

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

CITY OF GARLAND, TEXAS,

Plaintiff,

vs.

PUBLIC UTILITY COMMISSION
OF TEXAS, ET AL.,

Defendants.

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§

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

200TH JUDICIAL DISTRICT

REPLY BRIEF OF THE CITY OF GARLAND

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REPLY BRIEF OF THE CITY OF GARLAND

The City of Garland (“Garland”) is challenging the validity of the Commission’s Order on Rehearing¹ (the “Order”) in Docket No. 35655 and its authority to proceed with certificate of convenience and necessity (“CCN”) proceedings to implement such Order. This is Garland’s reply to the brief filed by the Public Utility Commission of Texas (the “Commission”) and the joint brief filed by the parties referred to herein collectively as the “Awardees.”²

I. OVERVIEW AND INTRODUCTION

Revealing its true position, the Commission believes it can exclude municipally owned utilities (“MOUs”) from consideration to construct CREZ³ transmission facilities as a pure matter of policy.⁴ And, that is what happened in this case. The reasons for exclusion, however, cannot withstand scrutiny under any legal standard. Even policy must adhere to the legislative directives, which did not happen here.

This case involves the Commission dividing up a \$5 billion to \$6 billion pie between

¹ The final order on rehearing in Docket No. 35655 was signed by the Commission on May 15, 2009.

² Oncor Electric Delivery Company LLC (“Oncor”), Electric Transmission Texas, LLC (“ETT”), Lone Star Transmission, LLC (“Lone Star”), Wind Energy Transmission Texas, LLC (“WETT”), Cross Texas Transmission, LLC (“Cross Texas”), Sharyland Utilities, L.P. (“Sharyland”), and LCRA Transmission Services Corporation (“LCRA”)

³ The term “CREZ” means Competitive Renewable Energy Zones.

⁴ Comm. Brief at 31.

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). 16 Tex. Admin. Code § 25.216. 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). Comm. Brief at 9-10 (emphasis added).

wholesale transmission utilities. Yet, the Commission decided that certain parties — specifically MOUs — were never allowed to be considered, even before evaluating in detail the criteria specified in the Commission’s selection rule. The Commission’s stated reasons for this action directly violate the statutory mandates and can only be described as arbitrary and capricious.

Several arguments or themes in various places in the briefs must be understood and corrected at the outset.

A. MOUs were “categorically eliminated” from consideration.

Both the Commission and the Awardees take Garland to task arguing that the MOUs were not categorically eliminated.⁵ For example, the Commission indicates “Garland and other MOUs were allowed to present evidence supporting their applications.”⁶ The Awardees say virtually the same thing.⁷ But to what end? Based on the Commission’s reasoning, there was no real any reason to put on evidence. In fact, no MOU could change the law that a MOU did not have to obtain a CCN or did not pay local property taxes.

The Commission’s brief goes on to discuss the specific criteria that were to be used to evaluate each applicant, presumably including the MOUs, under its substantive selection rule.⁸ This is shown on the facing page. The Awardees similarly argue “the governing Commission substantive rule *expressly requires the Commission to evaluate* TSPs [Applicants] on non-cost factors”⁹ Thus, both the Awardees and the Commission admit that the Commission was “*required*” or had “*at a minimum*” to look at the rule’s criteria for each entity.¹⁰ That, too, was

⁵ Aw. Brief at 18; Comm. Brief at 11.

⁶ Comm. Brief at 11.

⁷ Aw. Brief at 18.

⁸ Comm. Brief at 9-10.

⁹ Aw. Brief at 22 (emphasis added).

¹⁰ Aw. Brief at 22, Comm. Brief at 10.

not done here. Instead, FF 76 and FF 64 treat all MOUs as a group and eliminate them across the board.¹¹

If MOUs were not “categorically excluded,” where are the findings as to these selection criteria for each MOU? None exist, and the MOUs’ evidence as to the merits of their applications fell on deaf ears. In short, under the Commission’s rules of the game, the MOUs were never let out of the locker room and onto the playing field.

B. MOUs are among the low cost providers according to the Commission’s Order.

Both the Commission’s and the Awardees’ briefs argue that some evidence in the record *may* indicate that the MOUs *might not always* be the low cost providers. For example, the argument that Garland’s estimates of line costs were higher than others¹² is a non sequitor. By definition, they were just estimates and even the unbiased Commission Staff said the cost of construction would not vary greatly among applicants.¹³ Finally, the Order even recognizes the cost would not be known until the specific route was selected and construction was completed.¹⁴

The real question is whether the Commission recognized that MOUs were, in fact, low cost providers due to things such as the non-payment of local property taxes, the non-payment of federal income taxes, and the ability to issue tax exempt debt at lower rates than IOUs. Despite all the rhetoric and hyperbole in the briefs, the Commission did understand and recognize who the low cost providers were and said so. Finding of Fact 76.b. reads as follows:

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.

¹¹ Order at 41-2.

¹² Aw. Brief at 37-38.

¹³ Rebuttal Testimony of Michael J. Lee, Staff Ex. 6 [Binder 35].

¹⁴ Order at pp. 21-22.

Order at 42 (emphasis added). This is unequivocal recognition and a finding by the Commission that the MOUs did bring low cost benefits to the table the other competitors (like IOUs) could not. This Court and the parties should take, as a given, that MOUs are low cost providers as the Commission itself held.

C. Some issues have been narrowed.

In its initial brief, Garland explained why the three reasons the Commission used to exclude MOUs were invalid.¹⁵ From a review of the Awardees' and the Commission's briefs,¹⁶ Garland's understanding of the Commission's reasoning was incorrect. In other words, all parties apparently agree the third item — the lack of general jurisdiction over MOUs — is *not a basis* for the Commission's Order. Thus, the issues are: whether the lack of CCN jurisdiction over MOUs (which now has two subparts to address — routing and timing) and the MOUs non-payment of local property taxes are valid grounds for excluding MOUs across the board.

D. To the extent the Commission had discretion here, the Commission abused its discretion.

A major theme used by both the Commission and the Awardees to defend the Order is the Commission's alleged discretion to do what it did. As will be explained in more detail below, that is not correct. But, even if the Commission had some discretion to use the factors it did to exclude MOUs, the Commission abused its discretion.

