



Control Number: 49523



Item Number: 326

Addendum StartPage: 0

SOAH DOCKET NO. 473-19-6766
PUC DOCKET NO. 49523



APPLICATION OF LCRA § BEFORE THE STATE OFFICE
TRANSMISSION SERVICES §
CORPORATION TO AMEND ITS §
CERTIFICATE OF CONVENIENCE §
AND NECESSITY FOR THE § OF
PROPOSED MOUNTAIN HOME 138-KV §
TRANSMISSION LINE PROJECT IN §
GILLESPIE, KERR, AND KIMBLE §
COUNTIES § ADMINISTRATIVE HEARINGS

**LCRA TRANSMISSION SERVICES CORPORATION'S REPLY
TO EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

COMES NOW LCRA Transmission Services Corporation (LCRA TSC) and files this reply to exceptions filed by other parties to the Proposal for Decision (PFD) issued by the Administrative Law Judges (ALJs).

I. REPLY TO EXCEPTIONS

Creek House Ranch, LLC (Creek House), and Vorpahl Ranch, LP (Vorpahl), filed numerous exceptions to the PFD. To ensure the accuracy of the record and to correct misstatements of the law and facts, LCRA TSC finds it appropriate to reply to such exceptions.

A. LCRA TSC provided proper notice.

In their exceptions, Creek House and Vorpahl argue that additional notice should have been provided for segment modifications that have been agreed to by intervenor Maximino "Max" Michel-Gonzalez, d/b/a Beta Real Estate LLC and Savoy Ltd. (Beta Savoy) and which occur wholly on Beta Savoy's land. Creek House and Vorpahl contend that all landowners within 300 feet of proposed Segment C5 should have received notice of the modification made to accommodate Beta Savoy, the landowner directly affected by Segment C5. However, the evidence conclusively establishes that notice was properly provided to all required landowners in relation to Segment C5 in accordance with the rules of the Public Utility Commission of Texas (PUC or Commission).

Under PUC Procedural Rule 22.52(a)(3)(C), “Before final approval of any modification in the applicant’s proposed route(s), applicant shall provide notice as required under subparagraphs (A) and (B) of this paragraph to all directly affected landowners who have not already received such notice.”¹ That rule further states that “land is directly affected if an easement or other property interest would be obtained over all or any portion of it, or if it contains a habitable structure that would be within 300 feet of the centerline of a transmission project of 230 kV or less”²

Thus, the rule related to modifications does not require notice to all landowners within 300 feet of the centerline, but rather only to any landowner whose land is crossed (*i.e.*, an easement or other property interest is necessary for the routing) or who has a habitable structure within 300 feet of the centerline of the Project. This is the exact same notice the Commission requires for a CCN application.³ LCRA TSC provided notice to Beta Savoy, the only landowner directly affected by Segment C5, consistent with PUC Procedural Rule 22.52(a)(3)(C).⁴ Therefore, any routes containing Segment C5 are viable, contrary to Creek House and Vorpahl’s assertions.

Creek House and Vorpahl note that Texas Utilities Code (PURA) § 37.054⁵ requires notice of an application be given to all “interested persons.” However, the statute does not define “interested persons,” a fact which Creek House and Vorpahl appear to acknowledge because they cite only to the Commission’s rules for open house meetings in support of their argument regarding who should be considered an “interested person.” However, PURA § 37.054 relates to notice of an “application” and not notice of an “open house meeting.” The Commission’s rules specifically provide different notice requirements for open house meetings than for applications or route modifications. The open house meeting notice requirement is broader—which makes sense as the purpose of the open house is to solicit a broad range of opinions and information from members of the community during the route development phase, before the application is finalized and submitted for consideration.

¹ 16 Texas Administrative Code (TAC) § 22.52(a)(3)(C).

² 16 TAC § 22.52(a)(3).

³ 16 TAC § 22.52(a)(3)(C).

⁴ LCRA TSC Ex. 5 at 4.

⁵ This provision is part of the Public Utility Regulatory Act.

However, in regard to CCN applications, the Commission has explicitly adopted a rule that identifies interested persons who must be given notice—PUC Procedural Rule 22.52(a)(3)(A)—and it requires notice only to owners of land who would be directly affected by the requested certificate. As the rule states, “land is directly affected if an easement or other property interest would be obtained over all or any portion of it, or if it contains a habitable structure that would be within 300 feet of the centerline of a transmission project of 230 kV or less” Thus, the Commission has clearly and unambiguously spoken on what notice is required for an application, as well as a route modification, consistent with the requirements of PURA § 37.054.

