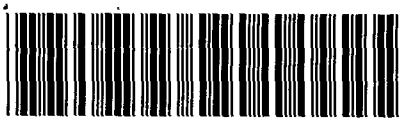

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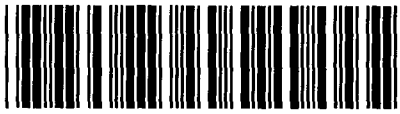

Item Number: 462

Addendum StartPage: 0

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

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

MOTION FOR REHEARING OF SOUTHERN CROSS TRANSMISSION LLC

TABLE OF CONTENTS

462

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

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 (sometimes "Order") signed May 23, 2017. In support of its Motion, SCT respectfully shows as follows:

INTRODUCTION

SCT appreciates the Commission's acceptance of a definitive route for the Garland transmission line, the strong statement urging timely completion of the directives to ERCOT, and the Commission's effort to clarify the two key issues raised in SCT's last Motion for Rehearing. SCT believes that the May 23rd Order will allow SCT to defer pursuing full judicial review of the Commission's Order while SCT participates fully at ERCOT as the Commission's Docket No. 46304 directives are considered. SCT is optimistic that through the ERCOT process, mechanisms can be put in place (if they don't already exist) to reasonably ensure the costs and benefits for interconnecting the SCT DC Tie, as well as for transactions over the SCT DC Tie, are aligned and that no group of ratepayers either in Texas or in the Southeast will be required to subsidize the other group. SCT is also hopeful that the ERCOT process will lead to modification of the preliminary cost allocation determinations reflected in the Commission's Order which purport to allocate all incremental costs associated with the SCT DC Tie to SCT or its customers.

In this Motion for Rehearing, SCT has eliminated previous Points of Error (POE 2 and 22) which addressed the shortcomings of the March 14, 2017 version of Ordering Paragraph 20 (relating to regulatory approvals in Louisiana). Similarly, with the new changes to Ordering

Paragraph 34, SCT Point of Error 1 is now limited to the more general question of whether the Commission can properly assign costs to SCT in this proceeding. SCT's remaining Points of Error largely focus on matters upon which there is fundamental disagreement between SCT and the Commission and relate to SCT's belief that changes to current cost allocations, even though done on an interim basis pending the outcome of Docket No. 46304, are limited by applicable law and properly determined through rules of general applicability in the administrative rulemaking and ERCOT Protocol Revision Request process. Those Points of Error are largely the same as those previously filed, but with the references revised and updated to conform to the May 23, 2017 Order. As previously indicated, SCT intends to preserve its right to review of the Commission's Order, but hopes to delay full review while progress is made at ERCOT in Project No. 46304.

OVERVIEW OF POINTS OF ERROR

The Commission's Order on Rehearing prejudices the substantial rights of SCT and its customers. The following are among the most serious 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, a FERC jurisdictional transmission company that will not be doing business within the State of Texas. The cost assignments assigned to SCT and its customers 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 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.[1]

- 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. In addition, the FERC has expressly found, based the Oncor's study reviewed by ERCOT and TSPs, that the SCT DC Tie can be interconnected to the ERCOT transmission system without any adverse reliability impacts.[2]
- 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.
- The Commission ignored the uncontroverted evidence that the SCT DC Tie and the interconnection will provide substantial benefits to ERCOT ratepayers.
- 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 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," and costs "that cannot be recovered from end-use customers under the current billing system" 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

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[1] SCT recognizes that the rates, terms and conditions of transmission service under the applicable TFO Tariffs may change over time through amendments to those tariffs that are filed with and accepted for filing by the FERC. The Federal Power Act requires that any such changes be just and reasonable and not unduly discriminatory.

[2] *Southern Cross Transmission LLC, et al.*, 137 FERC ¶ 61,206 P 32 (2011); *Southern Cross Transmission LLC, et al.*, 147 FERC ¶ 61,113 P 17 (2014).

the FERC Final Order to avoid paying its share of ERCOT system costs.[3] Two, the Commission posits that because the SCT DC Tie is considerably larger than the other DC ties, a different cost allocation scheme for it is justified.[4] The first proposition is false and the second is not supported by substantial evidence in the record. SCT is neither the applicant in the instant proceeding nor subject to the Commission's rate-making jurisdiction. The Commission's decision to impose an obligation on SCT to pay what it now characterizes as "extraordinary 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. Similarly, the Commission's imposition of costs on SCT "that cannot be recovered from end-use customers under the current billing system" 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.[5] The Commission has also directed ERCOT to recommend how the cost of ancillary services and transmission upgrades 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's 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, as is the case with any transmission-to-transmission interconnection, there may

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[3] *See e.g.,* Order on Rehearing at p. 7 ("Because the customers of exported power are not ERCOT customers, under the current market design and rules, they will not bear any responsibility for the extraordinary costs specific to the Southern Cross DC tie, Garland line, and Garland or Oncor substations that they impose on the ERCOT system. Southern Cross believes that those customers—and therefore Southern Cross—should get a free ride as to these extraordinary costs.").