Assuming that the CCN jurisdiction and non-payment of taxes factors were legitimate concerns and did not violate statutory mandates, the Commission ignored what the MOUs did to respond to those invalid factors. First, it is important to understand that these factors were raised

¹⁵ The first two were the CCN requirement and the payment of local property taxes requirement imposed by the Commission. The third reason was "the Commission believed that its lack of total and utter right to control a MOU in other respects was also significant."¹⁵ To refute this third reason, Garland's initial brief cited the Court to the Commission's extensive PURA Chapter 35 jurisdiction over transmission utilities, which expressly includes MOUs. Garland Brief at 6, 12-15.

¹⁶ Aw. Brief at 23; Comm. Brief at 18-21.

- (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 of 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 [Binder Vol. D].

by some parties after the applications to participate were filed and certainly were not mentioned in the Commission's selection criteria rule. Recognizing that the Commission was trying to find reasons to exclude the MOUs from the playing field, the MOUs found a way to address the issues being raised to exclude them.

Garland, TMPA, and the City of San Antonio ("San Antonio") offered to jointly own transmission facilities with another entity that would be subject to the CCN requirements the Commission was trying to and did impose as a mandatory requirement to be on the playing field. Specifically, San Antonio proffered a deal it had struck with South Texas Electric Cooperative ("STEC") to build certain lines because STEC was subject to CCN requirements.¹⁷ Likewise, both Garland and TMPA in their testimony offered to jointly own facilities with another entity to subject themselves to these same requirements.¹⁸

Garland did not stop there; it even offered to pay local property taxes if that was required by the Commission (even though that would increase transmission rates). These payments are called "payments in lieu of taxes" or "PILOT." The Awardees even quote portions of the record where Garland did so,¹⁹ which is shown on the facing page. Garland also offered other solutions to the CCN routing concern apart from jointly owning with another entity.²⁰

Without question, the MOUs met the challenge and had solutions for the roadblocks the

¹⁷ STEC Ex. 19 [Binder 37]; Tr. 1342-1344 (Dec. 4, 2008); CPS and STEC Memorandum of Understanding [Binder 19, Item 18].

¹⁸ Rebuttal Testimony of David Grubbs, Garland Ex. 8 at 7-9 ("Grubbs Rebuttal") [Binder 25]; Rebuttal Testimony of Eric Schroeder, TMPA Ex. 4 at 4-5 [Binder 38].

¹⁹ Aw. Brief at 35 (emphasis added).

²⁰ Garland committed to follow the Commission's rules concerning notice and to apply the routing criteria in PURA and the Commission's rules. Direct Testimony of David Grubbs, Garland Ex. 3 at 14-15 ("Grubbs Direct") [Binder 25]. Local public hearings would be held prior to development of final routes. CTP Proposal, Garland Ex. 1 at 19-20 [*Id.*]; Grubbs Direct, Garland Ex. 3 at 14-15 [*Id.*]; Grubbs Rebuttal, Garland Ex. 8 at 4-5 [*Id.*]. Garland also committed to keep the Commission informed concerning routing. Grubbs Rebuttal, Garland Ex. 8 at 4 [*Id.*].

Commission sought to place in their way of being able to compete. The fact that the Commission turned a blind eye and did not speak to these solutions is an abuse of whatever discretion the Commission had to impose such requirements.²¹ The Commission's failure to address the MOUs' solutions is also arbitrary and capricious because it leads to an unreasonable result.²² If the solutions had been accepted, the low-cost providers could have been included in the competition. Instead, they were excluded.

Only one inescapable conclusion remains after looking at the Order and what was before the Commission: The Commission was determined that MOUs would not participate in the competition or be awarded any of the new lines under any circumstance. The Commission's decision to act in this unwarranted and improper manner can only be arbitrary and capricious or a clear abuse of discretion.

Garland does not dispute that the Commission can come up with new standards on an ad hoc basis even though they are not in the rule. Those standards must, however, not violate statutory mandates and must not be arbitrary and capricious, which is the case here.

E. The failure of any one of the Commission's reasons is sufficient to overturn the Order.

Garland was clear in its initial brief²³ to point out that the failure of any one of the three reasons used by the Commission was sufficient to overturn the Order even though all of these are improper. The Awardees and the Commission meekly try to disagree. The Commission has only one sentence in a footnote challenging this proposition.²⁴ The Awardees have only one

²¹ *Fleetwood Community Home v. Bost*, 110 S.W.3d 635, 645 (Tex. App.—Austin 2003, no pet.).

²² *City of El Paso v. Public Utility Commission*, 883 S.W.2d 179, 184 (Tex. 1994). (An agency acts arbitrarily and capriciously when it: (1) fails to consider a factor the legislature required it to consider; (2) considers a legally irrelevant factor; or (3) weighs only relevant factors but reaches a completely unreasonable result.)

²³ Garland Brief at 15, 19.

²⁴ Comm. Brief at 18, fn.17 (last sentence).

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

sentence in their brief actually speaking to this point.²⁵

A review of FF 64 (shown on the facing page) demonstrates why Garland is correct as a matter of simple grammatical construction. Subparts “a” through “g” of FF 64 are all referring to aspects of the CCN jurisdiction the Commission believes it has over the Awardees and does not have over MOUs. Subpart “h” of FF 64 deals with non-payment of local property taxes. The finding does not contain any indication that each of these is an independent stand-alone ground. Nor is there an “or” between each of these subparts. If the Commission had intended that these be alternative stand-alone reasons, the Commission needed to say that clearly in the Order. It did not, and cannot now try to supply the missing language.

II. THE PRIMARY ISSUE TO BE RESOLVED

In its initial brief,²⁶ Garland stated the following central issue that should control the disposition of this appeal:

Did the Legislature intend to exclude MOUs from being allowed to build some of the new transmission lines when it adopted the new wind provisions found in PURA § 39.904(g), (h), and (i)?

This is the elephant in the room that neither the Awardees nor the Commission addressed head on. They ignored this point as if it did not exist. Sometimes, in a case like this, silence on an issue — especially when there is really nothing you can say — speaks the loudest.

