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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

TRAVIS COUNTY, TEXAS

200TH JUDICIAL DISTRICT

JOINT BRIEF IN SUPPORT OF THE FINAL ORDER

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GLOSSARY OF ACRONYMS

APA	Administrative Procedure Act
AR	Administrative Record
CCN	Certificate of convenience and necessity
COL	Conclusion of law
CREZ	Competitive Renewable Energy Zone
CTP	CREZ Transmission Plan
FOF	Finding of fact
GP&L	Garland Power and Light
MOU	Municipally owned utility
PURA	Public Utility Regulatory Act
STEC	South Texas Electric Cooperative
TSP	Transmission Service Provider

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Renewable Energy from Competitive Renewable Energy Zones (the “Final Order”), the Joint Intervenors respectfully show as follows:

I. INTRODUCTION

The Final Order challenged here by Garland faithfully implements a statutory mandate that the Commission “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 competitive renewable energy zones.” Public Utilities Regulatory Act § 39.904(g)(2).¹ The Commission developed a massive evidentiary record and held a five-day hearing before all three Commissioners. Based on that record, it issued a well-reasoned and well-supported order, with detailed and appropriate findings, that explains the reasons for the Commission’s decision and the evidence upon which it relied. As such, the Final Order is supported by substantial evidence, entitled to judicial deference accorded to an expert agency, and the Court should affirm it. In contrast, Garland’s challenge to the Final Order relies upon an untenable statutory construction and a flawed view of the evidentiary record. Essentially, Garland’s argument is that the Commission erred by considering criteria other than estimated costs and by not selecting the alleged low-cost transmission service providers (“TSPs”). Although Garland pays lip service to the statutory language, it ignores the fact that the Commission was tasked to develop a “plan” – not simply to designate a grab bag of TSPs based on whether they may have established some basic qualifications. Garland further ignores the mandate that the plan be “most beneficial and cost-effective to the customers” – a standard that is broader than mere cost and plainly delegates

¹ TEX. UTIL. CODE ANN. § 11.001 et seq. (Vernon 2007 & Supp. 2008) (“PURA”).

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significant discretion to the Commission in designing the plan.² Moreover, although Garland claims to be the low-cost TSP, there is compelling record evidence that contradicts that claim upon which the Commission could properly rely. Finally, Garland's allegation that the Commission "categorically" excluded municipally owned utilities ("MOUs") from consideration is incorrect – the Final Order makes clear that the Commission carefully evaluated the specific MOU proposals based on a full and fair consideration of the evidence.

II. STATEMENT OF THE NATURE OF THE CASE AND STATEMENT OF FACTS³

This case is before the Court as an administrative appeal of the Commission's Final Order in Docket No. 35665, brought by the City of Garland.

The Final Order, issued on May 15, 2009, was the culmination of three and a half years of proceedings at the Commission in which the Commission, its staff ("Staff"), and countless wind developers, transmission providers (including Garland and other MOUs), and others, worked diligently to implement the directives of Senate Bill 20, 79th Legislature, 1st Called Session (2005), which amended the PURA § 39.904, relating to the Goal for Renewable Energy. Since the passage of Senate Bill 20, the Commission has conducted two substantial rulemakings, beginning in January 2006, with the commencement of Commission Project No. 31852, *Rulemaking Relating to Renewable Energy Amendments*. With significant participation and

² The Commission has the implied discretion to interpret statutory terms that it must administer. *Southwestern Bell Tel. Co. v. Pub. Util. Comm'n of Tex.*, 745 S.W.2d 918 (Tex. App.—Austin 1988, writ denied).

³ The Statement of Facts and the Statement of the Nature of the Case are combined. The Local Rules of Civil Procedure and Rules of Decorum for the District Courts of Travis County, Texas ("Local Rules") provide that initial briefs of defendants in administrative appeals must include a statement of the nature of the case and a statement of facts, with statements of any disagreement with the Plaintiff's statement of the nature of the case and statement of facts in each section. The Local Rules also provide that a defendant's initial brief shall include reply points, separately numbered and specifying the point or points it addresses. Because Garland stood on its Brief in Support of its Request for Temporary Injunction as its initial brief on the merits, Garland's initial brief is not organized as contemplated by the Local Rules. Therefore, this Joint Brief will attempt to comply with the form contemplated by the Local Rules to the extent practical, but will not strictly comply in all circumstances because of the nature of the Garland brief to which this Joint Brief responds.

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briefing, the Commission has adopted two new Substantive Rules, conducted three hearings on the merits in two contested dockets, designated competitive renewable energy zones (“CREZ”), adopted a CREZ transmission plan (“CTP”) identifying transmission facilities necessary to bring renewable energy generated in the CREZ to load centers, and, in the Final Order, designated TSPs to construct, operate, and maintain those facilities (“CTP Facilities” or “CREZ Facilities”). The Final Order directly results from the proceedings in Commission Docket No. 35665, the competitive selection process in which Garland and other MOUs fully participated.

In its Original Petition and Application for Stay and Injunction (the “Petition”) filed with this Court on July 7, 2009, Garland sought reversal of the Final Order and the issuance of a temporary and permanent injunction preventing the implementation of the Final Order.⁴ The application for temporary injunction was denied by this Court in an order dated October 29, 2009. In its remaining administrative appeal, Garland alleges generally that: (1) the Commission acted in excess of its statutory powers and mandate in issuing the Final Order; (2) the Commission arbitrarily and capriciously “disqualified” Garland based on new, after-the-fact, legally irrelevant criteria; (3) the Final Order is based on findings that are simply conclusory and couched in statutory terms in direct violation of Section 2001.141 of the Administrative Procedure Act (“APA”); and (4) the Final Order is not supported by substantial evidence. *See* Garland’s Brief at p. 1. In doing so, Garland admits that its complaints arise from the fact that it was not selected to construct, operate, and maintain a portion of the CREZ Facilities when the Commission was “handing out pieces of the pie”⁵ and, while “not greedy,”⁶ Garland, a “not-for-

⁴ Despite the massive amount of participation by a multitude of parties in the three and a half years of proceedings that preceded the Final Order, Garland is the only party appealing the Final Order.

⁵ Garland’s Brief at p. 3.

⁶ Garland’s Brief at p. 4.

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profit municipal utility”⁷ was somehow entitled to a portion of the “[l]iterally hundreds of millions of dollars of pure profit *per year* . . . at stake.” Garland’s Brief at p. 4 (emphasis in original).

Garland now seeks to derail the more than three years of CREZ-related work described above, on the eve of its long awaited implementation, apparently because Garland does not stand to profit from the Commission’s ultimate decision in Docket No. 35665, as documented in the Final Order.

In Docket No. 35665, the Commission was further refining the development of an approximately \$4.9 billion dollar plan to bring renewable wind energy from the wind-rich zones of West Texas to population centers where the renewable energy would ultimately be consumed. More particularly, in Docket No. 35665, the Commission selected those transmission service providers that would build the transmission facilities identified in that plan.

The legislature’s charge to the Commission in this matter was simply 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 [the] ...renewable energy zones.” PURA § 39.904(g)(2) (emphasis added). Obviously, a charge of this breadth provides wide latitude for the exercise of discretion in the actual development and implementation of such a plan, and the Commission’s expertise in this arena makes it well-suited to exercise such discretion.

Garland proposed to build just \$113 million worth of transmission facilities, or roughly 2.3% of the entire plan. Thus, Garland was one of the smallest-scale bidders, seeking to build only a fairly minor part of the plan as a whole. One aspect of Garland’s bid that troubled the

⁷ Petition at p. 2.

