the Rusk substation. Oncor will own the Rusk substation. PURA Chapter 36 establishes the procedure for establishing a utility's rates. The Commission's order denies Oncor the opportunity to request recovery of the cost of the Rusk substation in its rates. It is improper for the Commission to conclude in this proceeding that the Rusk substation is not properly includible in Oncor's rate base. Because of SCT's agreement to reimburse Oncor in the event that Oncor is denied recovery of the cost of the Rusk substation in a rate proceeding, SCT is an aggrieved party and has been denied its due process rights.

**XVII. Point of Error No. 17: The Commission erred in prohibiting Garland, SCT, Rusk Interconnection, and their affiliates from seeking condemnation until SCT obtains "all necessary regulatory approvals in Louisiana" because the Order is inconsistent with the Commission's decision in its August 25, 2016 open meeting. (Order at 5, Finding of Fact 120A, Ordering Paragraph 20)**

In the August 25, 2016 open meeting, SCT understood the Commissioners to decide that the required regulatory approvals pertained only to state agency (i.e., Louisiana Public Service Commission) approval necessary to site and construct the facilities in Louisiana.[24] In a discussion with the Commissioners, SCT stated that the company would accept such a condition.

Ordering Paragraph 20, however, requires SCT to obtain "all necessary regulatory approvals in Louisiana" before seeking condemnation of any land in Panola County, Texas. As SCT explained in the open meeting, some of the regulatory permits arguably required by the phrase "all necessary regulatory approvals" cannot be obtained until after construction of the Louisiana facilities is completed. As a result, Ordering Paragraph 20 effectively requires SCT to complete all construction in Louisiana before seeking condemnation in Texas. This more stringent condition is not consistent with the decision apparently reached in the open meeting.

To make Ordering Paragraph 20 consistent with SCT's understanding of what the Commissioners intended to order, it should be revised as follows:

> Southern Cross Transmission must provide evidence that it has obtained all necessary regulatory approvals from the Louisiana Public Service Commission to site and construct the facilities in Louisiana for the Southern Cross DC Tie and all related interconnection facilities before Garland, Southern Cross Transmission,

[24] See, for example, the discussion in the Open Meeting transcript at 11:10-12 and 12:3-13.

Rusk Interconnection, and their affiliates are permitted to seek condemnation of any landowner's land in Panola County for the Garland project, so long as the landowner provides access to the land for surveying and design purposes.

If the Commission adopts this revision, SCT will waive the following point of error.

**XVIII. Point of Error No. 18: As currently worded, the language prohibiting Garland, SCT, Rusk Interconnection, and their affiliates from seeking condemnation until SCT obtains "all regulatory approvals" in Louisiana is not adequately explained and is not rationally supported by the evidence. (Order at 5, Finding of Fact 120A, Ordering Paragraph 20)**

The ostensible purpose of the condition is to protect the landowners' land from intrusion by a transmission line project that is later abandoned. The ALJs concluded, however, that there is no evidence that the agreement reached by SCT and Garland with the Panola Landowners Group do not adequately protect the interests of the landowners.[25] That agreement prevents SCT, Rusk, and Garland from seeking to condemn any land before SCT secures funding for the entire project. SCT, Garland, and Rusk proposed the agreement as a condition to the projects, which condition was included in the PFD as Ordering Paragraph 17.

Staff recommended, in addition, that SCT be required to show (1) that it has obtained all regulatory approvals in Louisiana for the SCT DC Tie and (2) it has constructed at least 75% of the SCT DC Tie. Staff offered no supporting testimony or evidence in the hearing to support the two additional conditions. Staff's Statement of Position and Initial Brief provide little or no supporting rationale.[26] Accordingly, the ALJs determined that Staff had failed to prove that the additional conditions would be reasonable.[27]

A similar situation occurred in a previous case, in which the Commission approved a Texas-New Mexico Power Co. (TNP) certificate of convenience and necessity for a power plant, but conditioned the certificate on TNP's receiving "all necessary permits from other state and federal agencies" for the construction and operation of the plant.[28] The Supreme Court sharply criticized the Commission, noting that some of the permits could not be applied for and issued

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[25] PFD at 9.

[26] Staff's Statement of Position at 13; Staff's Initial Brief at 24-25.

[27] PFD, Proposed Finding of Fact 121.

[28] *Texas-New Mexico Power Co. v. Tex. Industrial Energy Consumers*, 806 S.W.2d 230, 231 (Tex. 1991).

until construction had begun or been completed.[29] Accordingly, the Court remanded the case to the district court for review.

The Commission Order articulates no logical rationale for imposing a more stringent requirement that SCT obtain all regulatory approvals, which would significantly delay energization of the project.[30] Moreover, the Commission did not articulate any of the permissible grounds for changing the ALJs' proposed findings of fact. And the Commission simply ignored the ALJs' supporting discussion of their findings in the proposal for decision. As a result, Ordering Paragraph 20 violates both the Commission's own rule and Texas Government Code § 2003.049(h).

The Commission further erred by making findings that are not supported by any evidence.[31] Staff provided no evidence in support of the additional conditions. Moreover, the ALJs noted evidence showing that the SCT line will be highly likely to be built once the company obtains project funding.[32] As a result, there is a clear disconnect between the evidence and the Commission's determination—without an explanation—that SCT should obtain all regulatory approvals before seeking condemnation of any land in Panola County. It is arbitrary and capricious for an agency to fail to make apparent a rational connection between the facts and its decision.[33]

**XIX. Point of Error No. 19. The conditions imposed by the Commission are unreasonable and thus contrary to PURA § 37.051(c-2), which permits only reasonable conditions to protect the public interest. (Findings of Fact 42A, 44A, 48B, 59, 62, 70, 70A, 83A, 91A, 107, 119, 119A–119E, and 120A, Ordering Paragraphs 20, 32–36, and 42)**

Ignoring statutory limits on the Commission's authority, discriminating against interstate commerce, assigning costs to SCT and entities using its tie that no market participant has previously been charged and that are contrary to PURA and Commission rules, prohibiting the recovery of the cost of a facility without hearing evidence in a ratemaking proceeding, and requiring SCT to obtain regulatory approvals in Louisiana without any evidence supporting such

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[29] *Id.* at 232.

[30] Ordering Paragraph 20 is not supported by Finding of Fact 120A, which would not require regulatory approvals beyond those *necessary to construct* the SCT facilities in Louisiana.

[31] *Flores*, 74 S.W.3d at 541.

[32] PFD at 50.

[33] *Flores*, 74 S.W.3d at 543.

a requirement cannot be reasonable. Such conditions exceed the Commissions statutory authority to impose reasonable conditions pursuant to PURA § 37.051(c-2).

## CONCLUSION

For the foregoing reasons, the Commission should delete—or at least reverse its modifications to—all findings of fact and ordering paragraphs stating or ordering (1) that costs should be assigned to SCT or entities importing or exporting over the SCT DC Tie; (2) that no utility shall recover costs for the Rusk substation; and (3) that SCT is required to obtain "all necessary regulatory approvals in Louisiana" before seeking condemnation in Panola County. SCT will waive its no-evidence point of error against the broad language requiring "all necessary regulatory approvals in Louisiana" if the language is replaced with "all necessary approvals from the Louisiana Public Service Commission to site and construct the facilities." The Commission should also restore Finding of Fact 57.

Finally, SCT requests that the Commission grant SCT such other relief to which it is entitled.

Respectfully submitted,

Robert A. Rima
State Bar No. 16932500
Law Offices of Robert A. Rima
7200 N. MoPac Expy, Suite 160
Austin, TX 78732-2560
512-349-3449
512-349-9339 Fax
bob.rima@rimalaw.com

*Attorney for Southern Cross Transmission LLC*

## CERTIFICATE OF SERVICE

I certify that on October 3, 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

# APPENDIX C

**PUC DOCKET NO. 45624**

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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** |

**INITIAL BRIEF ON REHEARING**
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**INITIAL BRIEF ON REHEARING**
**OF SOUTHERN CROSS TRANSMISSION LLC**

TO THE HONORABLE PUBLIC UTILITY COMMISSION OF TEXAS:

Southern Cross Transmission LLC (SCT) files this, its Initial Brief on Rehearing, pursuant to the Commission's Order filed on December 1, 2016. The Commission directed SCT, TIEC, and Staff to brief the three issues identified below. Initial briefs are due by 12:00 PM on December 14, 2016; therefore, SCT's brief on these issues is timely filed.