Without repeating all that was said in its initial brief,²⁷ Garland asks that the Court not overlook this determinative issue and the fact that the Legislature knew what a municipal entity could or could not do when it enacted PURA § 39.904(g), (h), and (i). The legal presumption is

²⁵ Aw. Brief at 32.

²⁶ Garland Brief at 9.

²⁷ Garland Brief at 9, 11-13.

that the Legislature knew that (1) MOUs are not required to obtain CCNs, and (2) MOUs do not pay ad valorem property taxes.²⁸ Knowing this, the Legislature said in PURA²⁹ § 39.904(i) that “[T]ransmission service ... must be provided in a manner consistent with ... Chapter 35 [which clearly includes MOUs].”

Nowhere did the Legislature say or intimate that MOUs should be excluded from the competition for any reason like those used by the Commission. Had this been the intent, it would have only taken a few words to do so. If the Court agrees with Garland on this determinative issue, consideration of the remaining issues and arguments is unnecessary.

III. THE FURTHER SUBSTANTIVE ISSUES TO BE ADDRESSED

A. **The Commission exceeded its statutory authority and violated its direct statutory mandate by excluding MOUs before the merits of the selection criteria were considered.**

In its initial brief Garland pointed out that the Commission exceeded its statutory authority in several respects (shown in bold below):

1. **The statute does *not* allow the Commission to exclude MOUs for the reasons it did, which were well known to the Legislature.**

Neither the Commission nor the Awardees made an attempt to deny or challenge that the reasons used by the Commission to exclude MOUs were known to the Legislature and that the Legislature is presumed to know such matters.³⁰ The Commission, using *only* the lack of CCN jurisdiction and non-payment of property taxes, excluded all MOUs before evaluating them on the merits or criteria the Commission itself had developed.

2. **Specifically, the Commission could *not* exclude the known low cost providers — MOUs — without addressing the actual merits of their application.**

²⁸ *Northwest Austin Municipal Utility District No. 1 v. City of Austin*, 274 S.W.3d 820, 828 (Tex. App.—Austin 2008, pet. denied) (cited in Garland’s Initial Brief at 12, fn. 32).

²⁹ Public Utility Regulatory Act. TEX. UTIL CODE ANN. §§ 11.001-66.016 (Vernon 2007 & Supp. 2009) (“PURA”).

³⁰ *Id.*

As pointed out above, even the Commission acknowledged in FF 76.b. that MOUs were low cost providers and brought “benefits” to the customers. Those benefits were, however, never compared directly to any other entity as to any line to be built.

3. **Specifically, the Commission could *not* use the payment of property taxes to exclude MOUs because the non-payment of property taxes actually lowers the ultimate rates to the customers.**

The Legislature knew that MOUs do not pay property taxes and that payment of such taxes increases the transmission rates. With that background, the legislative mandate was *not* to pick entities that have higher costs (those paying local taxes) to increase rates. Similarly, the Legislature *did not* issue a mandate to protect the local taxing authorities. Instead, the *sole and exclusive mandate* was to protect the retail customers who ultimately pay for the transmission lines.

4. **The statute does *not* require that an entity obtain a CCN to participate and build any of these lines. The Commission *cannot* impose such a requirement because it would be contrary to the statute.**

Who needed CCNs and who did not was a fact of life and law that was clearly present when the statute was enacted. Yet the Legislature decided to include — not exclude — MOUs when it required the transmission to be done pursuant to PURA Chapter 35 in PURA § 39.904(i).

B. The Commission acted arbitrarily and capriciously by deciding to exclude MOUs, including Garland.

1. **Legal Standards and Overview**

All parties agree that an agency acts arbitrarily and capriciously when it: (1) fails to consider a factor the legislature required it to consider; (2) considers a legally irrelevant factor; or (3) weighs only relevant factors but reaches a completely unreasonable result.³¹ The Commission’s Order fails each of the three tests for arbitrary and capricious conduct:

³¹ *City of El Paso v. Public Utility Commission*, 883 S.W.2d 179, 184 (Tex. 1994).

a. fails to consider a factor the legislature required it to consider —

The Commission failed to consider and follow the prime directive and mandate: to provide the “most beneficial and cost-effective [transmission rates] to the [electric] customers [of this state].” PURA § 39.904(g)(2).

The Commission in FF 76.b. expressly recognized that MOUs have these benefits. Order at 43 (“The *benefits* to be gleaned *from participation by municipally owned utilities* in the CTP build-out”) (emphasis added).

The Commission failed to consider that all MOUs offered to jointly own lines with other entities, which would require CCNs, and two offered to pay PILOT if recoverable in rates. The Order is silent on these points.

b. considers a legally irrelevant factor —

The Order and the briefs filed by the Awardees and the Commission rely on three legally irrelevant factors to support exclusion of MOUs prior to considering the merits under the selection rule: (1) the non-payment of property taxes by MOUs, (2) the lack of CCN routing jurisdiction over MOUs, and (3) the lack of alleged CCN construction timing jurisdiction over MOUs.

c. weighs only relevant factors but reaches a completely unreasonable result —

Even assuming the three factors the Commission looked at were arguably relevant, the ultimate exclusion of MOUs is an unreasonable result because they are the low cost providers, which is the statutory mandate.

The Commission in FF 76.b. expressly recognized that MOUs have these benefits. Order at 43 (“The *benefits* to be gleaned *from participation by municipally owned utilities* in the CTP build-out”) (emphasis added).

2. The Commission failed to consider or speak to MOUs jointly owning with other entities, which would then require CCNs.

The record is clear that (1) STEC offered to jointly own lines with Garland and CPS, (2) Garland offered to jointly own lines with an entity that is required to obtain a CCN,³² and (3) Commission Staff recommended approving Garland if it jointly owned lines with another

³² Tr. at 1342 (Thursday, Dec. 4, 2008). Also see Statement of Intent, STEC Exh. 19 [Binder 36]; Tr. at 1366 (Friday, Dec. 5, 2008). [Transcripts, Vol. E] CPS and STEC submitted a more detailed Memorandum of Understanding on Dec. 18, 2008 [Binder 19, Item 601].

entity.³³ The undisputed purpose of these joint ownerships was to overcome and meet the CCN requirement the Commission was apparently going to impose.

