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SOUTHWESTERN PUBLIC SERVICE §  
COMPANY AND SOUTHWEST §  
POWER POOL, INC. FOR §  
DECLARATORY ORDER §

PUBLIC UTILITY COMMISSION

PUBLIC UTILITY COMMISSION  
FILING CLERK

OF TEXAS

TEXAS INDUSTRIAL ENERGY CONSUMERS'  
INITIAL BRIEF

June 21, 2017

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## I. INTRODUCTION

The issues raised by this petition for a declaratory order are critically important to TIEC members, who rely on the Commission to ensure that transmission service in Texas is reliable and available at rates that are reasonable and consistent with the state's policy objectives.

In theory, TIEC is not opposed to the concept of "competitive transmission procurement," and is open to the possibility that a competitive bidding process could ultimately reduce transmission costs for customers (if it were properly designed). In practice, however, there have been two primary problems with competitive transmission procurement. First, the lead time for transmission is relatively long due to planning and the regulatory approval process. Given this, adding delays from a competitive process could endanger reliability or increase congestion costs before a transmission solution can be completed. Second, TIEC has not yet seen a model for holding transmission providers to their bids that will appropriately ensure that customers actually receive savings from a competitive bidding process. There are many unknown factors in transmission planning that make costs difficult to predict and compare among providers. For example, a finished transmission line may be much longer than anticipated due to environmental restrictions, or the right-of-way costs may vary wildly from estimates included in the providers' bids. There are other costs that providers may significantly under- or overestimate (for example, steel costs), which makes it difficult to meaningfully compare the bids of two competing transmission companies. Traditionally, transmission providers have not been willing to take on the risks associated with such variables, and have instead insisted on full cost recovery regardless of up-front cost estimates. In this environment, customers receive limited (if any) benefits from so-called "competitive" procurement, despite the additional delays it may cause in the development process.

Outside of ERCOT, TIEC has an additional concern with a competitive transmission process—relinquishing jurisdiction to FERC. FERC has declined jurisdiction over transmission rates for areas within Texas that are outside of ERCOT based on the "bundled rate" exemption.<sup>1</sup> Under this exemption, this Commission maintains jurisdiction over transmission service that is provided as part of a bundled retail rate, even though this service would otherwise qualify as

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<sup>1</sup> FERC Order No. 888, 61 Fed. Reg. 21,540, 21,577-78 (May 10, 1996), *aff'd* by FERC Order No. 888-A, 62 Fed. Reg. 12,274, 12,304 (Mar. 14, 1997); *see also New York v. FERC*, 535 U.S. 1, 11-12, 25-28 (2002) (describing and upholding FERC Order Nos. 888 and 888-A on this issue).

interstate commerce and be rate regulated by FERC.<sup>2</sup> If the Commission were to allow competitive procurement in the non-ERCOT areas, this would open the door to transmission service in Texas being directly subject to FERC's ratemaking jurisdiction.<sup>3</sup> As the Commission is aware, FERC's ratemaking and policy objectives often differ sharply from this state's, which can entail substantial cost increases for Texas customers. Transmission service that is unbundled from retail service is subject to FERC jurisdiction in every respect except state siting requirements. FERC rules,<sup>4</sup> the United States Supreme Court,<sup>5</sup> and PURA<sup>6</sup> all recognize this outcome.

While TIEC observes that competitive transmission outside ERCOT could be beneficial at some point in the future, current Texas law does not allow it. The Legislature's decision on this point has protected Texas customers from the risks associated with FERC jurisdiction. The Legislature was explicit and precise in restricting new, transmission-only utilities to the ERCOT region, thereby preserving full jurisdiction over the non-ERCOT areas. As discussed below, the non-ERCOT utilities currently have an exclusive right to provide electric utility service in their respective areas,<sup>7</sup> and are not open to competition from merchant transmission providers.

## II. RESPONSE TO COMMISSION QUESTIONS

1. ***An electric utility as defined in PURA § 37.001 or other person may not construct transmission facilities in the State of Texas to provide service to the public without first obtaining from the Commission a certificate of convenience and necessity under chapter 37 of PURA.***

PURA § 37.051(a) prohibits an "electric utility or other person" from "directly or indirectly provid[ing] service to the public under a franchise or permit unless the utility or other person first obtains from the commission a certificate that states that the public convenience and necessity requires or will require the installation, operation, or extension of the service." Under PURA, the term "service" is "broadly defined" and would include the construction of

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<sup>2</sup> See FERC Order No. 888, 61 Fed. Reg. at 21,577-78; FERC Order No. 888-A, 62 Fed. Reg. at 12,304.