**Issue 1.** **Does the Commission's order issued on September 8, 2016, violate the dormant commerce clause of the U.S. Constitution?**

**Answer:** **The Commission's order violates the dormant Commerce Clause by imposing burdens and costs on SCT that would not be imposed on similar projects in ERCOT.**

The Commerce Clause in Article 1, Section 8, Clause 3 of the U.S. Constitution gives Congress the power "to regulate commerce ... among the several states." Under the dormant commerce clause doctrine, the allocation of that power to Congress prohibits states from taking actions that improperly burden or discriminate against interstate commerce.[1] The dormant Commerce Clause acts as a safeguard against state regulatory procedures that enable economic protectionism—"that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[2]

Federal regulation of the wholesale sale and transmission of electricity in interstate commerce can be traced back to the 1927 U.S. Supreme Court decision in *Public Utilities*

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[1] *See Granholm v. Heald*, 544 U.S. 460, 472 (2005); *Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978); *Piazza's Seafood World, LLC v. Odom*, 448 U.S. 744, 749 (5th Cir. 2006).

[2] *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008) (quoting *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988)).

*Commission of Rhode Island v. Attleboro Steam & Electric Co.*,[3] which held that the Commerce Clause prohibited states from setting the price of electricity generated in-state but sold across state lines. To fill the gap created by the *Attleboro* decision, Congress in 1935 enacted the Federal Power Act ("FPA"), establishing the Federal Power Commission (now the Federal Energy Regulatory Commission ("FERC")), to regulate the interstate sale and transmission of electricity.

Even with the enactment of the FPA, the dormant Commerce Clause doctrine continues to play vital role in modern federal energy law. While FERC has jurisdiction over wholesale transmission rates in interstate commerce, the dormant Commerce Clause is the protective bulwark against state regulatory measures that discriminate against interstate commerce, even if those state regulatory measures are not expressly prohibited by federal statute.

The Supreme Court has repeatedly recognized that simple state economic protectionism is subject to "a virtually per se rule of invalidity." under the Commerce Clause [4] Courts review regulatory measures that discriminate on their face or discriminate in purpose or effect under a form of strict scrutiny. [5] In such cases, the Supreme Court requires a state to demonstrate that the regulatory measures serve a legitimate, non-protectionist purpose and that there are no less discriminatory means that would advance that purpose.[6] In this case, the Commission's order fails that test on several cost allocation issues.

**A. The Commission's Order is facially discriminatory.**

First and foremost, the Commission's order is facially discriminatory against SCT. Numerous Ordering Paragraphs ("OPs") from the Commission impose discriminatory costs on SCT, including the following:

- OP 32 prohibits any utility from recovering in cost of service "any costs related to the Rusk or Panola substations or the Rusk to Panola line."

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[3] 273 U.S. 83 (1927).

[4] *Granholm*, 544 U.S. at 476 (quoting *Philadelphia*, 437 U.S. at 624).

[5] *Hughes v. Oklahoma*, 441 U.S. 332, 337 (1979).

[6] *See id.*; *Piazza's Seafood World, LLC*, 448 F.3d at 750; *cf. Philadelphia*, 437 U.S. at 624 ("The crucial inquiry ... must be directed to determining whether ch. 363 is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.").

- OP 33 requires SCT to pay all ERCOT costs for studies, protocol revisions, and other activities required by the SCT project.
- OP 34 imposes on SCT any additional costs due to the SCT project, including transmission upgrade costs, ancillary services costs, and costs of negotiating coordination agreements.
- OP 35 assigns to exports over the SCT Tie any incremental transmission and ancillary services costs required to support exports.
- OP 36 prohibits any utility from recovering in cost of service any costs associated with the SCT project.
- OP 42 requires all flows that pass through the SCT Tie to be accounted for in ERCOT's transmission-cost assignment to ensure that SCT pays for its use of the ERCOT grid.

It is particularly striking that OP 34 expressly acknowledges that SCT is being treated differently by stating that any additional costs "that *would otherwise be borne by ERCOT ratepayers* shall instead be borne by [SCT] . . . ." In other words, those additional costs would *normally* be borne by ERCOT ratepayers for projects *in* ERCOT, but those additional costs are being allocated to SCT's *interstate* project in this instance.

The effect of imposing the above-stated costs on flows over the SCT DC Tie will raise the cost of exports and imports, lower the potential margin on them, and place Qualified Scheduling Entities ("QSEs") scheduling those flows at a competitive disadvantage. The Commission has not imposed such costs on any other DC tie owners.[7] The Commission order would thereby allow a QSE to sell from ERCOT to SPP over the East Tie at one price, but that same QSE attempting a similar transaction from ERCOT to SERC over the SCT DC Tie would be subject to additional costs. The Supreme Court has routinely rejected as impermissible such discriminatory treatment.[8]

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[7] *Cf. John Havlir & Assocs., Inc. v. Tacoa, Inc.*, 810 F. Supp. 752, 756 (N.D. Tex. 1993) ("State statutes that impose burdens on out-of-state businesses that are not applicable to in-state businesses affect interstate commerce just as directly as those that regulate the flow of goods across state lines.").

[8] *See, e.g., Limbach*, 486 U.S. at 475-76 (invalidating Ohio law granting tax credits to ethanol produced in Ohio); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270-71 (1984) (invalidating law that exempted local production of liquor and wine from a 20% excise tax on the grounds that it had no purpose other than to insulate local producers from competition); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982) ("The Commission has made clear that its order is designed to gain an economic advantage for New Hampshire citizens at the expense of New England Power's customers in neighboring states."); *Philadelphia*, 437 U.S. at 624-28 (applying "a virtually per se rule of invalidity" to express ban on in-state disposal of out-of-state garbage); *see also John Havlir & Assocs., Inc.*, 810 F. Supp. at 756 ("The size and number of businesses, both in-state and out-of-state, affected by a discriminatory statute are irrelevant to the Commerce Clause analysis.").



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The Commission Staff's Reply to SCT's Motion for Rehearing acknowledges that SCT is being treated differently from "other DC ties" and "any other market participant," while arguing that discriminatory treatment is justified because of "the unique nature of this project."[9] Similarly, TIEC's Response states that the Commission's order provides "different treatment" in this case, while arguing that discriminatory treatment is appropriate due to different circumstances.[10] Both the Commission Staff and TIEC appear to concede that the Commission has not directly assigned similar costs to the existing DC ties, the existing most severe single contingency (MSSC), or any individual market participant, but instead assigns them to the loads that benefit from such transmission infrastructure and ancillary services. Neither party has provided or cited any evidentiary support for the proposition that the larger size of SCT DC Tie would alone justify the discriminatory treatment under the Commission's order.

### B. The Commission's Order fails to identify any legitimate, non-protectionist purpose for discriminatory treatment of SCT and fails to demonstrate that there is no less discriminatory means to achieve such a purpose.

Under a Commerce Clause analysis, the Commission has the burden to identify a legitimate, non-protectionist purpose for its discriminatory treatment of SCT, and it must establish that there are no less discriminatory means to accomplish that purpose.[11] This is a burden that the Commission has not attempted to, did not, and cannot meet.

The Order attempts to justify discriminatory treatment of SCT under the guise of the "public interest," but there is not a reasonable nexus between any specific public interest and the burdens and costs that are imposed on SCT by the Ordering Paragraphs. In its discussion, the Commission determines the public interest requires "that the reliability of the ERCOT system is not jeopardized and cost responsibilities are properly placed on market participants."[12] The Commission then merely includes the phrase "it is protective of the public interest" in most of the findings relating to the conditions imposed. Yet, the record evidence is that Oncor has already completed a reliability study—which was then presented to ERCOT and all TSPs in ERCOT and accepted by FERC—indicating that there is no adverse impact on the reliability of

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[9] *See* Comm'n Staff Reply to Mots. for Reh'g (Oct. 18, 2016) at 6-7.

[10] *See* TIEC's Resp. to [SCT's] Mot. for Reh'g (Oct. 18, 2016) at 7.

[11] *See Kans. City S. R. Co. v. McNamara*, 817 F.2d 368, 376 (5th Cir. 1987).

[12] Order at 3.

the ERCOT grid by interconnecting the SCT project. In practice, under existing protocols that apply to all market participants, ERCOT will allow SCT to operate only up to the point of unresolved congestion. Finally, the ALJs concluded that the evidence in this case does not support assigning costs to SCT.[13] The Commission cannot rely on its public interest statements to pass a rational-basis review, let alone the strict scrutiny standard applied to facially discriminatory state actions.[14]

The Commission's order is inconsistent with its own acknowledgment that FERC "found that the interconnection [with the SCT DC Tie] is in the public interest."[15] Indeed, FERC previously concluded that the ordered interconnection and transmission services related to the project are in the public interest because they will promote efficiency by increasing power supply options and improving competition.[16] Thus, the Commission's invocation of the "public interest" falls flat, particularly in light of the strong evidence in this case that (1) ERCOT already has or will develop the tools to address any operational issues related to maintaining the reliability of the ERCOT grid and (2) SCT customers—i.e., the applicable market participants—will pay for their use of the grid.[17]

In addition, as noted in Issue 3 below, FERC's interconnection order for SCT was premised on ERCOT's existing cost allocation method, which the Commission did not object to. The Commission's complete departure from its existing method solely for the SCT tie is not consistent with that order.