It is also undisputed that the Order has no findings and is silent as to this factor and solution. If being required to obtain a CCN is a legally relevant factor, the Commission's failure to speak to the MOUs' solution means the Order is arbitrary and capricious. In a case cited by the Commission, *CenterPoint Energy Entex v. R.R. Comm'n*, 213 S.W.3d 364, 374 (Tex. App.—Austin 2006, no pet.), the court held:

The findings and conclusions in this case provide no basis on which to assess the rationality of the decision [here, why joint ownership is not a viable solution].

* * *

The only evidence is that the franchise fees permit installation and maintenance of distribution infrastructure that benefits municipal and environs customers alike. Based on this record, we conclude that the Commission's finding regarding spreading the cost of franchise fees to environs customers is arbitrary and capricious.

This is likewise the inescapable and proper conclusion here. The Commission made no findings whatsoever explaining why joint ownership does not answer the lack of CCN jurisdiction used to exclude MOUs. The Commission is not free to silently ignore a relevant factor or solution, but it did just that. By its silence, the Commission acted in an arbitrary and capricious manner.

3. The non-payment of local property taxes by MOUs is not a legally relevant factor.

Perhaps the most inexplicable reason given by the Commission is the MOUs failure to pay local property taxes. Without question, such tax payments cause the rates to be higher. Nothing in the responsive briefs disputes this because it is a fundamental axiom in ratemaking. The Awardees only have one or two sentences addressing this and argue these tax payments

³³ Rebuttal Testimony of T. Brian Almon Staff Exh. 4 at 8-9 [Binder 36].

“provide important revenue to local governments.”³⁴ The Commission (in less than a page) argues that the local taxing entities “would protest the resulting loss to their tax base.”³⁵

The Awardees and the Commission have turned a blind eye to the statutory mandate to provide the most beneficial and cost effective transmission for the “*customers*.” PURA § 39.904(g)(2). The statute does *not* say to protect local taxing authorities. Instead, the statutory mandate is the antithesis of providing local taxing revenues. The Commission argues that Garland is talking “out of both sides of its mouth” because Garland offered to make the payments in lieu of taxes (PILOT) if necessary to secure a place in the competition.³⁶ This is nonsensical. Garland recognized the results of such payments. But, if the Commission was going to apply an improper factor that increased rates (rather than decreased them), Garland would go along in order to be considered.³⁷

First and foremost, the non-payment of local taxes is a legally irrelevant factor and actually contrary to the statutory mandate thereby leading to an unreasonable result. It is thus arbitrary and capricious. Furthermore, as described herein, the Commission abused its discretion in applying this if it were a proper factor when it did not allow MOUs to use one of the solutions to comply, such as paying PILOT.

4. The Commission’s lack of construction timing control over MOUs due to lack of CCN jurisdiction is a misstatement of the law.

Both the Commission and the Awardees rely here on the alleged “ability” of the

³⁴ Aw. Brief at 26-7.

³⁵ Comm. Brief at 21-2.

³⁶ Comm. Brief at 22.

³⁷ 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* [include payments as a cost item to be recovered in rates], *we would be more than glad to pay PILOT for these CREZ facilities*. Tr. at 1036-1037 (Dec. 3, 2008) [Transcripts, Vol. D] (emphasis added).

Commission to revoke a CCN of an entity that is not pursuing the work in a timely manner (as viewed at some future time by the Commission). That is then contrasted to the lack of control of the timing if they were awarded to an MOU because no CCN is required. This is a make-weight argument that has no validity in law.

The Commission cannot revoke a CCN of an entity unless it can be shown that the entity is not providing “service” according to PURA § 37.059³⁸ and the relevant case law. *See Denton County Electric Cooperative, Inc. v. Public Utility Commission*, 818 S.W.2d 490 (Tex. App.—Texarkana 1991, writ denied) (An implied power to reexamine prior CCN orders does not exist when the statute expressly delegates a particular power to do so and prescribes method of exercise).

The Commission seeks to rely on its Rule 25.216(f)(4),³⁹ which the Commission wishfully asserts would grant it the following: “If a selected TSP fails to comply with the order issuing it a CCN, the Commission can revoke it.”⁴⁰ That, however, is not the law regardless of what the Commission puts in its rule. *Denton County* holds that the Commission has no implied power to revoke a CCN, and that, as long as the utility was “providing service,” the CCN could not be taken away. Finally, the court held that the ongoing efforts of an entity (having been granted a CCN) to construct a transmission line would meet the “provision of service” definition set forth in the statute.⁴¹ Thus, while the Commission may be displeased with the progress on a line, the Commission has no legal basis to cancel the CCN.

³⁸ § 37.059. REVOCATION OR AMENDMENT OF CERTIFICATE. (a) The commission may revoke or amend a certificate after notice and hearing if the commission finds that the certificate holder has never provided or is no longer providing service in all or any part of the certificated area. (b) The commission may require one or more electric utilities to provide service in an area affected by the revocation or amendment of a certificate.

³⁹ 16 Tex. Admin. Code § 25.216(f)(4).

⁴⁰ Comm. Brief at 20.

⁴¹ *Denton County*, 818 S.W.2d at 494.

It is also of some consequence here, that several of *the Awardees* (Oncor, ITC, and LCRA) actually filed comments to this rule *agreeing* with Garland that *the Commission had no such jurisdiction once a CCN was granted*.⁴²

When the law is recognized for what it is, this “timing” factor is at best a “push,” meaning it does not favor one group (those needing a CCN) over the other (MOUs). Both are on equal footing when it comes to the Commission trying to control the timing of construction.

In fact, all entities have a significant incentive to construct the lines as rapidly as can be prudently done. The reason is quite simple when one considers ratemaking principles. The costs of these facilities can only be made a part of the transmission rates and used to earn a return when the assets are actually “used and useful” in providing service. In other words, except in special circumstances (where partial allowance may be allowed), the utility does not receive its profits until the asset is actually being used to provide the service. Given the hundreds of millions of dollars in profits at stake here, that is more than enough incentive for any utility to act in a timely manner to construct the lines.