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Commission was that Garland proposed to build transmission line segments located literally hundreds of miles from its municipal jurisdiction and existing infrastructure. Also troubling to the Commission was the fact that, as a municipally owned utility, Garland would not be subject to the Commission's oversight of the routing or timing of construction of transmission lines (exercised through the Commission's contested case process of applying for and securing a Certificate of Convenience and Necessity ("CCN"), from which process municipalities are statutorily exempted). *See* PURA § 37.051 (requiring an electric utility to obtain a CCN from the Commission); PURA § 31.002(6) (excluding an MOU from the definition of electric utility). The Commission was legitimately concerned that Garland's ability to avoid the Commission's contested case process for choosing the final routing of the lines and the Commission's continuing oversight over the construction of the lines, coupled with the fact that it would be condemning right-of-way for transmission lines hundreds of miles from its city limits, would generate accountability concerns among the landowners over whose property the lines would be built, exclude them from the otherwise well-developed and available Commission procedures for contesting transmission line routes, and ultimately lead to increased litigation and delay.

Garland contends that it should have been chosen to build the lines it asked for because it allegedly has one of the lowest costs to fund any project it was awarded (lowest cost of capital). However, the evidence before the Commission was conflicting as to whether this factor would ultimately translate into a lower rate for customers. For example, as described further in Reply Point 5 below, while Garland's expected rate to borrow money to build the project may have been low, its cost to construct the lines was higher than most others', and the return it sought on its investment was higher. Consequently, the record evidence before the Commission does not incontrovertibly yield a conclusion that Garland's total cost of service would be lower than that

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of the other interested parties competing to build the lines and in fact could actually be higher. In any case, Garland's projected cost amount touches on only one of many factors the Commission was required to consider in determining which providers should be included in the most beneficial and cost effective transmission plan.

Ultimately, in designing the most beneficial and cost effective plan, the Commission chose not to award the right to construct, operate, and maintain CTP Facilities to Garland, deciding that the purported benefit to the plan as a whole of having Garland build such a small piece of the transmission infrastructure was outweighed by the likely adverse consequences of Garland's involvement.

The Commission's decision in this matter was an exercise of its judgment and broad statutory discretion to implement the CTP in the most beneficial and cost-effective manner for customers. That judgment was amply supported by substantial evidence in the record before the Commission, and simply cannot be gainsaid by Garland.

III. SUMMARY OF THE ARGUMENT

As explained below, Plaintiff's allegations that the Commission erred in issuing a Final Order that did not select Garland as a CREZ TSP are erroneous.

First, the Commission did not act in excess of its statutory powers and mandate when it did not award CREZ Facilities to Garland, because Garland was in no sense "excluded" from consideration as a CREZ TSP, and the Commission was not required by statute or rule to award those Facilities to any particular party, including Garland or any MOU;

Second, the Commission did not arbitrarily and capriciously "disqualify" Garland based on new, after-the-fact legally irrelevant criteria, because the relevant statute and rule give the

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Commission broad discretion to consider criteria other than those specifically listed in the governing Commission rule;

Third, the Final Order contains the type of findings required by Section 2001.141 of the Texas Administrative Procedure Act;

Fourth, the Final Order, including its findings related to MOUs, is clearly supported by substantial evidence; and

Fifth, the record evidence was disputed as to whether Garland's cost of providing service is lower than the selected TSPs, and in any event that factor does not alone entitle Garland to selection to construct CTP Facilities.

IV. LEGAL STANDARDS

A reviewing court may reverse or remand an agency decision for further proceedings if substantial rights of the plaintiff have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) in violation of a constitutional or statutory provision; (2) in excess of an 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. TEX. GOV'T CODE ANN. § 2001.174 (Vernon 2000 & Supp. 2006). In reviewing the Commission's decision, the court must examine the order and, in consideration of the administrative record as a whole, determine whether it is reasonably supported by substantial evidence. *See Granek v. Tex. State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 778 (Tex. App.—Austin 2005, no pet.).

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A. The Substantial Evidence Standard

As Garland acknowledges, judicial review of the Final Order is conducted under the substantial evidence rule. Garland's Brief at p. 23; *See also* PURA § 15.001; APA § 2001.174. Under that standard, the question for this Court is whether some reasonable basis exists in the record for the agency's decision. Where the agency is addressing complex matters involving technical expertise, as is the case here, its decision is entitled to judicial deference. Therefore, the substantial evidence standard is critical to the Court's decision in this case.

An administrative decision is not supported by substantial evidence if the evidence as a whole is such that reasonable minds could not have reached the same conclusion that the agency must have reached in order to justify its decision. *See Tex. Health Facilities Comm'n v. Charter Med.-Dallas, Inc.*, 665 S.W.2d 446, 452-53 (Tex. 1984); *see also Hammack v. Public Util. Comm'n*, 131 S.W.3d 713, 727 (Tex. App.—Austin 2004, pet. denied). In determining whether an agency decision passes the substantial evidence test, two questions must be answered: (1) do the findings of fact stated in the agency order fairly support the agency's findings of ultimate fact or conclusions of law also stated in the order as the basis for the agency decision; and (2) if so, do the findings of underlying fact have reasonable support in the record of the administrative proceeding. *See Charter Medical*, 665 S.W.2d at 452-53. The test is not "whether the agency reached the correct conclusion, but whether some reasonable basis exists in the record for the action taken by the agency." *Id.* at 452. A reviewing court must consider only the reasonableness of the Commission's order and may not substitute its judgment for the agency's in making its determination. *See City of El Paso v. Public Util. Comm'n*, 883 S.W.2d 179, 185 (Tex. 1994). The quantum of evidence required to constitute "substantial evidence" is only more than a scintilla. *Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 566 (Tex. 2000).

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Indeed, the evidence can even preponderate against an agency's finding yet still constitute substantial evidence. *Mireles v. Tex. Dep't of Pub. Safety*, 9 S.W.3d 128, 131 (Tex. 1999).

The question here is not whether the Commission reached the correct conclusion, but whether any possible reasonable basis exists in the record for the Commission's action. *Id.* This Court may not substitute its judgment for the Commission's as to the weight of evidence on questions committed to agency discretion. TEX. GOV'T CODE ANN. § 2001.174. The agency alone has the power to weigh evidence and assess the credibility of witnesses. *Nucor Steel v. Public Util. Comm'n*, 26 S.W.3d 742, 748-49 (Tex. App.—Austin 2000, pet. denied). In reviewing an agency order, the “findings, inferences, conclusions, and decisions of an administrative agency are presumed to be supported by substantial evidence, and the burden is on the contestant to prove otherwise.” *Charter Medical*, 665 S.W.2d at 453. This is particularly true in a case such as this, where the Commission was relying on its considerable expertise “in calibrating the various technical aspects of this complex statutory scheme and in integrating the various policy considerations of a transitioning industry.” *See Power Resources Group, Inc. v. Pub. Util. Comm'n*, 73 S.W.3d 354, 357 (Tex. App.—Austin 2002, pet. denied). In cases where an agency is charged with deciding matters of unusual complexity involving technical expertise, courts generally defer to the decisions of the administrative agency. *Hunter Indus. Facilities, Inc. v. Texas Natural Resource Conservation Comm'n*, 910 S.W.2d 96, 111 (Tex. App.—Austin 1995, writ denied).

