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PUC DOCKET NO. 35665

COMMISSION STAFF'S PETITION	§	PUBLIC UTILITY COMMISSION
FOR SELECTION OF ENTITIES	§	
RESPONSIBLE FOR TRANSMISSION	§	OF TEXAS
IMPROVEMENTS NECESSARY TO	§	
DELIVER RENEWABLE ENERGY	§	
FROM COMPETITIVE RENEWABLE	§	
ENERGY ZONES	§	

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MOTION FOR REHEARING OF THE CITY OF GARLAND

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MOTION FOR REHEARING OF THE CITY OF GARLAND

To The Honorable Public Utility Commission of Texas:

Pursuant to Section 2001.146 of the Texas Administrative Procedure Act,¹ the City of Garland, whose municipally owned electric utility operates under the name Garland Power & Light ("Garland") files its Motion for Rehearing of the Commission's Order on Rehearing ("Order") dated May 15, 2009, placed in the U.S. Postal Service on May 19, 2009 and received by Garland in the U.S. mail on May 20, 2009. This Motion is timely filed.

I. Introduction

The Commission erred when it excluded municipally owned utilities ("MOUs"), including Garland, from selection as a CREZ² transmission service provider ("TSP") because it did so based upon criteria that do not appear in either PURA³ or the Commission's rules. The Commission erred by using after-the-fact criteria in selecting TSPs to construct CREZ transmission facilities. Among other things, the Commission erred by imposing a requirement that only TSPs that are required to obtain a certificate of convenience and necessity ("CCN") may be selected to construct CREZ transmission. The Commission also imposed as a criteria the

¹ Tex. Gov't Code Ann., Chapter 2001 (Vernon 2008) ("APA").

² Competitive Renewable Energy Zone(s).

³ Public Utility Regulatory Act, TEX. UTIL. CODE ANN. § 39.904(g)(2) (Vernon 2007 & Supp. 2008) ("PURA").

payment of property taxes. PURA does not include in the criteria for the development of a CREZ transmission plan and the selection of TSPs either the obtaining of a CCN or the payment of property taxes. Neither criteria appears in the Commission's rules. These new criteria were imposed after the filing of applications and without prior notice to MOUs. None of the reasons given by the Commission support rejection of the application of Garland, an experienced, low cost MOU, to construct CREZ Facilities.⁴ Furthermore, the Commission's order violates section 2001.141 of the APA.

II. The Commission Erred by Applying After-the-Fact Criteria in Selecting TSPs to Construct CREZ Facilities

The Commission erred because: (i) it did not follow PURA § 39.904(g)(2) and P.U.C. SUBST. R. 25.216 criteria; (ii) it applied criteria not found in either PURA § 39.904(g)(2) or P.U.C. SUBST. R. 25.216; (iii) it relied upon non-existent authority to create and consider additional criteria; and (iv) it did not select transmission service providers that would implement a CREZ transmission plan that will be most beneficial and cost-effective to customers. These errors are found in the Order, pp. 6-12; FF 53-72, 75, 76, 78, 79, 81-90, 92, 94-96, 120, 129; and CL 5, 7.

The Legislature has directed the Commission to designate CREZs and to develop a plan to construct transmission capacity necessary to deliver the renewable energy from the CREZs to customers "in a manner that is most beneficial and cost-effective to the customers."⁵ The term "customer" is not defined in Chapter 39, but it is defined in Chapter 17 as any person in whose name retail electric service is billed.⁶ The Legislature's intent to protect the interests of retail

⁴ P.U.C. SUBST. R. 25.216(c)(2).

⁵ PURA § 39.904(g)(2).

⁶ PURA § 17.002(4).

customers is also shown by its inclusion of provisions to protect retail customers in Chapter 39.⁷ The Legislature's use of the term "customers" indicates that it intended that the CREZ transmission plan be judged by its benefits to retail customers. This construction of PURA § 39.904(g) is further supported by the testimony of Pat Wood.⁸ Therefore, the statutory directive to develop a transmission plan that is most beneficial and cost-effective to customers requires consideration of the ultimate impact on retail customers. If low cost TSPs such as Garland are excluded from the construction of the CREZ Facilities, the cost of the CREZ Facilities will be higher than necessary, resulting in higher transmission rates that will be passed on to retail customers.⁹ This result does not meet the statutory standard for the required transmission plan.

Because Garland is an incumbent TSP, its ultimate retail customers will be further adversely impacted if incumbent municipally owned utilities are excluded. This is because the balance of payments in the postage stamp calculation of wholesale transmission rates will change, resulting in higher retail rates for customers served by municipally owned utilities if those TSPs are excluded.¹⁰ The assignment of CREZ Facilities to either an incumbent or new entrant in an amount significantly higher than the percentage of the TSP's existing facilities of the total existing ERCOT facilities will negatively impact the customer load served by all incumbents, including MOUs.

