

Control Number: 45624



Item Number: 449

Addendum StartPage: 0

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

RECEIVED

2017 APR -3 PM 2:42

APPLICATION OF THE CITY OF  
GARLAND TO AMEND A  
CERTIFICATE OF CONVENIENCE  
AND NECESSITY FOR THE RUSK TO  
PANOLA DOUBLE-CIRCUIT 345-KV  
TRANSMISSION LINE IN RUSK AND  
PANOLA COUNTIES

§  
§  
§  
§  
§  
§  
§

PUBLIC UTILITY COMMISSION  
BEFORE THE HEARING CLERK

PUBLIC UTILITY COMMISSION  
OF TEXAS

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

**TABLE OF CONTENTS**

|  |   |
|--|---|
| INTRODUCTION .....   | 1 |
| REQUESTS FOR CLARIFICATIONS TO THE ORDER .....   | 2 |
| 1. Request for Clarification Concerning ERCOT Cost Study .....   | 2 |
| 2. Request for Clarification Concerning Regulatory Approvals in Louisiana .....  | 3 |
| OVERVIEW OF POINTS OF ERROR .....  | 3 |
| POINTS OF ERROR .....  | 5 |
| I. Point of Error No. 1: The Commission's decision to impose an ongoing obligation on SCT to "pay any additional costs associated with the Garland Line, the Garland Substation, or the Southern Cross DC tie that would otherwise be borne by ERCOT ratepayers," without any limitation on the period of applicability or cost causation is ambiguous, arbitrary and capricious, contrary to law, and an abuse of discretion. (Order at 7-8 Findings of Fact 119B, Ordering Paragraph No. 34) ..... | 5 |
| II. Point of Error No. 2: 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 does not reflect the Commission's decision in its August 25, 2016 open meeting. (Order at 16, Finding of Fact 120A, Ordering Paragraph 20) .....  | 7 |
| III. Point of Error No. 3: The Commission's decision places an undue burden on interstate commerce by (a) allocating costs to SCT, (b) directly assigning incremental and ancillary service costs to imports and exports over the SCT tie, and (c) prohibiting utility recovery of costs associated with the Garland project or the SCT DC Tie. (Order at 3, Findings of Fact 42A, 44A, 48B, 59, 62, 70, 83A, 91A, 107, 119, 119A-119E, Ordering Paragraphs 33, 34, 35, and 42) .....                | 8 |
| IV. Point of Error No. 4: The Conditions on the Garland certificate imposed by the Rehearing Order are inconsistent with the transmission service  |   |

449



|       |  |    |
|-------|--|----|
|       | ordered by FERC in Docket No. TX11-1-000 and conflict with FERC’s exclusive jurisdiction over wholesale transmission service. (Order at 7-11, Findings of Fact 42A, 44A, 48B, 59, 62–70, 83A, 91A, 107, 113E–F, 119–119B, Ordering Paragraphs 33, 34, 35, and 42).....   | 12 |
| A.    | The Rehearing Order conflicts with FERC’s exclusive jurisdiction to order transmission service within ERCOT for export and import transactions. ....   | 13 |
| B.    | The Commission may address transmission rate-making in connection with the SCT project only through FERC-accepted changes to the TFO tariffs.....  | 15 |
| V.    | Point of Error No. 5. The Commission’s decision to directly assign transmission upgrade costs to SCT instead of ERCOT end-users is contrary to the limitations on the recovery of transmission service costs mandated by PURA § 35.004 and is arbitrary and capricious. (Order at 7-11, Findings of Fact 59, 113D-G, 119B, Ordering Paragraphs 34 and 42) .....  | 17 |
| VI.   | Point of Error No. 6: 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 7-11, Finding of Fact 119C, Ordering Paragraph 35).....   | 18 |
| VII.  | Point of Error No. 7: 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 7-11, Findings of Fact 59, 119B, Ordering Paragraph 34).....  | 19 |
| VIII. | Point of Error No. 8: 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 7–11, Findings of Fact 42A, 44A, 48B, 62, 70, 83A, 91A, 107, 113B–F, 119–119E, Ordering Paragraphs 32–36 and 42).....  | 20 |
| IX.   | Point of Error No. 9: 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 7-11, Findings of Fact 42A, 44A, 48B, 62, 70, 83A, 91A, 107, 119, 119A, Ordering Paragraphs 33 and 34).....   | 22 |
| X.    | Point of Error No. 10: 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 7-11, Findings of Fact 42A, 44A, 48B, 62, 70, 83A, 91A, 107, 119, 119A, Ordering Paragraphs 33 and 34) ..... | 22 |
| XI.   | Point of Error No. 11: 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 7-11, Findings of Fact 42A, 44A, 48B, 62, 70, 83A, 91A, 107, 119, 119A, Ordering Paragraphs 33 and 34) .....  | 24 |
| XII.  | Point of Error No.12: 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 7-11, Findings of Fact 42A, 44A, 48B, 59, 62, 70, 83A, 91A, 107, 119, 119A-119E, Ordering Paragraphs 33, 34, 35, and 42) .....  | 24 |
| XIII. | Point of Error No. 13: The Commission’s decision to assign costs to SCT based in part on import and export flows across the SCT DC Tie violates Substantive Rule 25.192(e). (Order at 7-11, Finding of Facts 113E-F and 119C, Ordering Paragraphs 35 and 42).....  | 25 |
| XIV.  | Point of Error No. 14: 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 7-11, Finding of Facts 119B-C, Ordering Paragraphs 34 and 35).....   | 26 |
|       | A. Direct assignment is unreasonably prejudicial, discriminatory, and anticompetitive.....   | 26 |
|       | B. Direct assignment is inconsistent with the method established in § 35.004(e) for ancillary services procurement and assignment in ERCOT. ....   | 27 |
| XV.   | Point of Error No. 15: 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 7-11, Findings of Fact 42A, 44A, 48B, 59, 62, 70, 83A, 91A, 107, 119, 119A-119E, Ordering Paragraphs 32, 33, 34, 35, and 42)..... | 28 |
| XVI.  | Point of Error No. 16: The Commission’s decision to prohibit any utility from recovering any costs related to the SCT DC Tie or the Garland Project (including the Oncor substation) violates PURA’s basic ratemaking guarantee and the postage stamp method mandated by PURA § 35.004(d). (Order at 7-11, Findings of Fact 119D and 119E, Ordering Paragraphs 32 and 36).....   | 29 |
| XVII. | Point of Error No. 17: 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 Oncor substation) because it did not adequately explain its decision or provide a rational connection between its decision and the facts. (Order at 7, Findings of Fact 119D and 119E, Ordering Paragraphs 32 and 36) .....  | 30 |

|  |    |
|--|----|
| XVIII. Point of Error No. 18: The Commission’s decision to prohibit any utility from recovering any costs related to the Oncor 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 9-10, Findings of Fact 119D and 119E, Ordering Paragraphs 32 and 36) ..... | 30 |
| XIX. Point of Error 19. The Commission does not have authority in this CCN proceeding to impose costs or to restrict a utility’s ability to recover costs in rates. (Order on Rehearing at 6, 8-9, Findings of Fact 113B, 113D) .....  | 31 |
| XX. Point of Error No. 20: The Commission erred in concluding that the benefits of the SCT DC Tie and interconnection are questionable. (Order on Rehearing at 6, 8-9, Findings of Fact 113B, 113D).....   | 32 |
| XXI. Point of Error No. 21: The Commission erred in concluding that “[b]ecause the customers of exported power are not ERCOT customers, under the current market design, they will not bear any responsibility for the costs they impose on the ERCOT system.” (Order on Rehearing at 7-11, Findings of Fact 59-62, 112-113F, 119-119F, Ordering Paragraph 42).....  | 33 |
| XXII. Point of Error No. 22: 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 16, Finding of Fact 120A, Ordering Paragraph 20) .....  | 35 |
| XXIII. Point of Error No.23. 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, 83A, 91A, 107, 119, 119A–119E, and 120A, Ordering Paragraphs 20, 32–36, and 42) .....  | 36 |
| CONCLUSION.....  | 36 |

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

|                                      |   |                                  |
|--------------------------------------|---|----------------------------------|
| <b>APPLICATION OF THE CITY OF</b>    | § |                                  |
| <b>GARLAND TO AMEND A</b>            | § | <b>BEFORE THE</b>                |
| <b>CERTIFICATE OF CONVENIENCE</b>    | § |                                  |
| <b>AND NECESSITY FOR THE RUSK TO</b> | § | <b>PUBLIC UTILITY COMMISSION</b> |
| <b>PANOLA DOUBLE-CIRCUIT 345-KV</b>  | § |                                  |
| <b>TRANSMISSION LINE IN RUSK AND</b> | § | <b>OF TEXAS</b>                  |
| <b>PANOLA COUNTIES</b>               | § |                                  |

**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 Order on Rehearing (“Order”) signed March 14, 2017. In support of its Motion, SCT respectfully shows as follows:

**INTRODUCTION**

For over six years, SCT personnel have worked collaboratively, transparently, and in good faith with a variety of stakeholders, including the Commission, in an effort to develop the SCT DC-tie project.