B. The Arbitrary and Capricious/Abuse of Discretion Standard

An agency decision is considered arbitrary or capricious or an abuse of discretion if the agency committed one of the following errors in making its decision: (1) failed to consider a factor that the legislature intended it to consider; (2) considered an irrelevant factor; or (3) reached a completely unreasonable result after weighing the relevant factors. *See City of El*

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Paso, 883 S.W.2d at 184; see also *Statewide Convoy Transps. v. Railroad Comm'n*, 753 S.W.2d 800, 804 (Tex. App.—Austin 1988, no writ). If an administrative decision is found to be supported by substantial evidence, the decision will not be found to be arbitrary and capricious unless there has been a violation of due process or some other unfair or unreasonable conduct that shocks the conscience. See *Tex. State Bd. of Dental Exam'rs v. Silagi*, 766 S.W.2d 280, 285 (Tex. App.—El Paso 1989, writ denied). It is also an abuse of discretion for an agency to fail to supply an explanation or reason for its decision when an explanation is necessary to an intelligent understanding of the agency's final order. See *City of El Paso v. El Paso Elec. Co.*, 851 S.W.2d 896, 900-901 (Tex. App.—Austin 1993, writ denied).

V. REPLY POINTS AND ARGUMENT

Reply Point 1: The Commission acted consistent with its statutory mandate because it allowed MOUs including Garland to participate in the TSP selection process and fully considered the merits of MOUs for selection as CREZ TSPs. (Reply to points A and B, pp. 11-14 of Garland's Brief).

In its Brief, Garland argues that “the Legislature never intended that MOUs be excluded across the board from being considered on the merits for building the new transmission lines,” and that “the Commission exceeded its statutory authority and violated its direct statutory mandate by excluding MOUs before the merits were considered.” Garland's Brief at pp. 11 and 13. These arguments are based on the erroneous presumption that MOUs were somehow *categorically excluded* from participating in the TSP selection process and were not considered as potential CREZ TSPs. The Joint Intervenors do not contend, nor does the Commission's Final Order state or imply, that the legislature intended that “MOUs be stricken from the invitation list and not allowed to compete on the merits or demerits of the particular MOU's situation,” as Garland asserts. Garland's Brief at p. 13. As discussed below, the Commission did not exclude Garland or other MOUs from consideration.

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Rather, the Commission carefully considered the voluminous evidence put before it by Garland and other participants in the proceeding and decided that MOUs like Garland, while qualified to be considered, were not among the most beneficial and cost-effective TSPs for selection to build the transmission facilities. By contrast, to understand how the Commission treated an entity it found to be not qualified to be a CREZ TSP, the court can easily compare the Commission's treatment of Garland with the Commission's decision regarding Tejas Transmission. *See* Final Order at p. 42, FOF 80. In other words, MOUs were not excluded from consideration or participation in the competitive selection process in Docket No. 35665 because they had been peremptorily or categorically determined to be unqualified. Instead, they simply were not awarded CTP Facilities after all of the evidence was considered, because the Commission did not consider them to be the most beneficial and cost effective candidates. The criteria Garland claims were imposed to eliminate MOUs were not exclusionary criteria but were considerations taken into account by the Commission based on the evidence. The Commission carefully evaluated the evidence related to Garland and determined that there were major pitfalls inherent in selecting Garland or another MOU, as the Commission comprehensively described in its Final Order.

Garland's full participation in Docket No. 35665 is clearly reflected in the administrative record. For example, Garland intervened in the proceeding on June 2, 2008. On July 24, 2008, Garland filed a Joint Initial Statement of Interest with Texas Municipal Power Agency ("TMPA"), another MOU. On September 12, 2008, Garland filed its CREZ Transmission Plan Proposal and Direct Testimony, consisting of the direct testimony of three different witnesses. Garland responded to a variety of pleadings in the docket. *See, e.g.*, Reply of the City of Garland to Joint Parties' Motion to Assign and Sever Priority Facilities (Sep. 26, 2008) (AR Binder 14,

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item no. 240); Reply of the City of Garland to Joint Parties' Motion to Sever Issues Related to Uncontested Projects (Oct. 2, 2008) (AR Binder 14, item no. 259). Eighteen hearing exhibits were offered by Garland and admitted. Garland was allotted 70 minutes for cross examination at the hearing, which is among the greater time allotments for participants at the hearing. Tr. Vol. 1, p. 14.⁸

Garland cites no evidence, findings, or even discussion to support its repeated assertions that it and other MOUs were "excluded across the board from being considered on the merits," (Garland's Brief at p. 11) or that the "Commission has crossed off all MOUs from the list of entities to be considered." Garland's Brief at p. 3. A review of the Final Order itself, as detailed below, reveals that Garland *was* afforded the opportunity to participate in the selection process in a meaningful way, *did* participate extensively, *was* evaluated on the merits, and emphatically was *not* excluded from the process. Indeed, the record demonstrated that through the end of the proceeding, when the Commission requested additional financial information from all applicants, the Commission was continuing to consider evidence submitted by Garland. At most, Garland has shown only that the Commission did not select it and other "Interested TSPs" at the end of a competitive selection process, in which MOUs and other Interested TSPs participated.

The governing rule provides that "Interested TSPs," as defined in P.U.C. SUBST. R. 25.216(c)(5), may submit CTP Proposals in competition with other Interested TSPs, and the Commission will evaluate and select the most qualified providers from among these proposals. 16 TEX. ADMIN. CODE § 25.216 (d), (e). Accordingly, to qualify for evaluation under the rule, Garland had to qualify as an Interested TSP, submit a Proposal, and participate in the Commission's competitive selection process under the criteria described in Substantive Rule

⁸ Garland's attorney, Mr. Lambeth Townsend, also represented TMPA (of which Garland is one of the four member cities), which was awarded 65 minutes. Thus Mr. Townsend had a total of 135 minutes to cross examine witnesses on behalf of his MOU clients, more time than any other participant in the hearing on the merits.

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25.216 (e). Garland timely submitted a proposal (Final Order at p. 29, FOF 29); the Commission received Garland's proposal and admitted it into evidence (AR, Binder 25, Garland Ex. 1); Garland submitted responsive and rebuttal testimony into evidence (AR Binder 25, Garland Exs. 3-9); the Commission requested that MOUs including Garland submit additional financial information (Final Order at pp. 37-38, FOFs 57 and 57a); Garland timely filed this information (Final Order at p. 38, FOF 58); Garland filed a post-hearing closing statement (AR Binder 19, item no. 606); and the Commission evaluated all the Interested TSPs' Proposals by considering the evidence and testimony submitted on each proposal (Final Order at pp. 41 and 59, FOF 74 and COL 4). All these findings establish that the Commission did not exclude Garland from consideration, that Garland was afforded the same opportunity as all other TSPs to demonstrate that it should build CREZ transmission facilities, and that the Commission evaluated Garland's proposal along with all the others. Garland does not cite any finding or conclusion saying the Commission was excluding the MOUs or not considering their applications.

Garland's entire argument constitutes a very simple logical fallacy: because it was not selected, it must not have been considered. But as noted above, not every TSP that was qualified (*i.e.*, was an "Interested TSP") was guaranteed to be selected. More importantly, the substantive rule's criteria, which Garland claims the Commission inappropriately supplemented during the proceeding, are expressly stated as minimum standards only, which the Commission could supplement in the contested case based upon specific factors presented by the evidence. The Commission did no more than implement the axiom that an agency rule may include a broad standard with a non-exclusive, illustrative list of particular conduct or criteria governed by the rule. *TXU Generation Co., L.P. v. Public Util. Comm'n*, 165 S.W.3d 821, 839-42 (Tex. App.—

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Austin 2005, pet. denied). Such a rule does not preclude the Commission from considering other evidence bearing on implementation of the most beneficial and cost-effective CTP.

