

# *Public Utility Commission of Texas*

---

## **Memorandum**

TO: Chairman Donna L. Nelson

FROM: Commissioner Kenneth W. Anderson, Jr.

DATE: July 18, 2013

RE: **Open Meeting of July 19, 2013, Agenda Item No. 9**

**Docket No. 41223** – *Application of Entergy Texas, Inc., ITC Holdings Corp., Mid South Transco LLC, Transmission Company of Texas, LLC and ITC Midsouth LLC for Approval of Change of Ownership and Control of Transmission Business, Transfer of Certification Rights, Certain Cost Recovery Approvals, and Related Relief*

---

The Proposal for Decision (PFD) in this docket correctly notes that “[t]his is a significant case—one involving precedential determinations regarding the ability of a vertically-integrated utility to unbundle its transmission assets and create a transmission-only utility outside of the Electric Reliability Council of Texas (ERCOT).”<sup>1</sup> The Administrative Law Judges (ALJs) went on to explain that to decide this case, we must consider several legal questions around whether Public Utility Regulatory Act (PURA)<sup>2</sup> permits the transactions contemplated by the Application of Entergy Texas, Inc. and ITC Holdings Corp., and their respective affiliates, in this docket (Application). In addition, we must also make a factually based decision as to whether the transactions contemplated by the Application are in the public interest.

At the open meeting of the Commission, unless my colleague proposes otherwise, I do not propose to discuss the merits of the fact-based public interest determination<sup>3</sup>. The focus of this memorandum is solely on the legal question of whether the proposed transaction is prohibited by or otherwise inconsistent with PURA. Certain parties opposing the Application contend that the Commission may not authorize a transmission-only utility outside of ERCOT. Other challengers contend that the transaction constitutes a de facto unbundling of services that may only take place in connection with the introduction of customer choice pursuant to Subchapter J of PURA Chapter 39 (Subchapter J).<sup>4</sup>

---

<sup>1</sup> *Application for Approval of Change of Ownership and Control of Transmission Business, Transfer of Certification Rights, Certain Cost Recovery Approvals, and Related Relief*, Docket No. 41223, Proposal for Decision at 2 (July 9, 2013) (PFD).

<sup>2</sup> Public Utility Regulatory Act, TEX. UTIL. CODE ANN. (Vernon 2007 & Supp. 2012).

<sup>3</sup> We can wait to have a complete discussion and make final decisions on all of the relevant issues raised by the Application at the August 9, 2013 open meeting of the Commission.

<sup>4</sup> PURA §§ 39.451 – 39.463.

The ALJs conclude that the Commission has the authority to certify a transmission-only utility outside of ERCOT. I agree with the judges and I would adopt their recommendation as to that legal issue. However, I am not, at this time, prepared to adopt the ALJs' conclusion that the transaction is inconsistent with PURA because the divestment of a vertically-integrated utility's transmission assets sidesteps the transfer to competition requirements of Subchapter J.

### **1. Does PURA Allow Certification of Transmission-Only Utilities Outside of ERCOT?**

The PFD first addresses whether PURA allows the Commission to certify a transmission-only utility outside of ERCOT.<sup>5</sup> Some who challenge the transaction assert that PURA § 37.051(d) prohibits such a utility, arguing that this provision restricts transmission-only utilities to areas within ERCOT. Citing PURA § 37.151(b), they reason that PURA generally requires that the holder of a certificate of convenience and necessity (CCN) serve every customer in the utility's certificated area, and that the only express exception to this requirement is for a utility certified under PURA § 37.051(d). This latter provision allows the Commission to certify a transmission-only utility serving the ERCOT power region, but is silent with respect to regions outside of ERCOT. While PURA § 37.051(d) refers to transmission-only utilities within ERCOT, that fact does not support an interpretation of PURA prohibiting the Commission from certifying a transmission-only utility outside of ERCOT.

The legislature enacted PURA § 37.051(d) in response to a district court decision that invalidated a Commission order transferring a CCN to Electric Transmission Texas, LLC (ETT), a transmission-only utility in the ERCOT power region.<sup>6</sup> In the wake of the ETT case, the legislature clarified the Commission's capacity to grant such a certificate by enacting PURA 37.051(d), which expressly authorized the Commission to certify a utility that only provided electricity transmission services. While the provision expressly allows certification of a transmission-only utility in ERCOT, nowhere does it restrict the Commission's authority to certify a transmission-only utility without a distribution service area outside of ERCOT. Accordingly, it is inappropriate to construe PURA's express allowance of transmission-only utilities in ERCOT as a prohibition on such utilities outside of ERCOT because such an approach ignores the rationale for passing PURA § 37.051(d)—namely, to overturn legislatively the district court ruling in the ETT case.