**Key examples of SCT’s collaboration include:**

- Participating in ERCOT’s Regional Planning Group process when the project was first introduced in 2011;
- Working diligently with many ERCOT stakeholders on a resolution at FERC in the Federal Power Act 210/211 proceedings;
- Submitting two economic studies: one to RPG in 2012, which included a full vetting of assumptions with the RPG stakeholders with ERCOT’s then-current grid planning topology; and a second one, in this contested case, which included ERCOT’s updated grid topology;
- Agreeing to reduce the project size to less than the FERC-approved 3,000 MW;
- Agreeing to TIEC’s and the Commission’s suggested project configuration changes at the Texas/Louisiana border;
- Configuring the tie to provide primary frequency response (subject to reaching an appropriate agreement with resources and the southeast balancing authority); and,

- More recently, participating in Project No. 46393 making key suggestions to improve ERCOT export tariff administration and rate design for the benefit of ERCOT ratepayers.

SCT intends to continue this collaborative approach in the ERCOT stakeholder processes directed by the Commission in Project No. 46304.

### **REQUESTS FOR CLARIFICATIONS TO THE ORDER**

While SCT appreciates certain benefits in the Commission's Order, including the Commission's acceptance of a definitive route for Garland's transmission line and its strong statement urging timely completion of the directives to ERCOT specified in Project No. 46304, SCT requests two clarifications of the Order. SCT believes that these clarifications could enable the ERCOT process to resolve SCT's concerns, and ultimately obviate SCT's need to pursue further litigation.

#### **1. *Request for Clarification Concerning ERCOT Cost Study***

Although this Motion identifies errors in the Commission's Order to preserve them for review, SCT would prefer to work toward answers in the ERCOT processes established by the Commission under Project No. 46304 that might resolve the need for such review.

SCT believes that certain aspects of the Order, such as Ordering Paragraph 34, are ambiguous regarding the potential scope and duration of the cost allocation evaluation for SCT, and could be argued to later justify imposition of additional costs on SCT beyond those identified in the ERCOT processes directed by the Commission under Project No. 46304. While SCT is willing to bear certain costs associated with its project, it needs certainty about those costs and assurance that they will not be open-ended and subject to change outside the normal process associated with rules of general applicability and revisions to Commission rules or ERCOT protocols.

To effectively and finally resolve cost and cost allocation issues, the Project No. 46304 ERCOT processes need to provide conclusive answers to all stakeholders, so that, among other things, SCT can determine whether to forgo review of the Order.<sup>1</sup>

To address this concern, SCT requests clarification that the ERCOT processes established by the Commission under Project No. 46304 will determine the costs allocated to SCT in the

---

<sup>1</sup> Preserving SCT's rights to review may require initiating review proceedings in certain forums to avoid any risk of waiver of those rights while Project No. 46304 is under way.



Order, so that SCT will know the extent of its proposed cost responsibility. To achieve this clarification, SCT proposes the addition of a new Ordering Paragraph as follows:

In accordance with the Commission's September 8, 2016 Order in Project No. 46304, ERCOT shall determine the costs to be allocated to SCT and to entities engaged in transactions over the SCT tie pursuant to this Order, including without limitation the costs contemplated in Ordering Paragraphs 32, 33, 34, 35, 36 and 42. ERCOT's determinations in Project No. 46304 shall consider economic benefit as applicable and shall not be subject to adjustment or redetermination except in rules and protocols of general applicability to all DC ties and/or to entities engaged in transactions over DC ties.

## **2. *Request for Clarification Concerning Regulatory Approvals in Louisiana***

Ordering Paragraph 20 appears to pre-condition any Garland condemnation on receiving "all regulatory approvals" in Louisiana. As discussed with the Commission at the August 25, 2016 Open Meeting, certain state and local government approvals, such as building permits and road crossing permits, are routinely issued closer to when financing is being arranged or when construction has begun.

Modifying Ordering Paragraph 20 as follows would reduce the uncertainty created by this ordering paragraph:

20. Garland must provide evidence that any siting authority required by the Louisiana Public Service Commission necessary to construct the Southern Cross DC Tie, the Southern Cross line, and all related interconnection facilities have been obtained before any landowner's land in Panola County may be condemned for the Garland line, the Garland substation, or the Oncor substation, provided that the landowner grants access to the land for surveying and design purposes.

In summary, SCT believes that the cost allocation overhang in the Order such as in Ordering Paragraph 34 and the Catch-22 in Ordering Paragraph 20 of requiring all regulatory approvals before construction in Louisiana begins are unintended consequences and do not represent the Commission's intent.

SCT respectfully requests that the Commission make SCT's suggested modifications to the Order to provide the regulatory certainty the parties deserve and the law requires, and to enable SCT to defer pursuing review of the Order while ERCOT undertakes its cost assessments.

## **OVERVIEW OF POINTS OF ERROR**

The Commission's Order on Rehearing seriously prejudices the substantial rights of SCT. The following are the most egregious errors:

- The Order violates the Commerce Clause of the U.S. Constitution by discriminating against out-of-state economic interests in favor of in-state economic interests, including protecting in-state generation from competition from out-of-state generation that would—without the barriers to entry erected by the Commission—reduce consumer costs in ERCOT.
- The Commission has exceeded its authority by assuming that PURA §37.051(c-2) gives it unfettered discretion and authority to impose costs on SCT, including cost assignments that are contrary to specific statutory provisions in PURA, the Commission’s own rules, and ERCOT Protocols.
- The Commission’s Order is not consistent with the FERC Order in TX11-1-001 as specifically required by PURA § 37.051(c-2), because the costs assigned to SCT and to transactions over its tie are contrary to the existing rates, terms, and conditions of the applicable Oncor and CenterPoint TFO Tariffs on file with the FERC and made available to the users of the other ERCOT-connected DC ties.<sup>2</sup>
- The Commission’s claim that the SCT DC tie poses serious reliability problems—which is its asserted justification for imposing conditions and assigning costs in this docket—is without merit, because PURA, Commission rules, and ERCOT procedures currently address or provide processes to address reliability concerns and cost assignments. Oncor’s reliability study, prepared as a condition to FERC’s granting its Final Order, concluded that the SCT DC Tie could be interconnected without reliability issues. Moreover, construction of the new facilities will take over four years, which is more than enough time to analyze and implement any required changes to Commission rules and ERCOT protocols. The Commission’s Order prohibits energizing the new Garland line and switching station until ERCOT completes its study of the integration and operational issues.
- The Commission has identified nothing unique about the SCT DC Tie that justifies its unprecedented and discriminatory allocation of costs to SCT. While the tie will be larger than the existing DC ties in ERCOT, it will not be the largest resource within ERCOT and may not be the largest load. Over 17,000 MW of wind generation resources have

---

<sup>2</sup> The word “existing” in the Offer of Settlement approved by FERC does not imply that the TFO tariffs cannot be changed over time.

been integrated using the normal processes for updating rules and protocols. Moreover, a Most Severe Single Contingency (MSSC) has long been recognized without the cost of procuring reserves having been allocated to that facility owner. The Commission has failed to justify treating SCT differently.

- The Commission ignored the uncontroverted evidence that the SCT DC Tie and interconnection will provide substantial benefits to ERCOT ratepayers. According to the first and second studies, those benefits will include \$160 million or \$900 million annually. In addition, payments by exporters will offset transmission cost of service by \$60 million annually. Importers of power over the tie will pay typical end-user charges. SCT will pay the direct interconnection costs associated with the Garland Line and the Garland switching station—a \$103–\$109 million contribution—as well as backstop the cost of the Oncor Substation. Access to imported power will improve system reliability during peak-load periods.
- The Commission assigned costs to SCT without evidence that costs exceed the benefits to ERCOT customers.

### POINTS OF ERROR

- I. **Point of Error No. 1: The Commission’s decision to impose an ongoing obligation on SCT to “pay any additional costs associated with the Garland Line, the Garland Substation, or the Southern Cross DC tie that would otherwise be borne by ERCOT ratepayers,” without any limitation on the period of applicability or cost causation is ambiguous, arbitrary and capricious, contrary to law, and an abuse of discretion. (Order at 7-8 Findings of Fact 119B, Ordering Paragraph No. 34)**

SCT recognizes that the Commission is concerned about protecting ERCOT ratepayers from costs associated with interconnecting the SCT DC Tie. It appears to SCT that the Commission’s approach to cost allocation issues as discussed in the Order on Rehearing is being largely driven by two propositions. One, the Commission believes that SCT is attempting to use the FERC Final Order to avoid paying its share of ERCOT system costs.<sup>3</sup> Two, the Commission posits that because the SCT DC Tie is considerably larger than the other DC ties, a different cost

---

<sup>3</sup> See e.g., Order on Rehearing at p. 7 (“Because the customers of exported power are not ERCOT customers, under the current market design, they will not bear any responsibility for the costs they impose on the ERCOT system. Southern Cross believes that those customers—and therefore Southern Cross—should get a free ride.”).

allocation scheme for it is justified.<sup>4</sup> The first proposition is false and the second is not supported by substantial evidence in the record. The Commission's decision to impose an ongoing obligation on SCT to pay any additional costs associated with the Garland Line, the Garland Substation, or the Southern Cross DC tie that would otherwise be borne by ERCOT ratepayers is ambiguous, arbitrary and capricious, contrary to law, and an abuse of discretion.