The Commission's reason for not selecting an entity on the grounds that it would not be subject to the Commission's oversight throughout the CCN process, for example, is entirely appropriate and certainly well within the discretion that the legislature granted to the Commission, recognizing its expertise in this area. The Commission was legitimately concerned with the lack of due process afforded to landowners who would be affected by Garland's construction of a transmission line, particularly since those landowners would be far from the Garland city limits and unable to vote in Garland's elections or to voice their concerns to the Commission through a CCN contested case proceeding (Final Order at p. 39, FOF 64d). The Commission utilized this factor not to exclude Garland or other MOUs from consideration altogether, but to weigh the parties' relative merits as it made its selection from among qualified Interested TSPs. This is akin to an employer receiving more qualified applications than available jobs, and applying some objective means of sorting out the qualified applicants for the limited spots. The Commission was entitled under the very terms of its rule to apply additional criteria as needed to select the most beneficial and cost-effective TSPs from among the pool of qualified Interested TSPs. That does not amount to excluding any Interested TSP from being considered. It just means Garland and other qualified MOUs were not ultimately selected to build parts of the CREZ transmission system.

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Reply Point 2: The Commission correctly interpreted and applied the criteria in PURA § 39.904(g)(2) and P.U.C. SUBST. R. 25.216(e) and considered legally relevant factors in its decision. (Reply to point C, pp. 14-19 of Garland's Brief).

A. The Commission's TSP selections are consistent with PURA § 39.904(g)(2) and P.U.C. SUBST. R. 25.216(e).

Garland tries to cast the Commission's TSP selections as arbitrary and capricious for allegedly not considering the governing statute, PURA § 39.904(g)(2), or for selecting TSPs other than Garland notwithstanding evidence Garland was the "low cost provider." Garland's Brief at pp. 14-15. Garland's theory relies upon two invalid premises: (1) that the evidentiary record contains no evidence to rebut Garland's claim that it was the "low cost provider," and (2) that the governing statute compels the Commission to select only the lowest cost providers to the exclusion of all other considerations.

As to the first premise, Garland provides this Court with no actual evidence in the administrative record that would support its claim. Garland simply says, without record citations, that "the only evidence (and it is undisputed) is that Garland and other MOUs are the low cost providers for the segments of the lines that they applied to build." Garland's Brief at p. 14. Garland at most adds, "[f]or example, Garland's cost of capital...was lower than all but one of the entities selected (STEC) according to the Commission Staff." Garland's Brief at p. 15. Notably, this is not an actual Commission finding, and Garland fails to discuss the considerable evidence that Garland is not a "low cost provider," which is outlined in Reply Point 5 of this Joint Brief. Garland's evidence was strenuously disputed, and the Commission had discretion to weigh this competing evidence.

On Garland's other claim, that the Commission acted arbitrarily and capriciously in not selecting the "low cost provider," Garland mischaracterizes the statutory requirements. PURA § 39.904(g)(2) provides that the Commission "shall develop a plan to construct transmission

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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 competitive renewable energy zones.” (emphasis added).

In order to support its claim that PURA requires the Commission to select the lowest cost provider for specific lines, Garland must re-write the statute in three respects. First, the legislature did not require the Commission to select specific providers on the basis of their being able to build specific lines for the lowest cost. Instead, the statute requires the Commission to adopt 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 Commission did just that – considering the unified plan as a whole, including the “balance in selecting multiple entities as TSPs.” Final Order at p. 9. Second, Garland ignores the word “beneficial.” The lowest cost provider may not necessarily be the most beneficial one to the customers or to the CREZ plan as a whole, just as the low-bidder on a bridge construction project may not be the best choice in terms of safety and other considerations. Third, Garland changes “cost-effective” to “lowest cost,” even though the two concepts are not the same. Indeed, the governing Commission substantive rule expressly requires the Commission to evaluate TSPs on non-cost factors, such as “the expertise of the Interested TSP’s staff” and “the Interested TSP’s proposed schedule for development and completion of each CTP Facility.” 16 TEX. ADMIN. CODE § 25.216(e). The Commission provided ample reasons in its findings of fact, particularly Finding of Fact 64 (discussed herein), as well as Findings of Fact 76, 78-79, and 81-90 and related discussion, to demonstrate that the TSPs it selected are part of the most beneficial and cost-effective plan for transmission improvements, while those it did not select are not.

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The underlying record demonstrates that the Commission took its responsibility to develop a plan that is “most beneficial and cost-effective to the customers” seriously, evaluating not only cost issues but also the complex technical and financial issues involved in coordinating the build out of approximately \$4.9 billion of transmission facilities among numerous entities. Put simply, the development of the “most beneficial and cost-effective” CTP does not necessarily mean selecting the lowest cost TSPs. Rather, it involves the careful balancing of many factors. The Commission found as much, stating:

62. It is important to strike the proper balance between the benefits of selecting a large pool of TSPs to participate in the CTP in order to spread financial risk, introduce novel technologies, and diversify sources of skills and materials against the benefits of selecting a small number of TSPs in order to avoid unnecessary complexity and coordination difficulties.

Final Order at p. 39, FOF 62. Garland’s attempt to isolate and elevate one half of the statutory standard – the cost-effectiveness issue – to the exclusion of the “most beneficial” criterion is inappropriate.

In addition to considering the “cost-effective” standard, the Commission focused its analysis on the “most beneficial” portion of the statutory standard, which involved issues such as the timely and reliable completion of the CREZ Facilities. The Commission’s Final Order reveals considerable concern about sequencing and oversight of the CTP build-out. *Id.* at pp. 13-18 (establishing process for sequencing the CREZ projects), 20-23 (prescribing Commission oversight and project reporting requirements). The Commission’s limited jurisdiction over MOUs, particularly its inability to revoke a CCN for non-performance, conflicted with these oversight responsibilities. *See* PURA § 31.002(6)(A) (excluding municipal corporations from the definition of “electric utility”); *see also* Final Order at pp. 39-40, FOF 64(g) (noting that “the Commission would not have the ability to revoke a CCN for a CTP facility from a municipally

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owned utility”). As a result, the Commission determined that its limited authority over the MOUs undermined its ability to ensure the CREZ Facilities were constructed in a manner that is most beneficial and cost-effective to the customers, and that this fact outweighed any advantages associated with selection of the MOUs. Final Order at p. 42, FOF 76(b). This is the precise analysis the CREZ statute’s standard requires. Accordingly, the Commission’s decision was consistent with PURA § 39.904(g)(2) and P.U.C. SUBST. R. 25.216(e).

B. The Commission considered legally relevant factors in its decision.

In its Petition, Garland claims that the Commission applied “after-the-fact” criteria for selection of TSPs to exclude MOUs by finding that the applicant must be subject to the CCN requirements of PURA and pay property taxes. While this is not an accurate characterization of the Commission’s findings (*See* Final Order FOFs 64 and 76, described below), a plain reading of the relevant statute and substantive rule makes clear that the Commission did not err in considering the Commission’s certification jurisdiction over MOUs, or the ability of the MOUs to pay property taxes.

