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Should accomplices to capital murder be eligible for the death penalty?

A Texas law that allows accomplices to capital murder to receive the death penalty has been in the spotlight recently as two accomplices faced execution dates. In 2007, the case of Kenneth Foster concluded with Gov. Rick Perry commuting to life in prison the death sentence Foster received as an accomplice to a capital murder. The scheduled August 2008 execution of capital murder accomplice Jeffery Wood was stayed on August 21 by a federal court. While neither the governor nor the federal court cited the law that allows accomplices to receive the death penalty — often called the "law of parties" — as a reason for halting the executions, the circumstances of the cases sparked debate on the law.

Texas law on accomplices

The law of parties defines how accomplices can be held responsible for their role in a crime. While it can apply to accomplices to any crime, recent attention has focused on its use in capital murder cases, which can result in the death penalty. The central issue is whether the state should continue to allow death sentences for accomplices who do not themselves directly cause the victim's death.

Capital murder is the only offense in Texas that can carry a death sentence. Penal Code, sec. 19.03 lists nine circumstances or types of victims that can qualify a murder as capital murder. In 2007, the Legislature created an offense called "super aggravated sexual assault" of a child that also could have been punished by death, but in 2008 the U.S. Supreme Court ruled that the death penalty was unconstitutional for child rape if there is no murder.

The law of parties, found in Penal Code, ch. 7, outlines when a person may be held criminally responsible for the actions of another. Under certain circumstances, the law allows accomplices to be held

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Recent decisions affect wind energy

Several recent state and federal decisions could affect the wind energy industry in Texas. These decisions have implications for the building of transmission lines, local tax abatement agreements, nuisance complaints against wind farms, and federal tax credits for wind energy generation. (For additional background information, see House Research Organization Focus report, Number 80-9, *Capturing the Wind: The Challenges of a New Energy Source in Texas,* July 8, 2008.)

PUC chooses scenario for transmission

In July, the Public Utility Commission of Texas (PUC) selected one of five proposed scenarios for developing transmission capacity for renewable energy in Texas, including wind energy. In a 2-1 vote, the PUC selected Scenario 2, with an estimated cost of $4.93 billion, to develop transmission capacity in designated Competitive Renewable Energy Zones (CREZs). The new transmission lines will allow electricity generated by wind and other sources to be transmitted from areas of relatively low population, such as West Texas and the Panhandle, to areas with many more consumers of electricity.

The transmission lines are expected to accommodate a maximum of 18,456 megawatts of generating capacity from renewable resources in these zones. The cost of the improvements will be met with a transmission charge of about $4 a month on the average residential utility bill. This charge reflects

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liable for a crime to the same degree as the person who actually commits the crime. Therefore, an accomplice to a capital murder may be convicted of capital murder and sentenced to death.

Accomplice and conspirator statutes

Penal Code, sec. 7.02 defines four types of actions that can result in a person being held criminally responsible for the actions of another person. The actions fall into two broad areas: the liability of accomplices and the liability of conspirators.

Those who are charged under the law of parties are charged with the actual crime committed, not with a violation of a specific part of the law of parties. For example, an accomplice involved in a capital murder would be indicted and convicted of capital murder. The charge given to the jury during the guilt-or-innocence phase of the trial would include instructions about applying the law of parties. However, juries do not have to declare that they found an accomplice to capital murder guilty under the law of parties or which, if any, section of the law of parties the jury applies to an offender.

Under certain circumstances, the law allows accomplices to be held liable for a crime to the same degree as the person who actually commits the crime.

Accomplice liability. Three types of actions may establish the liability of accomplices.

Under Penal Code, sec. 7.02(a)(2), an accomplice must have solicited, encouraged, directed, aided, or attempted to aid another person in committing a crime, while intending to promote or assist in the crime. Someone who tied up a victim for the killer or participated in some other direct way in a capital murder might fall under this portion of the law.