[4] *Id.* at p. 13 ("[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.").

[5] Project No. 46304 (*Oversight Proceeding Regarding ERCOT Matters Arising out of Docket No. 45624*) Revised Order May 23, 2017.

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 proposed, considered in the stakeholder process and implemented.

II. Point of Error No. 2: 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 9 and 13, Findings of Fact 42A, 44A, 48B, 59, 62, 70, 83A, 91A, 107, 119, 119A-119D, Ordering Paragraphs 33, 34, 36, and 43)

The Commerce Clause gives Congress the power to "to regulate commerce . . . among the several states."[6] Under the Dormant Commerce Clause doctrine, the allocation of that power to Congress prohibits state actions that improperly burden or discriminate against interstate commerce.[7]

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.[8] 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.[9]

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 serves a legitimate, non-protectionist purpose *and* that there are no less discriminatory means that would advance that purpose.[10]

The Commission's Order discriminates against SCT and entities transacting across the SCT DC Tie. Numerous ordering paragraphs—including but not limited to 33, 34, 36, and 43—impose costs directly on SCT and on entities transacting across the SCT tie. The Commission

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6 Article I, section 8, clause 3 of the U.S. Constitution.

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

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

9 *Granholm,* 544 U.S. at 476 (quoting *Philadelphia,* 437 U.S. at 624).

10 *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).

has not imposed such direct costs on any other market participant in connection with a comparable transaction taking place either solely within ERCOT or to, from, or over any other ERCOT interconnected DC tie.[11]

The Commission admits it is protecting in-state interests and claims to be protecting the interests of ERCOT ratepayers.[12] 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.[13]

Ordering Paragraphs 33, 34, 36, and 43 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 36, 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 36 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 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

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[11] 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.

[12] Order on Rehearing at 9.

[13] *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).

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 36 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.[14] First, the Commission cites to no evidence in the record demonstrating that the interconnection of the SCT DC Tie to the ERCOT grid or the operation of the tie will result in 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 7, system reliability does not depend on the allocation of costs within ERCOT. 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 without access to imported power.[15] Introducing more supply options during high load periods within ERCOT is a significant benefit of the DC Tie to ERCOT system reliability as well as to ERCOT energy consumers. The Order mischaracterizes this effect as a market distortion that reduces signals to build more capacity within ERCOT.

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14 Order on Rehearing at 9.

15 *Id.*

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 from 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, SCT and other DC tie interconnections improve the ERCOT market, not distort it.[16] ERCOT's existing price formation issues cannot be ascribed to SCT and they do not provide a legitimate, non-discriminatory purpose to justify discriminating against SCT in favor of in-state generators.[17]

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."[18] 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.[19] 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 3, 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."[20] The plain language of the statute does not delegate to the Commission 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.

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16 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.

17 *See Granholm,* 544 U.S. at 472; *Philadelphia,* 437 U.S.at 623-24 (1978).

18 Order on Rehearing at 11.

19 16 U.S.C. § 824k(a) & (k).

20 16 U.S.C. § 824k(k)(1).

III. Point of Error No. 3: 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, 14-15, Findings of Fact 42A, 44A, 48B, 59, 62–70, 83A, 91A, 107, 113D–H, 119–119C, Ordering Paragraphs 33, 34, 35, 36 42 and 43)

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[21] and its Final Order.[22] 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.[23] 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.

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[21] *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").

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

[23] 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 gird 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.*[24] 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 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.[25] Given the consensus among the applicants, the signatories to the Offer of

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[24] *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.

[25] 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

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.[26]

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.[27]

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).[28]

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

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

26 Conditional Order at p. 34; Final Order at p. 19.

27 Order on Rehearing at 6, 14.

28 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 34 (footnote omitted); *see also* Final Order at 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.[29]

FERC accepted those revised tariff sheets for filing in the normal course.[30] CenterPoint has followed the same procedure for updating its TFO Tariff.[31]

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".[32] 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).

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[29] Docket No. NJ15-18-000, *Oncor Electric Delivery Company, LLC*, Transmittal Letter at p. 2 (Sept. 22, 2015).

[30] Docket No. NJ15-18-000, *Oncor Electric Delivery Company, LLC* (Nov. 13, 2015) (unpublished letter order).

