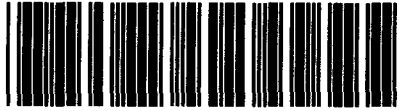




Control Number: 29705



Item Number: 387

Addendum StartPage: 0

**PUC DOCKET NO. 29705
SOAH DOCKET NO. 473-04-8361**

**APPLICATION OF SAM HOUSTON
ELECTRIC COOPERATIVE, INC. FOR
A CERTIFICATE OF CONVENIENCE
AND NECESSITY (CCN) FOR A
PROPOSED TRANSMISSION LINE IN
SAN JACINTO COUNTY, TEXAS**

§
§
§
§
§
§
§

**BEFORE THE
PUBLIC UTILITY COMMISSION
OF TEXAS**

2005 SEP 3 PM 4:34
PUC
CLERK

**SAM HOUSTON ELECTRIC COOPERATIVE, INC.'S
RESPONSE TO MOTION FOR REHEARING**

COMES NOW Sam Houston Electric Cooperative, Inc. ("Sam Houston") and files its Reply to the Motion for Rehearing of intervenors aligned with George H. Russell ("Russell" or "Russell Alignment") filed on Wednesday, September 14, 2005. ("Motion")¹ The Order in the above styled and captioned proceeding was issued by the Public Utility Commission of Texas ("Commission") on August 23, 2005 and received by Sam Houston on August 25, 2005. This Response is thus timely filed under Texas Gov't Cod Ann. §2001.146(b) (Vernon 1998 & Supp. 2005) on or before Monday, September 26, 2005.

**I.
INTRODUCTION AND INITIAL DISCUSSION**

The Motion for Rehearing should be summarily denied. The Motion completely fails to present any basis or argument which would merit the Commission's reconsideration of its decision in this proceeding, approving the Administrative Law Judge's ("ALJ") Proposal for Decision ("PFD"). Each of the arguments now made by the Russell Alignment have already been carefully considered and rejected by the ALJ and the Commission in this proceeding. The Motion confusingly and sporadically attempts to present certain arguments as grounds for the Commission to reverse its decision, without presenting the full factual findings of the case, and without providing any supporting authority to support such reasoning.

¹ Sam Houston will not address the *ex parte* communication made by Russell to Chairman Hudson via email dated August 20, 2005.

In short, Russell's Motion primarily contends that there is a more favorable route, one which does not cross his property, which is more closely aligned with "community, park/recreation-area, aesthetic and historical-property values"² Russell argues that these factors, all of which were carefully considered by the ALJ, should take precedence over all other factors that must be evaluated by the Commission when determining whether to grant or allow an amendment to a Certificate of Convenience and Necessity ("CCN")³. Russell's Motion completely fails to address, or even mention, such factors as "(1) the adequacy of existing service; (2) the need for additional service; and (3) the effect of granting the certificate on the recipient of the certificate and any electric utility serving the proximate area."⁴ Nor does Russell address the Commission's rules which delineate specific factors to be considered when evaluating the routing of a transmission line. Such specific factors include: "(1) whether the routes utilize existing compatible rights-of-way, including the use of vacant positions on existing multiple-circuit transmission lines; (2) whether the routes parallel existing compatible rights-of-way; (3) whether the routes parallel property lines or other natural or cultural features; and (4) whether the routes conform with the policy of prudent avoidance."⁵ As the PFD pointed out, and as the Commission properly recognized at the August 18, 2005 Final Order meeting, such factors are important and in this case overwhelmingly warrant the approval of Route No. 6.

Sam Houston respectfully submits that the record evidence supports the ALJ's recommendation to the Commission, and properly considers all of the factors as set forth in PURA and the Commission's Substantive rules. Accordingly, the Commission's adoption of the ALJ's PFD, including those specific findings of fact and conclusions of law as set forth in its Order, was not improper, as provided for under P.U.C. PROC. R. 22.263. The evidence in the record clearly establishes that the Commission did not find arbitrarily and capriciously, abuse its discretion, nor exercise unwarranted discretion in its decision to approve Route No. 6.

In an attempt to simplify and effectively address the issues raised in Russell's Motion with a certain degree of specificity, Sam Houston has sequentially numbered the paragraphs presented in Russell's Motion from beginning to end. Accordingly, for discussion purposes below when citing to specific points raised by the Russell, Sam Houston will cite both the

² Motion at Para. 20, Pg. 9

³ Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §37.056 (Vernon 1998 & Supp. 2005) (PURA)

⁴ PURA §37.056(c)

⁵ P.U.C. SUBST. R. 25.101(b)(3)(B)

paragraph number and the page on which that paragraph is located. (i.e., Motion at Para. 14, Pg. 6)

II.