Finally, if this was truly a legitimate concern, all the Commission had to do was hold that Garland would have to jointly own a line with an entity that did need to obtain a CCN. This is precisely what the unbiased Commission Staff recommended.⁴³ The silence in the Commission’s Order to speak to this solution is deafening. Yet, it speaks volumes — the Commission was not going to consider a feasible solution and was not going to allow MOUs to be players under any circumstance.

⁴² In the preamble to the adoption of this very rule, the Commission recited the following: “*CenterPoint, ITC, LCRA, and Oncor recommended* that the commission *delete the portion of the proposed rule that states the commission can revoke a CCN. They argued that the commission lacks the statutory authority to adopt the ability to revoke a certificate.*” 33 Tex. Reg. 5312-3 (July 4, 2008) (emphasis added).

⁴³ Rebuttal Testimony of T. Brian Almon, Staff. Ex. 4 at 8-9 [Binder 36].

5. The Commission's lack of CCN route control over MOUs is a legally irrelevant factor.

The Commission and Awardees ignore the statutory mandate and try to come up with a justification to not let MOUs on the playing field. Section 39.904(g)(2) of PURA does not speak to landowners at all. The only reference in the statute is to protect the retail “customers.” At the same time, the provisions of § 39.904(i) speak of transmission under and pursuant to PURA Chapter 35, which expressly includes MOUs.

The only real difference in the routing here is that the Commission is the judge for entities having to obtain CCNs versus the city council of the MOU being the judge if a MOU had been selected. Did the Commission have evidence that city councils would not act in a fair manner? No. Will some landowners still be upset over the ultimate decision? Of course, but this happens regardless of whether the Commission or a city council is the judge.

As indicated in its initial brief, even if the Commission were to doubt that Garland would act responsibly, the evidence shows that Garland has historically worked with landowners to mitigate routing impacts.⁴⁴ In addition, Garland committed to follow the Commission's rules concerning notice and to apply the routing criteria in PURA and the Commission's rules.⁴⁵ Thus, all affected landowners on potential routes would be notified and encouraged to participate in the public meetings. Local public hearings would be held prior to development of final routes.⁴⁶ Garland also committed to keep the Commission informed concerning routing.⁴⁷ No evidence contradicted Garland's testimony.

⁴⁴ CREZ Transmission Plan Proposal, Garland Exh. 1 at 19-20 (“CTP Proposal”) [Binder 25]; Grubbs Rebuttal, Garland Exh. 8 at 4-5 [*Id.*].

⁴⁵ Grubbs Direct, Garland Exh. 3 at 14-15 [Binder 25].

⁴⁶ CTP Proposal, Garland Exh. 1 at 19-20 [Binder 25]; Grubbs Direct, Garland Exh. 3 at 14-15 [*Id.*]; Grubbs Rebuttal, Garland Exh. 8 at 4-5 [*Id.*].

⁴⁷ Grubbs Rebuttal, Garland Exh. 8 at 4 [Binder 25].

The Awardees embellish the Commission's statements about an alleged lack of due process when they state, "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 64.d)."⁴⁸ First, that is not exactly what FF 64.d. says.⁴⁹ Finding of Fact 64 does not say anything about a landowner's ability to vote in Garland's elections. Second, the landowners' due process is fully protected by the condemnation process. Finally, the concern about the distance the landowners are from Garland is ludicrous considering that the area in which Garland sought to build lines is the Texas panhandle. Garland is actually closer than Austin for the landowners if distance to the venue of the hearing is a meaningful factor. Also, those landowners do not get to vote for the individuals who become PUC Commissioners. The lengths to which Awardees are willing to go to prop up the Commission's decision reveal the weakness of their arguments.

The inescapable conclusion is that the Commission was grasping at straws to come up with anything that would distinguish MOUs from the rest of the applicants. The lack of Commission control over routing is also a legally irrelevant factor that is arbitrary and capricious.

6. Summary

The Commission cannot escape the trap it has made for itself when it set out to exclude MOUs for invalid and unsupportable reasons. Each of the three reasons is in and of itself an irrelevant factor and violates the statutory mandate with the result being unreasonable. Even if the Court were to find that these factors were relevant, the Order still fails because it does not address the several viable solutions posed by the MOUs, including jointly owning lines with

⁴⁸ Aw. Brief at 20.

⁴⁹ FF 64.d. reads, "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." Order at 39.

80. The record evidence reflects that new-entrant TSP Tejas does not possess the current and expected capabilities to adequately finance the construction and operation of CTP facilities in the most beneficial and cost-effective manner.

a. According to Tejas' petition and application and the supporting information for the application filed on September 12, 2008, bates pages 0140 and 0141, Tejas is a subsidiary of Babcock & Brown Transmission Holdings, LLC. Babcock & Brown Transmission Holdings, LLC is a subsidiary of Babcock & Brown Infrastructure Group US, LLC. Babcock & Brown Infrastructure Group US, LLC is a subsidiary of Babcock & Brown LP. Babcock & Brown LP is a subsidiary of Babcock & Brown GP, LLC and Babcock & Brown Holdings, Inc. Both Babcock & Brown GP, LLC and Babcock & Brown Holdings, Inc. are subsidiaries of Babcock & Brown International Pty Ltd. Babcock & Brown International Pty Ltd. is a subsidiary of Babcock & Brown Limited.

b. Babcock & Brown Limited is the ultimate parent entity of Tejas and Tejas' affiliates.

c. According to Tejas' list of acronyms and selected defined terms, which is provided in the supporting information for its application at bates stamp 0043, the use of the term "Babcock & Brown" by Tejas indicates Babcock & Brown Limited and its subsidiaries.

d. Tejas estimated that \$380 - 400 million in equity capital would be required for the proposed projects and that Babcock & Brown or its managed funds expected to contribute the equity required to construct the requested facilities.

e. Tejas estimated that, by the time it received its CCN, Babcock & Brown will have spent \$20-25 million in development costs and significant management time and resources to support Tejas.