Another type of accomplice liability, in Penal Code, sec. 7.02(a)(3), requires the accomplice, while intending to promote or assist in the crime, to have failed to make a reasonable effort to prevent a crime that he or she had a legal duty to prevent. This legal duty is limited, and in most situations, mere presence at a crime does not make a person guilty as a party to the offense. An accomplice's actions might fall under this section if the person failed to prevent the death of a child who obviously had been severely injured over an extended period of time by someone in the accomplice's family.

The final area of accomplice liability rarely comes into play in capital murder cases. Found in Penal Code, sec. 7.02(a)(1), it requires an accomplice to have caused an innocent or nonresponsible person to do something illegal or to have aided that innocent person in doing something illegal. It also requires the accomplice to have the mental state or culpability required for the offense, such as committing the crime intentionally or knowingly.

Conspirator liability. "Conspirator liability" is established under the law of parties in Penal Code, sec. 7.02(b). Under this section, if persons conspire to commit a serious crime and, in the process of committing the crime, one of the them commits another crime that should have been anticipated, all parties can be guilty of the crime actually committed, even though they did not intend to commit it. Questions have been raised about whether a person should be eligible for the death penalty based on the standard that a crime "should have been anticipated."

This section of the law of parties could apply to capital murders associated with robberies, potentially including those cases spotlighted in 2007 and 2008. In one capital murder case, which was associated with a kidnapping and did not include a request from prosecutors for the death penalty, an accomplice drove a car used to abduct the victim, who was murdered by another person. The court said that the accomplice participated in the murder by, among other things, blocking the victim from moving her car. An appellate court said there was ample evidence that the accomplice should have anticipated that someone could be killed as a result of the kidnapping.

Conspirator liability under the law of parties is different from the crime of criminal conspiracy, found in Penal Code, sec. 15.02. Criminal conspiracy is committed if a person agrees with another that at least one of them will commit a crime and at least one of the persons performs an act in pursuit of the agreement. These actions must be done with the intent to commit a felony. The crime of criminal conspiracy is punished one category lower that the most serious felony that is part of the agreement among the conspirators. The death penalty is not an option in these cases because if the felony under this crime were capital murder, the punishment would have to be one degree lower than the death penalty.

Other requirements for imposing a death sentence

If a person is found guilty of capital murder, including as an accomplice, and the prosecutor seeks the death penalty, a separate punishment proceeding must be held. If the prosecutor does not seek the death penalty in a capital case and the person is found guilty, the judge must sentence the person to life in prison without parole.

During the punishment hearing in death penalty cases, the jury must answer certain questions to determine the punishment. One question is whether someone was an accomplice. Code of Criminal Procedure, art. 37.071 establishes these procedures and questions for capital murder cases. If the required number of jurors cannot agree on the answers to the questions, the jury is considered to be unable to answer the questions, and art. 37.071(g) requires that the defendant be sentenced to life without parole.

If a person is found guilty of capital murder, and the prosecutor seeks the death penalty, a separate punishment proceeding must be held.

Future danger, role of accomplice. The first question put to a jury during the punishment hearing is whether the defendant is a continuing threat to society. If the jury charge under which the defendant was convicted included an instruction on the law of parties, the jury also must decide whether the person actually caused the death or, if the person did not cause the death, whether the person intended to kill the victim or anticipated that a human life would be taken. All of these questions must be answered "yes" unanimously for a death sentence to be imposed. Otherwise, the defendant is sentenced to life in prison without parole.

Mitigating circumstances. If the jury unanimously agrees to the previous questions, it then must decide whether there are sufficient mitigating circumstances to warrant a sentence of life in prison without parole rather than a death sentence. The jury may respond with a "no" answer only unanimously. Otherwise, the defendant is sentenced to life without parole. Examples of mitigating evidence that accomplices charged with capital murder might ask a jury to consider include whether the accomplice played a minor role in a murder, along with factors commonly brought up in murder trials, such as the defendant's upbringing, mental health, and youth.

U.S. Supreme court rulings

The U.S. Supreme Court has ruled that states may impose a death sentence for an accomplice to murder when the accomplice's participation in the case is major and the accomplice's culpable mental state was one of reckless indifference to human life.

