

No. D-1-GV-09-001199
(consolidated)

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| CITY OF GARLAND, TEXAS, | § | IN THE DISTRICT COURT OF |
| PLAINTIFF, | § | |
| | § | |
| v. | § | TRAVIS COUNTY, TEXAS |
| | § | |
| PUBLIC UTILITY COMMISSION | § | |
| OF TEXAS, | § | |
| DEFENDANT. | § | 200 TH JUDICIAL DISTRICT |

**PUBLIC UTILITY COMMISSION OF TEXAS'
BRIEF ON THE MERITS**

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil
Litigation

BARBARA B. DEANE
Chief, Environmental Protection and
Administrative Law Division

DAVID PREISTER
Chief, Environmental Protection Section

DOUGLAS FRASER
Assistant Attorney General
State Bar No. 07393200

JOHN R. HULME
Assistant Attorney General
State Bar No. 10258400

Office of the Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Tel: (512) 475-4129
Fax: (512) 320-0052

ATTORNEYS FOR
THE PUBLIC UTILITY COMMISSION OF TEXAS

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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 |
| MOU | Municipally Owned Utility |
| MW | Megawatts |
| PUC, Commission | Public Utility Commission of Texas |
| PURA | Public Utility Regulatory Act |
| SB | Senate Bill |
| TSP | Transmission Service Provider |

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**PUBLIC UTILITY COMMISSION OF TEXAS’
BRIEF ON THE MERITS**

TO THE HONORABLE STEPHEN YELENOSKY:

The Public Utility Commission of Texas (Commission) files this brief on the merits in response to the brief of the City of Garland, Texas, (Garland) that was filed in connection with Garland’s application for a temporary injunction. At the October 29, 2009, hearing Garland’s counsel stated that Garland would rely upon that briefing as its brief on the merits.

Statement of the Nature of the Case

This is a suit for judicial review of the final order of the Commission in its Docket No. 35665. In that docket the Commission selected electric transmission companies to build high voltage transmission lines from areas, primarily in West Texas and the Panhandle, designated as Competitive Renewable Energy Zones (CREZs), to population centers in Central and East Texas. This docket was part of the

Commission's ongoing process of carrying out the legislative goal of bringing more renewable energy to customers in Texas.

Statement of Facts

Texas is a national leader in wind power and renewable energy. Texas is the top wind producer in the United States by far, with over 8,700 wind-generated megawatts (MW) now installed.¹ Texas' extensive efforts to promote wind power and renewable energy, including the CREZ process under attack in Garland's lawsuit, are the reason for the State's leadership.

In 1999, the Texas Legislature first established goals for the use of renewable energy in connection with the deregulation of retail electric sales under SB 7.² Texas' policy recognizes the benefits of renewable energy development, including lower electric costs and enhanced competition in electric markets; economic development in the areas where wind generation facilities are built; and the environmental benefits from the switch to clean, renewable energy technologies.

¹American Wind Energy Association Third Quarter Market Report at 3, *available at* <http://www.awea.org/publications/reports/3Q09.pdf> (last viewed Nov. 20, 2009).

² Act of May 27, 1999, 76th Leg., R.S., ch. 405, 1999 Tex. Gen. Laws 2543. *See* Tex. Util Code § 39.904(a). The targets have been increased since 1999. The current cumulative installed renewable generation capacity targets are 5,880 megawatts by 2015 and 10,000 megawatts by 2025. PURA § 39.904(a). Texas has already met the 2015 target.

In 2005, concern about the limitations of Texas' transmission infrastructure and electric grid's ability to accommodate new renewable generation led the Legislature to revise the Public Utility Regulatory Act (PURA)³ to ensure its renewable energy goals would be met.

The areas most favorable to wind energy production are in West Texas, but the sparse population there means that much of the wind energy produced there must be transmitted to other customers. Limited capacity of the transmission facilities in West Texas and between West Texas and the metropolitan areas in Central and East Texas restricted the amount of wind energy that could be transported out of the region to customers in other areas. Congestion increased as more wind farms were developed and more energy moved east. Additional transmission facilities were constructed, but the capacity increases typically provided only short-term benefits. As additional wind farms were developed, congestion on the transmission system recurred. Wind developers saw a "chicken-and-egg" problem. Transmission utilities sought assurances that new wind farms would be developed before building the additional transmission capacity while the wind developers sought greater certainty that additional

³Tex. Util Code §§ 11.001-66.017.

transmission facilities would be in operation by the time new wind farms were completed.

In 2005, SB 20⁴ sought to address this “chicken-and-egg” problem. SB 20 added PURA § 39.904(g)-(n), and also revised the renewable energy target provision in PURA § 39.904(a). SB 20 required the Commission to designate CREZs and develop and implement a plan to build the necessary transmission lines to bring energy from the CREZ to population centers.⁵ In the past few years, the Commission has made an extraordinary effort to do this. This enormous undertaking has included numerous rulemaking and contested case proceedings with dozens of participating interested parties. The Commission has undertaken major rulemakings and adopted detailed rules governing the designation of the CREZ,⁶ and the selection of transmission service providers to build the needed CREZ transmission lines.⁷ The Commission applied

⁴ Act of July 20, 2005, 79th Leg. 1st C.S. ch. 1, 2005 Tex. Gen. Laws 1, 2.

⁵ See PURA § 39.904(g)(2).

⁶ 16 Tex. Admin. Code § 25.174; Tex. Public Util. Comm’n, *Rulemaking Relating to Renewable Energy Amendments*, Project No. 31852 (Dec. 15, 2006) (Order Adopting § 25.174 as Approved at the December 1 Open Meeting).