DISCUSSION: COMMUNITY VALUES

A. The Order Adequately Considers Community Values

The majority of Russell's Motion attempts to maintain that Community Values were not adequately considered by the ALJ and reflected in the Commission's Order. In support of this argument, Russell interposes his own definition of "community values" and directs the Commission to follow his definition, even though such a term has not been defined by the Legislature or the Commission. Russell would have the Commission believe that the parties aligned with him, some of whom are not even members of the local community where the proposed project will be located (i.e. Sierra Club and Natural Area Preservation Association) are the only representative members of the community and therefore the Commission must follow the wishes of this small group which Russell has cobbled together.⁶ Such a position is reflected in Russell's Motion wherein he states: "The Order..., adversely affects the values of the *vast majority* of the members of the community..., "...a route that adversely impacts *almost everyone* in community," and "... only *token* neighbor opposition" to Route No. 1 was raised. (Emphasis added).⁷ Consistent with Russell's tact throughout this proceeding, such statements are not only misleading, but are not supported by the record evidence in this proceeding.

In fact, numerous other members of the community, not aligned with Russell, did voice their concerns, made filings, and participated at the Hearing by and through their representative, Mr. Walter Kellum.⁸ Mr. Kellum and the 13 other intervenors in this proceeding he represented, known as the Staley Group, adamantly opposed Route 1.⁹ These individuals are not just, to use Russell's derogatory term, "token" members of the community, but they do in fact live in the community and they have clearly made their views known to Sam Houston and the Commission as concerns the most appropriate route for this project. Even Jacinto Investments, the owner of the most property located in Waterwood, opposes Route No. 1.¹⁰ Also included in the "community" are the 4,200 Sam Houston members/consumers who reside in the area and who

⁶ See Motion at Para. 11, Pg. 5

⁷ Motion at Para. 2, Pg. 1 and Para. 18, Pg. 8

⁸ PFD at 2

⁹ Id. at 20

¹⁰ See Tr. at 521/21 – 522/8

will directly benefit from this project, and the ALJ properly considered these members/consumers.¹¹ Contrary to Russell's Motion, the ALJ's PFD establishes that community values, and the community as a whole, were properly considered and evaluated, and there is no reason to reconsider or overturn the ALJ's recommendation or this Commission's Final Order.

B. Rejection of Russell Witness Krueger's Testimony on "Religious Values" was Both Proper and Appropriate. (Responding to issue raised in Motion at Paragraphs 5 and 6, Pg. 3).

Russell attempted to offer the testimony of Frederick Krueger, an individual who lives in Santa Rosa, California, who opined, among other things, that it would be a sin to allow Sam Houston to construct its proposed project across the Russell property. In support of such opinion, Mr. Krueger provided two (2) pages of Biblical citations.

In ruling against the admission of this testimony, the ALJ stated that: "When the rules address "community values," this pertains to the community where the project is proposed, *not the religious community at large*." (Emphasis Added)¹² Nothing in Mr. Krueger's testimony even vaguely suggests that Mr. Krueger was familiar with the views and opinions of the local Texas community, and whether any of them subscribed to Krueger's religious beliefs or opinions. He was clearly not qualified to offer any opinion testimony on the beliefs of the local religious community, or for that matter, the community at large. Russell presented no evidence nor is able to cite any legal standard which supports that community values and values of a religious community at large are one in the same. Russell simply maintains that the ruling by the ALJ was a "legal error" primarily as a matter of public policy.¹³ Such an argument does not merit reconsideration of the Commission's Order on procedural grounds.

C. ALJ's Findings Do Not Support That Use of Existing Easement is an "Affront to the Spiritual Values of the Community" (Responding to issue raised in Motion at paragraph 4 pg. 2).