Creek House and Vorpahl urge the Commission to disregard its own rules and to expand the notice required for **all CCN applications under PURA § 37.054**. This would be a radical departure from the Commission’s existing rules that cannot be accomplished within the context of this contested case proceeding, and the Commission would subject itself to reversible error if it were to follow Creek House and Vorpahl’s suggested course of action.

An agency is bound to follow its own rules.⁶ If an agency wishes to change its rules, it must follow the rulemaking procedures of the Administrative Procedure Act.⁷ It cannot simply disregard the rule in circumstances where the rule plainly applies and guides the Commission’s analysis. As the Texas Supreme Court has noted, “If the Commission does not follow the clear, unambiguous language of its own regulation, we reverse its action as arbitrary and capricious.”⁸

Accordingly, Creek House and Vorpahl’s request for the Commission to disregard its rules and adopt an entirely new standard for notice of CCN applications or route modifications must be denied.⁹

⁶ *Flores v. Employees Ret. Sys.*, 74 S.W.3d 532, 542 (Tex. App.—Austin 2002, pet. denied); *Southern Clay Prods., Inc. v. Bullock*, 753 S.W.2d 781, 783 (Tex. App.—Austin 1988, no writ) (citing *Gulf Land Co. v. Atlantic Ref. Co.*, 134 Tex. 59, 131 S.W.2d 73, 79 (Tex. 1939)).

⁷ *Myers v. State*, 169 S.W.3d 731, 734 (Tex. App.—Austin 2005, no pet.) (“Allowing an agency to create broad amendments to its rules through adjudication, rather than through its rule making authority, effectively undercuts the Administrative Procedures Act.”) (“If an agency does not follow the unambiguous language of its own rules, we must consider its actions arbitrary and capricious.”).

⁸ *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254-255 (Tex. 1999); also *Bexar Metro. Water Dist. v. Texas Comm’n on Envtl. Quality*, 185 S.W.3d 546, 551 (Tex. App.—Austin 2006, pet. denied) (“A reviewing court will reverse an agency when it fails to follow the clear, unambiguous language of its own regulations, that is, when its actions are arbitrary and capricious.”).

⁹ Although Creek House and Vorpahl frame their argument as relating to the Segment C5 modification in this case, their proposed notice requirement would apply to both CCN applications and route modifications, and would be different than the current notice requirements set out in the Commission’s rules.

B. LCRA TSC's cost estimates are reliable.

Creek House and Vorpahl also except to the PFD with regard to its assessment of the relative estimated costs of Route Hunt 7A and Route Hunt 37A. Specifically, they argue that LCRA TSC's cost estimates all contain a "margin of error" and, therefore, "effectively, [Route] Hunt 7A costs the same as [Route] Hunt 37A."¹⁰ While LCRA TSC acknowledges that the costs developed during the CCN phase are necessarily estimations, because many components of the route costs cannot be determined at this early stage in the process, the evidence indicates that the cost estimates in this case were developed using a consistent methodology and are reliable for comparing routes to one another.¹¹ Under LCRA TSC's cost estimating methodology, Route Hunt 7A is estimated to cost approximately \$120,000 more than Route Hunt 37A. Whether this [\$120,000] is a meaningful difference is for the Commission to determine, but LCRA TSC disagrees with any insinuation that its cost estimates are unreliable such that Route Hunt 7A and Route Hunt 37A should be considered to "cost the same."

C. LCRA TSC complied with prudent avoidance.

In their exceptions, Creek House and Vorpahl present certain arguments regarding prudent avoidance to which LCRA TSC wishes to respond. First, in comparing the property of Kari and Jacob Short to the Creek House property, Creek House and Vorpahl discuss how the route selected will determine which property is "impacted." Further, Creek House and Vorpahl discuss the comparison of habitable structure counts on different routes in consideration. As noted in LCRA TSC's clarifications filed on May 4, 2020, the record evidence establishes the number of habitable structures within 300 feet of the centerlines of the different routes, but no statute, rule, or evidence in this case establishes that all such habitable structures are necessarily "impacted" or that any habitable structures are equally impacted. Likewise, nothing in the rules establishes that a habitable structure beyond 300 feet of a transmission line could not be considered by the Commission to be "impacted."