⁷ 16 Tex. Admin. Code § 25.216; Tex. Pub. Util. Comm’n, *Rulemaking Proceeding to Amend PUC Substantive Rules Relating to the Selection of Transmission Service Providers Related to Competitive Renewable Energy Zones and Other Special Projects*, Project No. 34560, (June 19, 2008) (Order Adopting 16 Tex. Admin. Code § 25.216).

those rules last year, in contested cases. The Commission analyzed the costs and benefits of wind generation and wind generators' financial commitment to Texas; designated the CREZ; and adopted a plan for construction of \$4.93 billion in CREZ transmission infrastructure.⁸ In Docket No. 35665, the docket at issue in this lawsuit, the Commission selected the providers that will build these CREZ lines. The Commission's selection was based on construction to deliver electricity "in a manner that is the most beneficial and cost-effective," as the Legislature mandated. PURA § 39.904(g).⁹

In selecting the providers, the Commission applied one of its new CREZ rules, 16 Tex. Admin. Code § 25.216, and evaluated each interested transmission provider's ability to finance, license, construct, operate and maintain the facilities.¹⁰ Garland complains that it was not selected.

⁸ Tex. Pub. Util. Comm'n, *Commission Staff's Petition for Designation of Competitive Renewable Energy Zones*, Docket No. 33672 (Aug. 15, 2008) (Order).

⁹ A more detailed procedural history is laid out in the Order on Rehearing in this Docket 35665 (Order) at 3-5. The Order can be found in Binder 21 of the record. It is Item 724. References to the rest of the administrative record for Docket 35665 will be "AR, Vol. ___, Item ___ at [page number]" for filings, "AR, [party name] Ex. ___ at [page number]" for exhibits, and "AR, TR, Vol. ___ at [page number]" for transcripts.

¹⁰ *Id.* at 1-2.

Summary of the Argument

Seemingly presuming it was entitled to build some of the CREZ transmission lines, Garland complains it was denied a “piece of the pie.” But the Commission followed the Legislature’s mandate and sought the *most* beneficial and cost effective providers to build the lines. In the Commission’s competitive process, Garland and two other municipally owned utility applicants were not excluded from competing but lost out—on the merits—after making their case. In analyzing competing applicants to find the “most beneficial and cost-effective,” the Commission appropriately weighed some particular characteristics of municipally owned utilities (MOUs) that made them less attractive candidates to build the lines. This was part of the merits decision.

Garland’s further, technical complaint about the findings of fact is also meritless. The findings are supported by substantial evidence, and underlying findings back up the ultimate conclusions regarding selection of the most beneficial and cost-effective transmission service providers. The findings show that the Commission considered the evidence. Part of that evidence revealed potential negatives for the three MOU applicants. After carefully weighing all the competing evidence, the Commission chose other applicants.

Argument and Authorities

I. Standard of Review

The Commission's orders are reviewed under the substantial evidence rule. PURA § 15.001. "At its core, the substantial evidence rule is a reasonableness test or a rational basis test." *City of El Paso v. Pub. Util. Comm'n*, 883 S.W.2d 179, 185 (Tex. 1994). In conducting a substantial evidence review, the courts will presume that the Commission's decision is valid and that its findings, inferences, conclusions and decisions are supported by substantial evidence; the plaintiffs have the burden of overcoming this presumption. *City of El Paso*, 883 S.W.3d 185; *Texas Health Facilities Comm'n v. Charter Med.-Dallas, Inc.*, 665 S.W.2d 446, 452 (Tex. 1984). The courts give "significant deference to the agency in its field of expertise." *AEP Texas Cent. Co. v. Pub. Util. Comm'n*, 258 S.W.3d 272, 279 (Tex. App.—Austin 2008, pet. filed) (citing *R.R. Comm'n v. Torch Operating Co.*, 912 S.W.2d 790, 792 (Tex.1995)); see Tex. Gov't Code §2001.174. Courts must uphold a Commission decision if "some reasonable basis exists in the record for the action taken by the agency." *City of El Paso*, 883 S.W.2d at 185. This is so even if the evidence preponderates against the decision. *Id.*

On questions of statutory construction, the reviewing court gives great weight to the Commission's interpretation of a statute the agency is charged with implementing, provided that the interpretation is reasonable and does not contradict

the plain language of the statute. *Reliant Energy, Inc. v. Pub. Util. Comm'n*, 153 S.W.3d 174, 187 (Tex. App.–Austin 2004, pet. denied). Courts actually defer to the Commission's interpretation of its own rules unless that interpretation is plainly erroneous. *Gulf Coast Coal. Cities v. Pub. Util. Comm'n*, 161 S.W.3d 706, 712 (Tex. App.–Austin 2005, no pet.).

II. The premise of Garland's argument is wrong. The Commission did not categorically exclude municipally owned utilities from building CREZ transmission facilities. (Responds to Garland Brief Section IV.A & B).

The basis of Garland's complaint is the false premise that the Commission categorically excluded MOU applicants from consideration as transmission service providers. Neither Garland nor the two other MOU applicants were selected. Garland takes that fact and the Commission's list of difficulties when MOUs are CREZ transmission service providers and tries to transmute them into a categorical refusal to *consider* MOUs. The Order does not support that twisted reading. Instead, the order reflects that the Commission considered Garland's application and after weighing all the evidence—including the particular characteristics of MOUs—simply chose other applicants to build the CREZ transmission lines.

Because it cannot, Garland cites nothing in the Commission's Order that actually says a municipally owned utility can never be selected as a CREZ transmission utility, regardless of its qualifications. Timely completion of the CREZ lines, and the

Commission's oversight of the process, were major issues in the proceeding. (Order at 2-3). And the inherent difficulties listed in Finding of Fact 64 address timely completion and Commission oversight. Consideration of evidence regarding these relevant characteristics of MOUs was not arbitrary and capricious.

