

Notice sent: Final Interlocutory None

Disp Parties: PLI, DFL-4

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Judge SAY Clerk MS

CAUSE NO. D-1-GV-09-001199

CITY OF GARLAND, TEXAS
Plaintiff

v.

PUBLIC UTILITY COMMISSION OF
TEXAS
Defendant

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IN THE DISTRICT COURT

OF TRAVIS COUNTY

200th JUDICIAL DISTRICT

Filed in The District Court
of Travis County, Texas

JAN 15 2010 BP
2:24 PM
At Amalia Rodriguez-Mendoza, Clerk

FINAL JUDGMENT

On December 15, 2009 the court considered the City of Garland's ("Garland") suit for review of the Order on Rehearing in Docket No. 35665 (the "Order") of the Public Utility Commission of Texas ("Commission").

The Court reverses and remands the agency decision because it is in excess of the agency's statutory authority, not reasonably supported by substantial evidence, and arbitrary and capricious. Specifically,

- 1) The factors set forth in Finding of Fact No 64 d, e, f, and h are legally irrelevant factors that the Commission should not have considered in making its ultimate finding.
- 2) The Commission's findings set forth in Finding of Fact No 64 d, e, f, and h are not supported by substantial evidence.
- 3) The Commission's ultimate finding, Finding of Fact 76, relies upon the irrelevant factors listed above and the findings listed above not supported by substantial evidence.

It is therefore ORDERED that the Commission's Order on Rehearing in Docket No. 35665 shall be and is hereby reversed and that this matter is remanded to the Commission for further proceedings not inconsistent with this Order.

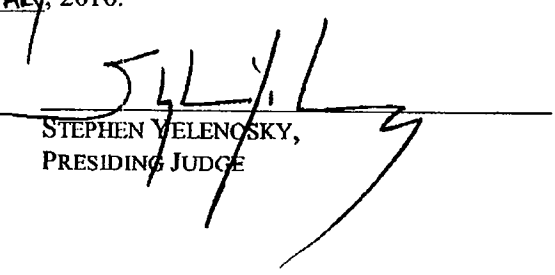


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It is further ORDERED that all of Garland's requests for declaratory and injunctive relief shall be and are hereby severed from this administrative appeal, and the clerk of this court is directed to establish a new file with a new cause number, which shall proceed to final judgment on all of Garland's claims for declaratory and injunctive relief that were previously asserted herein. **D-1-GV-10-000068** 98th Judicial District

This is a final judgment that disposes of all issues as to all parties in the case and is appealable.

SIGNED this 15 day of JANUARY, 2010.


STEPHEN YELENOSKY,
PRESIDING JUDGE



Filed In The District Court
of Travis County, Texas
on 12-21-09
at 12:09 M.
Amalia Rodriguez-Mendoza, Clerk

STEPHEN YELENOSKY

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December 21, 2009

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Re: D-1-GV-09-001199; *City of Garland, Texas vs. Public Utility Commission of Texas;*
in the 200th Judicial District Court, Travis County, Texas

Dear Counsel:

This letter is to give you my intended ruling and some significant reasons for it, but it is not intended to be incorporated into my order or to limit the possible bases of support for that order.

The PUC relied upon factors that are not relevant to providing transmission capacity in a manner most beneficial and cost-effective to electric customers and based its decision on underlying findings that lack substantial evidence.

In their briefs, the PUC and the intervenors supporting its decision repeatedly cut short the quotation of the statutory authority given the PUC, reducing it to "most beneficial and cost effective." The statutory language directs the PUC to "*develop a plan to construct transmission capacity necessary to deliver to electric customers, in a manner that is most beneficial and cost-effective to the customers, the electric output from renewable energy technologies in the*



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competitive renewable energy zones...." The PUC writes out the statutory language "to electric customers" and "to the customers." In argument, counsel suggested that "customers" be read as the "people of Texas." Neither the PUC, nor this court, can ignore statutory language or choose to give it a definition it does not have. Although the good of the people of Texas in all their capacities¹ and locales is presumably the goal of any state policy, the legislature makes state policy. The legislature reserves to itself all policy decisions except those it cedes through statute to an administrative agency, and it confers only the authority necessary to the statutory intent. Here, the legislature reserved to itself consideration of all but the good of electric customers.