f. Prior to commercial operation of the facilities (and likely as early as close of construction financing), Babcock & Brown intended to transfer its interest in Tejas to Babcock & Brown Infrastructure Fund North America, one of its managed funds.

g. Due to a number of events in the market, Babcock & Brown acknowledges that it has suffered a significant drop in its share price.

h. Commission Staff analyzed recent events in the capital markets for equity as they affected Tejas and evaluated other events that affected Tejas directly, such as the performance of the stock price of Babcock and Brown and a lowering of the company's credit rating. These events caused Commission Staff's witness Slade Cutter to withdraw his recommendation that Tejas is financially qualified to construct portions of the CREZ transmission facilities.

i. Babcock & Brown Limited's stock price on the Australian Securities Exchange dropped from over A\$8.00 to \$A0.25 during the approximate time period of September 2008 and November 2008.

j. On November 24, 2008, Babcock & Brown Limited requested that the Australian Securities Exchange halt trading on its stock.

k. Both Moody's and S&P have issued credit downgrades for various Babcock & Brown Limited affiliate entities. For example, on November 18, 2008, the rating by S&P for Babcock and Brown International Pty Ltd.'s short term rating was lowered from 'B' to 'C' and the long-term issuer credit was lowered to 'CCC+' from 'BB-.' S&P lowered the long-term credit rating again on November 20, 2008 to 'CC.' On August 26, 2008, Moody's lowered the rating for Babcock and Brown Infrastructure Group from 'Baa3' to 'Ba2.'

l. While Babcock & Brown Limited may survive the financial challenges that are presently buffeting it, or be able to structure Tejas' finances through other means, at present the Commission is unwilling to assume the risk that it may not.

others and actually paying the local taxes as “PILOT.” The failure to speak to a relevant factor is arbitrary and capricious and an abuse of discretion just as much as using a legally irrelevant factor. Thus, under no circumstance can this Order withstand legal scrutiny.

C. The critical findings here are invalid because they are conclusory and couched in statutory terms.

1. Legal standards

All parties cite the same leading case — *Texas Health Facilities Commission v. Charter Medical-Dallas, Inc.*, 665 S.W.2d 446, 451 (Tex. 1984) (“The required underlying facts may not be presumed from findings of a conclusional nature.”) — and acknowledge that § 2001.141(d) of the APA⁵⁰ requires that “[f]indings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings.”

2. General overview

In its initial brief, Garland explained that the lack of required findings occurred in two primary instances: (1) where the Commission *selected certain entities* [FF 75 and FF 78] to get awards, and (2) where the Commission *rejected MOUs* [FF 76] for reasons besides the generic ones addressed above.⁵¹

3. FF 80 is an exemplar of what should have been done, but was not.

The difference in how the Commission rejected Tejas (an IOU applicant) and how MOUs were rejected demonstrate the failings of the Order. In its FF 80 (reprinted on the facing page), the Commission went through the details of why Tejas would not be selected. These were not simply couched in statutory, conclusory terms and would have permitted the Court to exercise its role, as well as provide Tejas the means to intelligently prepare its appeal.

⁵⁰ Tex. Gov’t Code Ann. §§ 2001.001-2001.902 (“APA”).

⁵¹ The generic reasons are set forth in FF 64 of the Order.

93. Pursuant to P.U.C. SUBST. R. 25.216(d)(3), the Commission selected a designated TSP for each CTP facility.
94. A map that generally depicts the project assignments (including default projects) is attached to this Order as Attachment A.
95. A project-by-project designation of responsible CREZ TSPs is attached to this Order as Attachment B.
 - a. This spreadsheet reflects the entire project cost list (including default projects) provided in the ERCOT CTO study for scenario 2.
 - b. The spreadsheet identifies each project that the Commission has designated as default, priority, or priority dependent.
 - c. For purposes of this Order, a project is designated as priority dependent if that project involves work on a line designated as priority or on a station connected to a priority line.

The Commission should have included findings in the Order similar to this for each MOU. The Commission knew how to prepare and enter proper findings like FF 80; it simply chose not to do so.

4. Reply

The Awardees give short shrift to this argument and respond (apart from citing the legal standards) in one page.⁵² For the most part, the Awardees make general conclusory statements and cite to various findings with little or no analysis or explanation. When these are scrutinized carefully, these do not support the proposition for which they are cited. The Awardees begin with the statement:

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.⁵³

With the exception of FF 80, Garland agrees that these are nothing more than “ultimate findings” and cannot support the Order here pursuant to APA § 2001.141(d). Next, the Awardees on that same page assert that:

Finally, *Finding of Fact Nos. 93-97* explain how the Commission *balanced these factors* [those listed in FF 76 and the Order to exclude MOUs] to assign CTP projects to particular TSPs.⁵⁴

The findings cited here by the Awardees do not explain any type of “balancing” whatsoever.

Findings of Fact 93, 94 and 95 (reprinted on the facing page) are simple, one sentence descriptions of what happened or what was attached to the Order. Those can hardly be

⁵² Aw. Brief at 29.

⁵³ Aw. Brief at 29 (emphasis added).

⁵⁴ *Id.* (emphasis added).