The court first ruled in *Enmund v. Florida*, 458 U.S. 782 (1982), that it was unconstitutional to sentence Earl Enmund to death for his involvement as an accomplice in two murders. Enmund was convicted of first-degree murder and robbery for driving the getaway car used in a robbery in which two people were killed. The court wrote that Enmund's culpability was different from that of the killers and that the death penalty was unconstitutional for a person "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." The court held that in this case, the death penalty was not valid under the Eighth Amendment's ban on cruel and unusual punishment.

However, in *Tison v. Arizona*, 481 U.S. 137 (1987), the court upheld death sentences for certain types of

accomplices — those with major participation in the crime whose culpable mental state was one of reckless indifference to the value of human life. The court said that the earlier *Enmund* case did not address whether the Eighth Amendment prohibits the death penalty for these kinds of accomplices. The court examined death sentences given to two brothers who were involved in the killing of a family of four but who did not do the killing themselves. The case involved several crimes committed when three brothers helped their father, a convicted murderer, and another convicted murderer escape from a prison and then helped them abduct and rob a family of four. The brothers then saw their father and the other offender murder the family with shotguns. One of the brothers was killed by law enforcement officers while the other two, Ricky and Raymond Tison, were convicted of capital murder and given the death penalty for their role in the capital murders. The brothers' sentences later were reduced by an Arizona state court to life in prison.

The recent cases of Kenneth Foster and Jeffery Wood have called attention to Texas' law of parties.

Recent Texas cases

The recent cases of Kenneth Foster and Jeffery Wood have called attention to the Texas law of parties. Although the Foster and Wood cases have some similarities, they also differ in some ways, including the mental health issues raised in the Wood case. It is difficult to determine how many other accomplices have received death sentences or been executed in Texas. Defendants are charged and convicted of capital murder, and jurors are not required under the law to agree on or record whether they considered a defendant guilty as an accomplice or the primary murderer.

The Foster case received attention partly because it resulted in a rare gubernatorial commutation of a death sentence, although the governor did not cite the law of parties as a reason for the commutation. *(See Joint Trials, page 5).* Foster was sentenced to death for his role in the 1996 capital murder of Michael LaHood, Jr. Foster was driving three friends around San Antonio as they committed robberies. One passenger, Mauriceo Brown, shot and killed LaHood during what was described as a botched robbery. Foster was tried jointly with Brown, the triggerman, and found guilty of capital murder under the law of parties, with both Foster and Brown receiving death sentences. Brown was executed in 2006, and the two others involved in the crime received life sentences.

Just before Foster's scheduled execution, Gov. Perry commuted his sentence from death to life in prison. The governor may commute a death sentence only upon the recommendation of a majority of the seven-member Board of Pardons and Paroles. In the Foster case, the Board of Pardons and Paroles had voted six to one to recommend the commutation. For Foster, life in prison means that he must serve 40 years, without consideration of good conduct time, before he may be considered for parole in 2036. Foster committed his offense before the enactment in 2005 of the life-without-parole law, which requires those convicted of capital murder to either receive a death sentence or stay in prison for the rest of their lives, with no parole allowed. Foster may be punished only by the law in effect when his offense was committed.

The execution of Jeffery Wood for his role as an accomplice to capital murder was put on hold in August 2008, just before his scheduled execution, when a federal judge issued a stay. The stay was not related to the law of parties. The judge approved a request from Wood's attorneys to have a mental health expert examine Wood to help evaluate whether he was competent to be executed. Wood was convicted for his role in a 1996 robbery-murder. During the planned robbery, Wood was in a truck outside a convenience store in which David Reneau murdered store employee Kriss Keeran. Wood and Reneau were tried separately and Reneau was executed in 2002. In August 2008, the Board of Pardons and Paroles denied a request from Wood for a recommendation of a commutation of his death sentence, but the federal court stayed the execution later that month.

Debate

Some critics of the current law propose eliminating death sentences for all accomplices by amending the

questions put to a jury during the punishment phase of a capital murder trial or by amending the law of parties itself. Others propose changing only the portion of the law of parties that allows people to be considered accomplices based, in part, on what they should have anticipated.