This Court must defer to the Commission’s interpretation of the statutes governing its actions and its own rules as long as that interpretation is reasonable and does not conflict with the provision’s plain language. *Anderson-Clayton Bros. Funeral Home, Inc. v. Strayhorn*, 149 S.W.3d 166, 178 (Tex. App.—Austin 2004, pet. denied) (holding that even if there are other reasonable interpretations, courts will accept agency’s construction of a statute if it is consistent with its language and purpose). In fact, PURA contemplates that a CCN would be obtained by the selected TSPs, and the Commission’s consideration of CCNs is consistent with the statute. In particular, the statute states that in “considering an application for a certificate of public convenience and necessity for a transmission project intended to serve a [CREZ],” the Commission is not required to consider all of the usual factors in a CCN application. PURA

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§ 39.904(h). This provision clearly indicates that the legislature anticipated that the selected TSPs would apply for a CCN for the projects they were awarded.

PURA § 39.904(g)(2) provides that the Commission “shall 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 competitive renewable energy zones.” P.U.C. SUBST. R. 25.216(e) provides, in relevant part, as follows:

[t]he commission will evaluate each CTP Proposal [a filing to be submitted by each TSP seeking assignment of CTP Facilities] received by considering, *at a minimum*, the current and expected capabilities of the Interested TSP to finance, license, construct, operate, and maintain the CTP Facility or Facilities in the most beneficial and cost-effective manner and the expertise of the Interested TSP’s staff, the Interested TSP’s projected capital costs and operating and maintenance costs for each CTP Facility, the Interested TSP’s proposed schedule for development and completion of each CTP Facility, the Interested TSP’s financial resources, the Interested TSP’s expected use of historically underutilized businesses unless the Interested TSP is an electric cooperative or municipally owned utility, and the Interested TSP’s understanding of the specific requirements to implement the CTP Facilities in its CTP Proposal and, if applicable, the Interested TSP’s previous transmission experience and the Interested TSP’s historical operating and maintenance costs for its existing transmission facilities.

(emphasis added). The rule then goes on to provide a list of information that each TSP should submit with its CTP Proposal, including “[o]ther evidence, at the discretion of the Interested TSP, which supports its selection as a Designated TSP.” 16 TEX. ADMIN. CODE § 25.216 (2009).⁹ As is clear from the plain language of both PURA § 39.904(g)(2) and P.U.C. SUBST. R. 25.216(e), the Commission is given considerable discretion in selecting TSPs to construct CTP Facilities, and is given a *non-exhaustive* list of factors to consider when making that selection.

⁹ Notably, Garland did not participate in the rulemaking proceeding in which the Commission adopted the TSP selection rule. See *Rulemaking Proceeding to Amend PUC Substantive Rules Relating to Selection of Transmission Service Providers Related to Competitive Renewable Energy Zones and Other Special Projects*, PUC Project No. 34560, Order Adopting New §25.216 as Approved at the May 22, 2008 Open Meeting at (1-2)(listing parties who submitted comments on the proposed rule).

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Clearly, both PURA § 39.904(g) and P.U.C. SUBST. R. 25.216(e) set forth a very broad standard that gives the Commission considerable discretion in designating TSPs to construct, operate, and maintain CTP Facilities. *See Hammack*, 131 S.W.3d at 723. The CREZ statute's broad standard is intended to guide the Commission in its development of the CTP. Thus, it is within the Commission's discretion to determine what factors to consider when deciding the best plan for ensuring the CREZ Facilities are constructed in a manner that is most beneficial and cost-effective to the customers. *Texas Citizens for a Safe Future & Clean Water v. Railroad Comm'n*, 254 S.W.3d 492, 499 (Tex. App.—Austin 2007, pet. filed) (citing *Public Util. Comm'n v. Texas Tel. Assoc.*, 163 S.W.3d 204, 213 (Tex. App.—Austin 2005, no pet.)). Furthermore, the factors considered by the Commission and the methods it has selected to ensure that the CREZ statute's standard is satisfied is entitled to judicial respect. *Hammack*, 131 S.W.3d at 723 (“Because administrative agencies are given their statutory powers with a view to achieving legislative purposes more fully and effectively through the agency’s specialized judgment, knowledge, and experience, the methods chosen by the agency, and its interpretation of the statute it is required to administer, are entitled to judicial respect.”).

The process described in P.U.C. SUBST. R. 25.216(e) is a competitive selection process, with no guarantee or even indication that every applicant is entitled to assignment of CTP Facilities, even if it is qualified. The Commission is directed only to select the *most* qualified TSPs. The Commission is entitled to consider a variety of relevant factors in selecting TSPs to construct, operate, and maintain CTP Facilities. Its consideration of the Commission's certification jurisdiction over MOUs, and the ability of MOUs to pay property taxes was neither “after-the-fact” nor improper. Indeed, it plainly was within the Commission's discretion in determining which providers were “most beneficial” to consider that the payment of such

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property taxes serve to compensate local communities for the impact of the transmission infrastructure and provide important revenue to local governments, as well as to consider the impact on depriving landowners of the right to be heard regarding routing decisions in a Commission CCN proceeding.

C. Garland had notice of the factors that the Commission considered.

Finally, Garland received advanced notice of these criteria but chose not to modify its application. An agency may apply different criteria or standards in a contested case than previously announced criteria if the parties are afforded notice before the hearing that other parties are proposing the new standards. *Austin Chevrolet, Inc. v. Motor Vehicle Bd.*, 212 S.W.3d 425, 435-36 (Tex. App.—Austin 2006, pet. denied). This can occur through the discovery process such as by exchange of expert reports. *Id.*

Here, Garland had ample notice before the hearing that parties were contending the Commission should not award projects to MOUs due to the CCN issue. Several witnesses filed responsive testimony before the hearing raising this issue (Cross-Texas Ex. 2 at 17 [Willick Responsive Testimony]; ETT Ex. 9 at 7, 17-18 [Crowder Responsive testimony]; Sharyland Ex. 7 at 2, 10 [Goodlet Responsive Testimony]; Joint Parties Ex. 4 at 19 [Dyer Direct Testimony]). Indeed, Staff recommended awarding Garland a transmission project if it would commit to partnering with another non-municipal TSP out of concern over the CCN issue (Staff Ex. 11 and 16 [Almon Second Supplemental Responsive Testimony]). Garland had notice before the hearing and before its rebuttal testimony was due that parties were contending the Commission should not select it based on the fact that it did not need a CCN. Well before the hearing, Garland could have revised its application to partner with another TSP, or participate in another project on a financial basis, or form a joint venture company with another TSP or devise some other way to address the CCN issue. Instead, Garland chose to urge that the Commission cannot

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consider an MOU's inability to obtain a CCN, and stated that it would only "commit[] to work in good faith to enter into a commercially reasonable agreement" with another TSP if selected to build transmission. (AR Binder 19, item no. 606, Closing Argument of the City of Garland at pp. 4-7). Garland had ample pre-hearing notice of any alleged "after the fact" criteria and an opportunity to address those issues before hearing. That it chose not to do so does not render the Commission's reliance on those criteria erroneous.

Reply Point 3: The Final Order contains findings required by Section 2001.141 of the Texas Administrative Procedure Act (Reply to point D, pp. 20-23 of Garland's Brief).

Garland generally contends that the Final Order has not provided any specific fact findings supporting (1) the selection of the designated TSPs, and (2) the decision not to select MOUs, as required by Section 2001.141 of the APA. This is simply not true.