96. It is reasonable and appropriate for the Commission to assign responsibility for the wind collection points depicted in the CTO study, scenario 2 map to Oncor, LCRA, Sharyland, ETT, Lone Star, WETT, and Cross Texas.
- a. At the February 26, 2009 open meeting, ERCOT expressed that, in the interest of expedience, the Commission should select the TSPs that shall be responsible for these collection points.
 - b. The Commission is able to logically assign responsibility for the wind collection points based upon the assignments of geographically proximate CTP projects and the designated TSPs' expressions of interest in the wind collection points.
 - c. Responsibility for the wind collection points is assigned by the Commission as follows: Panhandle B B (Cross Texas); Panhandle A B (Sharyland); Panhandle A C (Sharyland); Panhandle A D (WETT); Central C (Lone Star); Central B (Oncor); Central A (Oncor); Central Bluff (Oncor); McCamey D (LCRA for high voltage functions; ETT for gathering functions); McCamey B (LCRA); McCamey C (LCRA for high voltage functions; ETT for gathering functions); West A (WETT); West C (WETT); Central D (WETT); Central E (WETT); Panhandle A A (Sharyland); Panhandle B A (Sharyland); McCamey A (LCRA); and West B (Oncor).
97. With the exception of the projects specifically identified in the CTP that are associated with nine of the wind power collection points, the wind power collection points are not CREZ transmission facilities and the costs for collection facilities are not recoverable through the transmission cost recovery mechanism. The Commission recognizes that there will be transmission facilities within and connected to the wind power collection points that are not included in the CTP that has been adopted by the Commission. Though the costs for the transmission facilities within and connected to the wind power collection points are not recoverable as CREZ transmission facilities pursuant to PURA § 36.053(d), to the extent they are determined to be transmission facilities, they will be eligible for consideration for recovery as transmission facilities through the standard TCOS process.
76. The 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 manner*.
- a. Due to the limited regulatory oversight over municipally owned utilities described in Finding of Fact No. 62 [sic 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).
 - b. 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 to show what is the statutory language).

considered a “balancing” of relevant factors, certainly not an explanation of why MOUs were not selected. Findings of Fact 96 and 97 (shown on the facing page) are likewise nothing more than explanations of the details of the assignments and what will be in rates. Neither finding has anything to do with “balancing” of factors to explain why MOUs were not selected. In fact, none of these five findings even includes a reference to MOUs.

The Commission likewise feebly tries to support and supply the required findings. First, the Commission cites to FF 57.a.⁵⁵ in several instances to show that “careful consideration” was given MOUs. All this demonstrates is that the Commission made the MOUs submit certain information; it certainly does not explain how it viewed that data. The Commission then boldly, but mistakenly, claims:

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.⁵⁶

The use of the word “hold” is telling; it connotes an ultimate conclusion, which is exactly what FF 76 is. The issue here is *not*, however, whether facts may be in the record (“record evidence” as the Commission alleges) to support the ultimate holding, rather the issue is whether *findings* are in the Order that explain the Commission’s reasoning.

Finally, if any doubt remains, a review of FF 76 (shown on the facing page) demonstrates that the Commission uses only conclusory and statutory language to explain its “holding” or

⁵⁵ FF 57.a. reads in pertinent part as follows: “57. On December 4, 2008, the Commissioners requested additional information from interested TSPs. a. Each municipally owned utility was instructed to submit information, and supporting documentation, reflecting ...[financial information].”

⁵⁶ Comm. Brief at 28.

conclusion. The Commission's allegation that this is "not conclusory" simply cannot withstand even the most cursory scrutiny.

D. The Commission's invalid, conclusory finding that a MOU cannot construct, operate, and maintain transmission facilities is not supported by substantial evidence.

1. Legal standards

The parties generally rely upon the same case law and agree upon the elements of the substantial evidence test. However, the Commission and the Awardees do not properly apply the requirement that a decision be reasonably supported by *reliable and probative* evidence in the record as a whole. *Charter Medical*, 665 S.W.2d at 452. The "more than a mere scintilla" of evidence required to show substantial evidence must still be both *reliable* and *relevant*.

The application of this requirement is illustrated by the decision in *Public Utility Commission v. Gulf States Utilities Co.*, 809 S.W.2d 201 (Tex. 1991). In that case, the Commission relied solely on conclusory testimony for selection of an allocation method. The Supreme Court held that the Commission's selected allocation method was not supported by substantial evidence because (1) the evidence the Commission cited did not support its decision and (2) the Commission failed to consider evidence relating to other relevant factors. *Id.* at 212.

2. Reply

a. Overview

In this case, no reasonable basis in the record exists or can be shown because, at least in part, the Commission did not make separate, specific findings about the capabilities of Garland or any other MOU (as was done in FF 80 for the one IOU). Instead, the Commission included all MOUs within its conclusory FF 76, expressed in statutory terms, that MOUs do not have the capabilities required. Also, no evidence is cited as support for this conclusory finding. In fact, no evidence in the record supports such a finding with respect to Garland. In sum, the grounds

given for the Commission's decision are not supported by the substantial evidence and are arbitrary and capricious.

The Commission contends that the Order is supported by substantial evidence because the Commission considered Garland's application.⁵⁷ Mere "consideration" is not enough. The record evidence cited by the Commission is nothing more than its discussion and findings concerning the irrelevant and improper factors imposed by the Commission. The mere fact that Garland filed an application and participated in the hearing does not provide or constitute any reliable and probative evidence to support the Commission's conclusory FF 76 concerning the MOUs' capabilities.

b. The Commission found that MOUs were low cost providers.

As stated earlier, the Commission actually found in FF 76.b. that:

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.⁵⁸

This unequivocal determination that MOUs brought low cost benefits to the customers (those the statute says to protect) is not subject to challenge or debate.

In an effort to draw the Court's attention away from the real issues, the Commission and Awardees cite testimony about the consideration of economies of scale.⁵⁹ There is but one glaring problem with this red herring — the Commission in its Order *did not rely* upon this theory or upon testimony that MOUs should be excluded because they would not have the

⁵⁷ Comm. Brief at 26.

⁵⁸ Order at 43 (emphasis added).

⁵⁹ Comm. Brief at 25, fn 18; Aw. Brief at 37-38.

economies of scale available to larger utilities.⁶⁰ In short, this is a misguided attempt to manufacture reasoning the Commission did not use or even speak to in the Order.

The only remaining issue is what findings and what evidence supports its conclusion in the first sentence of FF 76 that all MOUs, including Garland, “do not possess the current and expected capabilities to adequately license, construct, operate, and maintain [CREZ] facilities in the *most beneficial and cost-effective manner* (emphasis added to show statutory language).” The answer is found in FF 76.a., which refers the reader back to FF 64 [corrected from the original that references FF 62]. As can be seen from the above quote of FF 76.b., it references nothing but ambiguous and unknown “legal and regulatory uncertainties,” which are not defined anywhere. Presumably, this would again refer to FF 64, but even that is not ascertainable.

c. There is no refuge in FF 64.