SCT recognizes that the Commission under Project No. 46304 has directed ERCOT to study how the interconnection and operation of the SCT DC tie will impact the ERCOT grid and to determine what revisions to ERCOT's standards, guides, systems, and protocols are needed.<sup>5</sup> The Commission has also directed ERCOT to recommend how the cost of ancillary services should be allocated. SCT welcomes that examination and is confident that, with reasonable analysis and fairly minor integration activities, ERCOT can ensure that (1) power flows over the SCT DC tie will not create reliability issues within ERCOT and (2) SCT and its customers in ERCOT and the Southeast will pay their appropriate share of ERCOT costs.

Finally, SCT recognizes that the Commission has the authority, within the bounds of applicable law, to modify its rules and ERCOT protocols to address cost causation and reliability issues, including any changes that may be necessary because of the size of the SCT DC tie. SCT understands that there may be some costs of integrating the tie that are appropriately paid by SCT, but any such costs are unknown until ERCOT completes its studies and the appropriate rule and protocol changes have been implemented.

However, Ordering Paragraph 34 could be construed to require that SCT will be responsible for any and all future costs that are in any way "associated" with the Garland Line, the Garland Substation, or the Southern Cross DC tie that would otherwise be borne by ERCOT ratepayers, regardless of whether SCT had anything to do with causing those costs. Does the Commission intend to impose on SCT an ongoing, indefinite responsibility to pay any cost that is somehow associated with one of those facilities, without regard to cost causation? Or is it the Commission's intent that once the one-time integration costs are identified and resolved, future changes to the Commission's rules and ERCOT protocols will be considered and implemented

---

<sup>4</sup> *Id.* at p. 12 ("[A] different treatment of the Southern Cross DC tie specifically is due to its unprecedented size and the fact that it is not similarly situated to any other facility or entity currently in the ERCOT market. This project does not merely involve another entity seeking access to the market but an attempt potentially to alter the regulated market's structure.").

<sup>5</sup> Project No. 46304 (*Oversight Proceeding Regarding ERCOT Matters Arising out of Docket No. 45624*).

through the traditional processes involving nondiscriminatory changes in rules of general applicability?

For example, if in ten years the Commission authorizes a third-party generator to interconnect at the Panola switching station, will SCT be responsible for the cost of the new breaker and other interconnect facilities pursuant to Ordering Paragraph 34? If ERCOT endorses an economic transmission upgrade three years after the Garland line is in operation, will SCT be responsible for the cost of the upgrade under Ordering Paragraph 34 even though the upgrade meets the Commission's cost-benefit test and is thereby determined to benefit ERCOT ratepayers? Ordering paragraph 34 could be construed by some parties to impose the costs on SCT, and SCT needs to know now what the Commission's intent is.

SCT is confident that the one-time, initial costs the Commission has assigned to SCT in the Order will be manageable once the actual costs are known. However, SCT cannot finance or construct the project with an overhanging, unquantifiable, and continuing obligation to pay discriminatory costs. In its request for clarifications above, SCT has suggested a change to the Order that would clarify this issue.

Without the requested change, the Commission will put SCT in a position where it has little choice except to promptly pursue its legal remedies to challenge the Order. SCT would prefer to seek clarity through the collaborative ERCOT processes in Project No. 46304 that might remove the need to pursue review of the Order, and it requests that the Commission adopt the clarification of the Order set out in the request for clarifications above.

**II. Point of Error No. 2: 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 does not reflect the Commission's decision in its August 25, 2016 open meeting. (Order at 16, 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 siting authority required by the Louisiana Public Service Commission necessary to construct the facilities in Louisiana.<sup>6</sup> 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 regulatory approvals in Louisiana necessary to construct" the SCT Project in that state before seeking condemnation of

---

<sup>6</sup> See, e.g., for example, the discussion in the Open Meeting transcript at 11:10-12 and 12:3-13.

any land in Panola County, Texas. Even though the ordering paragraph is now limited to approvals necessary for construction, this language could still be construed to apply broadly to regulatory permits that cannot be obtained until after financing has been secured and construction of the Louisiana facilities is well underway. As a result, Ordering Paragraph 20 effectively creates a Catch-22, and is not consistent with the decision SCT believes was reached in the open meeting.

SCT requests that the Commission adopt the clarification set forth in the request for clarifications above.

**III. Point of Error No. 3: The Commission’s decision places an undue burden on interstate commerce by (a) allocating costs to SCT, (b) directly assigning incremental and ancillary service costs to imports and exports over the SCT tie, and (c) prohibiting utility recovery of costs associated with the Garland project or the SCT DC Tie. (Order at 3, Findings of Fact 42A, 44A, 48B, 59, 62, 70, 83A, 91A, 107, 119, 119A-119E, Ordering Paragraphs 33, 34, 35, and 42)**

The Commerce Clause gives Congress the power to “to regulate commerce . . . among the several states.”<sup>7</sup> Under the Dormant Commerce Clause doctrine, the allocation of that power to Congress prohibits state actions that improperly burden or discriminate against interstate commerce.<sup>8</sup>

The United States 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.<sup>9</sup> A state action is invalid if it does not regulate evenhandedly to effectuate a legitimate local public interest or if its effects on interstate commerce are more than incidental. 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.<sup>10</sup>

State actions that are facially discriminatory or that discriminate in purpose or effect are subject to strict scrutiny, and the burden shifts to the state to demonstrate that its action

---

<sup>7</sup> Article I, section 8, clause 3 of the U.S. Constitution.

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

<sup>9</sup> *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008).

<sup>10</sup> *Granholm*, 544 U.S. at 476 (quoting *Philadelphia*, 437 U.S. at 624).

serves a legitimate, non-protectionist purpose *and* that there are no less discriminatory means that would advance that purpose.<sup>11</sup>

The Commission's Order discriminates against SCT and entities transacting across the SCT DC Tie. Numerous ordering paragraphs—including but not limited to 32, 33, 34, 35, 36, and 42—impose costs directly on SCT and on entities transacting across the SCT tie. The Commission has not imposed such direct costs on any other market participant.<sup>12</sup>

The Commission admits it is protecting in-state interests and claims to be protecting the interests of ERCOT ratepayers.<sup>13</sup> The effect of the Commission's ordered cost allocations will be to disadvantage and discourage interstate transactions over the SCT DC Tie. The Commission has not articulated—nor does the record in this case support—any legitimate, non-protectionist purpose for its treatment of SCT and entities transacting across the SCT DC Tie. The Commission has failed to demonstrate—nor does the record in this case prove—that there are no less discriminatory means that would advance the state's purpose. Under such circumstances, the Supreme Court has rejected discriminatory treatment as impermissible.<sup>14</sup>

Ordering Paragraphs 32, 33, 34, 35, and 42 are the principal examples of Commission actions that discriminate against import and export flows across the SCT DC Tie. Each is facially discriminatory and burdens interstate commerce.

Ordering Paragraph 35, for example, assigns incremental transmission and ancillary services costs to imports and exports flowing over the SCT DC Tie. Under current practices, entities purchasing power in ERCOT arrange for QSEs to schedule their transactions with ERCOT and to collect and pay the settlement charges for the transactions, including a fee to cover the transmission cost of service.

The transmission and ancillary services costs assigned by Ordering Paragraph 35 to the interstate power flows over the SCT DC Tie are not directly assigned to other power flows within ERCOT—instead, they are socialized. They will therefore be costs imposed on interstate

---

<sup>11</sup> See *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979); *Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 749 (5th Cir. 2006).

<sup>12</sup> A more complete discussion of the legal and factual basis for the Commission's Dormant Clause error is presented in SCT's Initial Brief on Rehearing and Reply Brief on Rehearing, which are incorporated herein by reference.

<sup>13</sup> Order at 9.

<sup>14</sup> See, e.g., *New Energy Co. v. Limbach*, 486 U.S. 269 (1988); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270-71 (1984); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982); *Philadelphia*, 437 U.S. at 624-28; see also *John Havlir & Assocs., Inc. v. Tacoa, Inc.*, 810 F.Supp. 752, 756 (N.D. Tex. 1993).

power flows *in addition to* the normal transmission cost of service fees paid by in-state purchasers purchasing from in-state generators.

As a result, a purchaser within ERCOT obtaining power from an out-of-state generator over the SCT tie will pay more for transmission service within ERCOT than it would if it had instead obtained power from an ERCOT generator. Likewise, an out-of-state purchaser obtaining power from an ERCOT generator over the SCT tie will pay more for transmission service within ERCOT than an in-state purchaser obtaining power from the same generator. The effect of ordering paragraph 35 will thus be to increase costs for transactions across the SCT DC tie relative to available alternatives within ERCOT and make imports and exports across the tie less competitive, a classic case of discrimination against interstate commerce.