Therefore, while counts of habitable structures within 300 feet of a route is a metric typically considered in CCN transmission line proceedings, and while the PUC rules define land as directly affected if it contains a habitable structure that would be within 300 feet of the centerline

¹⁰ *Joint Exceptions of Creek House and Vorpahl to the Proposal for Decision*, at 9.

¹¹ LCRA TSC Ex. 8 at 15; Tr. at 74.

of a transmission project of 230 kV or less, LCRA TSC disagrees with any statement or implication that the number of habitable structures within 300 feet of the centerline of any particular route is an appropriate measure of “impact” from a transmission line route.

Creek House and Vorpahl also contend that a habitable structure on the Creek House property will be within 58 feet of the centerline of Route 37A and, as such, is at risk from electric and magnetic fields (EMF). It is undisputed that all habitable structures on the Creek House property are outside of the right of way (ROW) for any route segment,¹² including those on Route Hunt 37A. The uncontroverted evidence in this case establishes that the EMF levels at the edge of the ROW for each route are comparable to other transmission lines of this type that have been approved by the Commission, and LCRA TSC expert Curtis Symank testified the EMF levels do not cause him “any concerns regarding the routing and safe operation of the project.”¹³ Thus, any habitable structure on the Creek House property is within a safe distance from all route segments, including segments of Route Hunt 37A that are parallel and adjacent to the Creek House property line.

If the Commission is concerned about the proximity of Segment Z3 on Route Hunt 37A to the habitable structures on the Creek House property, LCRA TSC can work with Vorpahl and Creek House to move the location of Segment Z3 further interior to the Vorpahl property away from the Creek House property line. LCRA TSC previously explored this option with both Vorpahl and Creek House and determined that it is feasible to move Segment Z3 more interior to the Vorpahl property, with the consent of Vorpahl and Creek House. As with other landowners directly affected by an approved route, LCRA TSC is ready, willing, and able to cooperate with such landowners to implement minor deviations from the approved route to minimize the impact of the proposed transmission facilities consistent with the requirements of the Commission’s rules and the final order issued in this proceeding.

Finally, in their summary of routing recommendations, Creek House and Vorpahl erroneously state that Route Hunt 37A has a habitable structure that is “8 feet away from the centerline.”¹⁴ LCRA TSC assumes this is a typographical error, as there is no evidence in the

¹² LCRA TSC Ex. 12 at 11.

¹³ LCRA TSC Ex. 8 at 11.

¹⁴ *Joint Exceptions of Creek House and Vorpahl to the Proposal for Decision*, at 16.

record of any habitable structure being within eight feet of the centerline of any route segment. To be clear, no routes presented for consideration have a habitable structure within the ROW.

D. Route Differences

In their exceptions, Creek House and Vorpahl contrast Route Hunt 37A and Route Hunt 7A, focusing significantly on the segment differences in proximity to the Creek House and Vorpahl properties. They refer to a “fork in the road,” and use an enlarged depiction of that area (the node at the intersection of segments W4, Z3, and L4) to discuss the differences between the two routes. However, there are significant other differences between these two routes beyond those discussed by Creek House and Vorpahl.

In addition to the differences discussed in Creek House and Vorpahl’s exceptions, Route Hunt 37A and Route Hunt 7A differ almost entirely on the route they take north of Interstate Highway 10, between the new Mountain Home Substation and the Harper Substation. Whereas Route Hunt 7A goes primarily north before heading into the Harper Substation area from the west, Route Hunt 37A heads east shortly after leaving the Mountain Home Substation and enters the Harper Substation area from the southeast. While both routes enter the substation itself on Segment R3, they use very different segments to get there. LCRA TSC Exhibit 16 provides a visual depiction of these geographic differences between Route Hunt 37A and Route Hunt 7A, and the Commission should be aware of these differences when considering Creek House and Vorpahl’s exceptions.

II. CONCLUSION

In conclusion, LCRA TSC requests that the Commission reject those exceptions presented by Creek House and Vorpahl that are addressed above, find that LCRA TSC has provided proper notice of all 58 routes in consideration, including the modification resulting in segment C5, and issue an order approving LCRA TSC’s application to amend its certificate of convenience and necessity to construct the proposed project.

Respectfully submitted,

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**ATTORNEYS FOR LCRA TRANSMISSION
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CERTIFICATE OF SERVICE

I certify that a copy of this document was served on all parties on this date, May 15, 2020, in accordance with the service procedures set out in SOAH Order No. 1 issued in this docket.

/s/ Craig R. Bennett
Craig R. Bennett