⁷ PURA § 39.101.

⁸ Tr. at 751, line 12 to 752, line 13 (Dec. 2, 2008).

⁹ Tr. at 1039, lines 21-25 (Dec. 3, 2008).

¹⁰ Rebuttal Testimony of Cory J. Allen, STEC Exh. 4 at 20 to 24 and Exhibits CA-1 and CA-2; Tr. at 1038, line 9 to 1039, line 6 (Dec. 3, 2008).

The Commission erroneously cites and relies upon P.U.C. SUBST. R. 25.174(a)(4), which only contains provisions about the designation of CREZs, as its authority to create and apply the additional criteria for the selection of TSPs to construct CREZ Facilities. The only reference in P.U.C. SUBST. R. 25.174 to selection of TSPs is found in P.U.C. SUBST. R. 25.174(c). While that portion of the rule states that the Commission may establish a schedule and reporting requirements to ensure the timely completion of the CREZ Facilities, it does not provide any criteria for the selection of the TSPs. The Commission specified the criteria for selection of TSPs in P.U.C. SUBST. R. 25.216. Applicants relied upon the provisions of P.U.C. SUBST. R. 25.216 and submitted the information required by that rule. In applying the after-the-fact criteria not found in PURA or Commission rules, the Commission erred in not designating Garland as a TSP to construct the CREZ Facilities contained in Garland's CTP Proposal.

As a result of the above-mentioned errors, the Commission has not implemented a plan that is the most beneficial and cost-effective to customers. The Commission's refusal to comply with that statutory directive and select Garland as a TSP to construct CREZ Facilities prejudices Garland's substantial rights because it is (1) in violation of a constitutional or statutory provision; (2) in excess of the agency's statutory authority; (3) made through unlawful procedure; (4) affected by other error of law; (5) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

III. Eligibility for a Certificate of Convenience and Necessity is Not a Requirement for Being Selected as a TSP

The Commission erred because it created a new requirement for selecting a TSP to construct CREZ Facilities, eligibility for a CCN. Order, pp. 9-11; FF 53, 54, 61, 64(a)-(g), 76; CL 5, 7.

MOUs are TSPs because for the purposes of Subchapter A of Chapter 35 of PURA, they are included in the term “electric utility.” In the rule concerning selection of transmission service providers, the Commission defined “Interested TSP” as an entity that meets the definition of TSP provided in P.U.C. SUBST. R. 25.5(143), a definition that expressly includes MOUs.¹¹ TSPs that are municipally owned are not subject to the requirement to obtain a CCN for the construction of transmission lines because the Legislature chose to exempt MOUs when it enacted PURA in 1975. However, the Legislature did give the Commission authority to develop a CREZ transmission plan and to designate the TSPs to construct CREZ Facilities. Pursuant to those provisions of PURA and the Commission’s rules, Garland submitted its application to be designated to construct CREZ Facilities.

Nothing in PURA or P.U.C. SUBST. R. 25.216 requires that a qualified TSP must be obligated to obtain a CCN to be designated to construct CREZ Facilities. The Commission’s rules provide that a MOU may seek and be designated to construct CREZ Facilities. The Commission invited all interested entities to submit expressions of interest in construction of the CREZ Facilities.¹² The rule does not contain a stated disqualification of any existing TSPs, including MOUs.

A reason given for the imposition of a CCN requirement is the alleged lack of due process for landowners. That reason is not justified. Legally, the landowners are afforded due process because they ultimately have the right to challenge condemnation and the valuation of property under applicable statutes regardless of whether a CCN is required. Moreover, the evidence shows that Garland has historically worked with landowners to mitigate routing impacts. Garland has committed to follow the Commission’s rules concerning notice and to

¹¹ P.U.C. SUBST. R. 25.216(c)(5).

¹² P.U.C. SUBST. R. 25.174(c)(1).

apply the routing criteria in PURA and the Commission's rules. Garland will notify all affected landowners on potential routes and encourage landowner participation in the public meetings. Garland will also hold local public hearings. Garland does not intend to develop final routes until after the public hearings.¹³ In addition, Garland has committed to keep the Commission informed concerning routing.¹⁴

No evidence was presented that Garland has failed to notify landowners, work with landowners, or take appropriate mitigation steps to address landowners' concerns. No evidence was presented to support any of the supposed controversies that would occur if Garland continued to operate as it has both before and after the passage of PURA in 1975.