Russell argues that use of Sam Houston's existing easement along FM 980 is "some support for Route 6", but since said easement borders a cemetery and a "wilderness church",¹⁴ that such a use is an "affront to the spiritual values of the community."¹⁵

¹¹ See PFD at 31, Finding of Fact ("FOF") 21 and PFD at 32, FOF 28

¹² Order 17 at 2

¹³ Motion at Para. 5, Pg. 3 and Para. 6, Pg. 3

¹⁴ The "church" is located approximately six or seven tenths of a mile from the proposed transmission line. See Sam Houston's Initial Brief at 28, See also Tr. at 696/11-18

¹⁵ Motion at Para. 4, Pg. 2

Sam Houston would point out that “spiritual values” is not one of the factors listed in PURA or the Commission’s Substantive Rules. Furthermore, Russell cites no precedent which would suggest that “spiritual values” should be considered. Nor does Russell himself have any qualifications to testify as to the spiritual values of the community.

First, to be clear, Sam Houston has owned the easement to be utilized for this project since 1979, some twenty years before Russell’s family purchased its property in the area, and it was Russell who chose to establish a cemetery in Sam Houston’s right-of-way, not the other way around.

Russell’s argument that the existing easement “will almost surely entail condemnation of a greater width of easement paralleling the existing easement” is pure conjecture and simply not supported by the record.¹⁶ Russell has acknowledged that Sam Houston does have an existing easement, and even under Russell’s strained reading of the easement, Sam Houston can still properly construct the transmission line within its easement area.¹⁷

Further, the existence of a cemetery along the boundary of Sam Houston’s existing easement in this case does not negate the ALJ’s consideration of paralleling existing compatible Right-of-Way (“ROW”) (FM 980) or the utilization of Sam Houston’s existing ROW. The ALJ properly found that Russell established the cemetery “as an attempt to prevent SHECO from using its transmission line easement.”¹⁸ The ALJ further added that, “To allow such action would circumvent the entire routing process and encourage others to take similar actions. The ALJ concludes the transmission line may be built to the side of the cemetery within SHECO’s existing easement.”¹⁹

A review of the record clearly reveals that the ALJ’s consideration of existing ROW and the extent to which the route parallel’s existing ROW (FM 980) was proper as provided under the Commission’s Routing Rule, PUC Subst. R. 25.101 (b)(3)(B). Route No. 6 has a clear advantage when considering these factors despite the attempts of Russell to overshadow these factors with manufactured impediments. There is thus no credible argument or policy reason which merits the Commission’s reconsideration of this issue on the grounds that use of the existing easement would be an “affront to the spiritual values of the community.”²⁰

¹⁶ Id.

¹⁷ See Sam Houston’s Reply Brief at 37.

¹⁸ PFD at 28

¹⁹ Id.

²⁰ Motion at Para. 4, Pg 3

III. DISCUSSION: PRUDENT AVOIDANCE

At Paragraphs 3 and 16 on pages 2 and 7 of Russell's Motion, Russell ineffectively argues that Route 6 does not comply with the Commission's rule and policies concerning Prudent Avoidance. Russell fails to support the basis for these arguments and even fails to dispute or cite evidence contrary to the ALJ's FOFs in the PFD.

In Paragraph 3 Russell attempts to limit the consideration of the Commission's Prudent Avoidance policy to the number of habitable structures along a given route. Prudent Avoidance is not defined by the number of habitable structures within 300 feet of a given route. As noted by the ALJ in FOF 87 in the PFD, "P.U.C. SUBST. R. 25.101(a) (4) defines the term "Prudent Avoidance" as "the limiting of exposures to electric and magnetic fields that can be avoided with reasonable investments of money and effort."'"²¹ The ALJ went on in FOF 88 to find that "Route 6 adequately follows the Commission's rule and policies on prudent avoidance in that the route reflects reasonable investments of money and effort in order to limit exposure to electric and magnetic fields."'²²

A review of the Commission's rule reveals that there are other factors to consider other than the number of habitable structures along a given route. It is clear from a review of the FOF's in the PFD that the ALJ considered these factors and concluded properly in Conclusion of Law ("COL") No. 6 that Route No. 6 does comply with the Commission's Prudent Avoidance policy.²³ Thus Russell's simplified "habitable structure argument" does not hold up when examining the actual Commission Rule.