The Commission applied the Legislature's standard, implemented through its rule. PURA § 39.904(g)(2) simply instructs the Commission to develop a plan to build the CREZ transmission in a manner "*most* beneficial and cost-effective to the customers." Its rule, 16 Tex. Admin. Code § 25.216, sets out some specific selection criteria for CREZ transmission providers pursuant to PURA § 39.904(g)(2). Under this rule, the Commission evaluates each CREZ provider proposal by "considering, at a minimum, the current and expected capabilities of each Interested transmission service provider (TSP) to finance, license, construct, operate, and maintain the CTP [CREZ transmission plan] Facility or Facilities" *Id.* Among the specific criteria listed are the Interested TSP's:

- staff expertise;
- projected capital costs and operating and maintenance costs;
- proposed schedule for development and completion of each transmission facility;
- financial resources;

- expected use of historically underutilized businesses (unless the Interested TSP is an electric cooperative or municipally owned utility);
- understanding of the specific requirements to implement its proposal; and
- if applicable, its previous transmission experience and historical operating and maintenance cost for its existing transmission facilities.

16 Tex. Admin Code § 25.216(e). Rule 25.216 goes on to detail the information that each Interested TSP must submit with its proposal and the showing it must make regarding its financial resources. 16 Tex. Admin Code § 25.216(e)(1) & (2).

Garland had no entitlement to be selected as a CREZ TSP. It is clear from the statute, the rule, and the Order that this was a competitive selection process. (*See Order at FOF 52* (“The Commission’s open application process in the docket does not oblige it to select all of the interested applicants who submitted CTP proposals as designated TSPs for CREZ transmission facilities.”)); *Tex. Pub. Util. Comm’n, Rulemaking Proceeding to Amend PUC Substantive Rules Relating to the Selection of Transmission Service Providers Related to Competitive Renewable Energy Zones and Other Special Projects, Project No. 34560* (June 19, 2008) (Order adopting New § 25.216, at 4) (“The competitive selection process

required by the rule will ensure that the commission develops a transmission plan for delivering electricity from competitive renewable energy zones (CREZs) that is most beneficial and cost-effective to electric customers, as required by PURA §39.904(g).”)

Garland’s claim that the Commission rejected municipally owned utilities before the merits were considered is plainly wrong. This is readily apparent from the record and review of the Commission’s final order. Garland and two other MOUs were considered, but were not selected as the “*most* beneficial and cost-effective” providers.

Garland and other MOUs were allowed to present evidence supporting their applications. In addition to its CTP Proposal, which included supporting prefiled direct testimony,¹¹ Garland later filed additional direct and rebuttal testimony from several witnesses.¹² Garland participated in the hearing on the merits, where its proposal (and necessarily, the issues arising from its participation in building CREZ

¹¹ AR, Binder. 13, Item 216 (Garland CTP Proposal, including testimony).

¹² AR, Binder, Item 213 (Lanning direct); AR, Binder 25, Garland Ex. 3 (Grubbs direct); AR, Binder 13, Item 217 (Correction to Garland CTP Proposal); AR, Binder 25, Garland Ex. 8 (Grubbs rebuttal); AR, Binder 25, Garland Ex. 9 (Andrus rebuttal).

projects as a municipally owned utility) were extensively discussed.¹³ Garland submitted a written closing argument urging its selection.¹⁴

Significantly, the Commission did not issue a preliminary order excluding Garland and other MOUs from selection as a CREZ TSP. The decision not to award any of the projects to any of the three municipally owned utility applicants (other than a small default project to Texas Municipal Power Association (TMPA¹⁵)) was made after the hearing on the merits, and based upon all the record evidence regarding the MOUs seeking to be CREZ providers as well as other applicants. Indeed, in December 2008, during the five-day hearing, the Commissioners requested additional financial information from municipally owned utilities that sought to be selected as a TSP. (Order at 37 (FOF 57a).)

The Commission's order plainly states that the particular qualities of MOUs were only some of the criteria that the Commission weighed in making its selections. In a section entitled "TSP Selection Criteria," the Order discusses the information that each

¹³ *E.g.*, AR, TR, Vol. B at 235 - 242; Tr. Vol. B at 354 - 382; Tr. Vol. C at 568 - 572; Tr. Vol. 3 at 849 - 860.

¹⁴ AR, Binder 19, Item 606 (Garland closing argument).

¹⁵ Owners of existing facilities have the right to be designated as a "default" TSP to upgrade or modify their facilities as the PUC's CREZ transmission plan describes, unless the owner requests a different TSP or good cause exists to selection another TSP. 16 Tex. Admin. Code § 25.216(d)(2).

prospective TSP was required to submit, under Rule 25.216, to be considered. (Order at 6-7.) The Order then states:

The Commission evaluated these proposals by considering *all* of the evidence submitted by the parties. Based on the record evidence and the factors to be considered under PURA and Commission rules, the Commission formulated the following general principles to apply in selecting TSPs that are capable of building, operating, and maintaining the CTP projects in the manner most cost-effective and beneficial to customers. In addition to the principle that responsibilities for facilities should be assigned to entities that have established the ability to secure appropriate financing, these principles also address the urgency of the priority projects, the importance of balance in selecting multiple TSPs for the projects, the issues regarding municipally owned utilities, the proximity of the facilities to each other, the size of the project assignment relative to the size of the TSP, and the facilities requested by the TSPs in their proposals.

(Order at 7 (emphasis added); *see also* Order at 31 (FOF 44) (selection criteria), 32 (FOF 45) (information Interested TSPs required to submit).)