For the reasons stated above, the Commission's imposition of a requirement that a TSP must obtain a CCN and the refusal to select Garland as a TSP to construct CREZ Facilities because it is statutorily exempt from such requirement prejudices Garland's substantial rights because the Commission's refusal is (1) in violation of a constitutional or statutory provision; (2) in excess of the agency's statutory authority; (3) made through unlawful procedure; (4) affected by other error of law; (5) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

IV. Payment of Property Taxes is Not a Requirement for Being Selected as a TSP

The Commission erred in finding that payment of property taxes is a criteria for selecting a TSP to construct CREZ Facilities. FF 53, 54, 61, 64(h), 76; CL 5, 7.

¹³ CREZ Transmission Plan Proposal, Garland Exh. 1 at 19-20 ("CTP Proposal"); Direct Testimony of David Grubbs, Garland Exh. 3 at 14-15; Rebuttal Testimony of David Grubbs, Garland Exh. 8 at 4-5 ("Grubbs Rebuttal").

¹⁴ Grubbs Rebuttal, Garland Exh. 8 at 4.

Nothing in either PURA or the Commission's rules requires that a TSP must pay property taxes to qualify for selection to construct CREZ Facilities. Municipally owned electric facilities are exempt from property taxes by law and constitutional provision. This results in a lower transmission cost of service that benefits the ultimate retail customer, which meets the legislative directive to design the most beneficial and cost-effective plan for customers. All ratepayers in ERCOT will be required to pay for the construction of the CREZ transmission facilities that are, in large part, in areas without any distribution service to ERCOT customers.

For the reasons stated above, the Commission's imposition of a requirement that a TSP must pay property taxes and its refusal to select Garland as a TSP to construct CREZ Facilities because it is exempt from property taxes prejudices Garland's substantial rights because the Commission's refusal is (1) in violation of a constitutional or statutory provision; (2) in excess of the agency's statutory authority; (3) made through unlawful procedure; (4) affected by other error of law; (5) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

V. Garland is Fully Capable of Cost Effectively Constructing and Operating CREZ Facilities

The Commission erred when it found that a municipally owned utility does not have the current and expected capabilities to adequately license, construct, operate, and maintain CREZ Facilities in the most beneficial and cost-effective manner. Order, pp. 7-12; FF 61(e), 64, 75, 76, 78-79; CL 5, 7.

Garland has been providing electric service to its citizens since 1923. Garland is also a full service Qualified Scheduling Entity ("QSE") operating within the Electric Reliability Council of Texas ("ERCOT"). Garland has operated its QSE since they were established in

2000. Garland provides QSE services for other market participants and is the Master QSE for the Texas Municipal Power Agency's ("TMPA") Gibbons Creek Power Plant. Garland's transmission system consists of 24 municipally owned and 5 customer owned substations and 132 miles of transmission lines. Garland serves as the Transmission Operator for its transmission system and all of TMPA's 345-kV and 138-kV transmission lines and substations located in various parts of Texas.

Commission Staff found that it is reasonable to assume that Garland will be able to successfully and adequately construct, operate, and maintain CREZ Facilities.¹⁵ Staff also found that Garland is capable of financing the projects it applied for and has the third lowest financing costs of all interested TSPs and that selecting Garland as a TSP is likely to result in a transmission plan that is lowest cost and most beneficial to customers.¹⁶ No evidence supports the Commission's conclusion that the exclusion of applicants with the most transmission service experience and a low cost of capital is required for the Commission to develop a CREZ transmission plan that is cost-effective and beneficial to consumers.

The Commission justified the ignoring of the benefits of selection of MOUs as TSPs on the grounds of "limited regulatory oversight," i.e., no CCN requirement, and speculation about alleged delays in the projects if MOUs were selected. The findings are not specific to any MOU, and no specific basis is given for the concern about delay. Moreover, the lack of a CCN requirement would allow expedition of the construction of the CREZ Facilities, not a delay. Therefore, the grounds given for the Commission's findings are self-contradictory.

For the reasons stated above, the Commission's refusal to select Garland as a TSP to construct CREZ Facilities prejudices Garland's substantial rights because the Commission's

¹⁵ Direct Testimony of Michael Lee, Staff Ex. 3 at 5-6.

¹⁶ Rebuttal Testimony of Slade Cutter, Staff Ex. 5, at 5-6.

refusal is (1) in violation of a constitutional or statutory provision; (2) in excess of the agency's statutory authority; (3) made through unlawful procedure; (4) affected by other error of law; (5) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

VI. The Commission Erred by Finding and Concluding that It Does Not Have Jurisdiction Over MOUs Selected to Construct CREZ Facilities

The Commission erred in finding and concluding that it does not have jurisdiction over MOUs selected as TSPs to construct CREZ Facilities. Order, pp. 9-12; FF 64, 76; CL 5, 7.