The statements in FF 64 relate to two topics — CCN jurisdiction over MOUs and non-payment of local property taxes by MOUs. Some of the statements are nothing more than statements of law (such as subparts a, b, c, and h and some parts of these are not accurate). Others are not supported by any testimony other than conclusory speculation.⁶¹ This is precisely the type of testimony that *does not meet* the reliable and probative standard required for substantial evidence. *Charter Medical*, 665 S.W.2d at 452. Others, like the alleged “ability” to control the timing of construction by cancelling an already granted CCN, are simply a misstatement of the law as explained above. The end result is that no reliable and probative evidence supports these invalid factors the Commission purports to use.

⁶⁰ All of the MOUs had far more facilities than Sharyland, which had only some 16 miles of transmission and received the right to build approximately \$400 million in new lines. CPS Energy is the largest MOU in Texas, with 1,400 current miles of transmission lines. CPS CTP Proposal, CPS Ex. 1 at 4 [Binder 22]. Garland itself has some 132 miles of lines; TMPA likewise has some 270 miles of lines. Grubbs Direct., Garland Ex. 3 at 5 [Binder 25]; Direct Testimony of Eric Schroeder, TMPA Ex. 2 at 5 [Binder 38].

⁶¹ See, e.g., Responsive Testimony of Pat Wood, III, Joint Parties Ex. 3 at 11-14 [Binder 25]; Responsive Testimony of J. Calvin Crowder, ETT Ex. 14 at 17-18 [Binder 24].

Even if there were some evidence to support them, it does not and cannot cure the fact that these are legally irrelevant factors and are thus arbitrary and capricious. Finally, even if all these legal tests were ignored, the Commission still does not explain why joint ownership of lines is not a viable solution to have MOUs participate. That alone makes the decision arbitrary and capricious and an abuse of discretion.

IV. THE ALLEGED DEFENSES OF COMMISSION “DISCRETION” AND “POLICY” ARE ACTUALLY JUDGED UNDER SAME STANDARDS AND CANNOT BE SUSTAINED

A. The Commission’s “policy” must be within its discretion and, if so, must not be arbitrary and capricious.

1. Legal standards

The Commission cites *West Tex. Util. v. Office of Pub. Util. Counsel*, 896 S.W.2d 261, 272 (Tex. App.—Austin 1995, writ withdrawn) for the proposition that, at certain times, it can simply make a policy choice, yet points out that “this holding has been distinguished by the Austin Court.”⁶² The Commission goes on to admit where this argument leads: “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 (citing *West Tex. Util.*)”⁶³ We are thus back to whether the factors used to exclude MOUs were “arbitrary and capricious” as discussed in detail above.

There is yet another limitation on the Commission’s ability to argue that something is a policy decision. It first must be something that is within its discretion. The court in *West Tex. Util.* held:

⁶² Comm. Brief at 31 and at fn. 21 citing *CenterPoint Energy Entex v. R.R. Comm’n*, 213 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

⁶³ *Id.* at 32 (emphasis added); see *West Tex. Util.*, 896 S.W.2d at 272; *CenterPoint Energy Entex*, 213 S.W.3d at 374.

We determine that *the Commission's policy decision* to impose the surcharge on the two sets of cities that generated the expenses *falls within its discretion* to pass through ratemaking costs to the consumer.⁶⁴

Thus, the Commission's factors to exclude MOUs here (1) *must* first *be* within its discretion and (2) *must* also *not be* arbitrary and capricious.

2. Reply

The first thing this Court must do is determine whether the factors used by the Commission were within its discretion. That is covered earlier in explaining why these factors violated the statutory mandates and legislative intent to have MOUs in the competition. Assuming it has discretion here, the Commission's decision is to be judged by the arbitrary and capricious standard that has been briefed above. Simply stated, the "policy defense" is a circular argument and not a separate or different issue.

B. The Commission's discretion, if any, was abused.

1. Legal standards

Both the Commission and the Awardees rely heavily on the Commission's discretion to do what it did and its interpretation of the statute. The first step in that analysis is to determine if the actions or conduct is something the Commission had discretion to do. The well known and inviolate caveat here is that any such interpretation or discretion (as it were) "does not contradict the plain language of the statute."⁶⁵

The "abuse of discretion" standard is exactly the same as that used for "arbitrary and capricious" conduct. That is to say, an agency abuses its discretion when it: (1) fails to consider

⁶⁴ *West Tex. Util.*, 896 S.W.2d at 271 (emphasis added).

⁶⁵ *Reliant Energy v. Public Util. Comm'n*, 153 S.W.3d 174, 187 (Tex. App.—Austin 2004, pet. denied).

a factor the legislature required it to consider; (2) considers a legally irrelevant factor; or (3) weighs only relevant factors but reaches a completely unreasonable result.⁶⁶

2. Reply

The analysis of these arguments circles back to what has already been covered. First, the statutory provisions evidence that the Legislature did not exclude those who did not have to get CCNs or did not pay local property taxes. As such, the use of these factors is not something the Commission had the discretion to use to exclude MOUs. The next point is, assuming the Commission had discretion to look at these factors, did the Commission abuse its discretion? This too becomes a circular argument because this is judged by the same standards as “arbitrary and capricious” conduct.⁶⁷ This question is answered by the above discussion on that topic.

V. PRAYER

Garland requests all the relief set forth in its First Amended Original Petition.

⁶⁶ *City of El Paso v. Public Utility Commission*, 883 S.W.2d 179, 184 (Tex. 1994).

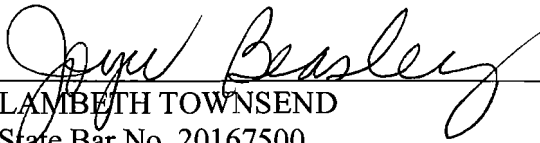
⁶⁷ *Fleetwood Community Home v. Bost*, 110 S.W.3d 635, 645 (Tex. App.—Austin 2003, no pet.).

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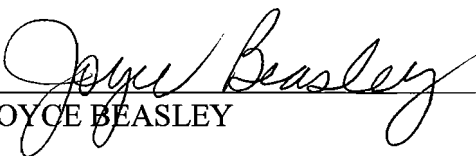
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