



Control Number: 50065



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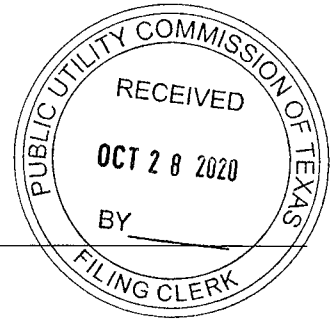
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DeAnn T. Walker
Chairman
Arthur C. D'Andrea
Commissioner
Shelly Botkin
Commissioner
John Paul Urban
Executive Director



Greg Abbott
Governor

Public Utility Commission of Texas



TO: Stephen Journeyay
Commission Counsel

All Parties of Record

FROM: Steven Leary *SL*
Administrative Law Judge

RE: Docket No. 50065 – *Complaint of Doug And Linda Crosson, Bo and Trish Lebo, and Bruce and Ann Ahlhorn Against Pedernales Electric Cooperative, Inc.*

DATE: October 28, 2020

Enclosed is the Proposal for Decision (PFD) in the above-referenced case. By copy of this memo, the parties to this proceeding are being served with the PFD.

Please place this docket on an open meeting agenda for the Commissioners' consideration. There is no deadline in this case. Please notify me and the parties of the open meeting date, as well as the deadline for filing exceptions to the PFD, replies to the exceptions, and requests for oral argument.

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DOCKET NO. 50065

COMPLAINT OF DOUG AND LINDA	§	PUBLIC UTILITY COMMISSION
CROSSON, BO AND TRISH LEBO, AND	§	
BRUCE AND ANN AHLHORN	§	OF TEXAS
AGAINST PEDERNALES ELECTRIC	§	
COOPERATIVE, INC.	§	

**PROPOSAL FOR DECISION
ON MOTION FOR SUMMARY DECISION**

This Proposal for Decision (PFD) addresses the motion to dismiss, and in the alternative, for summary decision, filed in this matter by Pedernales Electric Cooperative, Inc. (PEC). For the reasons set forth herein, the PFD recommends that the Commission deny PEC's motion to dismiss, but grant PEC's motion for summary decision and deny the complaint of Doug and Linda Crosson, Bo and Trish Lebo, and Bruce and Ann Ahlhorn (collectively, complainants), under 16 Texas Administrative Code (TAC) § 22.182.

I. Background

On October 1, 2019, the complainants filed the complaint at issue in this proceeding. A review of the pleadings reflects that the material facts are not in dispute. The complainants are landowners whose tracts are adjacent to a tract owned by Driftwood DLC Austin II, LLC. A currently-certificated 138-kilovolt transmission line operated by PEC crosses the Driftwood DLC tract in the northeast corner of the tract. Driftwood DLC requested PEC to relocate this portion of the transmission line to accommodate the building of a golf course. Driftwood DLC's proposed relocation site is within the Driftwood DLC tract, but would move a portion of the transmission line to within 300 feet of the complainants' residential tracts and habitable structures. Driftwood DLC has agreed to pay PEC for the costs of relocation and to furnish the necessary right-of-way. The complaint indicates that the complainants received notice from PEC of the relocation and were informed by PEC representatives that a proceeding to amend PEC's certificate of convenience and necessity (CCN) is not required because the relocation falls within an exception under 16 TAC § 25.101(c)(5)(D) (i.e., the landowner-requested relocation exception). The complainants request that a hearing be held to consider the proposed relocation. The complainants also seek a stay against the commencement of construction activities.

On October 23, 2019, PEC filed a response to the complaint. In the response, PEC stipulated to all material facts alleged in the complaint, moved to dismiss the complaint on the basis that it fails to state a claim for which relief can be granted, under 16 TAC § 22.181(d)(8), and for “other good cause shown,” under 16 TAC § 22.181(d)(11), and moved in the alternative for a summary decision in its favor under 16 TAC § 22.182.

On October 31, 2019, Commission Staff filed a statement of position, supporting PEC’s response in all respects and recommending dismissal of the complaint. The complainants and PEC thereafter submitted further written argument. The complainants filed a request for referral of the case to the State Office of Administrative Hearings (SOAH) for a hearing on the merits of the complaint.