<sup>3</sup> FERC Order No. 888-A, 62 Fed. Reg. at 12,304 ("[W]hen a bundled retail sale is unbundled and becomes separate transmission and power sales transactions, the resulting transmission transaction falls within the Federal sphere of regulation.").

<sup>4</sup> *Id.*

<sup>5</sup> See *New York v. FERC*, 535 U.S. at 11-12, 25-28.

<sup>6</sup> PURA § 11.009.

<sup>7</sup> There are certain exceptions specifically recognized in the statute, such as municipally owned utilities and electric cooperatives, but other investor-owned utilities are not authorized.

transmission facilities to serve the public.<sup>8</sup> Therefore, PURA prohibits an electric utility or other person from constructing transmission facilities to provide service to the public without first obtaining a CCN.

The Legislature recently delineated explicit requirements for someone that is not already a utility in Texas to obtain a CCN, further reinforcing the requirement that all entities providing electric service to the public must have a CCN. In 2009, the Legislature amended PURA to specifically authorize “transmission-only” utilities within ERCOT. In doing so, the Legislature prescribed very specific standards in PURA § 37.051(e) that must be satisfied before the Commission may grant a CCN to an entity that is not already an electric utility in Texas. In particular, PURA § 37.051(e) provides:

(e) The commission may consider an application [for a CCN] filed by a person not currently certificated as an electric utility for a certificate of convenience and necessity to construct transmission capacity that serves the ERCOT power region. Before granting a certificate under this section, the commission must find, after notice and hearing, that:

(1) the applicant has the technical ability, financial ability, and sufficient resources in this state to own, operate, and maintain reliable transmission facilities;

(2) the applicant has the resources and ability to comply with commission rules, requirements of the independent organization certified under Section 39.151 for the ERCOT power region, and requirements of the National Electric Reliability Council applicable to the provisions of transmission service; and

(3) for an application filed by a person that is not an electric utility, granting the application will not adversely affect wholesale transmission rates, as compared to the rates projected to be charged if an existing electric utility were to build the transmission facility.

In allowing the Commission to consider an application for a CCN by an entity that is not already a utility, the Legislature (1) limited this authority to applications to provide transmission service within ERCOT; and (2) provided specific standards that must be satisfied to protect the integrity of service and the interests of customers. By providing this very specific method for an

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<sup>8</sup> PURA § 11.003(19) (“‘Service’ has its broadest and most inclusive meaning. The term includes any act performed, anything supplied, and any facilities used or supplied by a public utility in the performance of the utility’s duties under this title ...”).

entity that is not already a utility to obtain a CCN to provide transmission service, the Legislature (1) made clear that a CCN is required for new entrants, and (2) precluded any other means of obtaining a CCN for a new utility.<sup>9</sup> Imposing these requirements reflects the Legislature's desire for the Commission to ensure that every electric utility or other person providing transmission service in this state can do so safely and reliably, and without unnecessary costs to customers.<sup>10</sup> Allowing an entity that is not currently an electric utility to construct transmission facilities without first obtaining a CCN and satisfying the requirements set forth in PURA § 37.051(e) would be at direct odds with the Legislature's intent.

In sum, an entity may not construct facilities to provide electric service to the public unless the entity is either: (1) an existing utility with a CCN to provide service to the public that has obtained Commission approval to amend its existing CCN, if necessary, to include the new facilities, or (2) an entity that has satisfied the requirements for obtaining a new CCN under PURA § 37.051(e), which is limited to transmission service within ERCOT.

**2. *PURA Chapter 37, does not authorize CCNs for electric utilities that will provide transmission-only service outside of ERCOT.***

As noted above, when the Legislature amended PURA to authorize transmission-only utilities, it explicitly limited this grant of authority to utilities providing transmission service *within ERCOT*.<sup>11</sup> Similarly, the authority to grant a new CCN for an entity that is not already a utility in Texas was limited to entities providing transmission service within ERCOT.<sup>12</sup> This limitation preserves the monopoly retail service areas of the non-ERCOT utilities, and precludes FERC from exercising ratemaking jurisdiction over transmission rates for Texas customers.