Although this project will be larger in size than other constructed DC ties, that difference alone does not justify the discriminatory treatment in the Commission's September 8, 2016,

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[13] Proposal for Decision at 50.

[14] *See also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (prescribing a balancing test when a state regulation is not discriminatory and regulates even-handedly with only incidental burdens on interstate commerce).

[15] *Id.* at Findings of Fact ¶ 6.

[16] On December 15, 2011, FERC issued its Proposed Order Directing Interconnection and Transmission Services and Conditionally Approving Settlement Agreement (*Southern Cross Transmission LLC, et al.*, 137 FERC ¶ 61,206 (2011) ("Conditional Order") which ordered the rendering of interconnection and transmission services conditioned upon the completion of on-going interconnection and reliability studies and the identification of the facilities to be owned and operated by Southern Cross, Garland and Oncor under the two interconnection agreements appended to the Offer of Settlement. Conditional Order at ¶ 31.

[17] *See also* Alexandra B. Klass & Jim Rossi, *Revitalizing Dormant Commerce Clause Review for Interstate Coordination*, 130 MINN. L. REV. 129, 173-74 (2015), *available at* http://scholarship.law.umn.edu/faculty_articles/426 ("[A] state's claims to benefits cannot be unduly narrow, and cannot be based on a process or substantive choice that ignores out-of-state benefits in making a regulatory choice—any more than a state can ignore out-of-state harms in discriminating against out-of-state firms.")



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order. Quite simply, there is no evidence in the record that the project will threaten ERCOT system reliability or that ERCOT protocols and operations cannot accommodate a 2,100 MW project (following reasonable and appropriate updating).[18] No nexus has been shown between the size of the SCT tie and the Commission's discriminatory allocation of costs to that tie. In fact, most of the costs allocated to SCT have nothing to do with project size. In short, the Commission's suggestion that the SCT DC Tie *could* cause reliability problems in ERCOT because of its size is purely speculative and inconsistent with the Commission's actions in the FERC proceeding.[19]

The Commission Staff suggests that the project will require ERCOT to perform multiple studies and protocol revisions, execute coordination agreements, and potentially acquire additional ancillary services.[20] However, ERCOT has routinely undertaken such steps for TSPs, and the Commission has not sought to assign costs to those TSPs as it has in this case. The Commission has not explained how the burdens would be uniquely different for this project so as to justify its clearly discriminatory order, nor can it do so.

The Commission Staff and TIEC suggest that discriminatory treatment of SCT is warranted because the costs should be allocated to external beneficiaries rather than ERCOT ratepayers.[21] But the 2015 Resero/LCG economic analysis shows that by the year 2020, ERCOT would receive substantial benefits, equaling *annual* production cost benefits of $175 million and *annual* consumer benefits of $162 million. In addition, SCT witness Ellen Wolfe's *uncontroverted* testimony shows that tariff charges for exports over the SCT tie will alone produce more than $60 million *annually* in contributions to ERCOT transmission costs.[22] The

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[18] *See* PUC Project No. 46304, *Oversight Proceeding Regarding ERCOT Matters Arising out of Docket No. 45624.*

[19] *See Granholm*, 544 U.S. at 492-93 ("Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods.... The court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable.").

[20] *See* Comm'n Staff Reply to Mots. for Reh'g (Oct. 18, 2016) at 6.

[21] *See id.* at 6 (suggesting that discriminatory treatment is necessary to avoid "subsidiz[ing] the participation of out-of-state participants"); TIEC's Resp. to [SCT's] Mot. for Reh'g (Oct. 18, 2016) at 8 (stating that discriminatory treatment is "clearly justified by the local benefit of preventing ERCOT customers from subsidizing a project that provides them with no benefits").

[22] SCT Ex. 3 (Wolfe Direct) at Ex. EW-2, p. 3.

Commission cannot support a finding that there is no benefit to ratepayers or that the benefit is *de minimis*.

Because the record evidence shows such significant benefits to ERCOT ratepayers, the Commission's claim that it is in the public interest to assign discriminatory costs to SCT and entities transacting across the SCT DC Tie is not supported by the evidence. Rather, it is shown to constitute economic protectionism intended to disadvantage and discourage out-of-state renewable energy consumers served by transactions over the SCT DC Tie.[23] Thus, the existing Commission order violates the dormant Commerce Clause by imposing discriminatory burdens and costs on SCT and entities transacting across the SCT DC Tie.

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

**Answer: The assignment of costs is not within the Commission's authority for two reasons: (1) The assignment of costs is inconsistent with express provisions of PURA and/or the Commission's rules; and (2) There is no specific, express authority for the Commission to assign costs to SCT as it has done in its order.**

**A. The Commission may not prescribe conditions that are inconsistent with express provisions of PURA or its own rules.**

The cost assignments in the Commission's order are inconsistent with specific provisions of PURA and Commission rules. Obviously, the Commission must comply with express statutory provisions,[24] and Texas courts have made it clear that an agency is bound to follow its own rules.[25]

Pursuant to section 35.004(d) of PURA the price of wholesale transmission services within ERCOT must be based on the postage stamp method. Under this provision, the cost of transmission upgrades in ERCOT is required to be allocated to each utility based on its share of ERCOT's total demand and included in postage stamp transmission rates. Substantive Rule 25.192 implements this requirement. The Commission's assignment of transmission upgrade

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[23] *See* Klass & Rossi, *supra*, at 173 ("Where there is a significant burden on interstate commerce, such laws cannot be justified solely by making reference to protecting reliability or prices for in-state consumers.").

[24] *Pub. Util. Comm'n v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 406 (Tex. 1995).

[25] *Flores v. Employees Retirement System*, 74 S.W.3d 532, 542 (Tex. App.—Austin 2002, pet. denied).

costs to SCT and entities using the SCT tie is fundamentally inconsistent with the postage stamp method required by PURA § 35.004(d) and Rule 25.192.[26]

Ordering Paragraph 34 in the Commission's order requires SCT to bear the cost of any transmission upgrades associated with the Garland project or the SCT DC Tie. Ordinarily, a TSP files an application pursuant to Chapter 37 of PURA, requesting Commission approval of transmission system upgrades that are identified as necessary by the TSP or through the ERCOT planning process. Alternatively, if no utility requests authorization to build facilities deemed necessary, section 39.203(e) provides that the Commission may require "an electric utility or a transmission and distribution utility" to construct the facilities. Either way, the cost of such facilities are included in the utility's rate base pursuant to Substantive Rule 25.192(c), subject to the Commission's approval in the utility's next rate case. Assigning transmission upgrade costs to SCT—which is neither an electric utility nor a transmission and distribution utility in Texas under PURA—violates this regulatory scheme.

Ordering Paragraph 35 in the Commission's order requires incremental transmission service costs necessary to support imports or exports over the SCT DC Tie to be assigned directly to those imports or exports. The practical effect of this requirement is to include the costs in the rates charged to the Qualified Scheduling Entities (QSEs) that schedule flows over the SCT DC Tie. Substantive Rule 25.192(c), however, prescribes the FERC expense accounts and plant accounts that are used to set each TSP's rate according to the postage stamp method. The direct assignment of incremental transmission service costs to QSEs pursuant to Ordering Paragraph 35 would remove those costs from the calculation of the postage stamp rates, contrary to both section 35.004(d) and Substantive Rule 25.192.[27]

The Commission determined that SCT should directly bear costs incurred by ERCOT for certain system administration activities. Substantive Rule 25.363, which implements this statutory provision, requires ERCOT to maintain a standard chart of accounts and submit annual budgets for approval. Together, PURA and the rule require that a system administration fee be set to fully fund ERCOT's approved budget. Section 39.151(e) further specifies that the fee is to

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[26] The assignment of transmission upgrade costs to entities using the SCT Tie is so clearly inconsistent with the existing rule that no such allocation mechanism even exists in PURA, a rule, or a tariff. It is unclear how the Commission's order would be implemented.