Imposing costs on SCT and on export and import flows across its tie as set forth in the Order will raise the costs of interstate power flows, lower the margins on them, and place out-of-state purchasers and generators at a competitive disadvantage relative to those transacting power entirely within ERCOT. In sum, the Commission's Order facially discriminates against interstate export and import flows across the SCT DC Tie without justification or evidence to support its discriminatory treatment.

The Commission asserts that it is only taking measures necessary to ensure ERCOT's system reliability and that the ERCOT market remains intact.<sup>15</sup> First, there is no evidence of any reliability problems. Indeed, as the Commission itself acknowledges, Oncor in the 210/211 proceedings indicated that SCT can be interconnected with no reliability issues. Moreover, as discussed in Point of Error 8, system reliability does not depend on the allocation of costs within ERCOT. Discrimination in this case against SCT and the entities purchasing power across its tie does nothing to protect system reliability from a facility that will not be in operation before 2021. Even assuming for the sake of argument that system reliability could be implicated, there will be ample time for ERCOT to conduct the studies required to ensure system reliability and the proper allocation of costs to be made before the facilities are placed in operation.

With respect to maintaining an intact ERCOT market, the Order belies a misunderstanding of basic economic principles. The Order correctly notes that imports of power into ERCOT during high load periods will restrain prices from surging as high as they would

---

<sup>15</sup> Order at 9.



without access to imported power.<sup>16</sup> Ignoring the benefit of ERCOT energy consumers, the Order mischaracterizes this effect as a market distortion that reduces signals to build more capacity within ERCOT.

Free trade is not a market distortion. Competition from outside suppliers and purchasers over DC ties will not distort the ERCOT market; rather, it will resolve the current distortions that have resulted from the relatively low capacity of the existing DC ties, which restricts ERCOT customers obtaining power from outside suppliers and ERCOT generators selling power to out-of-state purchasers. After all, the market prices surge to levels out of line with prices in other power grids primarily because the ERCOT grid is relatively isolated. By breaking down those barriers to competition, DC tie interconnections will improve the ERCOT market, not distort it.<sup>17</sup> The Commission's statement makes its anticompetitive and discriminatory purpose—*i.e.*, protecting ERCOT generators from outside competition—readily apparent. The Supreme Court has repeatedly held that such state economic protectionism is subject to a *per se* rule of invalidity.<sup>18</sup>

Finally, the Order contends that the Commission's rate-making authority is recognized in the Federal Power Act and its actions are therefore "invulnerable to Commerce Clause challenge."<sup>19</sup> The federal statutory language quoted by the Commission, however, is not the sort of delegation of power by the federal government to a state agency that might protect the Commission's action from review.<sup>20</sup> All of the Commission's rate-making authority within ERCOT is granted to it by the Texas legislature in PURA. As discussed in Point of Error 4, the cited section of the Federal Power Act grants no additional rate-making authority to the Commission. Rather, the federal statute pertains only to FERC's authority to require the provision of transmission services within ERCOT, and it requires FERC to ensure that the transmitting utility providing such services receive compensation "based on the rate-making methodology used by the Public Utility Commission of Texas"—to the extent practicable and consistent with the Act.<sup>21</sup> The plain language of the statute does not delegate to the Commission

---

<sup>16</sup> *Id.*

<sup>17</sup> Additional DC interconnections between ERCOT and neighboring grids will not affect ERCOT's jurisdictional status as long as made pursuant to an order under FPA Sec. 210-212, as the SCT tie would be.

<sup>18</sup> See *Granholm*, 544 U.S. at 472; *Philadelphia*, 437 U.S. at 623-24 (1978).

<sup>19</sup> Order at 11.

<sup>20</sup> 16 U.S.C. § 824k(a) & (k).

<sup>21</sup> 16 U.S.C. § 824k(k)(1).

the authority to take any action at all, much less authorize the Commission to implement a scheme of economic protectionism such as is contemplated in the Order.

**IV. Point of Error No. 4: The Conditions on the Garland certificate imposed by the Rehearing Order are inconsistent with the transmission service ordered by FERC in Docket No. TX11-1-000 and conflict with FERC's exclusive jurisdiction over wholesale transmission service. (Order at 7-11, Findings of Fact 42A, 44A, 48B, 59, 62-70, 83A, 91A, 107, 113E-F, 119-119B, Ordering Paragraphs 33, 34, 35, and 42)**

In its Initial Brief on Rehearing and its Reply Brief on Rehearing, SCT described: (1) FERC's statutory authority to order transmission services over the ERCOT grid in connection with the SCT transmission project, (2) the Offer of Settlement negotiated by the signatories setting forth the rates, terms, and conditions of the ordered transmission services, and (3) FERC's approval of the Offer of Settlement with the issuance of its Conditional Order<sup>22</sup> and its Final Order.<sup>23</sup> SCT incorporates by reference that discussion into this motion.

The Order fails to mention that in the Offer of Settlement the signatories explicitly agreed that transmission service over the ERCOT grid for export and import transactions over the SCT Project is to be provided at the same rates, terms, and conditions of the Oncor and CenterPoint TFO Tariffs on file with FERC that are available to the users of the other ERCOT DC ties.<sup>24</sup> Because the Order requires Oncor and CenterPoint to provide service for transactions over the SCT project on terms *other than* those in their TFO tariffs on file with FERC, it is inconsistent with the FERC order that approved the Offer of Settlement. As a result, the Order violates PURA § 37.051(c-2)'s requirement of consistency with that order.

---

<sup>22</sup> *Southern Cross Transmission LLC; Pattern Power Marketing LLC*, Proposed Order Directing Interconnection and Transmission Service and Conditionally Approving Settlement Agreement, 137 FERC ¶ 61,206 (2011) (the "Conditional Order").

<sup>23</sup> *Southern Cross Transmission LLC; Pattern Power Marketing LLC*, Final Order Directing Interconnection and Transmission Service, 147 FERC ¶ 61,113 (2014) (the "Final Order").

<sup>24</sup> Paragraph (K) of the Offer of Settlement provides:

In connection with the Southern Cross Project, Oncor and CEHE shall transmit power into 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, except that each such tariff shall be modified as necessary to comply with this Order, for PPM or 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 [CenterPoint Energy Houston Electric] currently provide transmission services under their respective TFO Tariffs.** (Emphasis added.)

**A. The Rehearing Order conflicts with FERC's exclusive jurisdiction to order transmission service within ERCOT for export and import transactions.**

The Commission's Order ignores the fundamental jurisdictional separation between its role in regulating the ERCOT market and FERC's role in regulating wholesale transmission service. *Transmission service over the ERCOT grid in connection with export and import transactions with neighboring regions is within the exclusive jurisdiction of FERC.*<sup>25</sup> With the enactment of FPA Sections 210, 211, and 212 in 1978, Congress intended FERC to exercise that exclusive jurisdiction pursuant to the requirements and standards of those statutory provisions.

SCT and Pattern Power Marketing ("PPM") worked with numerous stakeholders in Texas, including this Commission, to structure an interconnection between ERCOT and SERC that will comply with those requirements before it submitted an application to FERC for an order directing that interconnection and transmission services be provided. No party to the FERC proceeding, including this Commission, protested the application, claimed that the statutory requirements and standards necessary for the FERC to order interconnection and transmission services had not been met, or sought rehearing of FERC's Final Order.

Indeed, with respect to the provisions of the Offer of Settlement that require that transmission service over the ERCOT grid, not only did no party file opposing comment on or object to those provisions, this Commission's comments affirmatively promoted the existing transmission rate-making regime throughout ERCOT as supportive of the interconnection and transmission of renewable energy.<sup>26</sup> Given the consensus among the applicants, the signatories

---

<sup>25</sup> *Pub. Util. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927) (holding that states are constitutionally prohibited by the Commerce Clause from setting the price of electricity generated in-state but sold across state lines). In response to the *Attleboro* decision, Congress enacted the Federal Power Act and conferred on the Federal Power Commission (now FERC) exclusive jurisdiction over "the transmission of electric energy in interstate commerce and ... the sale of electric energy at wholesale in interstate commerce." FPA Section 201(b)(1). Section 201(c) further provides that "electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; not only insofar as such transmission takes place within the United States."

Moreover, FPA Section 2(23) defines the term "transmitting utility" as an entity owning, operating, and controlling facilities for the transmission of electricity in interstate commerce. As FERC found in its Conditional Order, Oncor and CenterPoint "own and operate transmission facilities that are used for the sale of electric energy at wholesale and ... they own and operate ERCOT facilities that are used for the transmission of electric energy in interstate commerce." Conditional Order at P 26.