Supporters of changing the law to prohibit death sentences for accomplices

Proportionality. Supporters of prohibiting death sentences for accomplices say putting accomplices to death for their role in a capital murder violates the concept that punishment for a crime should be in proportion to a person's actions and culpability. Accomplices in capital murder cases should not be punished with the same severity as those who actually caused a death. The death penalty should be reserved for the worst of the worst, and allowing accomplices — who did not themselves kill — to be put to death violates this principle.

The cases of Kenneth Foster and others illustrate the inequities that can result when an accomplice receives the same punishment as a triggerman. In another case, an accomplice to capital murder, Joe Lee Guy, who claimed to be an unarmed lookout, received a death sentence while the actual killers received life sentences. Upon an order from a federal district court based on appeals that did not address the law of parties, Guy was resentenced in 2004 to life in prison.

Joint trials for capital murder defendants

A Texas law allowing joint trials for capital murder defendants has become part of the debate on the "law of parties" and is being studied this interim by the House Criminal Jurisprudence Committee. Gov. Perry raised the issue in August 2007 when commuting the death sentence of Kenneth Foster, an accomplice to capital murder. Gov. Perry said in his statement, "I am concerned about Texas law that allows capital murder defendants to be tried simultaneously, and it is an issue I think the legislature should examine." Kenneth Foster was tried for capital murder in a joint trial with the triggerman for the murder of Mauriceo Brown.

Under Code of Criminal Procedure, art. 36.09, defendants involved in the same offense can be tried jointly or separately, at the courts' discretion. Courts must order separate trials if a defendant makes a motion to be tried separately and presents evidence that a joint trial would be prejudicial to any defendant or that one of the defendants has a previous conviction. One proposal to change the law would require that all trials — or at least all capital murder trials — be held separately. Another proposal would allow them to be held jointly but severed upon a motion by the defendant without any special showing. Yet another proposal would change the law so that trials were presumed to be separate, but would allow defendants to ask that they be joined.

Some critics of current law argue that courts do not always sever trials when they should and that all defendants would get fairer trials if they were tried separately. They say joint trials too easily allow one defendant to be tainted by evidence or information about another defendant, which can prejudice jurors, especially against accomplices. Such a change would not be a financial burden on courts because the state has a program to help reimburse counties for the investigation and prosecution of capital murders, say critics of current law. Supporters of joint trials argue that they can be a cost-effective use of court resources. They say current law sets appropriate standards for severing trials and that judges act in good faith, severing trials when appropriate.

The problem illustrated by the Foster case represents a fundamental flaw in Texas' statutes, not just a unique problem in one case. The state should set a uniform policy that only those who directly murder should be eligible to receive the death penalty. Such a policy would not limit the role or importance of juries, which still would decide guilt or innocence and still could make the decision that identifies a defendant as an accomplice to capital murder.

The law of parties should be overhauled to reflect punishment options now available that can severely punish accomplices to capital murder. In 2005, Texas instituted life without parole as a potential punishment for capital murder. This punishment is mandatory for anyone convicted of capital murder, including an accomplice, who does not receive a death sentence, and it could be mandated for all accomplices to capital murder. Another option would be to make "life" sentences an available punishment for accomplices to capital murder and to mandate a certain minimum number of years that would have to be served before an accomplice could be eligible for parole. This would be similar to the current requirement that certain offenders serve 35 calendar years, without consideration of good conduct time, before being considered for parole and to the requirement that some be granted parole only upon approval of a minimum of two-thirds of the Board of Pardons and Paroles.

Checks and balances. The state should not rely on appellate court review or executive clemency to limit the death penalty in accomplice cases only to the most egregious crimes. The cases of Kenneth Foster and Jeffrey Wood illustrate how inappropriate death sentences can be imposed and upheld by appeals courts. The state's clemency system rarely results in recommendations for a pardon or commutation from the Board of Pardons and Paroles, and gubernatorial pardons should not be relied on to fix a flawed policy.

Problems with the death penalty. Allowing accomplices to capital felonies to continue to be sentenced to death means even more cases plagued with the problems seen in death penalty cases. These problems include flawed procedures, racial and class disparities, and questionable legal representation. Given the growing number of exonerations of prison inmates and questions about lethal injection protocols, the state should be cautious about allowing any more death sentences, especially for those who did not actually kill. The supposed deterrent effects of the death penalty are much debated and should not be relied on to support a flawed state policy.