[27] As noted above in footnote 26, there is no allocation mechanism in the current rules to implement the Commission's order.

be collected from wholesale buyers and sellers—a class of market participants that does not include SCT.[28] In addition, it requires that the fee be "reasonable and competitively neutral." The Commission's requirement that SCT bear such costs—particularly costs not imposed on existing DC ties or any existing type of market participant—is inconsistent with section 39.151(e) and Rule 25.363.

Under Substantive Rule 25.363(g), ERCOT may charge reasonable user fees for services it provides to a market participant or other entity. The costs imposed by the Commission's order, however, are not for services ERCOT would provide to SCT. Moreover, it has been ERCOT's practice to pay for the activities in question out of its approved budget. The Commission's special assessment in this case is inconsistent with the Commission's rule, ERCOT's long-standing practices under its protocols, and the method prescribed by the legislature.

Ordering Paragraphs 34 and 42 implement the Commission's Finding of Fact 70A to require that all flows across the SCT DC Tie be accounted for in order to ensure that SCT "pays for its use of the ERCOT grid." But SCT will not use the ERCOT grid. Moreover, Substantive Rule 25.192(c)(3) clearly makes the entity scheduling an export solely responsible for paying transmission service charges for use of the grid. Requiring SCT to pay for transmission service for exports of power from ERCOT is inconsistent with Substantive Rule 25.192.

**B. The Commission may exercise only those specific powers that PURA confers upon it in clear and express language. Notwithstanding section 37.051(c-2), there is no specific, express authority for the Commission to assign costs to SCT as it has done in the final order.**

As explained in SCT's motion for rehearing, the Commission's assignment of costs directly to SCT is not specifically authorized by PURA. The Commission may not depart from established cost allocation methods based only on PURA § 37.051(c-2)'s general authorization to impose reasonable conditions to protect the public interest.

In its Reply to Motions for Rehearing, Commission Staff contended that sections 14.001 and 37.051(c-2) grant the Commission authority to assign costs to SCT on the grounds that it is "protective of the public interest."[29] TIEC also cites section 37.051(c-2) as authority for the

[28] Under ERCOT's current fee schedule, the system administration fee is based on load represented and charged to all QSEs—including those scheduling flows over all DC ties, including the SCT DC Tie.

[29] Commission Staff's Reply to Mots. for Reh'g at 9 (Oct. 18, 2016).

Commission to assign costs to SCT.[30] Neither section, however, specifically grants the power to order a non-Texas utility to bear costs. As shown below, any implied power to do so must be inferred from specific powers expressly granted elsewhere in PURA. No provision in PURA specifically authorizes the Commission to impose such costs on SCT, which is not a public utility and will never be a public utility in Texas.

Moreover, Staff misinterprets section 37.051(c-2), suggesting that it grants broad authority to impose any condition found to be in the public interest. To the contrary, the requirement that conditions must protect the public interest is an express *limitation* on imposing conditions that are specifically authorized elsewhere in PURA. That is, section 37.051(c-2) grants the Commission a *general* authority only to prescribe conditions that are reasonable and protective of the public interest. And it may impose such conditions only based on powers expressly granted elsewhere in PURA. For example, since section 39.151(d) authorizes the Commission to "adopt and enforce rules relating to system reliability," it can condition its approval of the application on SCT's registering with ERCOT as a market participant. But the Commission lacks the power to impose conditions that exercise what amount to new powers not *specifically and expressly* granted in any other provision of PURA—even if the Commission considers them to be reasonable and protective of the public interest.

The other section cited by Staff, section 14.001, is little changed from when it was originally enacted as part of section 16 of the original PURA in 1975.[31] The section grants general authority to the Commission to regulate public utilities and "to do anything specifically designated or implied by this title that is necessary and convenient to the exercise of that power and jurisdiction." The following provision, section 14.002, also from section 16 in the original PURA, is similarly a general grant of power, authorizing the Commission to "adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction."

Notwithstanding the general grants of power in the sections cited by Staff and TIEC, the Commission may exercise only those specific powers that PURA elsewhere confers upon it in clear and express language. The Texas Supreme Court applied this controlling principle in a 1990 Commission case, *Coalition of Cities for Affordable Utility Rates v. Public Utility Commission (River Bend)*. In its prudence review of the Gulf States Utilities River Bend Nuclear

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[30] TIEC's Response to SCT's Mot. for Reh'g at 9 (Oct. 18, 2016).

[31] Tex. Rev. Civ. Stat. art. 1446c, § 16 (1975).

Power Plant, the Commission contended that section 16 (along with several other PURA provisions) gave it the implied power to reserve judgment regarding the prudence of over $1.4 billion of expenditures on the plant.[32] The Commission intended to review the prudence of those expenditures in a later, separate case.

The Texas Supreme Court rejected the Commission's argument that it had an implied power to revisit the prudence of a portion of the plant expenditures. The Court conceded that section 16 allowed the Commission "to do all things, whether specifically designated by this Act or implied herein, necessary and convenient to the exercise of this power and jurisdiction."[33] Under the Court's construction, however, the quoted language (now in section 14.001) does not grant specific powers to the Commission. Rather, the Court held that the provision only authorized the Commission to exercise such powers that were *specifically* provided by other provisions in PURA:

> [T]he PUC can only do what is necessary and convenient with regard to powers "specifically designated . . . or implied herein . . ." ***by other provisions of PURA***. There is no language in this or any other section of PURA that allows the PUC to bifurcate into multiple proceedings the issue of a single investment's prudence.[34]

It was undisputed that the original section 16 of PURA broadly granted the Commission the powers to issue orders to "supervise and regulate the business of every public utility within its jurisdiction," to "make and enforce rules reasonably required in the exercise of its powers and jurisdiction," and to "call and hold hearings" with respect to administering PURA. Nonetheless, because nothing in PURA specifically authorized the Commission to bifurcate a prudence review, the Court held that it had no power to call a hearing, make a rule, or issue an order to that end.

*River Bend* is only one of a series of cases in which Texas courts held that the Commission's broad grant of authority currently in section 14.001 includes only powers specifically provided elsewhere in PURA. In a 1986 case, *City of Lubbock v. Public Utility Commission*, the Commission attempted to overturn a municipal utility charge on the grounds that it conflicted with a Commission substantive rule.[35] The court noted that section 16 of PURA

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[32] *Coalition of Cities for Affordable Utility Rates v. Pub. Util. Comm'n*, 798 S.W.2d 560 (Tex. 1990).

[33] *Id.* at 564.

[34] *Id.* at 564 (ellipsis in original; emphasis added).

[35] *City of Lubbock v. Pub. Util. Comm'n*, 705 S.W.2d 329, 330 (Tex. App. – Austin 1986, writ ref'd n.r.e.).

authorized the Commission to "make and enforce rules reasonably required in the exercise of its power and jurisdiction."[36] Upon examining several other provisions bearing on the issue, however, the court concluded that, under the circumstances of the case, section 16 and the other PURA provisions cited by the Commission did not amount to the "direct statutory authority" required for it to exercise jurisdiction over a municipal regulatory authority.[37] The Court therefore held that the Commission did not have authority to impose its rule on municipalities, notwithstanding the language in section 16 authorizing the Commission to adopt rules. The Court's reasoning demonstrates that sections 14.001 and 14.002 do not specifically authorize the Commission to impose costs on SCT—which is not a public utility in Texas.

Similarly, although the Commission once had broad authority to regulate the rates of telephone companies, the Texas Supreme Court limited its implied ratemaking powers. In a late 1980s telephone rate case, *Public Utility Commission v. GTE-Southwest, Inc.* ("GTE-Southwest"), the Commission attempted to make the company's new rates retroactively effective on a date prior to the issuance of the final order in the case.[38] Again, the Court noted section 16's broad grant of authority, but noted further that an agency may not create and exercise a new power that is not specifically granted:

> [T]he PUC is a creature of the legislature and has no inherent authority. ***An agency may exercise only those specific powers that the law confers upon it in clear and express language.*** As a general rule, the legislature impliedly intends that an agency should have whatever power is reasonably necessary to fulfill a function or perform a duty that the legislature has expressly placed in the agency. ***The agency may not, however, on a theory of necessary implication from a specific power, function, or duty expressly delegated, erect and exercise what really amounts to a new and additional power*** or one that contradicts the statute, no matter that the new power is viewed as being expedient for administrative purposes.[39]

Finding no retroactive ratemaking authority specifically granted in any provision of PURA under the circumstances of the case, the Court overruled that portion of the Commission's order.[40]

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[36] *Id.* at 330.

[37] *Id.* at 331.

[38] 901 S.W.2d at 406.

[39] *Id.* at 406 (emphasis added; internal quotation marks and citations omitted).