The Commission's Order goes on to discuss, in greater detail, several matters key to its selections. (Order at 8-11.) Among these is the evidentiary record on the issues surrounding the potential participation of municipally owned utilities. Order at 9-10. But the bottom line remains this: In numerous places, the Order makes clear the Commission's final selections were made based on the record evidence as to *all* the applicants' qualifications and suitability. (*E.g.*, Order at 11 ("Based upon consideration of the evidence and the evaluation of each proposal as provided in P.U.C. SUBST. R.

25.216(e), including the application of the general principles discussed above, the Commission assigns responsibility for the balance of the CTP projects that have not already been assigned in Docket No. 36416 [default projects to upgrade facilities awarded to existing owners] to Cross Texas, ETT, LCRA, Lone Star, Oncor, Sharyland, STEC, and WETT.”); Order at 42 (FOF 78 & 79) (similar findings that new entrant providers Cross Texas, Lone Star, WETT are the “best qualified”).)

The Order’s next paragraph discusses the TSP applicants that the Commission did not select as the best qualified to build some of the lines, including Garland. (Order at 11-12.) With regard to TSP applicant Tejas, the Commission noted questions about its financial resources. With regard to applicant Texas-New Mexico Power Company, the Commission found its proposed participation (one portion of a line, the rest of which would have to be built by another TSP) was too small to be cost-effective or beneficial. With regard to the three municipally owned utility applicants (Garland, CPS Energy, and TMPA), the Commission noted: “In its analysis, the Commission also reaches the determination that *the disadvantages of municipally owned utility participation in the CTP build-out outweigh the potential benefits.*” (Order at 11 (emphasis added).) Thus, the Commission weighed the disadvantages of the participation of Garland, CPS and TMPA, and elected not to select them, just as it opted not to select other, non-MOU providers.

Commission staff did not “approve” Garland’s TSP application. (Garland Brief at 25.) In contested-case proceedings, Commission staff is simply a party like any other, whose “recommendations” the Commission may accept or reject.

Just because PURA § 39.904 does not expressly exclude MOUs from selection as CREZ TSPs does not prohibit the Commission from considering the problems inherent with selecting MOUs. Even if the Commission had categorically excluded MOUs as Garland contends, it would have acted within its statutory authority. PURA § 39.904(g)(2) leaves the criteria for the selection of CREZ TSPs to the Commission’s broad discretion. The statute does not expressly address the TSP selection, but simply directs the Commission to develop a plan (which necessarily includes TSP selection) to build the CREZ lines in the most beneficial and cost effective manner to the customers. This provision gives the Commission broad discretion to consider whatever factors it deems appropriate when selecting TSPs. *Hammack v. Pub. Util. Comm’n*, 131 S.W.3d 713, 723 (Tex. App.—Austin 2004, pet. denied); *Pub. Util. Comm’n v. Texland Elec. Co.*, 701 S.W.2d 261, 269 n.6 (Tex. App.—Austin 1985, writ ref’d n.r.e.).

III. The Commission did not consider legally irrelevant factors or fail to consider the relevant factors. (Responds to Garland Brief Section IV.C).

Review of the Order readily shows that the Commission did not act arbitrarily and capriciously, as Garland claims. See *City of El Paso v. Pub. Util. Comm’n*, 883 S.W.2d

179, 185 (Tex. 1994) (listing criteria for determining the reasonableness of agency decisions).

- *The Commission considered relevant factors.* Contrary to Garland's claims, the Order shows the Commission selected providers to build the CREZ transmission facilities in the manner "most beneficial and cost-effective to customers," the PURA § 39.904(g)(2) standard, and substantial evidence supports that determination.
- *The Commission did not consider legally irrelevant factors.* To argue otherwise, Garland mischaracterizes how the Commission considered the issues involved with participation of municipally owned utilities in building CREZ transmission. All were highly relevant to whether Garland and the other MOU applicants were the *most* beneficial and cost-effective transmission service providers the Legislature told the Commission to select, PURA § 39.904(g).
- *After weighing only relevant factors, the Commission reached a reasonable result.* Again, Garland mischaracterizes the standard for the selection of the CREZ transmission providers under PURA and the Commission rule. It is not simply the "lowest bidder," but instead which entities can provide the transmission service in the "*most beneficial and cost effective*" manner.

In any event, Garland's assertion it would be the "low cost" provider is questionable.

A. The Commission considered the factors relevant to TSP selection.

As noted, the Legislature established the "most beneficial and cost effective" standard in adopting PURA §39.904(g)(2) in 1995. To implement that standard, in June 2008, before Garland and the other applicants submitted their CTP proposals, Commission Rule 25.216 was adopted. This rule listed the information interested TSPs were required to submit and the matters the Commission would specifically consider in selecting from among the CREZ TSP applicants. Garland did not challenge Commission Rule 25.216. As it was a competition rule,¹⁶ any challenge to the rule had to be brought within fifteen days of its publication in the Texas Register. PURA § 39.001(f). To the extent Garland complains about the standards the Commission applied in making its selection, it is too late to challenge them. Agency rules may include broad statements of standards and nonexclusive lists of criteria. *See TXU Elec. Generation, L.P., v. Pub. Util. Comm'n*, 165 S.W.3d 821, 839-42 (Tex. App.—Austin 2005, pet. denied).

¹⁶ *Tex. Pub. Util. Comm'n, Rulemaking Proceeding to Amend PUC Substantive Rules Relating to the Section of Transmission Service Providers Relating to the Selection of Transmission Service Providers Relating to Competitive Renewable Energy Zones and Other Special Projects*, Project No. 34560 (June 19, 2008) (Order adopting 16 Tex. Admin. Code § 25.216 at 1).

B. The Commission did not consider factors irrelevant to TSP selection.

What Garland characterizes as “legally irrelevant factors” were in fact highly relevant to the Commission’s determination as to whether Garland should be selected as one of the most beneficial and cost-effective transmission providers.¹⁷ Here, Garland mischaracterizes the Order’s discussion of certain aspects of the municipally owned utilities’ participation in building CREZ transmission that led the Commission to select other candidates.