The complainants admit that they did not submit the complaint to the Commission’s informal resolution procedures prior to filing the formal complaint, as required by 16 TAC § 22.242(c). In a pleading dated November 12, 2019, the complainants seek a good cause exception to this requirement, stating that they had attempted to informally resolve the dispute with PEC representatives prior to filing the complaint, did not hear back from these representatives after their initial contact with them, and feared that the relocation process might begin without the opportunity for review by the Commission. Commission Staff does not oppose the request for a good cause exception. The ALJ recommends that that good cause exists to waive the informal resolution requirement under 16 TAC § 22.242(c).

Because under § 25.101(c)(5)(D) the Commission retains discretionary authority to hold a hearing to determine whether an activity requires a CCN amendment, the ALJ recommends that the motion to dismiss be denied. Because the material facts of this case are not in dispute and this case clearly falls within the landowner-requested relocation exception of § 25.101(c)(5)(D), the ALJ recommends that no hearing is necessary, that PEC’s motion for summary decision be granted, and that the complaint be denied.

No hearing was held on the motion to dismiss or the motion for summary decision.

II. The Motion to Dismiss

Central to the discussion of this case is the interpretation of 16 TAC § 25.101(c)(5)(D). The pertinent portion of this rule states:

(c) Projects or activities not requiring a certificate. A certificate, or certificate amendment, is not required for the following:

* * *

(5) Routine activities associated with transmission facilities that are conducted by transmission service providers. Nothing contained in the following subparagraphs should be construed as a limitation of the commission's authority as set forth in PURA. Any activity described in the following subparagraphs shall be reported to the commission in accordance with §25.83 of this title. The commission may require additional facts or call a public hearing thereon to determine whether a certificate of convenience and necessity is required. Routine activities are defined as follows:

* * *

(D) The relocation of all or part of an existing transmission facility due to a request for relocation, provided that:

- (i) the relocation is to be done at the expense of the requesting party; and
- (ii) the relocation is solely on a right-of-way provided by the requesting party.

PEC asserts that the complaint should be dismissed under 16 TAC § 22.181(d)(8) for failure to state a claim for which relief can be granted, and under 16 TAC § 22.181(d)(11) for other good cause shown. Commission Staff agrees with PEC.

The applicable rule, 16 TAC § 25.101(c)(5)(D) first sets out a general rule—a CCN amendment is generally not required for “routine activities,” which are defined to include a relocation of part of an existing transmission facility due to a request for relocation, so long as the relocation is being done at the expense of the requesting party and is solely on right-of-way provided by the requesting party. The rule, however, also provides an exception that the Commission “may require additional evidence or call a public hearing thereon to determine whether a [CCN] is required.”

In the present case, the complainants concede that PEC is relocating part of its existing transmission facility at Driftwood DLC’s request, the relocation is being done at Driftwood DLC’s expense, and the relocation is solely on right-of-way provided by Driftwood DLC, thus satisfying the general rule in 16 TAC § 25.101(c)(5)(D). The complainants argue, however, that the Commission should exercise its discretion under 16 TAC § 25.101(c)(5) by requiring a public hearing on Driftwood DLC’s request to relocate the transmission line.

In light of the Commission's broad authority to hold a hearing to determine whether a proposed activity requires a CCN amendment, the ALJ concludes that dismissal under 16 TAC § 22.181(d)(8) or (d)(11) is not the appropriate vehicle for disposition of this case. For this reason, PEC's motion to dismiss should be denied.

III. The Motion for Summary Decision

In the alternative that its motion to dismiss was denied, PEC moved for summary decision in its favor, because the complaint does not allege any violation of a statute or rule and because the undisputed evidence shows that the criteria of (c)(D)(i) and (ii) are satisfied. The complainants do not dispute that the criteria of (c)(D)(i) and (ii) are satisfied, but contend that the language of (c)(5) permits the Commission to nonetheless require a hearing in this case to enable the complainants to meaningfully participate in the process and to determine whether a CCN amendment should be required.