Section 2001.141 of the APA provides that "findings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings." APA § 2001.141(d). These "ultimate findings" consist of findings that embody a mandatory fact finding set forth in the relevant enabling act or a factor that statute requires the agency to legally act upon in the matter before it. *Charter Medical*, 665 S.W.2d at 450-51. Underlying findings that support ultimate findings must be clear and specific, such that parties can intelligently prepare an appeal and a reviewing court can fairly and reasonably review the agency's actions. *Public Util. Comm'n v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 413 (Tex. 1995); *Goeke v. Houston Lighting & Power Co.*, 797 S.W.2d 12, 15 (Tex. 1990). Yet, underlying findings need not follow any precise form or meet some hyper-technical level of detail, and must merely demonstrate what the agency was thinking when it weighed the balance of the evidence. *GTE-Southwest*, 901 S.W.2d at 412; *Goeke*, 797 S.W.2d at 15; *see also* Beal, 1 Texas Administrative Practice and Procedure § 8.3.5 at 8-62 (2007). An agency need not specify which

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underlying findings support each of its ultimate findings. *Smith Motor Sales, Inc. v. Texas Motor Vehicle Comm'n*, 809 S.W.2d 268, 271-72 (Tex. App.—Austin 1991, writ denied).

Here, the only mandatory statutory consideration is whether the Commission's TSP selections are consistent with the CREZ statute's requirement to "develop a plan to construct transmission capacity necessary to deliver [electricity from competitive renewable energy zones (CREZs)] to electric customers, in a manner that is most beneficial and cost-effective to the customers." PURA § 39.904(g)(2). Findings of Fact 75, 79-80, 92, and 95-96 provide the ultimate findings embodying the Commission's consideration of the CREZ statute's directive. These findings state that the selected TSPs are capable of building CREZ Facilities in the most beneficial and cost-effective manner, and should participate in the plan according to the assignments made.

The Final Order also contains underlying findings of fact explaining how the Commission selected the TSPs. Finding of Fact Nos. 52-73 and the discussion on pages 6-11 of the Final Order extensively describe the selection criteria the Commission employed. Finding of Fact Nos. 74-92 and the discussion on pages 11-13 describe the Commission's application of the criteria and how each TSP met (or failed to meet) each criterion. In particular, subparts (a) & (b) of Finding of Fact No. 76 and the discussion on pages 9-10 fully explain the reasons why the Commission found that it could not satisfy the CREZ statute's standard if it were to select the MOUs to construct CREZ Facilities. Finally, Finding of Fact Nos. 93-97 explain how the Commission balanced these factors to assign CTP projects to particular TSPs. Taken together, these findings of fact (1) show the Commission fully considered all of the evidence and facts, (2) informed the parties of the facts found so that they could intelligently prepare and present an appeal, and (3) enable a reviewing court to properly exercise its function of reviewing the Final

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Order. Accordingly, the Final Order fully complies with the requirements of APA § 2001.141(d). See *State Banking Board v. Allied Bank Marble Falls*, 748 S.W.2d 447, 449 (Tex. 1988).¹⁰

Reply Point 4: The Final Order, including findings regarding MOUs, is clearly supported by substantial evidence. (Reply to point E, pp. 23-25 of Garland's Brief).

As stated above, this is a substantial evidence, rather than *de novo*, review of the Final Order. In its Petition and in its Brief, Garland asserts that the Commission's findings regarding MOUs are not supported by substantial evidence. Garland's other claim, that the Commission failed to select the lowest cost provider in contravention of the statute, in reality is in part a substantial evidence claim because parties introduced conflicting evidence on that point and the substantial evidence test applies to claims concerning the agency's resolution of factual conflicts in the record. *Firemen's & Policemen's Civil Serv. Comm'n v. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984). Garland's Brief's listing of "uncontroverted and undisputed" evidence about its own capabilities ignores that other parties submitted a massive amount of evidence on their own capabilities as well as evidence rebutting Garland's assertions about its abilities to build transmission in a beneficial and cost-effective manner. It is abundantly clear from a brief review of the evidence in the administrative record that the Final Order, including the Commission's decision to not award CTP facilities to MOUs like the Plaintiff, is supported by substantial evidence.

In the Final Order, the Commission stated "[t]he record evidence reflects that the municipally owned utilities do not possess the current and expected capabilities to adequately license, construct, operate, and maintain the facilities in the most beneficial and cost-effective

¹⁰ Garland's observation that several parties suggested additional findings in their reply to Garland's Motion for Rehearing is of no moment. Garland's Brief, p. 22. The Court must evaluate the findings that the Commission actually adopted, not those that parties may have proposed.

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manner.” Final Order at p. 41, FOF 76. The Commission further states that “due to the limited regulatory oversight over municipally owned utilities described in Finding of Fact No. [64], the Commission is not persuaded that, if portions of the CTP were assigned to municipally owned utilities, the Commission could fulfill its statutory obligations under PURA § 39.904(g)(2).”¹¹

FOF 64 provides as follows:

64. Inherent difficulties arise if municipally owned utilities are designated as CREZ TSPs.
 - a. A municipally owned utility’s authority to waive its own jurisdiction is limited.
 - b. The Commission does not have jurisdiction over municipally owned utilities regarding their routing of transmission lines.
 - c. The Commission does not have jurisdiction over municipally owned utilities regarding the timing of the construction of their transmission lines.
 - d. The selection of a municipally owned utility as a designated TSP for CTP facilities would deprive affected landowners of an independent, objective, and state-wide adjudication regarding the routing and timing of construction of CREZ transmission lines.
 - e. The absence of an independent decision-maker regarding the routing and timing of CREZ transmission lines, if such were assigned to a municipally owned utility, raises valid due process concerns.
 - f. The provision of procedural due process to affected land owners is particularly questionable regarding CTP facilities that lie well outside of the applicant municipally owned utilities’ traditional boundaries, which municipally owned utilities requested.
 - g. As the Commission would not have the ability to revoke a CCN for a CTP facility from a municipally owned utility, the Commission’s ability to ensure timely, beneficial, and cost-effective construction would be more limited if it selected a municipally owned utility to be responsible for CTP facilities.
 - h. Municipally owned utilities are not required to pay ad valorem property taxes and whether a municipally owned utility can be held

¹¹ PURA § 39.904(g)(2) provides that the Commission “shall 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 competitive renewable energy zones.”

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to its commitment to provide a payment in lieu of taxes is questionable.

As demonstrated by FOF 64, the Commission listed at least *eight* specific reasons for its finding that the Commission's ability to fulfill its statutory obligations under PURA § 39.904(g)(2) would be questionable if it awarded CTP Facilities to MOUs. As is clear from the substantial evidence standard described above, the Commission needed only a reasonable basis to support its actions in the Final Order. If any *one* of the eight listed factors were supported by evidence in the record, the Final Order is valid and Garland's appeal must fail. However, *each* of the eight factors listed in FOF 64 is supported by substantial evidence in the administrative record, which results in a Final Order that goes above and beyond what is required to withstand a substantial evidence challenge. While the administrative record is replete with evidence that supports the Commission's findings in FOFs 64 and 76 and the Final Order as a whole, the following is a summary of just some of the evidence that supports the Commission's findings in FOFs 64 and 76:

FOF 64(a): A municipally owned utility's authority to waive its own jurisdiction is limited.¹²

- Q. (Comm. Nelson) But I do have a question, which is, I believe that—and I don't remember who it was, but somebody in opening statements said that CPS [Energy] cannot agree to be under the PUC's jurisdiction?