[31] Docket No. ER17-136-000, CenterPoint Energy Houston Electric, LLC, (Dec. 15, 2016) (unpublished letter order).

[32] Order on Rehearing at 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.[33]

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 70A 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[34] 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

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[33] 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.").

[34] 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.[35]

SCT has made clear since it began working with the Commission and the other Texas stakeholders that it seeks the same treatment under rules of general applicability 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 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.

IV. Point of Error No. 4. 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.[36] 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).

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[35] In order to allow the Project No. 46304 tasks to begin, SCT has advised ERCOT that it will voluntarily pay for certain study costs, subject to refund.

[36] To change its rules, the Commission must follow the rulemaking procedures prescribed in subch. B of the Administrative Procedures Act.

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 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.[37]

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.[38] 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.

V. Point of Error No. 5: 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 36)

Ordering Paragraph 36 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. 4, 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

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

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

transmission service costs to QSEs scheduling import and export transactions violates both section 35.004(d) and Substantive Rule 25.192.

VI. Point of Error No. 6: 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.

VII. Point of Error No. 7: 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 32–37 and 43)

On page 7-8 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 32–37 and 43 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.[39] 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.[40]

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.[41] 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.[42] Similarly, allocating costs to SCT in the Order would not reduce any supposed *market* uncertainty the tie and interconnection might conceivably create within ERCOT.[43] 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

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

[40] 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.

[41] 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.

[42] According to testimony in this case, the tie will not be operational for another four years, sometime in 2021.

[43] 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.

it.[44] QSEs acting for SCT customers outside of ERCOT will schedule transactions to wheel 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.[45]

VIII. Point of Error No. 8: 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.[46] 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.[47]

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[44] 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).

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

[46] PFD at 50.

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

IX. Point of Error No. 9: 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 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.[48] 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.

X. Point of Error No. 10: 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. 9, 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.[49] 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.[50] Furthermore, an agency must adequately explain its reasoning when it departs from its earlier policy or appears to be inconsistent in its determinations.[51] In this case, the Commission's failure to give proper notice violates SCT's due process rights.

XI. Point of Error No. 11: 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-119D, Ordering Paragraphs 33-37 and 43)

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

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

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

50 *Oncor*, 406 S.W.3d at 269.

51 *Oncor*, 406 S.W.3d at 267, 269.

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, including DC ties, on an equitable basis through postage stamp rates charged by TSPs under PURA § 35.004(d). None of these costs are assigned based on the source of the supply. Likewise, the costs of ancillary services are assigned to all load, including DC tie load, on an equitable basis through ERCOT settlement charges to QSEs. SCT justifiably assumed, therefore, that competition and fair play were the law of the land in ERCOT. For the Commission to now characterize the assumption that SCT and the users of the SCT DC tie would be subject to the same rules as other ERCOT DC tie owners and users as a claim for a "free ride" is arbitrary and unlawfully discriminatory.

For each cost allocation determination in the Order, there is an existing rule or protocol which allocates the cost differently. In this Order, the Commission departs from each cost allocation methodology currently applicable to similarly situated facility owners and users and, in place of non-discriminatory rules of general applicability, creates a lengthy list of "exceptions" to existing laws and rules. The Commission has never had one set of transmission rates for all but one market participant. The Commission has never directly assigned system wide ancillary services costs to one market participant—not even the owner of the facility which currently defines the MSSC. The Commission's statement that because the customers of export power are not ERCOT customers they bear no responsibility for the extraordinary costs specific to the SCT DC Tie is flat wrong.[52] The costs incurred by QSEs exporting over the tie equal or exceed ERCOT TCOS and applicable settlement charge types. Those costs will be passed on to the QSE's customers in SERC.

The Commission articulates no rational justification for imposing special cost allocation rules 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 is discriminatory and violates PURA § 39.001.

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[52] Order on Rehearing at 7.

XII. Point of Error No. 12: 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 36 and 43)

Ordering paragraph 36 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 43 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.

Because it would be impractical for each TSP to bill each end-use customer, the transmission rates are charged to DSPs or QSEs who in turn must collect from the customers they serve, whether in or out of the ERCOT system. 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.[53]

XIII. Point of Error No. 13: 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 36)

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

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[53] *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.

"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 section 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 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 section 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 section 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.

XIV. Point of Error No. 14: 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-119D, Deleted Finding of Fact 57, Ordering Paragraphs 32, 33, 34, 36, and 43)

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.[54] 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.[55] The ALJs therefore found that (1) ERCOT should first assess the benefits from the SCT DC Tie, and then (2) the

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

[55] PFD at 40-46.