<sup>26</sup> Docket No. TX11-1-000, Comments of the Public Utility Commission of Texas at pp. 6-7 (Nov. 4, 2011):

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

to the Offer of Settlement, and the other parties intervening in the FERC proceeding—including this Commission—it is not surprising that the FERC would direct Oncor and CenterPoint to provide transmission service for exports and imports over the SCT project at the same rates, terms, and conditions set forth in their TFO Tariffs as are made available to the users of the other DC ties.<sup>27</sup>

Ignoring the unequivocal approval by FERC of the Offer of Settlement on the applicability of the rates, terms, and conditions of the Oncor and CenterPoint TFO Tariffs for transmission service over the ERCOT grid, the Commission asserts that the Federal Power Act confers on the Commission the authority to devise its own transmission rate-making regime in place of the rate-making required by FERC in *its* Final Order.<sup>28</sup>

The Commission relies on the final sentence of FPA Section 212(a) and FPA Section 212(k) as support for this proposition. What the Commission apparently overlooks, however, is that these provisions provide the standards governing the rates, terms, and conditions to be established by *FERC*—not the Commission—in ordering transmission service under FPA Section 211. Moreover, the Commission also does not acknowledge that FERC (1) faithfully applied these standards when it directed transmission service at the same rates, terms, and conditions of the current Oncor and CenterPoint TFO Tariffs that are made available to users of the other DC ties, and (2) expressly found that the transmission rates set forth in the Offer of Settlement complied with the rate-making standards of Sections 212(a) and 212(k).<sup>29</sup>

No party to the FERC proceeding argued that the Offer of Settlement failed to meet the statutory standards—and the Commission is barred from arguing otherwise, given that the Final Order is final and non-appealable. Moreover, irrespective of FERC’s finding, the fact remains

---

interconnection. Accordingly, the PUCT’s open-access rules encourage development of renewable energy resources. (Footnotes omitted.)

<sup>27</sup> Conditional Order at P 34; Final Order at P 19.

<sup>28</sup> Order at 6, 14.

<sup>29</sup> In its Conditional Order, the FERC concluded:

The Commission has previously found that the ERCOT protocols and procedures regarding interconnection and transmission service meet the requirements of section 212 for purposes of directing interconnection and transmission services under sections 210 and 211, and accordingly, has adopted them for use in the TFO tariffs. *Here, under the Offer of Settlement, the parties have agreed to amend 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).*

Conditional Order at P 34 (footnote omitted); *see also* Final Order at P 19.

that the TFO Tariffs are based on the transmission rate-making methodology utilized by this Commission. Indeed, both Oncor and CenterPoint routinely file amendments to their TFO Tariffs at FERC based on changes to wholesale transmission service rates approved by this Commission. For instance, in Docket No. NJ15-18-000, Oncor filed at FERC revised tariff sheets for its TFO Tariff to reflect changes to its wholesale transmission service rates approved by this Commission. In its transmittal letter, Oncor stated:

The TFO Tariff establishes the rates, terms and conditions for [transmission service to HVDC Interconnections], consistent with the PUCT's and [FERC's] rules mandating open-access, non-discriminatory and comparable wholesale transmission service. [Oncor] is filing the Revised Sheets to maintain that consistency and in order to conform the TFO Tariff rates consistent with [Oncor's] recently revised wholesale transmission service rates approved by the PUCT for service within ERCOT. Accordingly, this filing is consistent with the provisions of Section 212(k)(1) of the FPA.<sup>30</sup>

FERC accepted those revised tariff sheets for filing in the normal course.<sup>31</sup> CenterPoint has followed the same procedure for updating its TFO Tariff.<sup>32</sup>

**B. The Commission may address transmission rate-making in connection with the SCT project only through FERC-accepted changes to the TFO tariffs.**

The Commission's unequivocal statement in the Rehearing Order that "the Federal Power Act ("FPA") specifically grants to the Commission the authority to make rate-making decisions for transmission services in ERCOT"<sup>33</sup> is, at best, an incomplete and inaccurate characterization of the Commission's role in the rate-making process with respect to DC ties.

There is a well-established process that has been used by both this Commission and FERC to reflect changes to the transmission rate-making methodology under the TFO Tariffs. First, the Commission may make changes to its transmission rate-making methodology for the ERCOT grid. Second, those changes are then filed with, reviewed by, and acted upon by FERC, utilizing the standards set forth in FPA Sections 212(a) and (k).

---

<sup>30</sup> Docket No. NJ15-18-000, *Oncor Electric Delivery Company, LLC*, Transmittal Letter at p. 2 (Sept. 22, 2015).

<sup>31</sup> Docket No. NJ15-18-000, *Oncor Electric Delivery Company, LLC* (Nov. 13, 2015) (unpublished letter order).

<sup>32</sup> Docket No. ER17-136-000, *CenterPoint Energy Houston Electric, LLC*, (Dec. 15, 2016) (unpublished letter order).

<sup>33</sup> Rehearing Order at p. 14.

To the extent the Commission intends to follow that procedure after ERCOT considers the impact of the SCT project on the ERCOT market and grid so that any resulting changes to the ERCOT transmission rate-making can be reflected in modifications to the TFO Tariffs on file with FERC, SCT agrees that the Commission has the authority to consider *those* kinds of changes *in that manner*.

However, those provisions of the FPA cannot be read to confer on this Commission unilateral authority to directly regulate the use of the ERCOT transmission grid for export and import transactions over the SCT DC Tie. Moreover, the express terms of the existing TFO Tariffs make it clear that the transmission service provided for export and import transactions must be made available to all wholesale participants on a non-discriminatory basis in compliance with FERC's open-access transmission policies.<sup>34</sup>

Several of the conditions imposed by the Order conflict with the current Oncor and CenterPoint TFO Tariffs. For example, based on Findings of Fact 63 through 70 of the Order, SCT will be required to pay the costs for ERCOT to study whether transactions across the ERCOT system for delivery to SCT DC tie should be subject to security-constrained economic dispatch ("SCED") or whether a congestion management program should be implemented. However, both the Oncor and CenterPoint TFO Tariffs<sup>35</sup> set forth load shedding and curtailment procedures for transmission customers scheduling electricity over the DC ties. Both Tariffs expressly provide that those procedures will be applied on a non-discriminatory basis, and neither Tariff requires the transmission customer or the DC Tie owner to pay for internal costs of developing the specific procedures to be applied to any particular transaction causing congestion. To the extent that the Commission requires SCT to pay for the development of SCT-specific congestion management procedures, that requirement is, on its face, discriminatory and directly

---

<sup>34</sup> Oncor Electric Delivery Company LLC, Tariff for Transmission Service To, From and Over Certain Interconnections, Revision No. 13, Section 2.0 ("Oncor TFO Tariff") ("All of the services provided pursuant to this TFO Tariff are available to all wholesale market participants on a non-discriminatory basis"); CenterPoint Energy Houston Electric, LLC, Transmission Service Tariff for Transmission Service To From and Over Certain Interconnections, FERC Electric Tariff, Sixth Revised Volume No. 1, Authority ("CenterPoint TFO Tariff") ("While the services to be rendered and the terms and conditions of such service are governed by [prior FERC Section 210 and 211 Orders ("Orders")] and such services are rendered under this Tariff in accordance with such said Orders, the Transmission Provider offers under this Tariff transmission services consistent with the Pro-Forma Open Access Transmission Tariff adopted by the [FERC] in Order No. 888 in Docket No. RM95-8-000, "Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Service by Public Utilities.").

<sup>35</sup> Oncor TFO Tariff, Section 2.19; CenterPoint TFO Tariff, Section 5.0.

contrary to the existing procedures of both TFO Tariffs. FERC will not approve a TFO tariff that is discriminatory on its face.

SCT has made clear since it began working with the Commission and the other Texas stakeholders that it seeks the same rate-making treatment afforded to other DC ties interconnecting with the ERCOT grid. No party has accused those other DC ties of seeking a “free ride” or to be subsidized by ERCOT ratepayers, and it is inappropriate and unseemly to direct that accusation at SCT. To the extent there are legitimate operational differences between SCT and the other DC ties that would justify changes in the rate-making treatment, the Commission can identify those differences and implement appropriate changes to the Oncor and CenterPoint TFO Tariffs, and those changes must be submitted to FERC for approval. However, seeking to impose those changes directly on SCT through conditions on the Garland CCN is contrary to FERC’s exclusive jurisdiction over wholesale transmission service. And it prevents Oncor and CenterPoint from complying with their obligations under the FERC’s Final Order to provide transmission service for transactions over the SCT project under those Tariffs.

**V. Point of Error No. 5. The Commission’s decision to directly assign transmission upgrade costs to SCT instead of ERCOT end-users is contrary to the limitations on the recovery of transmission service costs mandated by PURA § 35.004 and is arbitrary and capricious. (Order at 7-11, Findings of Fact 59, 113D-G, 119B, 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.<sup>36</sup> The Commission’s decision to directly assign transmission upgrade costs to SCT or 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 or entities using the SCT tie would also double-charge and double-recover transmission costs under the current rules, since the cost

---

<sup>36</sup> To change its rules, the Commission must follow the rulemaking procedures prescribed in subch. B of the Administrative Procedures Act.