[40] *Id.* at 408.

Applying the same reasoning to this case, an appellate court would overrule the Commission's assignment of costs to SCT.

The courts' reasoning in *City of Lubbock* and *GTE-Southwest* applies with equal force to the Commission's authority to prescribe conditions pursuant to section 37.051(c-2). The Commission cannot use that general power to prescribe conditions that exercise what amounts to a new power. Just as it cannot use its broad rulemaking authority to exercise power beyond its express statutory authority, the Commission cannot prescribe conditions that impose costs or obligations the Commission does not have separate, express authority to impose.

Indeed, the Texas Supreme Court has declined to find Commission implied powers when its express authority seemed fairly clear. In a 2001 case, *Public Utility Commission v. City Public Service Board*, the Texas Supreme Court held that in the absence of express statutory authority, the Commission did not have implied power to adopt the postage stamp method of calculating wholesale transmission rates.[41] It was undisputed in the case that the Commission could regulate wholesale transmission service and set rates for investor-owned utilities.[42] And while it did not have express authority to set municipal utility rates for such service, the Commission contended it had an implied authority to do so by virtue of an express grant of rulemaking authority in section 35.006 of PURA, which provided that it could "adopt rules relating to wholesale transmission service, rates, and access." Since Chapter 35 applies to municipal utilities, the Commission argued, it could adopt a rule prescribing the calculation of wholesale transmission rates for all utilities, which necessarily was the type of rule authorized by section 35.006.[43]

Although it might seem reasonable that the authority to adopt rules relating to wholesale transmission rates implies the authority to prescribe a method for calculating such rates, the Court rejected the Commission's argument. According to the Court, the Commission's rule impinged on municipal utilities' express authority to set their own rates without Commission approval.[44] Therefore, the Court would not infer Commission authority to set municipal wholesale transmission rates from its express statutory authority to adopt rules relating to all

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[41] *Pub. Util. Comm'n v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 312 (Tex. 2001). The dispute in the case was over the Commission's authority to adopt the postage stamp method before the adoption of the 1999 amendment to PURA that expressly requires that method.

[42] *Id.* at 317.

[43] *Id.* at 318.

[44] *Id.*

wholesale transmission rates. It held that the Commission had exceeded its statutory authority and deemed the rule to be invalid.[45] The same is true in this case, where the Commission lacks express statutory authority to directly assign costs to SCT and, as explained under Issue 2.A, there are express statutory provisions that preclude any implication that an alternative method can be used.

Finally, in a 2007 case, *Texas Municipal Power Agency v. Public Utility Commission*, the Texas Supreme Court revisited the issue of the Commission's authority over municipal utility wholesale transmission rates, when it determined that the Commission could not revise a bundled rate that Texas Municipal Power Agency (TMPA) charged its member cities.[46] The agency's bundled sales rate did not include a separate charge for transmission service.[47] The Court acknowledged that in 1995 the legislature had granted the Commission authority to regulate wholesale transmission service by electrical utilities, including municipal utilities.[48] The Court then examined the mandatory duties relating to transmission service that Chapter 35 imposes on the Commission.[49] Upon concluding that the Commission could reasonably carry out its statutory duties without affecting the sales contracts between municipal utilities, the Court held that the legislature did not impliedly give the Commission the power to revise the contracts.[50] Accordingly, the Court overruled Commission and held that it lacked jurisdiction to unbundle or interfere with TMPA's sales contract.[51]

In the foregoing cases, the Court would not allow the Commission to create what amounted to a new power, no matter how expedient the power might be in administering its other, undisputed powers. The Court's holdings have a clear implication in this case, where the Commission may not extend its authority by implication to impose costs on SCT.

To summarize, the Commission has no specific, express statutory authority to impose the costs in question on an entity such as SCT, which is not a public utility under Texas law. Nor

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[45] *Id.* at 325.

[46] *Texas Municipal Power Agency v. Pub. Util. Comm'n*, 253 S.W.3d 184 (Tex. 2007).

[47] *Id.* at 187.

[48] *Id.*

[49] *Id.* at 193-96.

[50] *Id.* at 196.

[51] *Id.* at 201.

may the Commission assign costs to SCT in a manner that is inconsistent with specific provisions in PURA and the Commission's rules.

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

**Answer: The Commission's order is contrary to the FERC interconnection order.**

**A. Introduction**

As explained below, FERC's interconnection order for SCT includes required findings under FPA § 212 approving the rates, terms, and conditions for the proposed transmission service. FERC's approval under § 212 was premised on the use of existing rates, terms, and conditions established by the Commission and ERCOT protocols, including the existing postage stamp rate allocation of transmission upgrade costs as required by PURA § 35.004(d) as well as the existing load-ratio share allocation of ancillary services costs under PURA § 35.004(e).

Contrary to the premises of the FERC order, the Commission completely departed from its existing cost allocation methods and instead directly allocated transmission upgrade and ancillary services costs to SCT or to users of the SCT tie. The inconsistency is particularly striking, given that the Commission has not adopted a new rule of general applicability here or a new methodology applicable to all similarly situated market participants, but rather is prescribing an ad hoc cost allocation, applicable only to a single entity or to QSEs transacting over only one of six DC ties (i.e., the five existing DC ties plus the future SCT DC Tie).

The Commission recognized in its order that its charge in approving the application is to fashion reasonable conditions to protect the public interest, consistent with FERC's Final Order issued in Docket No. TX11-1-000.[52] Despite that acknowledgment, the Commission's order evidences no consideration for the findings and conclusions reached in the FERC Order, as many of the conditions the Commission's order seeks to impose are contrary to the FERC Order. For that reason alone, the Commission must modify its order to reconcile and make consistent with the FERC Order whatever reliability conditions the Commission has the specific, express authority to impose.

[52] *Southern Cross Transmission LLC; Pattern Power Marketing LLC*, Final Order Directing Interconnection and Transmission Service, 147 FERC ¶ 61,113 (May 15, 2014) (the "FERC Order").

The FERC Order was issued pursuant to Sections 210, 211, and 212 of the FPA.[53] All three provisions were added by Congress to the FPA in 1978 with the enactment of the Public Utility Regulatory Policies Act of 1978 ("PURPA") and are designed to authorize FERC to order the creation of a new interconnection with the ERCOT transmission system and the rendering of transmission service within ERCOT for transactions over the newly-established interconnection without subjecting ERCOT and utilities operating within ERCOT to FERC's plenary jurisdiction.[54]

Other applicants have utilized the process set forth in FPA Sections 210, 211, and 212 to authorize the creation of a new interconnection with ERCOT while still maintaining the jurisdictional independence of ERCOT and the ERCOT utilities from FERC's plenary jurisdiction.[55] In all of these cases, the rates, terms, and conditions of ordered interconnection and transmission services are set forth in an Offer of Settlement among the parties seeking service and the parties from whom service is requested. FERC's approval of that Offer of Settlement provides the basis upon which FERC issues its final order directing the rendering of interconnection and transmission services.

SCT has been working on its DC Tie project since 2009. It worked initially with Pattern Power Marketing ("PPM") and Garland and later with Oncor and CenterPoint to develop the project, utilizing the statutory framework set forth in FPA sections 210, 211, and 212 and the process employed in earlier proceedings in which new interconnections with ERCOT were ordered.

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[53] FPA Section 210 sets forth the requirements and standards pursuant to which FERC may order the physical interconnection of transmission facilities. Section 211 sets forth the requirements and standards by which FERC may order the providing of wholesale transmission service. Section 212 addressing ratemaking and cost allocation issues pertaining to ordered interconnection and transmission services.

[54] The history of these provisions arises out of what is commonly referred to as the "Midnight Connection." *See* Cudahy, *The Second Battle of the Alamo: The Midnight Connection*, 10 J. NAT. RESOURCES AND ENV'T. 56 (1995). *See also* Fleisher, *ERCOT's Jurisdictional Status: A Legal History and Contemporary Appraisal*, 3 TEX. J. OF OIL, GAS, AND ENERGY LAW 1 (2009).

[55] *See Brazos Electric Power Coop, Inc.*, 118 FERC ¶ 61,199 (2007); *Kiowa Power Partners, LLC*, et al., 99 FERC ¶ 6,251 (2002); *Central Power & Light Co.*, 17 FERC ¶ 61,078 (1981). The interconnection ordered in the *Brazos* order was never built.

A critical aspect of the early development of the SCT Project was to ensure the on-going jurisdictional independence of ERCOT.[56] As a result, SCT considered it vital that the transaction rigorously complied with the statutory requirements and standards set forth in FPA Sections 210, 211, and 212.