PEC counters that although the language of (c)(5) recognizes the Commission's broad authority under PURA to require additional facts or call a public hearing, a hearing is only necessary when a factual dispute exists as to the applicability of the exception and that no hearing is warranted in this case. PEC cites as precedent the Commission's decision in Docket No. 42444.¹ That case also involved a landowner complaint about a utility's attempts to both rebuild a substantial portion of a transmission line and relocate a smaller portion of it. The complainant in Docket No. 42444, a landowner whose tract adjoined the site of the relocated transmission line, contended that a CCN amendment was required, while the utility contended the activities were exempt under (c)(5). The Commission granted summary decision for the utility and, in rejecting the complainant's assertion that the unique facts of that case required a hearing, stated:

Such an interpretation would almost guarantee less utility and landowner cooperation, while increasing the time, complexity, inconvenience and costs for utilities and landowners. Further, such an interpretation would establish due process rights for activities that the Commission has expressly exempted and which could have many unintended consequences.²

¹ *Complaint of CTMGT Frisco 113, LLC against Oncor Electric Delivery Company, LLC and Rock Hill Enterprises, Ltd*, Docket No. 42444, Order (Dec. 18, 2014)

² *Id* at 8.

The complainants in this case attempt to distinguish Docket No. 42444 because while that case did not involve habitable structures, this case does. Additionally, the complainants note that Docket No. 42444 was referred to SOAH prior to the Commission ruling on a motion for summary decision, and request that this case likewise be referred to SOAH.

Although the complainants attempt to distinguish this case from Docket No. 42444 on the basis of habitable structures, the rule in question makes no such distinction. The relocation in this case appears to fall precisely within the type of routine activity expressly exempted in (c)(5) from the requirement of a CCN amendment. It should be noted that on November 12, 2019, the complainants filed a petition for rulemaking in Docket No. 50226.³ The petition sought to add a new subsection (iii) to § 25.101(c)(5)(D), stating, “all landowners who were noticed under § 25.83(c)(3) of this title have given their prior written consent.” The Commission considered the rulemaking petition at the December 13, 2019 open meeting, but declined to make the requested changes at that time.

Because the complaint does not allege a violation of a statute or Commission rule, and because the undisputed facts reflect that the conduct complained of falls within the well-recognized exception of (c)(5)(D), no hearing is necessary to determine whether a CCN amendment is required. Therefore, the ALJ concludes that PEC is entitled to a summary decision in its favor as a matter of law.

IV. Findings of Fact

The ALJ makes the following findings of fact.

Complainants

1. The complainants are individuals who own residential tracts adjacent to tract owned by Driftwood DLC.

Respondent

2. The respondent, PEC, is a domestic nonprofit corporation registered with the Texas secretary of state under file number 7336401.
3. PEC provides electric transmission service under CCN number 30128 in Hays County.

³ *Petition of Rulemaking of Doug & Linda Crosson, Darrell & Patricia Lebo, Bruce & Ann Anlhorn, and Lawrence D & Deneice Griffin*, Docket No 50226.

Basis of Complaint

4. PEC operates a currently-certificated 138-kilovolt transmission line that crosses the northeast corner of the Driftwood DLC tract.
5. In February of 2018, Driftwood DLC requested PEC to relocate that portion of the transmission line within the Driftwood DLC tract to accommodate the construction of a golf course.
6. Driftwood DLC and PEC entered into an agreement for the relocation. Under the terms of the agreement, PEC will relocate part of its existing transmission facility at Driftwood DLC's request, the relocation will be done at Driftwood DLC's expense, and the relocation will be solely on right-of-way provided by Driftwood DLC.
7. The complainants own residential tracts near the proposed relocation site. The complainants own habitable structures located within 300 feet of the proposed centerline of relocated transmission line.
8. In accordance with 16 TAC § 25.83(c)(3), PEC mailed written notice of the relocation to the complainants on July 15, 2019. The notice included a description of the project and contact information for PEC and the Commission.
9. Prior to filing the complaint, the complainants contacted PEC and expressed concerns about the relocation. The complainants were informed by PEC representatives that a CCN amendment was not required because the exception of 16 TAC § 25.101(c)(5)(D) applies.