¹² While not a specific FOF in the Final Order, it is important to note that, in addition to limitations on an MOU's ability to waive its own jurisdiction, the Commission would likewise be unable to assert jurisdiction over an MOU, even if an MOU were capable of agreeing to that jurisdiction. It is well settled that the Commission's authority is limited to the authority granted to it by the Legislature. In *Public Utility Commission of Texas v. City Public Service Board of San Antonio*, the Texas Supreme Court noted that "[a]s we have said before, 'the PUC is a creature of the legislature and has no inherent authority.' This is true of every state administrative agency, and as a result every such agency has only those powers expressly conferred upon it by the Legislature." 53 S.W.3d 310, 316 (2001). "[W]hen the Legislature expressly confers a power on an agency, it also impliedly intends that the agency have whatever powers are reasonably necessary to fulfill its express functions or duties." *Id.* Consequently, the Commission possesses only the powers that the Legislature has expressly granted to it and the powers that are necessarily implied from the expressly-granted powers. *See Id.* "An agency may not, however, exercise what is effectively a new power, or a power contradictory to that statute, on the theory that such a power is expedient for administrative purposes." *Id.* *See also Pub. Util. Comm'n v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 407 (Tex. 1995). Because no provision of PURA contemplates Commission certification jurisdiction over MOUs, there is a significant question as to whether the Commission could exercise such jurisdiction, even if an MOU consented to it.

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A. (CPS witness David Luschen) That is correct. The way I understand it is, it's a legal point of the municipality, so we could not today do the CCN.

Docket No. 35665 Hearing Transcript, Volume 3, p. 732 (hereinafter cited using the following convention: Tr. Vol. x, p. x.).

- Garland witness David Grubbs: You know, we've committed to the Commission that we would follow the CCN procedures in any case, from environmental to public notice to police (sic) hearings. But if you feel more comfortable with us going to (sic) CCN route—I don't believe there's a legal way we can do the CCN by ourselves without providing another party in there, but we're willing to do that. Tr. Vol. 4, p. 1040.

FOF 64(b)-(c): The Commission does not have jurisdiction over municipally owned utilities regarding their routing of transmission lines./The Commission does not have jurisdiction over municipally owned utilities regarding the timing of the construction of their transmission lines.

- As Garland itself proclaimed, "Because it is not an 'electric utility,' *GP&L is not required to obtain a CCN for the construction of transmission lines under Chapter 37 of PURA*. Therefore, no CCN application is required for CREZ transmission projects awarded to GP&L." Garland's CTP Proposal, Page 5, admitted as Garland Ex. 1. (emphasis added).
- "Because PURA § 31.0[0]2(6)(A) exempts municipally owned utilities from the definition of electric utilities, *GP&L is not required to obtain a CCN for the construction of transmission lines under Chapter 37 of PURA*." Pre-filed Direct Testimony of Garland witness David Grubbs, p. 6, lines 11-14, admitted as Garland Ex. 3. (emphasis added).

FOF 64(d)-(e): The selection of a municipally owned utility as a designated TSP for CTP facilities would deprive affected landowners of an independent, objective, and state-wide adjudication regarding the routing and timing of construction of CREZ transmission lines./The absence of an independent decision-maker regarding the routing and timing of CREZ transmission lines, if such were assigned to a municipally owned utility, raises valid due process concerns.

- Q. (CPS attorney Pat Escobedo): At Page 8, Lines 4 through 7, you state "Landowners and affected parties are not allowed to intervene in the case and are not allowed to conduct discovery, put forth evidence or have their evidence reviewed and considered by an independent, impartial third party." Now, you're explaining—when you make that statement, you're actually explaining the process that applies at the PUC. Isn't that correct?

A. (LCRA witness Lance Wenmohs) No. . . this is explaining the CPS Energy process or any process that would be implemented by a municipally owned utility that doesn't have to go through the CCN process and come before this Commission for the routing of transmission lines. Tr. Vol. 3, pp. 665-666.

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- “In essence, when a municipally-owned utility proposes to place a transmission line on private property in Texas, landowners, and affected parties have an extremely limited process where they may argue against the placement of the facility on their land and are not afforded an impartial, disinterested legal venue such as SOAH in which they can provide evidence to protect their interests. Unlike electric utilities, the CPS Energy Board decides which transmission line route should be built by CPS Energy. Landowners and affected parties are not allowed to intervene in the case and are not allowed to conduct discovery, put forth evidence, or have their evidence reviewed and considered by an independent, impartial third party. The affected landowners must make their appeal to the CPS Energy Board of Directors rather than before a neutral third party and they have not right to appeal to a higher authority.” Responsive Testimony of Lance Wenmohs, LCRA Witness, pp. 7-8, admitted as LCRA Ex. 5.

FOF 64(f): The provision of procedural due process to affected land owners is particularly questionable regarding CTP facilities that lie well outside of the applicant municipally owned utilities’ traditional boundaries, which municipally owned utilities requested.

- “These entities’ proposal to build transmission lines far from their municipal boundaries without submitting to the Commission’s jurisdiction and the landowner protection that accompany the CCN process could present difficult and sensitive issues that ultimately delay completion of the lines. . . .Landowners in the Panhandle and the Hill Country will have less influence over the siting of facilities in their area if constructed by Garland, TMPA or San Antonio. . . .These municipal utilities are attempting to extend their CCN exemption far beyond the situation for which it was intended, in derogation of the Commission’s authority over transmission line routing. This could easily lead to litigation or legislation that might delay completion of the CREZ lines.” Responsive Testimony of ETT witness Calvin Crowder, pp. 17-18, lines 10-23, 1-2, admitted as ETT Ex. 9.
- “Landowners and other interested parties may not be satisfied that officials in or from distant municipalities will decide their fates in routing and related issues. . . . [A]ccording to their discovery responses, CPS Energy, GP&L and TMPA effectively combine the roles of applicant and ultimate decision-maker. . . . A dissatisfied landowner having his land taken through eminent domain granted by a distant city council would become the Poster Child for the next Session of the Texas Legislature.” Responsive testimony of Joint Parties’ witness Pat Wood, p: 9, 14-16, lines 9-19, 8-14 admitted as Joint Parties’ Ex. 3.

FOF 64(g): As the Commission would not have the ability to revoke a CCN for a CTP facility from a municipally owned utility, the Commission’s ability to ensure timely, beneficial, and cost-effective construction would be more limited if it selected a municipally owned utility to be responsible for CTP facilities.

- “Because it is not an ‘electric utility,’ GP&L is not required to obtain a CCN for the construction of transmission lines under Chapter 37 of PURA. Therefore, no CCN

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application is required for CREZ transmission projects awarded to GP&L.” Garland’s CTP Proposal, Page 5, admitted as Garland Ex. 1.

- “Because PURA § 31.0[0]2(6)(A) exempts municipally owned utilities from the definition of electric utilities, GP&L is not required to obtain a CCN for the construction of transmission lines under Chapter 37 of PURA.” Direct Testimony of Garland witness David Grubbs, p. 6, lines 11-14, admitted as Garland Ex. 3.

FOF 64(h): Municipally owned utilities are not required to pay ad valorem property taxes and whether a municipally owned utility can be held to its commitment to provide a payment in lieu of taxes is questionable.

- (Smitherman) . . . And I guess if a for-profit TSP would have built that, then the local county would have assessed a value to it and would have collected some taxes on it. Right?

A. (Garland witness Lanning) Yes.

Q. (Smitherman) How does that change if a muni or someone like the city of Garland does that? Do you make a payment to the local county government, the school district and—

A. (Lanning) I think Mr. Townsend should be able to answer that question regarding legal. It’s my understanding that there is not—that other towns don’t have the capability of charging the PILOT, but that’s something that Mr. Townsend should talk about. Tr. Vol. 3, pp 485-486.