Upon reviewing the Application submitted by SCT and PPM in Docket No. TX11-1-000 and accompanying Offer of Settlement entered into among SCT, PPM, Garland, Oncor, and CenterPoint, FERC agreed that the statutory requirements for eligibility for an order issued under Sections 210 and 211 were met.[57] Specifically, FERC found that both SCT and PPM qualified as "electric utilities" and, as such, were entitled to seek orders requiring the provision of interconnection and transmission service pursuant to FPA Sections 210 and 211.[58] Similarly, Garland was also found to meet the requirements of an "electric utility" and could be the subject of an order requiring interconnection under FPA Section 210.[59] Finally, FERC determined that Oncor and CenterPoint, as the transmission and distribution successors of entities that were previously subject to FPA Section 211 transmission service orders, meet the definition of "transmitting utility" and could be the subject of a future order requiring transmission under FPA Section 211.[60]

With respect to the statutory standards that must be met as a condition to the issuance of final orders under FPA Sections 210 and 211, those standards are explicitly set forth in the statute, were commented upon by this Commission and TIEC, and were addressed by FERC in its Conditional Order and its Final Order. It is with respect to those standards that this Commission's order is directly contrary.

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[56] When FPA Sections 210, 211, and 212 were added with the enactment of PURPA, Congress also added Section 201(b)(2) to provide that an entity subject to a FERC order under FPA Sections 210, 211, and 212 is expressly deemed not to be "public utility" and is not subject to FERC's plenary jurisdiction. Congress did not confer any discretion on FERC as to whether an order directing interconnection and/or transmission services must be coupled with the assurance that the jurisdictional status quo of ERCOT is maintained. The status quo is maintained by operation of statute through the express carve-out of entities subject to the FPA Sections 210, 211, and 212 orders from the definition of "public utility" pursuant to FPA Section 201(b)(2).

[57] No party participating in the proceeding claimed that any requirement of FPA Sections 210, 211 or 212 had not been met by the Applicants or the signatories to the Offer of Settlement.

[58] Conditional Order at ¶ 25.

[59] *Id.* In addition, in response to the request of this Commission, FERC went on to determine that Garland's involvement in the transaction did not render Garland a "transmitting utility" under the FPA. *Id.* ¶ 26.

[60] *Id.*



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## B. The Ordered Interconnection Service

FPA Section 210(c) directs FERC to issue an order requiring the physical interconnection of transmission facilities with the facilities of an eligible applicant only if FERC determines that (1) such order is in the public interest; (2) the order would (a) encourage overall conservation of energy or capital, (b) optimize the efficiency of use of facilities or resources, or (c) improve the reliability of any electric utility system or Federal power marketing system to which the order applies; and (3) the order meets the ratemaking standards set forth in FPA Section 212. The ratemaking standard in Section 212 provides:

> (c)(1) Before issuing an order under Section 210 or subsections (a) or (b) of section 211, the Commission shall issue a proposed order and set a reasonable time for parties to the proposed interconnection or transmission order to agree to terms and conditions under which such order is to be carried out, including the apportionment of costs between them and the compensation or reimbursement reasonably due to any of them . . . .
>
> (c)(2)(A) If the parties agree as provided in paragraph (1) within the time set by the Commission and the Commission approves such agreement, the terms and conditions shall be included in the final order.

The parties to the Offer of Settlement did reach agreement on the apportionment of costs among them and the compensation or reimbursement reasonably due to any of them. With respect to the costs of interconnection facilities, the Offer of Settlement provides: "Garland further agrees that it will not seek to recover from wholesale or retail customers in Texas the costs incurred in constructing the interconnection facilities identified in the Garland/SCT Interconnection Agreement."

In its comments on the Application and Offer of Settlement, this Commission requested clarification as to whether the commitment made by Garland covers (1) the thirty-mile transmission line from Oncor's Rusk switching station to the new switching station near the Texas/Louisiana border, (2) the switching station at the border and (3) any facilities to be constructed by Garland at Oncor's Rusk switching station pursuant to the Oncor/Garland Interconnection Agreement.[61] In its comments, TIEC contended that the commitment made by the Applicants should not be limited to the facilities to be owned and operated by Garland but, instead, should be expanded to include all ERCOT upgrades that are identified by the

[61] Docket No. TX11-1-000, Comments of the Public Utility Commission of Texas at pp. 5-6 (Nov. 4, 2011).



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interconnection and reliability studies.[62] To address this Commission's concerns, the Applicants and Garland made the following revised commitment in the Applicants' Answer to the comments of this Commission and TIEC:

> [T]he existing contractual arrangements pursuant to which Garland is participating in the development of the Project prohibit Garland from seeking to recover from ERCOT ratepayers the original costs of constructing any of the facilities with which Garland is involved and that will be built to connect the Project to the ERCOT transmission system. There is no need, for purpose of this representation, to distinguish between interconnection and transmission facilities—the representation covers the cost of constructing all Garland-owned facilities needed to interconnect the SCT Project to the ERCOT transmission system.[63]

The Applicants objected to TIEC's request to expand the commitment to all ERCOT network upgrades, asserting that the upgrades are already subject to established cost allocation rules within ERCOT and subject to this Commission's oversight, and FERC should not dictate how the costs of those upgrades are allocated.[64]

In its Conditional Order, FERC noted that since the parties to the Offer of Settlement had agreed upon the allocation of costs between them, FERC would not normally need to issue a conditional order.[65] However, FERC also agreed with the comments of this Commission and TIEC that it would not issue a final order directing the interconnection between Garland and SCT, since the interconnection and reliability studies to be performed in connection with the SCT Project were not yet completed and, thus, the interconnection facilities to be built by the parties were not yet finalized. Instead, the parties were directed—upon completion of the interconnection and reliability studies—to revise the interconnection agreements and the Offer of Settlement to "include details regarding the facilities that will be owned, operated and maintained by SCT, Garland and Oncor to facilitate the requested interconnection."[66]

On January 8, 2014, the Applicants received written notification from Oncor that the interconnection and reliability studies within ERCOT necessary to identify the facilities required

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[62] Docket No. TX11-1-000, Comments of Texas Industrial Energy Consumers at pp. 5-6 (Nov. 4, 2011).

[63] Docket No. TX11-1-000, Motion of Southern Cross Transmission LLC and Pattern Power Marketing LLC for Leave to Answer and Answer at p. 5 (Nov. 18, 2011).

[64] *Id.* at p. 6.

[65] FERC Conditional Order at ¶ 29.

[66] *Id.*



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to safely and reliably interconnect the SCT Project to the ERCOT grid had been finalized and the requisite review by ERCOT and the ERCOT transmission owners had been completed. As a result, in accordance with Conditional Order, the parties to the Offer of Settlement finalized and filed the executed Interconnection Agreements and revised the Offer of Settlement consistent with the Conditional Order.

To that end, SCT, Garland, and Oncor reached an agreement regarding the specific facilities that each will own, operate, and maintain to facilitate the requested interconnection. These facilities were identified in Exhibit A to each of the final, filed Interconnection Agreements. In addition, the Applicants represented to FERC that the interconnection and reliability studies undertaken by Oncor and reviewed by ERCOT and the ERCOT transmission owners confirmed that, with the construction and operation of the facilities identified in Interconnection Agreements, the SCT Project can be interconnected to the ERCOT grid without any adverse impacts on the continued reliability of the grid. No party to the FERC proceeding—including this Commission and TIEC—took issue with the representation.[67]

Accordingly, FERC issued its Final Order ordering Garland to interconnect to the SCT Project, finding that:

> [T]he Revised Application includes a complete list of facilities that will be constructed. Further, the Revised Application affirms that costs for the facilities identified in the Garland/SCT interconnection agreement are the responsibility of the Project and will not be recovered from ERCOT ratepayers, and 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***. Thus, we find that, with respect to the proposed interconnection, the revised Offer of Settlement meets the requirements of sections 212(a) and 212(k) and will direct Garland to provide the requested interconnection service under the rates, terms and conditions provided for in the revised Offer of Settlement.[68]

Thus, with respect to the FERC-ordered interconnection service to be provided by Garland to SCT, the Applicants agreed to this Commission's request for a clarification of the commitment to ensure that the costs of any facilities to be owned and operated by Garland are not recovered

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[67] The Applicants filed the revised Offer of Settlement and the final executed Interconnection Agreements on February 20, 2014. That same day, FERC issued a Notice of Filing providing March 24, 2014 as the deadline for the submission of comments on or protests to the filing. No comments were submitted before or after the March 24 deadline.

[68] FERC Order at ¶ 20 (emphasis added; footnote omitted).

from Texas wholesale and retail ratepayers. FERC adopted that revised commitment in adopting the Offer of Settlement.