These particular characteristics were highly relevant to the Commission’s ultimate determination. Part of the analysis of the most beneficial choice concerned timeliness and the exact route chosen. For an MOU, the Commission’s authority to ensure both is severely constrained. In addition, the limited rights of affected landowners and the taxing authorities might increase the number of lawsuits that

¹⁷ Garland contends that, because the Commission did not state that each of its reasons for excluding MOUs was an independent or stand-alone ground, should any one of these reasons be found arbitrary and capricious, the entire order must be set aside and remanded. (Garland Brief at 15.) This is simply wrong. The Commission’s Order should be affirmed if there is substantial evidence supporting the selection of the best-qualified providers that the Commission made. Each of the issues regarding municipally owned utilities was part of the totality of the evidence regarding the municipally owned, and non-municipally owned, TSP applicants that the Commission considered in making the selection. Even if one or more of these factors were deemed arbitrary and capricious, substantial record evidence still supports the selection of the applicants the Commission chose instead of Garland.

could slow construction. Because the transmission lines are distant from the municipalities that own the MOUs, these issues would not be resolved through local political processes. Garland's suggestion that the Commission needed to ignore these inherent difficulties when weighing competing offers to construct lines is itself unreasonable.

As a whole, the evidence—including that relating to these concerns about MOUs—indicated that the municipally owned applicants were not the best qualified. (Order at 41 (FOF 75) (“The record evidence reflects that 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 manner.”) (emphasis added); FOF 76b (“the benefits to be gleaned from participation by municipally owned utilities in the CTP build out *are outweighed by* the additional legal and regulatory uncertainties and greater probability of delay that arise from their inclusion.”) (emphasis added).)

- (1) **That Garland, as an MOU, does not obtain CCNs from the Commission for its transmission projects is relevant to the selection of the CREZ transmission providers.**

The Commission did *not* say, as Garland contends, that selected providers *must* be required to obtain certificates of convenience and necessity (CCNs) from the

Commission. The Commission did note that its lack of jurisdiction over the routing of MOU's transmission lines raised due process concerns. (Order at 9.) The findings of fact further explain the concerns the Commission had about jurisdiction over the routing (FOF 64b) and timing of construction (FOF 64c) of MOU-built CREZ lines, including that affected landowners would not have an "independent, objective, and state-wide adjudication" regarding the routing and timing of construction (FOF 64d). The due-process concerns were particularly troublesome with regard to lines the MOUs proposed to build well outside their traditional service-area boundaries (like Garland's) (FOF 64e & 64f).

The Commission's CCN authority also allows it to ensure lines are constructed timely. For non-MOU lines, the Commission can revoke the designation of a provider that does not timely apply for its CCN. (*See* Order at 52 (FOF 134) ("Pursuant to P.U.C. Subst. R. 25.216(f)(1), if the Commission determines that a designated TSP has failed to submit a CCN application in compliance with this Order designating it responsible for a CTP facility, the Commission may revoke the designation assigned to it and select another entity for the CTP facility.").) The CREZ CCN applications include a cost estimate and an implementation schedule for the Commission's review. 16 Tex. Admin. Code § 25.216(f)(2). If a selected TSP fails to comply with the order issuing it a CCN, the Commission can revoke it. 16 Tex. Admin. Code § 25.216(f)(4).

The Legislature need not have required a CCN for CREZ lines for the Commission to consider the negative impacts resulting from the fact that MOUs are not subject to PURA's CCN requirements. The fact that the Legislature exempted CREZ CCN's from two factors the Commission considers with other CCNs—the adequacy of existing service, PURA § 37.056(c)(1), and the need for additional service, PURA § 37.056(c)(2)—obviously indicates the Legislature assumed CCNs would be required for at least some of the CREZ projects—and that the remaining CCN criteria were important.

Garland's history of working with landowners (or the alleged lack of evidence of any problems in this regard), and its promise to act responsibly and follow the Commission's CCN rules, may support its application, but the Commission was not obligated to select it based solely upon these representations. And while Garland may pledge to follow the Commission's CCN rules, it is unclear how Garland would apply them—it could not conduct an APA contested case and leave resolution of any issues to an independent decisionmaker.

The underlying concern that the Commission would have limited regulatory oversight over the construction of the CREZ lines built by a municipally owned utility was particularly troublesome given the time-sensitivity of completing the planned transmission by the end of 2013. (*See* Order at 2 (Commission anticipates selected

entities will move diligently to develop and submit CCN applications, which Commission will address expeditiously; selected entities to promptly begin and complete construction), 3 (CCN applications sequenced to meet anticipated 2013 deadline).) That concern was highly relevant to whether Garland should be selected as a CREZ TSP.

- (2) **That Garland, as an MOU, was not required to pay property taxes is relevant to the selection of the CREZ transmission providers.**

Here again, Garland mischaracterizes the Commission's order. The Commission did not *require* that selected providers pay property taxes. Instead, the Order notes that municipally owned utilities are not required to pay ad valorem taxes, and it is questionable whether a municipally owned utility could be held to a commitment to make payments in lieu of taxes. The local taxing entities where Garland proposed to build lines—far outside its city limits and service area—would protest the resulting loss to their tax base. The record evidence reflects the basis for this concern, and the relevance of this issue to Garland's selection as a TSP. (AR, TR, Vol. C at 485-88; TR, Vol. D at 1036.)

In fact, Garland speaks out of both sides of its mouth with regard to the tax issue. Although Garland cites the fact it does not pay ad valorem taxes as one reason it is the

“low cost” provider, in fact Garland offered during the hearing to make payments in lieu of taxes for the CREZ facilities it proposed to build. (AR, Binder 19, Item 606.)