- Q. (Comm. Anderson) Okay. Do you pay PILOTS on those facilities outside the City of Garland?

A. (Grubbs) To the best of my knowledge, we pay only PILOT within the city limits of Garland and have not paid it outside of there. But much like Mr. Schroeder said, assuming that the Commission is willing to allow that in our future TCOS cases, we would be more than glad to pay PILOT for these CREZ facilities. Tr. Vol. 4, pp. 1036-1037.

As demonstrated above, there is infinitely more than a scintilla of evidence in the administrative record to support the FOFs and ultimate conclusions relating to MOUs that are in the Final Order. Those FOFs and ultimate conclusions clearly demonstrate major issues associated with oversight over MOUs that explain why the Commission did not feel comfortable awarding CTP Facilities to Garland. Foremost among those issues is, as described in FOF 64(g), the fact that, with no ability to revoke a CCN from an MOU, the Commission would have virtually *no oversight* over the routing and construction of transmission lines by MOUs. The

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Commission would also have no way to assure that the CREZ Facilities were completed by the end of 2013, a stated goal of the Commission, to the extent those facilities were awarded to MOUs. Furthermore, absent the CCN process, landowners affected by Garland's routing would not have adequate due process assurances to protect their rights, or even to voice their concerns. Accordingly, it was well within the Commission's discretion to decide that selecting Garland to build and operate CREZ Transmission would not result in the facilities being constructed in the "most beneficial" manner. For these reasons stated above, the Final Order is supported by substantial evidence. *See Charter Medical*, 665 S.W.2d at 452-53.

Reply Point 5: The evidence was disputed as to whether Garland was the "lowest cost provider," and in any event, that alone would not entitle it to selection to construct CTP Facilities. (Reply to points B and E).

A. Staff did not recommend an unqualified award of CTP Facilities to Garland.

In its Brief, Garland ignores the above-described plethora of substantial evidence in support of the Final Order while arguing that Commission Staff "approved" Garland as the applicant with "the third lowest financing costs" and states that "the only evidence (and it is undisputed) is that Garland and other MOUs are the low cost providers for the segments of the lines that they applied to build." Garland's Brief at pp. 25 and 14, respectively.

As an initial matter, it is important to note that Commission Staff is a party to the proceeding, and, while the Joint Intervenors value its input in the proceedings in which it participates, Commission Staff does not have the authority to "approve" or "disapprove" anything of the sort.

Garland's Brief mischaracterizes Staff's recommendation as an unqualified "approval" of Garland as a CREZ TSP, focusing solely on what Staff witnesses may have said regarding costs associated with Garland. Garland's Brief at p. 25. Notably, even in the statements attributed to it by Garland in Garland's Brief, Staff did not say that Garland was the lowest cost provider. As

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discussed further below, financing costs and costs of capital are only one aspect of the total cost of providing service.

More importantly, Commission Staff witness Brian Almon testified that “it is Staff’s position that the City of Garland . . . should only be assigned CTP Facilities as partners in joint ventures with another TSP so that any transmission line in which they have an ownership interest undergoes the CCN process at the [Commission].” Supplemental Testimony of Brian T. Almon, pp. 6-7. Thus, even Staff did not recommend an unqualified award of CTP Facilities to Garland, and shared the same concerns expressed by the Commission in the Final Order.

B. Garland’s “lowest cost provider” evidence was disputed.

Garland states that the Commission failed to implement a CREZ transmission plan that is most beneficial and cost-effective to customers, as directed by PURA § 39.904(g)(2), because “it did not select a low-cost, experienced TSP, Garland, and instead chose applicants with higher costs.” Petition at p. 5.

Even if it were true that municipal entities, such as Garland, would, as Garland claimed in Docket No. 35665, have access to tax-advantaged debt for financing any CTP Facilities that they were awarded, this does not necessarily mean that the transmission cost of service for Garland would be lower than the cost of service of investor-owned utilities, or that a decision not to award CTP facilities to Garland would result in a higher cost to ratepayers. The record evidence demonstrates that Garland’s construction costs were among the highest of those submitted. See WETT Exhibit 2A. Moreover, the record evidence supports a finding that it is likely that Garland’s rate of return would be significantly higher than the equivalent rates of return for all of the non-municipally-owned TSPs. *See, e.g.,* Cross-Rebuttal Testimony of Ellen Blumenthal, Sharyland Ex. 17 at 4 (“[T]he rate of return for GP&L at a 1.5 DSC ratio is equal to a

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[confidential] percent rate of return on the transmission assets GP&L proposed to build. This rate of return is much higher than those for the non-municipal TSPs.”).

Other witnesses disputed Garland’s assertion that it and other MOUs are the “low cost providers.” Joint Parties’ witness Dyer testified that MOUs could not achieve economies of scale (Joint Parties Ex. 4 at 6). ETT witnesses Krause and Moore disputed Garland’s cost projections (ETT Ex. 11 at 8-10, 14; ETT Ex. 12 at 4, 10-11). Oncor witness Jenkins testified that Oncor has cost advantages over Garland (Oncor Ex. 11 at 9-10, 24-25). Staff witness Lee concluded that the cost per mile among all the applicants did not vary significantly (Staff Ex. 6 at 4-5). The hearing transcript contains more testimony on cross-examination disputing Garland’s and other MOUs’ alleged cost advantages. *See* Tr. Vol. 2, pp. 335-36 [TMPA witness Graves], 337-38 and 352-54 [Garland witness Lanning], 355-380 [Sharyland witness Blumenthal]; Tr. Vol. 3, pp. 390-97 [Sharyland witness Blumenthal], 409-10 [Garland witness Lanning], 438-40 [Sharyland witness Blumenthal], 632-37 [CPS witness Jungman]; Tr. Vol. 4, pp. 849-862 [Oncor witnesses Speed and Hevert], 1035-37 and 1042-44 [Garland witness Grubbs]; Tr. Vol. 5, pp. 1293-1300 [Staff witness Cutter]. Even if it were assumed that Garland could construct CTP Facilities at a lower cost, the Commission found that any savings would likely be outweighed by legal and regulatory uncertainties and the greater probability of delay associated with those uncertainties, as discussed in the Final Order, FOFs 64 and 76.

The Commission reasonably decided, despite the fact that Garland presented evidence that it is a “low cost TSP,” that the selection of Garland to construct CTP Facilities would not result in the most beneficial and cost-effective transmission plan.

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VI. PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Joint Intervenors pray that this Court deny Garland's requested relief and uphold the Final Order in all respects. Joint Intervenors further pray for such other and further relief to which they may be entitled.

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document has been served in accordance with the Texas Rules of Civil Procedure on all counsel/parties or record in this matter on this 6th day of November 2009.

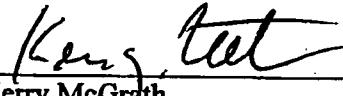
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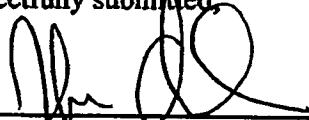
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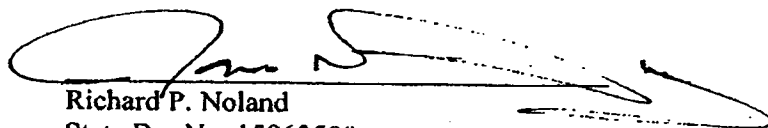
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