PURA § 37.051(d) provides that a CCN “may be granted to an electric utility or other person under this section for a facility used as part of the transmission system *serving the*

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<sup>9</sup> See, e.g., *In re Clark*, 977 S.W.2d 152, 156 (Tex. App.—Houston 1998, orig. proceeding) (“Generally, the express mention or enumeration of one thing, consequence, or class is equal to the express exclusion of all others.”).

<sup>10</sup> See Joint Appendix, Item 7, Transcript of Testimony Before the House State Affairs Committee on March 31, 2009 on Tex. H.B. 3406, 81st Leg., R.S. (2009) at 6-7 (discussing the lack of technical and financial standards for transmission-only utilities in PURA and the need to ensure reliability) [hereinafter H.B. 3406 Transcript]; see also Joint Appendix, Item 4(i), Bill Analysis Associated with Corrected House Committee Report, at 2 (“The substitute differs from the original by adding findings that are required from the PUC before it grants a CCN.”).

<sup>11</sup> See PURA § 37.051(d).

<sup>12</sup> PURA § 37.051(e).

*ERCOT power region* solely for the transmission of electricity.”<sup>13</sup> Similarly, PURA § 37.051(e) provides standards under which the Commission can grant a CCN to “a person not currently certificated as an electric utility for a certificate of convenience and necessity to construct transmission capacity *that serves the ERCOT power region*.” There is no similar provision for granting a CCN to an entity that will provide transmission-only service in areas outside of ERCOT. Under the well-known principle of *expressio unius est exclusio alterius*,<sup>14</sup> the Legislature’s decision to limit the authorization for new transmission-only utilities to those serving the ERCOT power region creates a negative implication that transmission-only utilities are not authorized in the non-ERCOT areas. If transmission-only utilities were authorized throughout the state, then the specific authority for transmission-only utilities within ERCOT would be meaningless surplusage. Under established rules of construction, every word of a statute is presumed to be used for a purpose, and every word excluded must also be presumed to have been excluded for a purpose.<sup>15</sup>

Indeed, the legislative history behind PURA § 37.051(d) and (e) reveals that the limiting phrase “serving the ERCOT power region” was only added in the Committee Substitute.<sup>16</sup> This demonstrates that the Legislature originally contemplated allowing transmission-only utilities throughout the state, but deliberately amended the bill language to restrict this grant of authority to ERCOT. The cardinal rule of statutory interpretation is to ascertain and follow the Legislature’s intent.<sup>17</sup> That is done through looking at the statute as a whole—not reading individual provisions in isolation—and by “keeping in mind at all times the old law, the evil, and the remedy.”<sup>18</sup> The bill analysis for C.S.H.B. 3406 explicitly stated that the purpose of the legislation was to “clarif[y] the [Commission]’s authority to grant a CCN to an electric utility or other person for a facility used as part of the transmission system but limit[] it to a system serving the Electric Reliability Council of Texas (ERCOT) power region solely for the

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<sup>13</sup> Emphasis added.

<sup>14</sup> See, e.g., *In re Clark*, 977 S.W.2d at 156.

<sup>15</sup> *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981).

<sup>16</sup> Joint Appendix, Item 4(i), Bill Analysis Associated with Corrected House Committee Report, at 2 (“C.S.H.B. 3406 adds a provision, not in the original, clarifying that a granted CCN is for a facility used as part of the transmission serving the Electric Reliability Council of Texas (ERCOT) power region, whereas the original does not specify a facility serving the ERCOT power region.”). The statutory language ultimately passed as an amendment to HB 3009, but that amendment was identical to the committee language from HB 3406.

<sup>17</sup> *Sw. Bell Tele. Co. v. Pub. Util. Comm’n of Tex.*, 888 S.W.2d 921, 926 (Tex. App.—Austin 1994, writ denied).

<sup>18</sup> *Cameron*, 618 S.W.2d at 540.



transmission of electricity.”<sup>19</sup> The Legislature’s intent was *not* to allow transmission-only utilities outside of ERCOT, and the statutory language should not be interpreted to achieve a conflicting result.