(3) The Commission’s lack of jurisdiction over Garland is relevant to the selection of the CREZ transmission providers.

Once again, Garland mischaracterizes the Commission’s Order. The Commission did not “exclude” MOUs because they lacked “complete and utter” jurisdiction over them, as Garland contends. (Garland Brief at 19.) The Order says no such thing. The Commission’s jurisdictional concern, already explained, related to the lack of Commission authority over the routing and construction of transmission lines by MOUs, given that MOUs do not obtain CCNs from the Commission for their lines.

None of the findings of fact and conclusions of law that Garland cites support its argument.

- *Finding of fact 64* simply describes various inherent difficulties with municipally owned utilities’ participation in the CREZ; it does not exclude municipally owned utilities for the reasons stated.
- *Finding of fact 76* states that the capabilities of the three MOU applicants do not make them the most beneficial and cost-effective providers—the statutory standard for TSP selection.

- *Conclusions of law 5 -7* do not reference municipally owned utilities at all, and say nothing about their relative merits as CREZ TSPs.

That CREZ transmission service is subject to PURA Chapter 35, under which the Commission sets transmission rates for both MOUs and investor-owned utilities, does not in any way suggest the Commission did not have legitimate concerns about its authority over the routing of lines and timing of construction for any lines Garland were selected to build.

C. The Commission reached a reasonable result after applying only the relevant factors.

Garland's argument here (Garland Brief at 15) is premised entirely upon mischaracterization of the statutory standard for CREZ provider selection. The standard is not simply to pick the "lowest bidder" for each CREZ transmission project. Had that been the intent, the Legislature could have simply instructed the Commission to pick the lowest cost provider—*i.e.*, the lowest conforming bidder—as Garland suggests. But the Legislature did not do that. Instead, it told the Commission to develop a plan to deliver electricity in a manner that is "most beneficial and cost effective to the customers." This necessarily involves a range of matters (financial, operational, and other) bearing upon the prospective providers' ability to build the lines expeditiously and to provide cost effective and reliable transmission service.

Weighing these factors was left to the Commission's discretion. Cost was not the only consideration in deciding which were "most beneficial."

The Commission's TSP Selection Rule, implementing the "most beneficial" statutory standard, did not simply mandate selection of the low cost provider. The Commission's rule — 16 Tex. Admin. Code § 25.216 — more specifically outlines the type of analysis that the Commission will engage in selecting the most "beneficial and cost-effective provider."

In any event, there is some evidence that Garland would not be the "low-cost provider." Evidence indicated that Garland's rate of return would in fact be higher than other, non-MOU applicants (AR, Binder 38, Sharyland Ex. 17 at 3), and that Garland's construction cost for building the lines would be higher than for the non-MOU TSPs (AR, Binder 40, WETT Ex. 2A). Other record evidence also contradicted Garland's alleged cost advantage.¹⁸ Courts do not substitute their judgment as to the weight of the evidence on questions left to the agency's discretion. Tex. Gov't Code

¹⁸ *E.g.*, AR, Binder 25, Joint Parties Ex. 4 at 6 (MOUs could not achieve economies of scale); Binder 32, Oncor Ex. 11 at 9-10, 24-25 (Oncor cost advantage over Garland); Binder 24, ETT Ex. 11 at 8-10 (disputing alleged Garland cost advantage); TR, Vol. B at 335-338, TR, Vol. B at 352-380; TR, Vol. C at 438-40; TR, Vol. C at 632-37; TR, Vol. D at 849-862; TR, Vol. D 1035-37; TR, Vol. C at 1042-44; TR, Vol. E at 1293-1300.

§ 2001.174; *Nucor Steel v. Pub. Util. Comm'n*, 26 S.W.3d 742, 748-49 (Tex. App.—Austin 2000, pet. denied).¹⁹

IV. The Commission's findings are sufficient and supported by substantial evidence. (Responsive to Garland's Brief Section IV. D. & E.)

Contrary to Garland's complaints, the Commission's findings of fact include required underlying findings and are supported by substantial evidence.

The Texas Supreme Court laid out the requirements for findings of fact and conclusions of law. *Texas Health Facilities Comm'n v. Charter Med.-Dallas, Inc.*, 665 S.W.2d 446 (Tex. 1984). An agency must articulate findings that support its conclusions of law. The reviewing court tests the agency's conclusions to determine whether they are reasonably supported by the findings and by substantial evidence in view of the reliable and probative evidence in the record as a whole. *Id.* However, the courts will not "lay out a precise form of findings to be made by the Commission." *Id.* at 452. And an accompanying statement of underlying facts is only required when ultimate findings are stated in statutory terms. *Id.* at 451.

¹⁹ Garland argues the fact that it does not have to pay property taxes is one reason it is purportedly the "low cost" provider. Yet, during the hearing, Garland acknowledged that it makes payments in lieu of taxes (PILOT) for some of its facilities, AR, TR, Vol. D at 1036, and offered to make such payments for the CREZ transmission facilities it proposed to build and operate. AR, Binder 19, Item 577.

The Commission was given a broad statutory mandate to select transmission providers that would be able to construct transmission capacity for renewable energy from the CREZs “in a manner that is most beneficial and cost-effective to the customers.” PURA § 39.904(g). The Commission’s discussion in its Order as well as the findings of fact and conclusions of law, show the careful consideration that MOUs, as well as the other applicants, were given. (Order at 9-10, FOF 57a., 64, 76.)