Furthermore, it is disingenuous, at best, for Russell to argue that Route No. 6 is unacceptable from a Prudent Avoidance standpoint based on the number of habitable structures considering previous arguments made by Russell in this proceeding. In his Initial Brief, Russell advocated for the approval of Route No. 3 stating: "The PUC policy of prudent avoidance should not prevent Route 3 from being selected as the preferred route. The number of habitable structures along Route 3 is not significantly greater than that of SHECO's own preferred Route 9. There are 12 habitable structures along proposed Route 9, and there are 14 habitable structures along Route 3." If twelve (12) or fourteen (14) habitable structures are consistent with the

²¹ PFD at 37, FOF 87

²² PFD at 37, FOF 87

²³ See PFD at 39, COL 6

policy, surely four (4), the number of habitable structures located along Route No. 6, would be equally, or more, consistent with the policy.²⁴

It is also important to point out that Russell cites no legal precedent or any evidence in the record which would raise questions concerning the ALJ's FOFs related to Prudent Avoidance. In fact, nowhere in the Motion does Russell even dispute the ALJ's FOFs concerning Prudent Avoidance on which COL 6 is based. Reversal of the ALJ's findings as to prudent avoidance, and habitable structures, and a choice of Route No. 1, based upon the record evidence in this proceeding, would be contrary to the Commissions routing policy and prior decisions in CCN cases that have been previously approved.²⁵

IV. DISCUSSION, RECREATIONAL AND PARK AREAS/HISTORICAL AND AESTHETIC VALUES

Russell, in Paragraph 13 of his Motion, claims that Route 6 is inferior when evaluating recreational and park impacts. However, the discussion is quite limited and the primary argument made by Russell against Route No. 6 is that it would cross the Texas Parks and Wildlife Division's ("TPWD") "Prairie and Piney Woods Trails" and that "as testified to by Ms. Reed, the main architect of the trail, a transmission line would detract from the beauty of the trail."²⁶ Russell fails to apprise this Commission of one small fact. As noted by the ALJ in the PFD, Ms. Reed "...admitted that she designed the trail to cross underneath the present distribution line".²⁷ Not only was the trail designed to cross under the distribution line, it was also designed to cross FM 980 in two (2) locations, loop across the Russell properties, utilize other existing roadways, and follow along the Waterwood Parkway.

Russell maintains that his route has additional advantages "over Route 6 when solely considering historical values."²⁸ Once again the record evidence simply does not support such a statement. Sam Houston was made aware of a State Archaeological Landmark ("SAL") during

²⁴ The four (4) habitable structures located on Route No. 6 are 200', 200' 240' and 300' away from the centerline of the proposed transmission line.

²⁵ See Docket Nos. 29833 and 28450, in which routes were approved along an FM road with more habitable structures, visibility, and aesthetic impacts than any of the other alternative routes.

²⁶ Motion at Para. 13, pg. 6

²⁷ PFD at 23. The proposed transmission line will be located where the existing distribution line is now located, and the distribution line will also be located on the transmission structure.

²⁸ See Motion at Para. 9, pg. 11

the intervention period by Mr. George Russell.²⁹ However, after PBS&J contacted the Texas Historical Commission (“THC”) on behalf of Sam Houston, it was discovered that the SAL was formally designated in May of 2004, following the completion of the Environmental Assessment (“EA”) and the Public Input meeting.³⁰ Furthermore, the THC indicated to PBS&J in a letter dated August 24, 2004, “that the SAL would not prevent construction of the transmission line as long as Sam Houston had a cultural resources survey performed along the route where it crosses the SAL, and coordinated with the THC regarding possible mitigation for any cultural resource sites that were documented during the survey.”³¹

Russell claims, without record evidence, that the Longleaf Pine Preserve is designated as a State Archaeological Landmark.³² However, the cited source (Exh. R-2, at Exh. GHR-2) does not even address this issue.³³ The cite references the exhibit which contains the “mail notice documents”³⁴ Although, there is an SAL designation (designated after the initiation of this project) within the so called Longleaf Pine Preserve, there are absolutely no facts or evidence which support Russell’s claim that the Longleaf Pine Preserve itself is a SAL. Furthermore, the site associated with the SAL and submitted by Mr. Russell to the THC is 500 or more feet away from FM 980 and will not be crossed by the transmission line.³⁵

The ALJ properly considered the effects of Route No. 6 on Recreational and Park Areas/Historical and Aesthetic values and properly ruled that the Commission’s factors were satisfied by Route No. 6. Russell is unable to provide any supporting record evidence to support the claim that Route No. 6 is contrary to the Commission’s policies concerning routing effects on Recreational and Park Areas/Historical and Aesthetic Values.

²⁹ See Ex. A-13 at 22/6

³⁰ Id. at 22/7-9.

³¹ Id. at 22/11-15

³² See Motion at Para. 9, pg. 2

³³ See Id.