The Third Court of Appeals’ decision in *Cities of Harlingen* does not support a different interpretation of the statute. That decision was based on PURA as it existed prior to the 2009 amendments to § 37.051(d) and (e).<sup>20</sup> *Cities of Harlingen* did not interpret or apply the revised statutory language. Rather, the sole holding of that case, as explicitly laid out by the opinion, was to overturn the district court’s determination that the Commission had “exceeded its statutory authority in granting a CCN to a transmission-only utility without a service area.”<sup>21</sup> In other words, *Cities of Harlingen* merely rejected the argument—and the finding of the district court—that granting CCNs to transmission-only utilities is unlawful because they would not have the certificated service areas referenced in PURA § 37.151.<sup>22</sup> Although a non-ERCOT transmission-only utility would not be able to comply with PURA’s service area requirements, the specific limitation of transmission-only utilities to ERCOT areas in 2009 is an independent bar that has never been examined by any court, including the *Cities of Harlingen* court.

Indeed, the Third Court of Appeals’ references to the 2009 statutory changes in *Cities of Harlingen* were *dicta* merely noting consistency with the court’s decision “as to whether [a transmission-only] utility can obtain a CCN when it has no specific certificated area.”<sup>23</sup> For instance, *Cities of Harlingen* described the 2009 changes as a legislative clarification “that an electric utility intending to operate a facility that is part of the transmission system serving the ERCOT power region may obtain a CCN even if the utility will provide only transmission services and will not satisfy section 37.151’s certificated-area-related requirements.”<sup>24</sup> Notably,

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<sup>19</sup> Joint Appendix, Item 4(i), Bill Analysis Associated with Corrected House Committee Report, at 2.

<sup>20</sup> *Pub. Util. Comm’n of Tex. v. Cities of Harlingen*, 311 S.W.3d 610, 615 n.2 (Tex. App.—Austin 2010, no pet.) (“ETT’s application was filed and approved prior to the 2009 legislative session, and therefore, our review of sections 37.051 and 37.151 of the PURA is in accordance with the pre-2009 versions of those statutes.”).

<sup>21</sup> *Cities of Harlingen*, 311 S.W.3d at 620-21 (quotation marks omitted); see also *id.* at 620 n.6 (“Our holding is *only that a transmission-only utility can obtain a CCN without a certificated area.*”) (emphasis added) (quotation marks omitted); *id.* at 619-20 (“Consequently, we hold that the Commission has been conferred power under the PURA to grant a CCN to a transmission-only utility that does not have a certificated service area.”).

<sup>22</sup> *Id.* at 618-19.

<sup>23</sup> *Id.* at 620.

<sup>24</sup> *Id.* at 620 (emphases added); see also *id.* at 620 n.7 (“We note that the bill analysis for House Bill 3406 . . . references the district court’s findings in this case and provides that the legislation clarifies the Commission’s

the Third Court of Appeals did not speak as to whether transmission-only utilities *outside* of ERCOT could be granted CCNs, or how that part of the law was affected by the passage of the 2009 amendments. To interpret *Cities of Harlingen* as somehow addressing these other questions would go well beyond its narrow holding limited to reversing the district court's finding that the Commission could not grant a CCN to a transmission-only utility without a service area.<sup>25</sup> Accordingly, *Cities of Harlingen* does not impact the plain language analysis of PURA 35.051(d) and (e), which clearly demonstrates that transmission-only utilities are not authorized outside of ERCOT.

**3. *SPS has the exclusive right to construct transmission facilities within its certificated service area-is obligated to provide adequate service.***

In some respects, asking whether SPS has a “Right of First Refusal” (ROFR) is the wrong question. Rather, PURA currently gives SPS an exclusive right to provide electric service in its area. If SPS refuses to provide a certain regulated electric service (for example, constructing a particular facility), then the Commission can either order SPS to provide that service or it will not be provided. PURA does not offer any other option for a third-party to come into SPS's service area and provide regulated transmission (or any other electric) service. As discussed above, the Legislature authorized transmission-only utilities solely within ERCOT, and authorized CCNs for a *new* transmission-only utility solely within ERCOT (and only if the requirements of PURA § 37.051 (d) and (e) are satisfied).