Conspirator liability provision. A narrower approach would be to address only the conspirator liability portion of the law of parties because it is the most troubling aspect of the law and one that is out of step with other states' accomplice liability laws. It allows accomplices to be found guilty of capital murder, and to be eligible for a death sentence, if they *should have anticipated* the murder. It is too difficult for a jury to determine what a person should have anticipated, and such conjecture about what went on in a defendant's mind should not be used to make someone eligible for a death sentence. This provision has been used to obtain death sentences for accomplices such as lookouts or getaway drivers who were not directly involved in a capital murder and did not kill or intend to kill. The case of Kenneth Foster illustrates how accomplices could receive a death sentence partly because they should have anticipated a murder. Even though juries use the standard of whether the accomplice *actually anticipated* the murder when imposing punishment, it is still is too difficult to determine and inappropriate for life and death decisions.

Opponents of changing the law to prohibit death sentences for accomplices

Proportionality. Opponents of prohibiting death sentences for accomplices say Texas has decided that the death penalty is an appropriate penalty for those who are intimately involved in committing capital murder and that Texas law should not be changed to eliminate this punishment option for accomplices to such crimes. Texas law follows a tradition in criminal law and the policies of most of the 36 states that have the death penalty by holding all those participating in a crime responsible for the offense. This policy is especially appropriate and morally justifiable in capital murder cases, considered the worst of the worst offenses. Current law holds accomplices to capital murder responsible for their own actions, not the actions of others. Texas' sentencing laws for accomplices are constitutional based on decisions made by the U.S. Supreme Court.

Imposing a blanket prohibition against death sentences for accomplices would remove from consideration a punishment option that may be warranted in some cases. Texas has a long-standing tradition of giving prosecutors discretion to pursue the death penalty in appropriate cases and allowing juries to examine the specific facts of a case to decide who should receive the death penalty.

Much of the criticism currently being leveled at the law of parties really should be directed toward the particular prosecutions and the juries' decisions in the Foster and Wood cases, not with the law itself. The law of parties has been used to obtain death sentences for accomplices to some horrific crimes, including the killers of James Byrd, Jr., who in 1998 was dragged to his death in Jasper, Texas, and some of the inmates who escaped from a Texas prison in 2000 and went on a crime spree that included killing a police officer.

Checks and balances. Checks and balances and safeguards help ensure that a death penalty is appropriate and legally justified. As with all death penalty cases, prosecutors decide carefully when to seek the death penalty and reserve it for only the worst crimes in which the role of an accomplice meets the constitutional requirements for a death sentence. Juries consider the circumstances of each case and before imposing a death sentence must unanimously answer questions about a defendant's future dangerousness, the accomplice's role in the capital murder, and mitigating circumstances that would warrant a sentence of life without parole rather than death. If even one juror does not agree to impose a death sentence, the accused accomplice cannot be sentenced to death. The appeals process for death sentences through the state and federal courts is extensive and thorough. The commutation in the Foster case illustrates how the system works to ensure death sentences for accomplices are carried out only in appropriate cases, with final review by the Board of Pardons and Paroles and the Governor's Office.

Problems with the death penalty. Death sentences are used for punishment, deterrence, and retribution, all of which are appropriate reasons to retain the option for accomplices to capital felonies. Critics of the process for imposing death sentences on accomplices often are just critics of the death penalty itself. The deterrent effect of being involved in a capital felony could be diluted if accomplices to capital murder could not receive the death penalty. Potential death sentences also allow prosecutors to reach plea agreements in appropriate cases. For example, in one recent capital murder case in San Antonio, the accomplice avoided a potential death sentence by agreeing to plead guilty and accept a punishment of 50 years in prison.