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.<sup>37</sup>

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.<sup>38</sup> Assigning transmission upgrade costs to SCT or to entities 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 is arbitrary and capricious.

**VI. Point of Error No. 6: 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 7-11, 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 QSEs that schedule transactions across ERCOT that flow over the SCT DC Tie.

As explained in Point of Error No. 5, 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 scheduling import and export transactions violates both section 35.004(d) and Substantive Rule 25.192.

---

<sup>37</sup> Imports over the SCT tie will generally serve ERCOT loads at a lower cost than native generation, assuming the transactions are economically rational.

<sup>38</sup> SCT Ex. 3 (Wolfe Direct) at Exhibit EW-2, p. 3.



**VII. Point of Error No. 7: 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 7-11, Findings of Fact 59, 119B, Ordering Paragraph 34)**

Ordering Paragraph 34 requires SCT to bear the cost of any transmission upgrades necessitated by 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 expressly 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.

**VIII. Point of Error No. 8: 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 7–11, Findings of Fact 42A, 44A, 48B, 62, 70, 83A, 91A, 107, 113B–F, 119–119E, Ordering Paragraphs 32–36 and 42)**

On page 7 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. 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 must 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.).

In Findings of Fact 113B–C and 113E–G, the Commission made essentially three distinct underlying findings to bolster its ultimate findings that SCT should bear certain costs. One, no party “met the burden of proof” to demonstrate the benefits of the SCT DC Tie and interconnection to Texas customers. Two, the SCT DC Tie poses a “great deal of uncertainty” for the ERCOT market and grid reliability. And three, SCT should bear any additional costs associated with exporting and importing power across its tie “in accordance with the Commission’s general policy of allocating system costs to end users.”

Based on these underlying findings of fact, the Order found in Finding of Fact 113D that it is not in the public interest to allow any additional costs arising from the interconnection facilities to be “uplifted to ERCOT ratepayers.” In Finding of Fact 113G, it found that the risk created by the interconnection justifies “preliminary precautions,” including not allowing certain costs to be paid by ERCOT ratepayers. Ordering Paragraphs 32–36 and 42 impose costs on SCT and entities using its tie. There is no rational connection between the underlying findings and the Commission’s decision to require SCT and those entities to bear all costs arising from the SCT DC Tie and interconnection.

First, it was not incumbent on either SCT or Garland at the outset of this case to prove the benefits of the SCT DC Tie and interconnection with ERCOT, because approval of the application is required by PURA § 37.051(c-2) without a showing of benefits. Rather, it was the burden of any party requesting conditions to be placed on the application to prove up all

elements required to justify the conditions.<sup>39</sup> At hearing, however, the parties seeking a condition that ERCOT ratepayers will not bear any costs associated with SCT's DC Tie and interconnection failed to offer any evidence of the estimated costs or benefits.<sup>40</sup>

Since the burden of proof in this case is on the party seeking to have a condition imposed, a lack of evidence cannot support the imposition of a condition.<sup>41</sup> As a result, the Order's finding in Finding of Fact 113B that no party proved the benefits of the DC Tie cannot justify the Order's imposition of costs on SCT.

Second, accepting for the sake of argument the Order's premise that the tie and interconnection could be reasonably expected to create uncertainty for the ERCOT market and for grid reliability, such uncertainty would not be ameliorated by the "preliminary precaution" of imposing costs on SCT in the Order. A facility's effect on grid stability is an engineering matter, not an accounting matter. Any effect of the tie on grid stability cannot, therefore, be logically related to the preliminary allocation of costs to SCT in the Order. It is elementary that the tie cannot disrupt grid reliability four years before it is operational.<sup>42</sup> Similarly, allocating costs to SCT in the Order would not reduce any supposed *market* uncertainty the tie and interconnection might conceivably create within ERCOT.<sup>43</sup> A condition cannot be justified on the basis of results it patently cannot achieve. The Order thus failed to show how the "preliminary precautions" it has imposed would address the alleged problems it seeks to prevent.

Third, a general policy of allocating system costs to *end users* cannot justify allocating costs directly to SCT, which will not ever be an end user within ERCOT or elsewhere. SCT will be a transmission line operating entirely outside of ERCOT. It will transmit electricity, not use it.<sup>44</sup> QSEs acting for SCT customers outside of ERCOT will schedule transactions to wheel

---

<sup>39</sup> See 1 Tex. Admin. Code § 155.427 (providing that, in assigning burden of proof, judge shall consider which party is seeking affirmative relief).

<sup>40</sup> SCT's witness Ellen Wolfe gave strong, detailed testimony explaining her estimates of the considerable benefits that will accrue from the DC Tie and interconnection, but no other party offered controverting estimates of either benefits or costs. Without such estimates, they failed to establish that there will be net costs that could be reasonably allocated to SCT.

<sup>41</sup> Indeed, the Commission notes in the Order on Rehearing that ERCOT's analysis of the DC Tie and interconnection may prove up the benefits to Texas customers.

<sup>42</sup> According to testimony in this case, the tie will not be operational for another four years, sometime in 2021.

<sup>43</sup> SCT's witnesses testified that the DC Tie reduce market uncertainties by bringing into ERCOT additional supply in times of shortage and demand in times of surplus, thereby stabilizing the ERCOT market.

<sup>44</sup> As used in the Commission's substantive rules, "end user" denotes a customer who consumes electricity at the customer's premises and is not a reseller. See, e.g., 16 Tex. Admin. Code § 25.5(113).

electricity across the grid to be taken out at the DC Tie. Those customers will be end users, and they will pay export charges for their use of the grid under current Commission rules and ERCOT protocols. But under no generally accepted meaning of the term will SCT be properly allocated costs as an *end user* in accordance with a policy of allocating costs to end users. The general policy of allocating costs to end users cited by the Commission therefore cannot justify the imposition of costs on SCT in the Order. It is arbitrary and capricious for an agency to fail to explain a rational connection between the facts and its decision.<sup>45</sup>

**IX. Point of Error No. 9: 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 7-11, 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.<sup>46</sup> 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.<sup>47</sup>

**X. Point of Error No. 10: 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 7-11, 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

---

<sup>45</sup> *Flores v. Employees Retirement System*, 74 S.W.3d 532, 542 (Tex. App.—Austin 2002), pet. denied (*Flores*).

<sup>46</sup> PFD at 50.

<sup>47</sup> *Flores*, 74 S.W.3d at 541.

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. 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 or other ERCOT market participants other than wholesale buyers and sellers 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.

As noted by the Staff in its post-hearing brief, the costs of all the activities at issue here are currently paid from ERCOT's annual budget and funded through the system administration fee.<sup>48</sup> The Commission's special assessment in this case is inconsistent with the Commission's rule, its current practice, and the method prescribed by the legislature. It therefore exceeds the Commission's statutory authority.

---

<sup>48</sup> Commission Staff's Statement of Position at nn.20, 34 & 41 (citing Staff Ex. 13–15 & Ex. 17).

**XI. Point of Error No. 11: 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 7-11, 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. 10, 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.<sup>49</sup> 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.<sup>50</sup> Furthermore, an agency must adequately explain its reasoning when it departs from its earlier policy or appears to be inconsistent in its determinations.<sup>51</sup> In this case, the Commission's failure to give proper notice violates SCT's due process rights.

**XII. Point of Error No.12: 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 7-11, Findings of Fact 42A, 44A, 48B, 59, 62, 70, 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 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).

---

<sup>49</sup> *Oncor Elec. Delivery Co. v. Public Util. Comm'n*, 406 S.W.3d 253, 268 (Tex. App.—Austin 2013, no pet.) (*Oncor*).

<sup>50</sup> *Oncor*, 406 S.W.3d at 269.

<sup>51</sup> *Oncor*, 406 S.W.3d at 267, 269.

None of these costs are assigned based on the source of the supply. SCT justifiably assumed, therefore, that competition and fair play were the law of the land in ERCOT. For the Commission to now characterize that assumption as a claim for a “free ride” is arbitrary and unlawfully discriminatory.

The Commission has here departed from PURA’s generally-applicable “load pays” mandate. 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. 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—including the existing most severe single contingency (MSSC)—to existing DC ties, their users, or any other individual market participant. Indeed, the Commission has never imposed such costs on the existing DC ties or on entities using those ties. There is no rational justification for imposing a special “load doesn’t pay” rule on SCT and users of its tie. 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.

**XIII. Point of Error No. 13: The Commission’s decision to assign costs to SCT based in part on import and export flows across the SCT DC Tie violates Substantive Rule 25.192(e). (Order at 7-11, Finding of Facts 113E-F and 119C, Ordering Paragraphs 35 and 42)**

Ordering paragraph 35 requires that any incremental transmission and ancillary services costs required to support imports and exports over the SCT DC Tie be assigned to those imports and exports. Ordering paragraph 42 requires 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” and that any export-related costs and costs related to the tie’s size be allocated to SCT. As noted above, SCT will not use the ERCOT grid; instead, its customers will use—and pay for their use of—the 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.<sup>52</sup>

**XIV. Point of Error No. 14: 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 7-11, Finding of Facts 119B-C, 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 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 will 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 directly assign such cost responsibility to any other market participants—including the existing DC ties or the existing most severe single contingency—for the ability to participate in the ERCOT market. Through their QSEs, purchasers importing or exporting power over the SCT DC Tie will pay their load-ratio share of ancillary service charges accordance with current statutes, rules, and ERCOT protocols. The Commission’s decision is

---

<sup>52</sup> *Flores*, 74 S.W.3d at 542. To change its rules, the Commission must follow the rulemaking procedures prescribed in subch. B of the Administrative Procedures Act.