The discussion in the Order shows the Commission’s consideration of the applications of the three MOUs and Garland’s specifically. (Order at 9-10.) Relying on the record evidence, the Commission articulated its general concerns about municipally owned utilities. *Id.* First, the fact that MOUs are not subject to the Commission’s jurisdiction with respect to the routing of transmission lines was a problem. *Id.* The Commission found that due process might be implicated when an MOU attempted to route facilities outside the MOU’s traditional service area. *Id.* Also, the Commission determined that it might not be able to fulfill its duty to develop a plan for CREZ construction that would be the most beneficial and cost-effective to customers if it designated utilities over which it did not exercise oversight. *Id.* And finally, the Commission noted that Garland’s expressed motive of protecting its ratepayers from a negative impact from a change in the matrix was not a relevant factor in developing the CREZ plan. *Id.*

The Commission's findings of fact also show that the Commission considered the evidence in determining not to designate Garland as a transmission service provider. The decision was not based on some premeditated exclusion as Garland implies.

Finding of fact 57.a demonstrates that MOUs were not categorically excluded. They were instead explicitly asked to provide financial information to help the Commission make its decision. (FOF 57.a.)("57. On December 4, 2008, the Commissioners requested additional information from interested TSPs. Each municipally owned utility was instructed to submit information, and supporting documentation, . . .") Finding 58 states that Garland, in fact, provided the requested information along with the other applicants. (FOF 58.) Similarly, finding of fact 76 relies directly on the "record evidence" to hold 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 manner." (FOF 76.) This finding is not conclusory as Garland claims in its brief; it is a statement of facts found by the Commission about the abilities of Garland. The Order goes on to explain that the problem with Garland and the other MOUs is the limited oversight that the Commission can exercise over them. (FOF 76.a.) Because of this limitation, the

Commission found it could not be assured that it could meet its statutory requirements under PURA. (*Id.*)

Finding of fact 64 lays out in detail the reasons for not designating Garland. But Garland does not claim this finding is invalid for the technical reasons it relies on to challenge other findings. Rather, Garland contends this finding is not supported by substantial evidence. That claim is simply wrong. The Commission's findings in FOF 64, followed by the record references supporting them, are as follows.²⁰

64. Inherent difficulties arise if municipally owned utilities are designated as CREZ TSPs [Transmission Service Providers].

- a. A municipally owned utility's authority to waive its own jurisdiction is limited. (AR, TR Vol. C at 732) (CPS cannot agree to be under PUC jurisdiction); (AR, TR Vol. D at 1040) (Garland does not believe it can "do the CCN" alone)
- b. The Commission does not have jurisdiction over municipally owned utilities regarding their routing of transmission lines. (AR, Binder 25, Garland Ex. 1 (Garland's CREZ Transmission Plan) at 5) (GP&L not required to obtain CCN because it is not an electric utility); (AR, Binder 25, Garland Ex. 3 (Grubbs Direct) at 6) (Garland not required to obtain CCN to construct transmission lines).

²⁰ Intervenor Oncor recited the evidence supporting FOF 64 in its pre-hearing brief for the temporary injunction hearing, and the Commission adopted those arguments in its pre-hearing brief. However, the findings and evidence are so compelling, that recapitulating them here on the merits is appropriate.

- c. The Commission does not have jurisdiction over municipally owned utilities regarding the timing of the construction of their transmission lines. (*Id.*)
- d. The selection of a municipally owned utility as a designated TSP for CTP [CREZ Transmission Plan] facilities would deprive affected landowners of an independent, objective, and state-wide adjudication regarding the routing and timing of construction of CREZ transmission lines. (AR, TR, Vol. C at 665-66) (MOUs' processes do not allow landowners to conduct discovery, put on evidence, or have their evidence reviewed by an independent, impartial third party); (AR, Binder 26, LCRA TSC Ex. 5 (Wenmohs Responsive) at 7-8) (under MOU processes, landowners and affected parties have extremely limited opportunities to argue against placement of lines and no impartial venue like SOAH.)
- 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. (*Id.*)
- 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. (AR, Binder 24, ETT Ex. 9 (Crowder Responsive) at 17) (MOUs attempt to extend CCN exemption beyond their boundaries gives landowners less influence and raises questions that could cause litigation and delays.); (AR, Binder 25, Joint Parties Ex. 3 (Wood Responsive) at 14) (GP&L combines roles of applicant and decision-maker; landowners may be dissatisfied that officials "in or from distant municipalities will decide their fates" through eminent domain.)
- 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. (AR, Binder 25, Garland Ex. 1 (Garland's CREZ transmission plan) at 5) (GP&L not an "electric utility" so no CCN required); (AR, Binder 25, Garland Ex. 3 (Grubbs direct) at 6) (GP&L not required to obtain CCN for transmission line construction.)

- 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. (AR. TR, Vol. C at 485-86) (for-profit utilities pay local taxes, but towns other than Garland are not capable of charging Garland for PILOT [payments in lieu of taxes]); (AR, TR, Vol. D at 1036) (GP&L pays PILOT to City of Garland only within the city limits.)

Garland's further complaint that the Commission disregarded its "uncontroverted" evidence purporting to show Garland as a "low cost" provider, is also without merit. (See Garland's Brief at 24.) Under the APA, the Commission "is not required to state facts that it rejected and upon which it did not rely in reaching its conclusions." *Pedernales Elec. Coop. v. Pub. Util. Comm'n*, 809 S.W.2d 332, 337 (Tex. App.—Austin 1991, no pet).