Significantly, FERC agreed with the Applicants that TIEC's request to expand the commitment to cover all ERCOT network upgrades should be rejected, finding that the ratemaking treatment of any upgrades would be addressed under *established* ratemaking principles applied by this Commission to all network upgrades built within ERCOT.[69] This Commission's order is inconsistent with FERC's finding, given that the Commission now seeks to make SCT responsible for all network upgrades associated with the SCT Project.

### C. The Offer of Settlement and the Applicable Ratemaking Standards

With respect to a FERC order under FPA Section 211 to provide wholesale transmission service, FPA Section 212(a) requires the "transmitting utility" that is the subject of such order to "provide wholesale transmission service at rates, charges, terms and conditions which permit the recovery by such utility of all costs incurred in connection with the transmission services and necessary associated services. . . ." Furthermore, "such rates, charges, terms, and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, *and not unduly discriminatory or preferential*."[70] Finally, FPA Section 212(k) provides that any order "requiring transmission service 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."

In the Offer of Settlement submitted with the Application, the signatories addressed the issue of transmission service over the ERCOT system as follows:

> In connection with the Southern Cross Project, Oncor and CEHE shall transmit power in and out of the ERCOT grid at the rates and under the terms and conditions set forth in Oncor's and CEHE's respective TFO Tariffs,[71] except that each tariff shall be modified as necessary to comply with this Order, for PPM or

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[69] FERC Order at ¶ 20.

[70] Emphasis added.

[71] The reference to TFO Tariff is to the Tariff for Transmission Service To, From and Over Certain Interconnections. The currently effective TFO Tariff on file for Oncor is Revision No. 13 which was accepted for filing by FERC on June 24, 2015 in Docket No. NJ14-10-000. Subsequent revisions to the rates set forth in the Oncor TFO Tariff were filed and accepted for filing in Docket Nos. NJ15-14-000 and NJ15-18-000.

> any other entity that is an eligible customer under the TFO Tariff. Oncor and CEHE shall make compliance filings to modify their respective TFO Tariffs to apply to the import or export of power over the Garland Transmission Facilities and the Southern Cross Project into and out of the ERCOT grid at the Western Point of Interconnection ***at the same rates and on the same terms and conditions under which Oncor and CEHE currently provide transmission services under their respective TFO Tariffs.***[72]

Thus, it was explicitly made clear in the Offer of Settlement that, with respect to transmission service over the ERCOT system, the ordered transmission service applicable to customers transmitting power into and out of ERCOT through the SCT Project would be at the same rates, terms, and conditions provided by Oncor and CenterPoint to their other customers under the existing TFO tariffs, including the existing cost allocation methods employed in ERCOT. No party to the proceeding—and neither the Commission nor TIEC—protested or expressed any reservation with this provision to any degree or at any time. In fact, in its filed Comments, this Commission not only did not object to this provision in the Offer of Settlement but went on to explain to FERC that its existing transmission ratemaking policies were supportive for the transmission of renewable energy:

> Regarding transmission rates, Texas law and PUCT rules for open access to transmission have contributed to the development of wind capacity in ERCOT. The PUCT has adopted open-access rules that differ from [FERC's] rules in several respects. By statute and by PUCT rule, each distribution service provider pays its share of the costs of all the transmission service providers in ERCOT using a postage-stamp method. Rates are not distance sensitive, which helps encourage building transmission lines even though renewable resources are not near load. Moreover, the PUCT's open-access rules provide ease of interconnection. Accordingly, the PUCT's open-access rules encourage development of renewable energy resources.[73]

Given the absence of objections to and, in fact, the affirmative support by this Commission for the application of existing ERCOT transmission ratemaking policies to customers importing and exporting power over the SCT Project, it is not surprising that FERC adopted the Offer of Settlement on this issue. As FERC stated in its Conditional Order:

> The Commission has previously found that the ERCOT protocols and procedures regarding interconnection and transmission service meet the

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[72] Docket No. TX11-1-000, Joint Application of Southern Cross Transmission LLC and Pattern Power Marketing LLC For An Order Directing a Physical Interconnection of Facilities and Transmission Service Under Sections 210, 211, and 212 of the Federal Power Act, Offer of Settlement, Paragraph (K) (Sept. 6, 2011) (emphasis added).

[73] Docket No. TX11-1-000, Comments of the Public Utility Commission of Texas at pp. 6-7 (Nov. 4, 2011) (footnotes omitted).

> 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 their TFO tariffs to apply those ***existing*** rates, terms and conditions to the proposed transmission service. Therefore, we find that, with respect to the transmission services to be provided by Oncor and CenterPoint, the Offer of Settlement meets the requirements of sections 212(a) and 212(k).[74]

FERC re-affirmed this determination in its Final Order, directing that Oncor and CenterPoint provide the requested transmission service under the rates, terms, and conditions provided for in the revised Offer of Settlement.[75]

In light of the unanimous agreement among all of the parties to the FERC proceeding, including this Commission, over the ratemaking standards as well as the ERCOT protocols and procedures to apply to transmission service over the ERCOT system, it is extremely disappointing that this Commission has instead prescribed an entirely new ratemaking methodology applicable only to transmission service to and from the SCT Project. On its face, the Commission's order is in direct conflict with the Offer of Settlement and the FERC Order and contradicts its earlier representations to FERC.[76]

It cannot be reasonably claimed that the discriminatory treatment of SCT and its customers under the Commission's order is necessitated by legitimate operational concerns as to how the SCT Project will impact the ERCOT system. The existing TFO Tariffs provide ERCOT with several tools to address any potential operational concerns. For example, Section 2.19 of the current Oncor TFO Tariff sets forth a number of practices that are available to ERCOT to manage transactions over the transmission system to address transmission congestion, reliability concerns, and emergency situations. The Tariff makes it clear that those practices will be implemented in a non-discriminatory fashion. For example, in addressing transmission constraints, Section 2.19.2 provides:

> To the extent ERCOT determines that the reliability of the transmission system can be maintained by redispatching resources or when redispatch arrangements are necessary to facilitate generation or transmission transactions for an eligible transmission service customer, the Company or transmission service customer will initiate procedures to redispatch its resources, as directed by ERCOT.

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[74] Conditional Order at ¶ 34 (emphasis added; footnote omitted).

[75] FERC Order at ¶ 19.

[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.



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> To the greatest extent possible, any redispatch shall be made on a least-cost non-discriminatory basis. Except in emergency situations, any redispatch under this section will provide for equal treatment among transmission service.

SCT has repeatedly pointed out the substance of the above provision in numerous pleadings in proceeding. The Commission's order, however, now makes it clear that SCT and its customers within ERCOT cannot expect non-discriminatory treatment. In fact, the order seems clearly intended to explicitly discriminate against SCT and its customers by making them responsible for the payment of costs that are not allocated to other transmission providers or transmission service customers within ERCOT. Such treatment is directly contrary to the Offer of Settlement and—by virtue of FERC's approval of the Offer of Settlement—the FERC Order itself.

Finally, this Commission might bear in mind that SCT has pursued the development of the SCT Project for nearly eight years and, throughout that process, has worked closely with numerous stakeholders within ERCOT to address legitimate concerns and questions about the Project. The Offer of Settlement was a voluntary agreement reached by SCT, PPM, Garland, Oncor, and CenterPoint to allow the SCT Project to move forward in a way to address the principal regulatory issue of concern throughout ERCOT—i.e., the maintenance of the jurisdictional status quo so that ERCOT and the ERCOT utilities will not become subject to FERC's plenary jurisdiction. The signatories to the Offer of Settlement negotiated the terms of the settlement based on settlements that had been approved in prior Section 210/211 proceedings. Although there were questions and concerns raised by this Commission and TIEC before FERC, for the most part those concerns were addressed and resolved. No party protested the Application or proposed changes to the Offer of Settlement, and no party sought rehearing of the FERC Order.

It is in that context that SCT views this Commission's change in position with respect to the SCT Project as particularly disappointing and unfair. Indeed, the Commission's order could be perceived as not only inconsistent with the FERC Order, but also as an attempt to frustrate the development of a project that has been generally supported by most of the interested Texas stakeholders—including this Commission—over the past eight years. Under the circumstances, SCT would likely have a remedy at FERC pursuant to PURPA Section 205(a),[77] enacted by

[77] Codified at 16 U.S.C. § 824a-1.

Congress with the enactment of FPA Sections 210, 211, and 212, that grants to FERC the authority to exempt electric utilities from any state law, rule or regulation which "prohibits or prevents the voluntary coordination of electric utilities" should FERC "determine that such voluntary coordination is designed to obtain economical utilization of facilities and resources in any area."