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.[56] 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 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

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

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.[57]

XV. Point of Error No. 15: 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, Ordering Paragraphs 32 and 37)

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 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.

XVI. Point of Error No. 16: 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 7-11, Findings of Fact 119D, Ordering Paragraphs 32 and 37)

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 37

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

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.[58] 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*;[59] 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.

XVII. Point of Error No. 17: 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 10, Findings of Fact 119D, Ordering Paragraphs 32 and 37)

The due process clause of the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 19, of the Texas Constitution provide a guarantee of fair procedure. The due process clauses also proscribe arbitrary state action. The Commission's Order denying utility recovery of the cost of the Oncor substation without a hearing violates these guarantees.[60]

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.[61] It is improper for the Commission to conclude in this proceeding that the substation is not properly includible in Oncor's rate base.

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[58] PFD at 42-46 and Findings of Fact 57-61.

[59] 74 S.W.3d 532.

[60] 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.

[61] 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.

XVIII. Point of Error 18. 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 at 6, 8-10, Findings of Fact 113B, 113D, Ordering Paragraphs 32 and 37)

The Commission does not have authority in this CCN proceeding to prohibit any utility from recovering any costs related to the Oncor substation.[62] 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.[63]

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

XIX. Point of Error No. 19: The Commission erred in concluding that the benefits of the SCT DC Tie and interconnection are questionable. (Order on Rehearing at 6, 8-10, 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.[64] The uncontroverted evidence, however, establishes that the project will provide substantial benefits to those ratepayers.

As an initial matter, no party to this proceeding has challenged the assertion that 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.[65] There is also no reason to question that exports over the SCT tie will produce substantial export charge revenues in accordance with the

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62 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.

63 PUC Subst. R. 25.101(c)(2).

64 Order on Rehearing at 8.

65 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).

Commission's transmission tariff rule and ERCOT's protocols.[66] 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.[67]

SCT presented an economic study that showed hundreds of millions of dollars of ***additional*** benefits to ERCOT customers from transactions over 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.[68] 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.[69] 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 energy benefits in ERCOT.[70] 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.[71]

XX. Point of Error No. 20: 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, 119-119E, Ordering Paragraph 43)

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

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66 *See* 16 T.A.C. § 25.192(a), (e), (f); ERCOT Protocols 4.2.1.2 and 9.16.1.

67 *See* Tex. Gov't Code § 2001.174(2).

68 *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).

69 SCT Ex. 3 at 10 (Wolfe Direct).

70 SCT Ex. 3, Exhibit EW-2 at 3, 19 (Wolfe Direct).

71 *See* Tex. Gov't Code § 2001.174(2).

grid.[72] 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.[73] 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[74] based on the same postage stamp rates established for customers within ERCOT.[75] 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.[76] 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,[77] and they establish an ERCOT system administration fee that is paid by all QSEs, including those scheduling exports.[78] 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.[79] 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.[80] The study used UPLAN system simulation software, which is widely used to model electric system operations and has

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72 Order on Rehearing at 7-9.

73 *Id.* at 10-11.

74 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).

75 16 T.A.C. § 25.192(e)(1).

76 16 T.A.C. § 25.192(f).

77 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).

78 ERCOT Protocol 9.16.1.

79 SCT Ex. 3, Exhibit EW-2 at 3, 19 (Wolfe Direct).

80 *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).

been licensed by ERCOT since 2003 for its Regional Planning Group transmission planning and economic analysis.[81]

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 2, 11, and 13. 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.[82] As a result, the Commission erred in Ordering Paragraph 42 by requiring that any export related costs be allocated to SCT.

XXI. Point of Error No. 21. 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, and 119A–119D, Ordering Paragraphs 32–37, and 43)

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, and (4) prohibit recovery of the cost of a facility without hearing evidence in a rate-making proceeding. These conditions exceed the Commissions statutory authority to impose reasonable conditions pursuant to PURA § 37.051(c-2).

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81 SCT Ex. 3 at 10 (Wolfe Direct).

82 *See* Tex. Gov't Code § 2001.174(2).

CONCLUSION

The Commission should delete—or at least reverse its modifications to—all findings of fact and ordering paragraphs stating or ordering: (1) that costs should be assigned to SCT or entities importing or exporting over the SCT DC Tie and (2) that no utility shall recover costs for the Oncor substation. 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,

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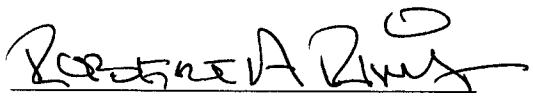
CERTIFICATE OF SERVICE

I certify that on June 12, 2017, a true and correct copy of this document was served on all parties via the Public Utility Commission of Texas Interchange website.



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