V. The Commission's policy decision is reasonable.

Finally, the Commission's determination should be upheld as a reasonable policy decision. The Austin Court of Appeals has held that when, as here, "an agency decision involves the balancing of competing interests . . . and an evaluation of the

equities of the situation, the agency is making a fundamental policy choice.” *West Tex. Util. v. Office of Pub. Util. Counsel*, 896 S.W.2d 261, 272 (Tex. App.–Austin 1995, writ withdrawn) (citing *Tex. Ass’n. of Long Distance Tel. Cos. v. Pub. Util. Comm’n (Texaltel)*, 798 S.W.2d 875 (Tex. App.–Austin 1990, writ denied)).²¹ In that situation, “[t]he agency can choose to implement such a policy through the APA’s formal rulemaking procedures or, under certain circumstances, on an ad hoc basis.” *Id.*

When an ad hoc policy decision is appropriately made, the reviewing court determines whether the decision was arbitrary and capricious, not merely whether it was based on substantial evidence. *Id.* Here, as demonstrated above in this brief, the Commission’s decision was not arbitrary and capricious. It was reasonable, based on relevant factors, and should be upheld.

²¹ The Commission is aware that this holding has been distinguished by the Austin Court and is not applicable in every situation. See *CenterPoint Energy Entex v. R.R. Comm’n*, 213 S.W.3d 364 (Tex. App.–Austin 2006, no pet.). The Court differentiated the *CenterPoint Entex* situation from the *West Texas Utilities/Texaltel* cases because the Commission in the latter cases provided a rational basis in its order explaining its reasons for the decision. The order in *CenterPoint Entex*, on the other hand, gave no explanation and no evidence showed why it was more reasonable. Here, the selection docket is more nearly analogous to a determination of the competing interests in *West Texas Utilities/Texaltel*. The Commission’s reasons are plainly laid out in the order.

PRAYER

For the reasons stated here and in the accompanying briefing of Intervenors, the Commission prays that Garland take nothing by its suit, that the Commission's order in its Docket No. 35665 be in all things affirmed, and that the Commission be granted any further relief to which it is justly entitled.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

BARBARA B. DEANE
Chief, Environmental Protection and
Administrative Law Division

DAVID PREISTER
Chief, Environmental Protection Section



DOUGLAS FRASER
Assistant Attorney General
State Bar No. 07393200

JOHN R. HULME
Assistant Attorney General
State Bar No. 10258400

Environmental Protection and
Administrative Law Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Tel: (512) 475-4129
Fax: (512) 320-0052

ATTORNEYS FOR THE
PUBLIC UTILITY COMMISSION OF TEXAS

CERTIFICATE OF SERVICE

I, Douglas Fraser, do hereby certify that a true and correct copy of the foregoing Public Utility Commission of Texas' Brief on the Merits was mailed by certified mail, return receipt requested, or first class mail as indicated to the following on the 6th day of November, 2009. In addition, a copy was sent by email to counsel of record.

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| <p>Lambeth Townsend <i>Certified Mail</i> LLOYD GOSSELINK ROCHELLE & TOWNSEND, PC 816 Congress Avenue, Suite 1900 Austin, TX 78701 Fax: (512) 472-0532 <i>Attorneys for the City of Garland</i></p> <p>Kerry McGrath CLARK THOMAS & WINTERS P O Box 1148 Austin, TX 78767 Fax: (512) 474-1129 <i>Attorneys for AEP Texas Central Company, AEP Texas North Company and Electric Transmission Texas, LLC</i></p> <p>Chris Reeder Elizabeth G. Bloch BROWN MCCARROLL, LLP 111 Congress Ave, Suite 1400 Austin, TX 78701 Fax: (512) 479-1101 <i>Attorneys for Lone Star Transmission, LLC</i></p> | <p>James W. Checkley, Jr. LOCKE LORD BISSELL & LIDDELL 100 Congress, Suite 300 Austin, TX 78701 Fax: (512) 305-4800 <i>Attorneys for Cross Texas Transmission, LLC</i></p> <p>Katherine Coleman ANDREWS KURTH LLP 111 Congress Avenue, Suite 1700 Austin, TX 78701 Fax: (512) 320-9292 <i>Attorneys for Texas Industrial Energy Consumers</i></p> <p>Richard L. Adams Megan C. Davis VINSON & ELKINS LLP Trammel Crow Center 2001 Ross Avenue, Suite 3700 Dallas, Texas 78201-2975 Fax: (214) 999-7736 <i>Attorneys for Oncor Electric Delivery Company LLC</i></p> |
|--|---|

James E. Guy
SUTHERLAND ASBILL & BRENNAN LLP
701 Brazos Street, Suite 970
Austin, Texas 78701-2559
Fax: (512) 721-2656
Attorney for Sharyland Utilities, L.P.

Christopher Malish
MALISH & COWAN, PLLC
1403 West Sixth Street
Austin, Texas 78703
Fax: (512) 477-8657
*Attorney for Wind Energy Transmission
Texas, LLC*

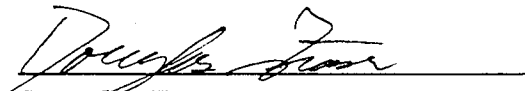
Patrick R. Cowlshaw
Jackson Walker LLP
901 Main Street, Suite 600
Dallas, Texas 75202
Fax: (214) 953-5822
*Attorney for RES America Developments,
Inc.*

James H. Barkley
BAKER BOTTS LLP
910 Louisiana Street
Houston, Texas 77002
Fax: (713) 229-2773
Attorney for Iberdrola Renewables, Inc.

Paul Shinkawa
James N. Rader
Post Office Box 220
Austin, Texas 78767-0220
Fax: (512) 476-4010
*Attorneys for LCRA Transmission Services
Corporation*

Shannon McClendon
400 West 15th Street, Suite 720
Austin, Texas 78701
Fax: (512) 264-9122
Attorneys for AES Wind Generation, Inc.

Steven Baron
CONSULTING AND LEGAL SERVICES
P. O. Box 5573
Austin, Texas 78763
Fax: (512) 479-8070
*Attorney for E.ON Climate & Renewables
North America, Inc.*


Douglas Fraser