As discussed above, FERC has already determined that SCT and PPM are "electric utilities" under the FPA and any entity in ERCOT that would seek to sell electricity to purchasers in SERC over the SCT Project would also qualify as "electric utilities."[78] FERC has previously found that the ordered interconnection and transmission services in connection with the operation of the SCT Project are in the public interest because those services will promote efficiency by increasing power supply options and improving competition.[79] If the true purpose of the this Commission's order is to frustrate the development of the SCT Project for discriminatory and protectionist purposes and, as a result, this Commission's order prevents the voluntary coordination of electric utilities seeking the economical utilization of facilities and resources in ERCOT and SERC, then an exemption from the discriminatory provisions of the Commission's order would be warranted.[80] Hopefully, this Commission's reconsideration of the legal issues associated with order indicates a willingness by the Commission to re-evaluate its approach to the SCT Project.

## CONCLUSION

SCT urges the Commission to reconsider its September 8, 2016 order in this case and delete those provisions that impose costs on SCT or entities transacting across the SCT DC Tie. SCT is an interstate transmission company. SCT does not, and never will have, facilities in Texas. SCT does not, and will not, engage in energy transactions in Texas. The Commission's direct allocation of costs to SCT or to entities transacting over the SCT tie is contrary to PURA.

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[78] FPA Section 3(22) defines "electric utility" as a person or Federal or State agency (including an entity described in section 201(f)) that sells electric energy."

[79] Conditional Order at ¶ 31.

[80] Indeed, Central and Southwest Corporation ("CSW") filed a petition under PURPA Section 205(a) seeking an exemption from a PUCT order prohibiting the re-establishment of the "Midnight Connection" created by the CSW operating utilities in Texas and Oklahoma. Shortly thereafter, the first DC tie connection between ERCOT and SPP was created by FERC's approval of the first Section 210/211 settlement. *See Central Power & Light Co.*, 17 FERC ¶ 61,078 (1981), *order on reh'g*, 18 FERC ¶ 61,100 (1982).

The Commission does not have the necessary expressed authority to impose costs on an entity that is neither a public utility nor other defined regulated entity under PURA.

Further, the assignment of costs to SCT or entities using the SCT DC Tie that are not assigned to other DC ties or to similar transactions in ERCOT is contrary to SCT's FERC Order. This Commission's order flies in the face of its representations and agreement in the FERC docket regarding the ratemaking standards that apply to transmission service over the ERCOT system, including the SCT DC Tie. Thus, the order violates both PURA § 37.051 (c-2), which specifically applies to this proceeding, and PURA § 35.005(c), which states "The Commission may not issue a decision or rule relating to transmission service that is contrary to an applicable decision, rule, or policy statement of a federal regulatory agency having jurisdiction."

If the Commission imposes new and different ratemaking standards in this case, the resulting facially discriminatory treatment would be a *per se* violation of the dormant commerce clause. Finally, under PURPA Section 205(a), a forum is available at FERC to exempt SCT from a Commission order that is intended to simply thwart the development of the SCT Project.

While this brief has focused on the issues designated by the Commission, SCT respectfully requests that the Commission grant SCT's Motion for Rehearing in all respects and provide SCT with such other relief to which it may be entitled.

Respectfully submitted,

Robert A. Rima
State Bar No. 16932500
Law Offices of Robert A. Rima
7200 N. MoPac Expy, Suite 160
Austin, TX 78732-2560
512-349-3449
512-349-9339 Fax
bob.rima@rimalaw.com
*Attorney for Southern Cross Transmission LLC*

**CERTIFICATE OF SERVICE**

I certify that on December 14, 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



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# APPENDIX D

**PUC DOCKET NO. 45624**



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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** |

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**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.



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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

[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,

Robert A. Rima
State Bar No. 16932500
Law Offices of Robert A. Rima
7200 N. MoPac Expy, Suite 160
Austin, TX 78732-2560
512-349-3449
512-349-9339 Fax
bob.rima@rimalaw.com
*Attorney for Southern Cross Transmission LLC*

**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

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CAUSE NUMBER *(FOR CLERK USE ONLY)*: D-1-GN-17-000192 COURT *(FOR CLERK USE ONLY)*: 126TH

STYLED SOUTHERN CROSS TRANSMISSION LLC v. PUBIC UTILITY COMMISSION OF TEXAS

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|---|---|---|---|
| Name: | Email: | Plaintiff(s) Petitioner(s) | ☒ Attorney for Plaintiff Petitioner |
| Marnie A. McCormick | mmccormick@dwmrlaw.com | Southern Cross Transmission LLC | ☐ *Pro Se* Plaintiff Petitioner |
| Address: | Telephone: | | ☐ Title IV-D Agency |
| P. O. Box 1149 | 512-744-9300 | Defendant(s) Respondent(s) | ☐ Other |
| City State Zip: | Fax: | Public Utility Commission of Texas | Additional Parties in Child Support Case |
| Austin, TX 78767-1149 | 512-744-9399 | | Custodial Parent: |
| Signature: | State Bar No. | | Non-Custodial Parent: |
| /s/ Marnie A. McCormick | 00794264 | (Attach additional page as necessary to list all parties) | Presumed Father: |

**2. Indicate case type, or identify the most important issue in the case *(select only 1)*:**

DO NOT CHECK CASE TYPE (EXCEPT OTHER) FOR CLERK TO SELECT SUIT TYPE; SEE SEC. 3 BELOW

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|---|---|---|---|---|
| **Contract** | **Injury or Damage** | **Real Property** | **Marriage Relationship** | **Post-judgment Actions (non-Title IV-D)** |
| *Debt/Contract*<br>☐ Consumer DTPA<br>☐ Debt/Contract<br>☐ Fraud/Misrepresentation<br>☐ Other: Debt/Contract<br><br>*Foreclosure*<br>☐ Home Equity—Expedited<br>☐ Other Foreclosure<br>☐ Franchise<br>☐ Insurance<br>☐ Landlord/Tenant<br>☐ Non-Competition<br>☐ Partnership<br>☐ Other Contract: | ☐ Assault/Battery<br>☐ Construction<br>☐ Defamation<br>*Malpractice*<br>☐ Accounting<br>☐ Legal<br>☐ Medical<br>☐ Other Professional Liability:<br><br>☐ Motor Vehicle Accident<br>☐ Premises<br>*Product Liability*<br>☐ Asbestos/Silica<br>☐ Other Product Liability List Product:<br><br>☐ Other Injury or Damage: | ☐ Eminent Domain/Condemnation<br>☐ Partition<br>☐ Quiet Title<br>☐ Trespass to Try Title<br>☐ Other Property<br><br>**Related to Criminal Matters**<br>☐ Expunction<br>☐ Judgment Nisi<br>☐ Non-Disclosure<br>☐ Seizure/Forfeiture<br>☐ Writ of Habeas Corpus—Pre-indictment<br>☐ Other: | ☐ Annulment<br>☐ Declare Marriage Void<br>*Divorce*<br>☐ With Children<br>☐ No Children<br><br>**Other Family Law**<br>☐ Enforce Foreign Judgment<br>☐ Habeas Corpus<br>☐ Name Change<br>☐ Protective Order<br>☐ Removal of Disabilities of Minority<br>☐ Other | ☐ Enforcement<br>☐ Modification—Custody<br>☐ Modification—Other<br>**Title IV-D**<br>☐ Enforcement/Modification<br>☐ Paternity<br>☐ Reciprocals (UIFSA)<br>☐ Support Order<br>**Parent-Child Relationship**<br>☐ Adoption/Adoption with Termination<br>☐ Child Protection<br>☐ Child Support<br>☐ Custody or Visitation<br>☐ Gestational Parenting<br>☐ Grandparent Access<br>☐ Parentage/Paternity<br>☐ Termination of Parental Rights<br>☐ Other Parent-Child |
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| ☐ Discrimination<br>☐ Retaliation<br>☐ Termination<br>☐ Workers' Compensation<br>☐ Other Employment: | ☒ Administrative Appeal<br>☐ Antitrust/Unfair Competition<br>☐ Code Violations<br>☐ Foreign Judgment<br>☐ Intellectual Property | ☐ Lawyer Discipline<br>☐ Perpetuate Testimony<br>☐ Securities/Stock<br>☐ Tortious Interference<br>☐ Other | | |

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| | | |
|---|---|---|
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| ☐ Arbitration-related | ☐ Garnishment | ☐ Protective Order |
| ☐ Attachment | ☐ Interpleader | ☐ Receiver |
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