The PUC found that MOUs do not pay *ad valorem* taxes and that payment-in-lieu-of-taxes might be infeasible. The PUC did not explain a connection between this finding and providing beneficial and cost-effective transmission capacity to electric customers. The record includes only speculation that taxing entities and others would be angered by transmission lines that did not come with tax payments. Had a finding of ill effects on taxing entities or others been made and supported by substantial evidence, it would not show a connection with the interest of electric customers *qua* electric customers.

The PUC's findings regarding affected landowners, as stated, lack substantial evidence, and, as defended, are irrelevant factors. Though the findings are couched in terms of "due process concerns," there was no testimony that selecting an MOU would lead to a route-selection process that would be unconstitutional. The testimony cited shows concern for opposition, including litigation, but no opinion testimony (expert or otherwise) that landowners would have valid due process claims. Former PUC and FERC Chairman Wood testified that the absence of CCN proceedings to adjudicate landowner opposition "would be more explosive in a very property rights state, and I hate to think of what backlash that could cause....."² Aside from being speculative, it is no evidence that landowners in opposition would have legitimate due process complaints that could legally and permanently derail the plan.

Feared opposition, standing alone, is not a relevant factor. *See Starr County v. Starr Industrial Services, Inc.* The PUC and intervenors suggest that the feared opposition does not stand alone here because the PUC found that it would cause delay. Opposition necessarily carries with it some amount of delay, if only the additional time to hear the opponents' testimony. Opposition *with* delay, then, is nothing more than opposition standing alone. Even assuming that some type and/or amount of delay can make opposition a relevant factor and assuming the legislature authorized the PUC to determine whether that would be the case here, the PUC failed to articulate a finding that meets the *Charter Medical* standard and the record

¹ At oral argument, it was suggested that the statutory authority extends to the interest of electric customers in all their capacities - including their capacities as taxpayers and, some, as landowners. When the legislature refers to individuals in a particular capacity, the meaning has to be limited to the actions and interests of those individuals *in that capacity*. Otherwise, the reference is superfluous and throughout the statutes "doctor," "consumer" and "felon" would all simply mean "person."

² Additionally, at least one aspect of the fear appears to have been that this matter could end up back in the legislature. Former Commissioner Wood testified, "[t]his does not need to be another political football in the next legislative session." (Tr. at 745).

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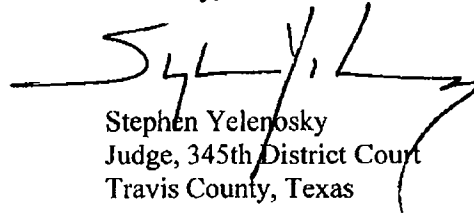
reveals nothing but supposition. Furthermore, there is not even supposition, much less evidence, about *the length* of any feared delay. Whichever entities are chosen to provide the transmission, the process of selecting and obtaining approval for routes will require many months. Were the feared opposition to add a year, perhaps that would be relevant; a week, certainly not. The PUC can no more rely on a supposition about "delay" than it can rely on a supposition about "cost," without some specificity and evidence. This is especially true here because of the testimony that the CCN certification process for "new entrants" that were selected by the PUC would also cause delay. There is nothing to distinguish "delay" that was acceptable from "delay" that was not.

The finding that "the municipally owned utilities do not possess the current and expected capabilities" references and relies upon the findings regarding property taxes and landowner concerns. Therefore, it is infected with the consideration of irrelevant factors and based on underlying findings that lack substantial evidence.

Though invited to do so by the court, the PUC and intervenors were unable to provide any authority for the application of a harmless error doctrine in judicial review of an agency's consideration of irrelevant factors. A harmless error doctrine would require a court to make a determination that an agency would have reached the same decision had it disregarded the irrelevant factor(s). Unless the agency's decision itself affirmatively demonstrates that an irrelevant factor was not relied upon or that other, relevant factors were sufficient and independent grounds for the decision, the court has no basis for concluding the irrelevant factors made no difference. *See TDI v. State Farm*. Therefore, I do not reach the question of whether consideration of the irrelevant factors was harmless.³

Please attempt to agree to a form of an order and submit it to me for approval in early January. If you are not able to reach agreement as to form, please set a hearing through my Court Operations Officer to occur in the first half of January.

Sincerely,



Stephen Yelenosky
Judge, 345th District Court
Travis County, Texas

SY/ar

Original: Hon. Amalia Rodriguez-Mendoza, District Clerk

³ The analysis would begin with considering what, if anything, is left in the subparts to Finding 64 upon which the PUC could properly have relied.