In addition to PURA § 37.051(d), the Third Court of Appeals overturned the district court decision against ETT and upheld the Commission's authority to certify transmission-only

---

<sup>5</sup> PFD at 5.

<sup>6</sup> *Cities of Harlingen v. Public Utility Commission of Texas*, No. D-1-GV-08-000253 (345th Dist. Ct., Travis County, Tex. Oct. 8, 2008).

utilities in *Public Utility Commission v. Cities of Harlingen*.<sup>7</sup> The court determined that PURA authorizes the Commission to certify a transmission-only utility even if that utility does not have a certificated area in which it will provide distribution services. Importantly, the court identified this authority independent of the legislature's addition of PURA § 37.051(d), and no part of the decision limits that authority to specific areas within Texas, whether inside or outside of ERCOT.

In the current docket, the Commission faces the same legal issue presented in the ETT case, albeit under slightly different facts. Even so, the location of the transmission facilities outside of ERCOT does not affect the Commission's authority to issue a CCN to a new owner. Instead, I believe *Harlingen* stands for the proposition that the Commission is authorized to certify a transmission-only utility in any part of the state.

## **2. Does PURA Allow ETI to Transfer its Transmission Assets Before the Introduction of Customer Choice?**

The ALJs conclude that allowing the sale of transmission assets under the proposed transaction circumvents the statutory framework regarding the transfer to retail competition as set forth in Subchapter J.<sup>8</sup> However, that conclusion does not consider the context and circumstances that led to the passage of Subchapter J, which mandates that vertically-integrated utilities unbundle upon the introduction of customer choice in certain regions of Texas outside of ERCOT.

The legislative purpose of Subchapter J does not support an interpretation of PURA that disallows divestment of transmission assets in an area where customer choice has not been introduced. Subchapter J was enacted in response to the delay of customer choice because of the scarcity of retail competitors and transmission capacity in southeast Texas outside of ERCOT.<sup>9</sup> That delay resulted in a PURA-implemented rate freeze for Entergy Gulf States, Inc. (Entergy), the sole utility operating in that region. The rate freeze precluded any Entergy rate increase even though it had incurred substantial expenditures to move toward competition.<sup>10</sup> Subchapter J allowed Entergy to obtain regulatory relief in spite of the freeze, but also set in place the restructuring requirements for the move to competition when the Commission determined customer choice was appropriate.<sup>11</sup>

While Subchapter J requires vertically-integrated utilities to unbundle upon the introduction of retail competition, a utility's sale of transmission assets does not necessarily

---

<sup>7</sup> 311 S.W.3d 610 (Tex. App.—Austin 2010, no pet.).

<sup>8</sup> PFD at 12.

<sup>9</sup> House Comm. on Regulated Industries, Bill Analysis, Tex. H.B. 1567, 79th Leg. R.S. (2005).

<sup>10</sup> *Id.*

<sup>11</sup> PURA § 39.453.

trigger customer choice allowing for retail competition in the applicable region. Furthermore, the transactions contemplated by the Application in no way involve a move to, or the introduction of, retail customer choice within the Entergy service territory. Additionally, no provision of Subchapter J expressly prohibits a vertically-integrated utility from divesting its transmission assets. To the contrary, Subchapter J specifically incorporates provisions of PURA that allow for the types of transfers that the transaction contemplates so long as those transactions are consistent with the public interest. PURA § 39.452(a) states that an electric utility operating under Subchapter J remains subject to the regulatory authority prescribed by Chapter 14 of PURA. Upon Commission approval, PURA § 14.101(b) allows a transaction in which a utility transfers a portion of its assets or ownership or interest. This provision of PURA indicates that even if Subchapter J governs a vertically-integrated utility in a region where customer choice has not been introduced that utility may still transfer part of its assets or ownership in a sale transaction. To conclude otherwise would mean that Entergy could never transfer any portion of its ownership or facilities before the introduction of customer choice in the applicable area notwithstanding PURA provisions that allow it to do so. In addition, policy reasons may support approval of the transfer of Entergy's assets to encourage appropriate investment in transmission facilities in Texas.

In summary, with respect to the threshold legal questions raised by the Application, I believe the Commission should consider this PFD recommendation in a broader context to evaluate its impact on future Commission decisions. For that reason, I have concerns about the legal conclusions of the PFD insofar as they evaluate the Commission's authority to approve this transaction under PURA. I look forward to discussing these issues with you either at the next open meeting or at the open meeting to be held on August 9, 2013.