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 imports and exports at a competitive disadvantage relative to power flowing entirely within ERCOT or over other DC ties. The Commission's imposition of ancillary service costs on entities using the SCT DC Tie will discriminate against SCT and those entities.

**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 or 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) 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 it 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.

**XV. Point of Error No. 15: 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 7-11, Findings of Fact 42A, 44A, 48B, 59, 62, 70, 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.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> The Commission Order modified, deleted, and added to the ALJs' findings of fact to assign costs to SCT. The Commission may do so, however, only if it makes at least one of several statutorily prescribed determinations.

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:
  - (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

---

<sup>53</sup> PFD at 45, Proposed Finding of Fact 57.

<sup>54</sup> PFD at 40-46.

<sup>55</sup> PFD, Proposed Findings of Fact 58 and 59.

Rule 22.262 echoes these limitations. The Commission must therefore articulate in writing why it changes proposed findings of fact and conclusions of law.

None of the reasons offered by the Commission satisfy the statutory requirement. Indeed, the Commission did not discuss the specific conditions proposed by the ALJs other than to note that while it generally agrees with their proposed conditions, it believes some additional conditions and modifications to the ALJs conditions required. For the most part, the Commission simply ignored the ALJs' supporting discussion of the findings of fact in the proposal for decision and failed to cite any evidence supporting the findings in the Order related to the assignment of costs to SCT.

In connection with the ALJs' decision not to allocate costs to SCT, the Commission did not determine that any of the ALJs' findings of fact, conclusions of law, or ordering paragraphs failed to properly apply or interpret applicable law, commission rules or policies, or prior decisions. Nor did the Commission expressly reject any of the findings on the grounds that they are not supported by a preponderance of the evidence. Finally, the Commission did not expressly determine that the ALJs relied on a Commission policy or prior administrative decision that is incorrect or should be changed.

The Commission thus failed to make any of the statutorily prescribed determinations for changing the findings of fact and conclusions of law regarding the allocation of costs of ERCOT activities and costs related to any system upgrades, etc. required to accommodate the SCT DC Tie and interconnection. The Commission's Order violates both its own rule and Texas Government Code section 2003.049, which this agency is bound to follow.<sup>56</sup>

**XVI. Point of Error No. 16: The Commission's decision to prohibit any utility from recovering any costs related to the SCT DC Tie or the Garland Project (including the Oncor substation) violates PURA's basic ratemaking guarantee and the postage stamp method mandated by PURA § 35.004(d). (Order at 7-11, 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 Oncor substation. The practical effect of this prohibition is to deny Oncor the right to recover the cost of the Oncor substation in its rates.

Section 36.051 of PURA generally assures utilities they can charge rates that afford them a reasonable opportunity to earn a fair return of and on their invested capital that is used to serve

---

<sup>56</sup> *Flores*, 74 S.W.3d at 542.

customers. In addition, 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 these provisions of PURA.

**XVII. Point of Error No. 17: 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 Oncor substation) because it did not adequately explain its decision or provide a rational connection between its decision and the facts. (Order at 7, 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 Oncor substation. The practical effect of this prohibition is to deny Oncor the right to recover the cost of the Oncor substation in its rates. Ordering Paragraph 36 prohibits any utility from recovering costs associated with the Garland Project or the SCT DC Tie. The ALJs discussed the recovery of the cost of the Oncor substation along with other transmission upgrades. Because they concluded that the record did not resolve the question of benefits from the DC Tie and interconnection, the ALJs found that the Commission should refer the issue to ERCOT.<sup>57</sup> The Commission reversed the findings of the ALJs without expressly referring to their analysis or the specific findings. 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*;<sup>58</sup> 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.

**XVIII. Point of Error No. 18: The Commission’s decision to prohibit any utility from recovering any costs related to the Oncor 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 9-10, 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

---

<sup>57</sup> PFD at 42-46 and Findings of Fact 57-61.

<sup>58</sup> 74 S.W.3d 532.

process clauses also proscribe arbitrary state action. The Commission's Order denying utility recovery of the cost of the Oncor substation without a hearing violates these guarantees.<sup>59</sup>

Oncor is not a party to this proceeding. Pursuant to a lawful order of FERC, Oncor is obligated to provide transmission service for the SCT Project, which will require it to construct the substation. Oncor will own the substation. PURA Chapter 36 establishes the procedure for establishing a utility's rates. The Commission's Order effectively denies Oncor the opportunity to recover the cost of the substation in its rates.<sup>60</sup> It is improper for the Commission to conclude in this proceeding that the substation is not properly includible in Oncor's rate base.

**XIX. Point of Error 19. The Commission does not have authority in this CCN proceeding to impose costs or to restrict a utility's ability to recover costs in rates. (Order on Rehearing at 6, 8-9, Findings of Fact 113B, 113D)**

The Commission does not have authority in this CCN proceeding to prohibit any utility from recovering any costs related to the Oncor substation.<sup>61</sup> One, the Commission cannot lawfully predetermine the ultimate rate treatment of the Oncor substation. PURA section 36.051 entitles a utility to a reasonable opportunity to earn a return on its used and useful capital investment. PURA section 36.053 requires the Commission to include the prudent actual money cost of used and useful utility property in rate base, and it specifies that utility property is to be valued at the time it is dedicated to public use.

Two, the Rusk Substation is not a component of the facility for which a CCN was requested in this case. And, as noted above, Oncor is not a party and is not required under Commission rules to obtain a CCN to construct the substation.<sup>62</sup>

The Commission cannot extend its authority in this CCN proceeding to circumvent the statutory requirements imposed on its ratemaking authority.

---

<sup>59</sup> Because of SCT's agreement to reimburse Oncor in the event that Oncor is denied recovery of the cost of the substation in a rate proceeding, SCT is an aggrieved party and has been denied its due process rights.

<sup>60</sup> SCT voluntarily agreed to accept the risk that Oncor would not be allowed to include all of its costs of constructing the substation in its TCOS and agreed to backstop that risk.

<sup>61</sup> A more complete discussion of the legal and factual basis for this point of error is presented in SCT's Initial Brief on Rehearing and Reply Brief on Rehearing, which are incorporated herein by reference.

<sup>62</sup> PUC Subst. R. 25.101(c)(2).

**XX. Point of Error No. 20: The Commission erred in concluding that the benefits of the SCT DC Tie and interconnection are questionable. (Order on Rehearing at 6, 8-9, Findings of Fact 113B, 113D)**

The Order concurs with the ALJs that the benefits of the Garland line and the SCT DC Tie to Texas ratepayers are questionable.<sup>63</sup> The uncontroverted evidence, however, establishes that the project will provide substantial benefits to those ratepayers.

As an initial matter, the SCT tie and Garland line will provide millions of dollars of benefits to the local community and taxing authorities in Rusk and Panola Counties and provide reliability benefits by providing ERCOT a substantial emergency power supply.<sup>64</sup> These benefits were not disputed. There is also no reason to question that exports over the SCT tie will produce substantial export charge revenues in accordance with the Commission's transmission tariff rule and ERCOT's protocols.<sup>65</sup> As a result, the Commission's conclusion that these benefits are questionable is affected by error of law, is not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole, is arbitrary and capricious, and is characterized by an abuse of discretion or clearly unwarranted exercise of discretion.<sup>66</sup>

SCT presented an economic study that showed hundreds of millions of dollars of additional benefits to ERCOT customers from the SCT tie. This study followed an earlier study that presented far more benefits to ERCOT customers from the SCT tie under the then-current ERCOT grid topology and market assumptions. The studies were presented by Ellen Wolfe, who previously led ERCOT's study of the benefits of transitioning to a nodal market.<sup>67</sup> Her study in this case used UPLAN system simulation software, which is widely used to model electric system operations and has been licensed by ERCOT since 2003 for its Regional Planning Group transmission planning and economic analysis.<sup>68</sup> Ms. Wolfe's study showed that the SCT tie would produce more than \$60 million per year of export charge revenues, more than \$170 million per year of production cost savings, and more than \$160 million per year of consumer

---

<sup>63</sup> Order on Rehearing at 8.

<sup>64</sup> Garland Ex. 2 at 10 (Cline Direct); SCT Ex. 3 at 15 and Ex. EW-2 at 21-22 (Wolfe Direct); SCT Ex. 6 at 13 (Parquet Rebuttal).

<sup>65</sup> See 16 T.A.C. § 25.192(a), (e), (f); ERCOT Protocols 4.2.1.2 and 9.16.1.