SPS has both an exclusive right to provide electric service—including transmission service—in its certificated service area, as well as an obligation to provide such service. SPS's CCN provides it with the monopoly right to provide electric service within its certificated service area.<sup>26</sup> Along with that right also comes the obligation, under PURA § 37.151, to “service every customer in the utility's certificated area” and “provide continuous and adequate service in that

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authority to issue CCNs to new owners and operators of certain wholesale electric transmission facilities that do not have traditional utility service areas.”) (quotation marks omitted) (citing Joint Appendix, Item 4(i), Bill Analysis Associated with Corrected House Committee Report).

<sup>25</sup> *Id.* at 621-22 (“We conclude that the district court erred in holding that the Commission exceeded its statutory authority in granting a CCN to a transmission-only utility without a service area.”) (quotation marks omitted). The only finding of the district court regarding whether a transmission-only utility is allowed was its fifth finding that the Commission “exceeded its statutory authority in granting a CCN to ETT, a transmission-only utility without a service area.” *Id.* at 616.

<sup>26</sup> See, e.g., *Lamb County Elec. Co-op., Inc. v. Pub. Util. Comm'n of Tex.*, 2001 WL 23142 at \*1 (Tex. App.—Austin 2001, no pet.) (“The monopoly right to provide such power was evidenced by the Commission's certificates of convenience and necessity issued to the utilities.”). (

area.” SPS cannot decline to fulfill its obligation to provide adequate service by handing off the construction and operation of transmission lines to a transmission-only utility. Under PURA § 37.155, SPS could theoretically enter into enforceable contracts that designate areas and customers that can be served by another *retail* utility. However, such assignments to a transmission-only utility are not authorized (nor is a transmission-only utility authorized in the first place).<sup>27</sup> Additionally, PURA provides no path for issuing a CCN to a new retail electric utility in SPS’s service area, as the authorization for new entrants is limited to transmission-only utilities within ERCOT. Therefore, PURA does not provide any avenue for SPS to contract away to a transmission-only utility its exclusive obligation to construct transmission lines within its service area.

The Commission has ample tools to address transmission issues within non-ERCOT areas in light of this restriction. In particular, PURA provides a clear mechanism for the Commission to require SPS (or any other non-ERCOT utility) to construct needed transmission facilities in order to fulfill its service obligations under § 37.151. Under § 39.203(e), the Commission has the authority to “require an electric utility or a transmission and distribution utility to construct or enlarge facilities to ensure safe and reliable service for the state’s electric markets . . . .”<sup>28</sup> This provision is not limited to ERCOT, but applies to “electric utilities” (which would include SPS) and the state’s “electric markets,” which extends beyond ERCOT. This statutory tool allows the Commission to order SPS to fulfill its obligation to provide adequate service throughout its service area and construct needed transmission facilities in the case there are reliability concerns.

### III. CONCLUSION

For the reasons discussed above, PURA provides non-ERCOT utilities with an exclusive right to provide transmission service in their respective service areas. In doing so, the Legislature has also protected Texas retail customers from having their electric service directly

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<sup>27</sup> As recognized in *Cities of Harlingen*, transmission-only utilities are not considered retail electric utilities under PURA Chapter 37 because retail customers cannot also be transmission service customers under the Commission’s rules. 311 S.W.3d at 619 (citing P.U.C. Subst. R. 25.5(142)); see also PURA § 37.001(c). (“Retail electric utility means a person . . . that operates, maintains or controls in this state a facility to provide retail electric utility service.”).

<sup>28</sup> Besides the clear reference in § 39.203(e) to “electric utilities” in addition to “transmission and distribution utilities,” another provision of PURA, § 36.053, makes clear that § 39.203(e) also applies to vertically integrated utilities like SPS. Specifically, PURA § 36.053 allows an electric utility to include in rate base any enlargements ordered by the Commission under § 39.203(e) to facilitate meeting renewable energy goals.

subject to FERC jurisdiction. While it may be reasonable for the Legislature to reexamine this restriction in the future if competitive transmission procurement becomes a realistic and beneficial option, the legislature has currently restricted any "competition" from transmission-only utilities to the ERCOT region.

Respectfully submitted,



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ATTORNEYS FOR TEXAS INDUSTRIAL  
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#### **CERTIFICATE OF SERVICE**

I, James Zhu, Attorney for TIEC, hereby certify that a copy of the foregoing document was served on all parties of record in this proceeding on this 21<sup>st</sup> day of June, 2017 by facsimile, electronic mail and/or First Class, U.S. Mail, Postage Prepaid.



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James Zhu