Conspirator liability provision. Changes focusing only on the conspirator liability provision of the Texas law of parties would eliminate the possibility of a death sentence for some accomplices to capital murder even when a jury might determine it was justified. Current law sets appropriate standards for imposing a death sentence when an accomplice is convicted under the conspirator liability portion of the law of parties. The law requires that to be found guilty, an accomplice *should have* anticipated the victim's death, but the standard for receiving a death sentence — found in the questions asked of jurors deciding punishment — is whether the person *actually* anticipated the victim's death. Jurors must unanimously decide beyond a reasonable doubt that an accomplice actually anticipated the death before the jury may impose a death sentence. In addition, all the other requirements for imposing a death sentence must be met, including findings about future dangerousness and any mitigating evidence. Prosecutors need the flexibility to fit criminal charges to cases that might fall under circumstances described by this provision.

— by Kellie Dworaczyk

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amortizing transmission facilities over their useful life, probably 35 to 40 years. Transmission rates could fluctuate depending on other factors, such as increases in electricity demand or the building of other transmission facilities.

With certain modifications, areas that have received a CREZ designation include zones in the Panhandle, around McCamey, and in the Abilene and Sweetwater areas. A large portion of the Panhandle is in the jurisdiction of the Southwest Power Pool (SPP), outside the jurisdiction of ERCOT (Electric Reliability Council of Texas). ERCOT operates the electric grid and manages the deregulated electricity market for 75 percent of the state. It operates wholly within Texas and, therefore, is generally not subject to federal regulation as are electric grids that cross state lines.

Generators who want to pursue interconnection with customers in the SPP service area will not be discouraged by the PUC from doing so, as long as they do not interconnect simultaneously with customers in the ERCOT service area. Generators in the area of the Panhandle that is in SPP's jurisdiction who want to interconnect with ERCOT first must obtain a determination by the Federal Energy Regulatory Commission (FERC) disclaiming federal jurisdiction before the PUC will issue a certificate of convenience and necessity (CCN) to allow the interconnection. The transmission service providers who would be responsible for that interconnection also must obtain the determination from FERC. These precautions are intended to avoid bringing ERCOT under federal interstate regulation.

Footprint of the Southwest Power Pool

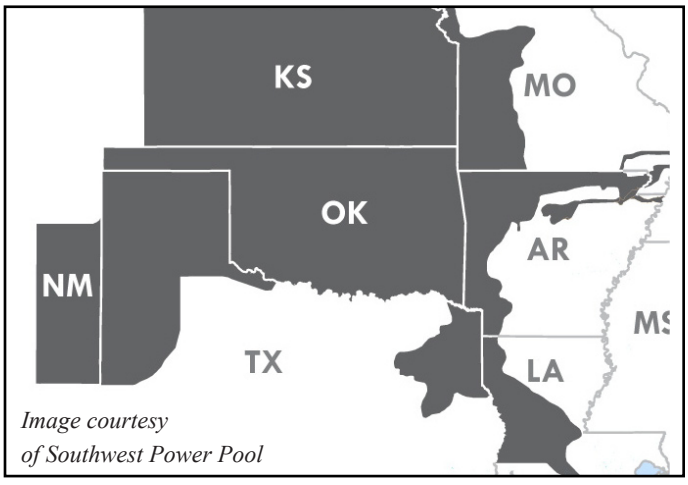

Image courtesy of Southwest Power Pool

The jurisdiction of the Southwest Power Pool encompasses parts of several states, including a large portion of the Texas Panhandle, where two CREZs have been designated.

Opinions on Scenario 2

PUC Chairman Barry Smitherman and Commissioner Paul Hudson, who voted in favor of Scenario 2, said in memos filed before the final order that it would best meet present and future needs for transmission development. They said other proposed scenarios had various weaknesses, including higher capital costs and lack of analytical data showing the amount of wind energy proposed could be reliably or cost-effectively integrated into the electric grid. Still other scenarios would have provided too little transmission capacity, and thus less environmental benefit, or would not have addressed congestion issues.