As discussed above, although MOUs are exempt from CCN requirements, Garland is subject to the Commission's regulatory oversight as are all other TSPs under Chapter 35 of PURA. Section 39.904 of PURA specifically provides that transmission service for a CREZ is subject to Chapter 35.

Section 39.904(g)(2) and (j) of PURA requires the Commission to develop and implement a transmission plan that is most beneficial and cost-effective for customers. The Legislature has necessarily granted the Commission the power to determine the general location and routing of the CREZ Facilities, the TSP authorized to construct the CREZ Facilities, the scheduling of the facilities, and oversight requirements. In approving Scenario 2 in its final order in Docket No. 33672, the Commission determined the general location and routing of the CREZ Facilities. In its order in this docket and in Docket No. 36146, the Commission is selecting TSPs to construct CREZ Facilities and establishing schedules and oversight requirements. Also, in its order in this docket, the Commission has exercised its authority to require default providers, including MOUs, to comply with various reporting requirements. The Commission Staff has previously required that default providers, including MOUs, provide

specified reports. In recognition of the Commission's authority under PURA §§ 39.904(g)(2) and (j), Garland submitted its application to be designated as a TSP to construct CREZ Facilities.

For the reasons stated above, the Commission's refusal to select Garland to construct CREZ Facilities prejudices Garland's substantial rights because the Commission's refusal is (1) in violation of a constitutional or statutory provision; (2) in excess of the agency's statutory authority; (3) made through unlawful procedure; (4) affected by other error of law; (5) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

VII. The Commission's Order Does Not Comply with Section 2001.141 of the APA

The Commission erred because it has not provided any specific findings supporting its selection of the designated TSPs and how their selection fulfills the requirements of PURA § 39.904(g)(2) as required by Section 2001.141 of the APA. The Commission further erred because it has not provided any specific findings supporting its rejection of Garland's application. This error permeates the entire order, including without limitation the following: Order at pp. 1-2, 5-12; FF 44-79, 81-96; CL 5, 6.

The Commission merely recites the provisions of P.U.C. SUBST. R. 25.216, but makes no individual findings concerning the merits of any selected TSP or how each selected TSP meets the rule's criteria. The Commission's order provides no guidance concerning the factual basis for the Commission's selection of each designated TSP. The Commission merely makes conclusory collective findings that the selected TSPs meet the Commission's criteria without any findings of fact to support the conclusory findings. The Commission also makes only conclusory and collective findings that MOUs should not be selected as TSPs. The conclusory findings in the Commission's order do not support, and cannot be used to support, any assertion that the

Commission has implemented a CREZ transmission plan that would be most beneficial and cost-effective to customers as required by PURA § 39.904(g)(2).

For the reasons stated above, the Commission's selection of the listed TSPs and the rejection of Garland's application to be designated as a TSP to construct CREZ Facilities is (1) in violation of a constitutional or statutory provision; (2) in excess of the agency's statutory authority; (3) made through unlawful procedure; (4) affected by other error of law; (5) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

VIII. Correction to Finding of Fact No. 76(a)

In Finding of Fact No. 76(a), the Order refers back to Finding of Fact No. 62. Due to the addition of two findings of fact, Finding of Fact No. 62 was renumbered as Finding of Fact No. 64 in the Order on Rehearing. Finding of Fact No. 76(a) should be corrected to properly reference Finding of Fact No. 64.

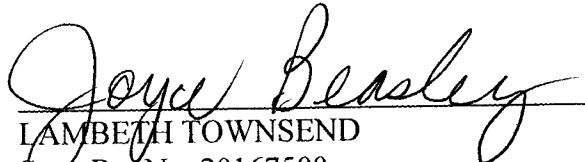
WHEREFORE, PREMISES CONSIDERED, Garland moves that its Motion for Rehearing be granted and Garland be selected as TSP to construct CREZ Facilities.

Respectfully submitted,

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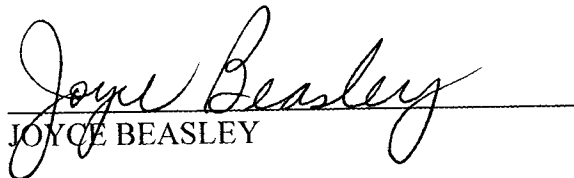

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CERTIFICATE OF SERVICE

I, Joyce Beasley, attorney, certify that a copy of this document was served on all parties of record in this proceeding on this 8th day of June, 2009, in the following manner: hand delivered, e-mailed, sent via facsimile, or mailed by U.S. First Class Mail.


JOYCE BEASLEY