<sup>66</sup> See Tex. Gov't Code § 2001.174(2).

<sup>67</sup> See Project No. 28500, *Activities Related to the Implementation of a Nodal Market for the Electric Reliability Council of Texas* (Nodal Study filed Dec. 21, 2004).

<sup>68</sup> SCT Ex. 3 at 10 (Wolfe Direct).

energy benefits in ERCOT.<sup>69</sup> There is no reasonable basis in the record for finding that the benefits of the SCT DC Tie and interconnection are questionable, and the Commission's conclusion is not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole.<sup>70</sup>

**XXI. Point of Error No. 21: The Commission erred in concluding that “[b]ecause the customers of exported power are not ERCOT customers, under the current market design, they will not bear any responsibility for the costs they impose on the ERCOT system.” (Order on Rehearing at 7-11, Findings of Fact 59-62, 112-113F, 119-119F, Ordering Paragraph 42)**

The Order on Rehearing erroneously declares that SCT is seeking a “free ride” for itself and its export customers because those customers would not pay for their use of the ERCOT grid.<sup>71</sup> The declaration is based in part on the mistaken belief that there is no ERCOT market participant to which export-related costs can be directed.<sup>72</sup> These statements are incorrect and inconsistent with the Commission's own transmission rate rule, which expressly imposes charges on transmission customers who use the ERCOT system to export power<sup>73</sup> based on the same postage stamp rates established for customers within ERCOT.<sup>74</sup> And during system peak months, the export charges are substantially higher than rates for transactions entirely within ERCOT. Revenues from those export charges offset transmission costs that would otherwise be assessed to ERCOT customers.<sup>75</sup> As a result, export customers contribute at least as much to ERCOT transmission costs as ERCOT customers do.

Similarly, ERCOT's protocols assign responsibility for ancillary services to all QSEs, including QSEs exporting over DC ties,<sup>76</sup> and they establish an ERCOT system administration

---

<sup>69</sup> SCT Ex. 3, Exhibit EW-2 at 3, 19 (Wolfe Direct).

<sup>70</sup> See Tex. Gov't Code § 2001.174(2).

<sup>71</sup> Order on Rehearing at 7-9.

<sup>72</sup> *Id.* at 10.

<sup>73</sup> 16 T.A.C. § 25.192(a) (“The [transmission rate] tariff shall apply to all distribution service providers (DSPs) *and any entity scheduling the export of power from the Electric Reliability Council of Texas (ERCOT) region.*”) (emphasis added); 16 T.A.C. § 25.192(e) (“*Transmission rates for exports from ERCOT*”) (emphasis added).

<sup>74</sup> 16 T.A.C. § 25.192(e)(1).

<sup>75</sup> 16 T.A.C. § 25.192(f).

<sup>76</sup> ERCOT Protocol 4.2.1.2 (“ERCOT shall assign part of the Ancillary Service Plan quantity ... to each QSE ... *(including the shares for Direct Current Tie (DC Tie) exports ....)*”) (emphasis added).

fee that is paid by all QSEs, including those scheduling exports.<sup>77</sup> Export customers thus bear their share of ancillary service and ERCOT administration costs just as ERCOT customers do.

Again, the evidence establishes that charges for exports over the SCT tie under the Commission's transmission rate rule and ERCOT's protocols would produce more than \$60 million per year in revenues that would be applied to ERCOT system costs, in addition to other benefits of the SCT tie identified in the preceding Point of Error.<sup>78</sup> These benefits are demonstrated in an economic study presented by SCT witness Ellen Wolfe, who previously led ERCOT's study of the benefits of transitioning to a nodal market.<sup>79</sup> The study used UPLAN system simulation software, which is widely used to model electric system operations and has been licensed by ERCOT since 2003 for its Regional Planning Group transmission planning and economic analysis.<sup>80</sup>

Contrary to statements in the Order, SCT has never suggested that either it or users of its tie should get a "free ride." Rather, SCT has noted that the Commission's transmission rate rule and ERCOT's protocols already allocate ERCOT system costs to DC tie export customers (as well as to ERCOT import customers). SCT has also objected to being singled out by the Commission for direct assignment of specific costs *unlike* any other DC tie, most severe single contingency, or other ERCOT market participant. *See* Points of Error 3, 12, and 14. The Commission erred in characterizing SCT's objection to the Commission's discriminatory treatment as a request for a "free ride."

In sum, both the law and the evidence establish that customers of power exported over the SCT tie will make a substantial contribution to ERCOT system costs. The Commission's contrary conclusion is affected by error of law, is not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole, is arbitrary and capricious, and is characterized by an abuse of discretion or clearly unwarranted exercise of discretion.<sup>81</sup> As a result, the Commission erred in Ordering Paragraph 42 by requiring that any export related costs be allocated to SCT.

---

<sup>77</sup> ERCOT Protocol 9.16.1.

<sup>78</sup> SCT Ex. 3, Exhibit EW-2 at 3, 19 (Wolfe Direct).

<sup>79</sup> *See* Project No. 28500, *Activities Related to the Implementation of a Nodal Market for the Electric Reliability Council of Texas* (Nodal Study filed Dec. 21, 2004).

<sup>80</sup> SCT Ex. 3 at 10 (Wolfe Direct).

<sup>81</sup> *See* Tex. Gov't Code § 2001.174(2).



**XXII. Point of Error No. 22: 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 16, Finding of Fact 120A, Ordering Paragraph 20)**

The ostensible purpose of Ordering Paragraph 20 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 does not adequately protect the interests of the landowners.<sup>82</sup> 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) that 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.<sup>83</sup> Accordingly, the ALJs determined that Staff had failed to prove that the additional conditions would be reasonable.<sup>84</sup>

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.<sup>85</sup> The Supreme Court sharply criticized the Commission, noting that some of the permits could not be applied for and issued until construction had begun or been completed.<sup>86</sup> 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 in Louisiana, which would significantly delay energization of the project. Moreover, the Commission did not articulate any of the

---

<sup>82</sup> PFD at 9.

<sup>83</sup> Staff’s Statement of Position at 13; Staff’s Initial Brief at 24-25.

<sup>84</sup> PFD, Proposed Finding of Fact 121.

<sup>85</sup> *Texas-New Mexico Power Co. v. Tex. Industrial Energy Consumers*, 806 S.W.2d 230, 231 (Tex. 1991).

<sup>86</sup> *Id.* at 232.

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.<sup>87</sup> 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.<sup>88</sup> 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 make a decision that is not rationally connected to the facts.<sup>89</sup> At the outset of this Motion, SCT has proposed a clarification to address this issue.

**XXIII. Point of Error No.23. 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, 83A, 91A, 107, 119, 119A–119E, and 120A, Ordering Paragraphs 20, 32–36, and 42)**

It cannot be reasonable to (1) ignore statutory limits on the Commission's authority, (2) discriminate against interstate commerce, (3) assign 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, (4) prohibit recovery of the cost of a facility without hearing evidence in a rate-making proceeding, and (5) require SCT to obtain regulatory approvals in Louisiana without any evidence supporting such a requirement. These conditions exceed the Commission's statutory authority to impose reasonable conditions pursuant to PURA § 37.051(c-2).

### CONCLUSION

SCT has requested two clarifications to the Order that could enable the ERCOT processes ordered in Project No. 46304 to resolve the need for SCT to pursue its legal remedies concerning the Order. SCT respectfully requests that the Commission adopt those clarifications.

With regard to the points of error, the Commission should delete—or at least reverse its modifications to—all findings of fact and ordering paragraphs stating or ordering: (1) that costs

---

<sup>87</sup> *Flores*, 74 S.W.3d at 541.

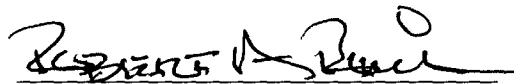
<sup>88</sup> PFD at 50.

<sup>89</sup> *Flores*, 74 S.W.3d at 543.

should be assigned to SCT or entities importing or exporting over the SCT DC Tie; (2) that no utility shall recover costs for the Oncor substation; and (3) that SCT is required to obtain “all 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 regulatory approvals in Louisiana” if the language is replaced with “any siting authority required by the Louisiana Public Service Commission.” The Commission should also restore Finding of Fact 57 which found that the record does not resolve the question of whether the benefits of the SCT Project to ERCOT ratepayers support including transmission-upgrade costs in transmission cost of service.

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

Respectfully submitted,

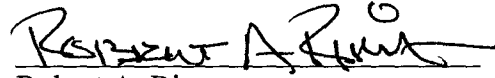
A handwritten signature in black ink, appearing to read 'Robert A. Rima', written over a horizontal line.

Robert A. Rima  
State Bar No. 16932500  
Law Offices of Robert A. Rima  
6207 Shadow Mountain Dr.  
Austin, TX 78731  
512-349-3449  
512-349-9339 Fax  
bob.rima@rimalaw.com

*Attorney for Southern Cross Transmission LLC*

### **CERTIFICATE OF SERVICE**

I certify that on April 3, 2017, 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