Complaint

10. On October 1, 2019, the complainants filed the complaint against PEC with the Commission.
11. The complaint states that the complainants believe the proposed relocated transmission line will negatively impact the value of their homes and that viable alternatives to the project exist.
12. Although the complaint acknowledges that PEC contends that the exception of 16 TAC § 25.101(c)(5)(D) applies, the complaint asserts that the Commission should exercise its discretion to hold a hearing on the contemplated transmission line relocation.

13. In neither the complaint, nor in subsequent pleadings, do the complainants dispute that the relocation was requested by Driftwood DLC, that the relocation expenses were to be paid by Driftwood DLC, or that the relocation was to be accomplished solely on right-of-way furnished by Driftwood DLC.

Motion to Dismiss and for Summary Decision

14. In its response to the complaint filed on October 23, 2019, PEC moved for dismissal of the complaint for failure to state a claim for which relief may be granted and for other good cause shown, and moved in the alternative for summary decision in its favor.

V. Conclusions of Law

The ALJ makes the following conclusions of law.

1. The Commission has authority over this matter under PURA⁴ §§ 15.051 and 32.001.
2. PEC is a transmission service provider as defined by 16 TAC § 25.5(141).
3. Under 16 TAC § 25.101(c)(5), certain routine activities by transmission service providers with respect to transmission facilities do not require a CCN amendment.
4. Under 16 TAC § 25.101(c)(5)(D), relocation of an existing facility in response to a request for relocation constitutes a routine activity and does not require a CCN amendment when the relocation is to be done at the expense of the requesting party and solely on right-of-way furnished by the requesting party.
5. Under 16 § TAC 22.242(c), a complainant generally must submit a complaint to the informal resolution process before presenting the complaint to the Commission.
6. Good cause exists under 16 TAC § 22.242(c)(2) to waive the requirement of informal resolution.
7. Under 16 TAC § 22.181(d)(8), the ALJ may recommend to the Commission that it dismiss a proceeding, with or without prejudice, for failure to state a claim for which relief may be granted.

⁴ Public Utility Regulatory Act, Tex. Util. Code §§ 11.001-66.016.

8. Under 16 TAC § 22.181(d)(11), the ALJ may recommend to the Commission that it dismiss a proceeding, with or without prejudice, for other good cause shown.
9. Because under 16 TAC § 25.101(c)(5)(D), the Commission retains discretionary authority to hold a hearing to determine whether a proposed activity requires a CCN, dismissal under 16 TAC § 22.181(d)(8) or (d)(11) is not appropriate in this case.
10. Under 16 TAC § 22.182, the Commission may grant a motion for summary decision if the pleadings, affidavits, materials obtained by discovery or otherwise, admissions, matters officially noticed, or evidence of record show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law.
11. Under 16 TAC § 22.182(d), a hearing on a motion for summary decision is not required.
12. Under 16 TAC § 22.182(f), disposition of a case by summary decision requires preparation of a PFD.
13. Because the relocation complained of in this case is in response to Driftwood DLC's request, is to be performed at Driftwood DLC's expense, and will be performed solely on right-of-way furnished by Driftwood DLC, the relocation does not require a CCN amendment under 16 TAC § 25.101(c)(5)(D).
14. The complaint in this case is appropriate for disposition by summary decision because the undisputed facts reflect that PEC is entitled to a decision in its favor as a matter of law.

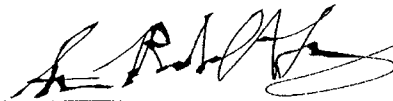
VI. Ordering Paragraphs

In accordance with these findings of fact and conclusions of law, the ALJ proposes the following ordering paragraphs.

1. The Commission denies PEC's motion to dismiss.
2. The Commission grants PEC's motion for summary decision and denies the complaint.
3. The Commission denies all other motions, and any other requests for general or special relief if not expressly granted.

Signed at Austin, Texas the 28th day of October 2020.

PUBLIC UTILITY COMMISSION OF TEXAS

A handwritten signature in black ink, appearing to read 'S. Leary', written over a horizontal line.

STEVEN LEARY
ADMINISTRATIVE LAW JUDGE

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