Commissioner Julie Parsley, who voted against Scenario 2, said in her dissent that the transmission capacity it provided, combined with the megawatts of existing wind energy generation, would exceed the limits of reliability. As a result, ERCOT could not reliably or cost-effectively integrate the full amount of wind capacity proposed in Scenario 2. Commissioner Parsley said she would prefer to see a staged build-out of some of the transmission lines identified in Scenario 2, but only those that would be within ERCOT's current jurisdiction. She previously had said that more measured steps would help ensure reliability and not endanger ERCOT's independence by running transmission loops outside of ERCOT's jurisdiction, which could bring ERCOT under possible federal regulation if electric grids outside of Texas were able to connect to those loops.

Laying the transmission lines

The PUC expects to select those responsible for constructing new transmission lines in the designated zones by the end of 2008. Those selected will submit applications to lay transmission lines by the end of 2009. The PUC intends to consider applications by mid-2010,

and the selected entities will begin construction after their applications are approved. The CREZ lines identified as most suitable to relieve current congestion are expected to be placed into service first. The PUC estimates the project will be finished by 2013.

Legal developments

Qualifications for tax incentives

Texas Attorney General Greg Abbott issued an opinion in September that could affect school district tax incentives to wind energy developers, who usually lease the land on which their turbines are placed. The Texas Comptroller of Public Accounts had requested an opinion on whether those with a leasehold interest in certain property were eligible under Tax Code, 313.025(a) to apply for a limitation on the appraised value of the qualified property. Tax Code, ch. 313, the Texas Economic Development Act, allows school districts to grant temporary taxable value limitations to businesses that agree to make a required level of investment and create a specific number of new jobs meeting certain wage and benefit requirements.

The PUC estimates the transmission lines will be finished by 2013.

The attorney general's opinion (GA-0665) concluded that a person who meets the other requirements of chapter 313 and who owns land, a building or other improvement, or tangible personal property, such as wind turbines, is "the owner of qualified property" under section 313.025(a) and eligible to apply for the limitation on the appraised value of the qualified property, regardless of whether the person owns or leases the land on which the property is to be placed. This opinion is important for clarifying local use of school district property value limitations as an economic incentive to attract wind energy development or other industries that typically lease land.

The issuing of the attorney general's opinion had been suspended pending the results of a suit on a similar issue that claimed the Taylor County commissioners did not follow the law when entering into tax abatement agreements with wind energy companies. A notice of non-suit was filed in that case on July 31, meaning that the plaintiffs dropped the lawsuit, at least for now. The plaintiffs had argued that wind turbines were the personal property of the wind energy company and not considered "real property" that could be the subject of a tax abatement agreement under Tax Code, chap. 312.402(a).

Nuisance suit dismissed

The landowners who had challenged Taylor County's tax abatement agreement with the owners of the wind energy company had filed a nuisance suit in 2006 against the facility, the massive Horse Hollow wind farm. The 42nd District Court dismissed the plaintiffs' claim that the wind farm interfered with the use and enjoyment of their land by diminishing its scenic beauty and being abnormal and out of place in its surroundings. The district court did allow the jury to decide whether the noise from the wind turbines constituted a nuisance, and the jury found against the plaintiffs.

On August 21, in *Rankin v. FPL Energy*, the 11th Court of Appeals in Eastland upheld the district court's decision that visual aesthetical impact causing emotional injury cannot be the basis for a nuisance suit. The court said that it did not mean to minimize the visual impact of the wind farm on the plaintiffs by characterizing it as an "emotional reaction" and that "unobstructed sunsets, panoramic landscapes, and starlit skies have inspired countless artists and authors and have brought great pleasure to those fortunate enough to live in scenic rural settings." Nevertheless, allowing plaintiffs to bring a nuisance action against a neighbor's lawful activity on the basis that it substantially interferes with their view would, in effect, give plaintiffs the right to zone the surrounding property, the court said. The decision has been appealed to the Texas Supreme Court.