³⁴ See Ex. R-2

³⁵ Tr. at 903/4-15.

V.
DISCUSSION MISCELLANEOUS

A. FOF 85 Is Not “Against the Preponderance of the credible evidence in the docket”³⁶

In FOF 85, the ALJ states that, “Route 6 is the best alternative weighing the factors set forth in PURA §37.056(c), PUC SUBST.R. 25.101(3)(B)”³⁷ Russell simply contends that such a finding is “against the preponderance of the credible evidence in the docket”.³⁸ However, Russell cites no authority or references any evidence which supports this claim. The ALJ carefully scrutinized the record evidence in this case and Sam Houston submits that such record evidence clearly supports the selection of Route No. 6 over that route, No. 1³⁹, preferred by Russell.

B. Route 6 Cost Advantage

Russell claims that, “All Route 6 really has going for it is a small cost advantage, which may vaporize altogether in the condemnation process.”⁴⁰ Once again Russell’s claims are not substantiated by the evidence, explaining why Russell has chosen not to cite any specific evidence supporting the claim. As previously discussed, there is no evidence that condemnation will be necessary, nor is this a relevant factor for the Commission to consider. In fact, just the opposite is true. Sam Houston can construct its line within its easement area. The ALJ further found that Route No. 6 provided significant cost savings, approximately \$418,844 both in initial construction and in costs associated with the annual repairs and maintenance.⁴¹ The claim by Russell is an over simplification of the evidence in record and does not with any specificity present an error that would merit the Commission’s reconsideration of its decision to approve Route 6.

³⁶ Motion at Para. 7, Pg. 3.

³⁷ PFD at 36 – The ALJ does incorrectly cite the Commission Rule, the cite should read PUC SUBST. R. 25.101(b)(3)(B).

³⁸ Id.

³⁹ At page 2 of his Motion, Russell claims that Route No. 1 is routed “largely through monoculture tree farms”. The record evidence does not support this claim.

⁴⁰ Motion at Para. 20, Pg. 8 and 9.

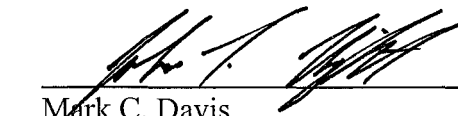
⁴¹ PFD at 22.

CONCLUSION

Russell presents a Motion for Rehearing which simply provides no reasoned or legal argument that would support the reconsideration of the Commission's decision in this proceeding. Russell raises the identical arguments that have already been presented to, considered, and rejected by the ALJ. Even as to those issues raised in Russell's motion, such issues are not supported by the record evidence and Russell fails to provide the Commission with any such evidence that would warrant reconsideration. The record clearly supports that the ALJ adequately considered all of the PURA and PUC Substantive Rule factors and reasonably recommended Route No. 6 in the PFD, which the Commission reasonably adopted in its Final Order. The Russell Motion simply does not raise any issues or cite specific evidence which contradicts the findings of the ALJ and Order issued by the Commission. Thus, Sam Houston respectfully submits that no good cause exists to grant the Motion for Rehearing of Russell.

WHEREFORE, PREMISES CONSIDERED, Sam Houston respectfully requests that the Motion for Rehearing be denied.

Respectfully Submitted,



Mark C. Davis

State Bar No. 05525050

Email: mdavis@bbrsaustin.com

Nelson H. Nease

State Bar No. 24008904

Email: nnease@bbrsaustin.com

John T. Wright

State Bar No. 24037747

Email: jwright@bbrsaustin.com

BRICKFIELD BURCHETTE RITTS & STONE, P.C.

1005 Congress Avenue, Suite 400

Austin, Texas 78701-2415

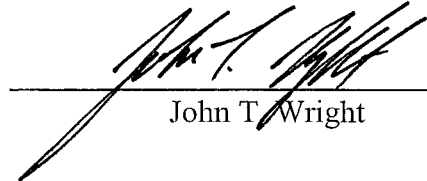
(512) 472-1081

(512) 472-7473 FAX

ATTORNEYS FOR SAM HOUSTON ELECTRIC
COOPERATIVE, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing, **SAM HOUSTON ELECTRIC COOPERATIVE, INC.'S RESPONSE TO MOTION FOR REHEARING**, was hand delivered and/or mailed this **23rd day of September, 2005** by First Class, U.S. Mail, postage pre-paid to All Parties of Record.



John T. Wright