Laguna Madre wind project upheld

U.S. District Judge Lee Yeakel issued an oral ruling in August dismissing the Coastal Habitat Alliance's suit against Texas Land Commissioner Jerry Patterson, the commissioners of the Public Utility Commission, and

two private wind energy companies, Iberdrola (formerly PPM) and Babcock and Brown, that are constructing large wind energy generation projects near Laguna Madre in Kenedy County. The Coastal Habitat Alliance, which includes the King Ranch, the American Bird Conservancy, the Lower Laguna Madre Foundation, and the Coastal Bend Audubon Society, had sought an injunction against Iberdrola's Penascal project and Babcock and Brown's Texas Gulf Wind project, claiming the state of Texas was violating its agreement with the federal government under the Coastal Zone Management Act by allowing unpermitted development along the coast. The Alliance cited possible irreparable environmental harm to the Laguna Madre and a severe threat to migratory and resident birds. The Alliance says they also have requested that the National Oceanic and Atmospheric Administration, the federal agency with oversight of coastal zone management, either bring Texas into compliance by requiring implementation of a regulatory program or remove Texas from the coastal management program.

Tax incentives for wind energy

Congress recently extended tax credits for both industrial wind energy systems and smaller-capacity wind energy systems as part of the Emergency Economic Stabilization Act of 2008.

Production tax credit

Congress extended the federal renewable electricity production tax credit (PTC) for wind energy through December 31, 2009. The PTC, originally authorized by Congress in the Energy Policy Act of 1992, is a per-kilowatt-hour tax credit available to taxpayers for electricity generated by certain energy resources, including wind. Taxpayers may qualify for the credit if they produce electricity from certain renewable resources to sell within the taxable year. The PTC for wind energy applies only to commercial and industrial wind systems, not to the small wind systems used to power individual homes or businesses. It provides a 1.5-cent-per-kilowatt-hour tax credit and is available for the first 10 years that a generation facility is in operation. The credit is adjustable for inflation and currently is 2 cents per kilowatt-hour for wind and most other qualifying technologies.

Since establishing the tax credit, the federal government has provided several one- to two-year extensions, but also has allowed the credit to lapse in three different years. The PTC has not lapsed since 2005, but was set to expire at the end of this year if Congress had not voted to extend it again. With no lapse in the credit since 2005, promoters of wind energy say, the industry has benefited from increased stability and growth, resulting in a continual increase in new wind power generation. Opponents of the PTC say that wind energy production should rely on market forces, especially as high oil and gas prices have made the industry more attractive and competitive, not on government subsidies that have resulted in more than $2 billion in lost revenue to the federal government since 1995.

Other incentives for wind energy

The new legislation also includes provisions for smaller-capacity wind systems, as determined by their maximum potential output of energy. Small commercial wind systems were made eligible for an energy tax credit for renewable energy systems, for which the cap was increased from $500 per half-kilowatt of capacity to $1,500 per half-kilowatt of capacity. Residential small wind investment has been added as qualifying property under the Residential Energy-Efficient Property Credit and capped at $4,000.

The new legislation also authorizes $800 million of new clean, renewable energy bonds (CREBs) to finance facilities that generate electricity from certain energy sources, including wind, and it extends the termination date for existing CREBs by one year.

Pickens wind energy project

Mesa Power, LLP, owned by energy tycoon T. Boone Pickens, has changed its previous plans to use a water district's eminent domain authority to obtain right of way for water lines that also could host electric transmission lines for a wind energy project. Mesa Power had planned to join its Pampa wind energy project in the Panhandle with the water pipeline project of the Roberts County Fresh Water Supply District No. 1, which would pump groundwater from the Panhandle to other parts of the

state. Instead, Mesa Power has applied to the PUC to lay electric transmission lines independently of the water district. The collaboration with the water district would have allowed the wind energy project to use the right of way acquired by the water district to run transmission lines from Roberts County to west of Fort Worth, delivering power to the ERCOT grid.

SB 3 by Averitt, the omnibus water legislation enacted by the 80th Legislature during its 2007 regular session, allows clean energy projects to use rights of way held by a water district to host electric transmission lines. However, the Roberts County water district recently suspended eminent domain proceedings for their water pipeline project, eliminating the right of way that was to serve as host to the electric transmission lines for the wind energy project. Issues subsequently were raised concerning the water district's board when the U.S. Justice Department invalidated a change in the qualifications for candidates seeking election to fresh water supply district boards, saying the state failed to show that the change would not harm minority voting rights.

— by Blaire D. Parker

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