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**APPLICATION OF RAYBURN
COUNTRY ELECTRIC
COOPERATIVE INC., TO OBTAIN A
CERTIFICATE OF CONVENIENCE
AND NECESSITY FOR A PROPOSED
TRANSMISSION LINE WITHIN
HENDERSON AND VAN ZANDT
COUNTIES**

§ **BEFORE THE STATE OFFICE**
§
§ **OF**
§
§ **ADMINISTRATIVE HEARINGS**
§
§

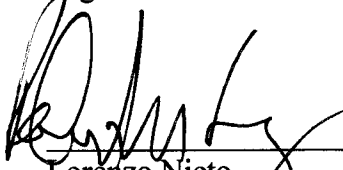
COMMISSION STAFF'S INITIAL BRIEF ON REMAND

DATE: September 5, 2008

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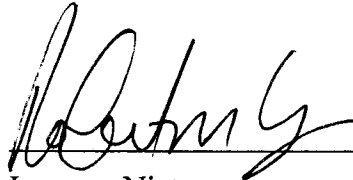
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true and correct copy of the foregoing document was served on all parties of record in this proceeding via U.S. regular mail, postage prepaid, or facsimile transmission in accordance with P.U.C. Proc. R. 22.74 on this, the 5th day of September 2008.

 signed by permission
Lorenzo Nieto

COMMISSION STAFF'S INITIAL BRIEF ON REMAND

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COMMISSION STAFF'S INITIAL BRIEF ON REMAND

I. INTRODUCTION

This matter concerns Rayburn Country Electric Cooperative, Inc.'s (Rayburn Country or Rayburn) application for amendment of its certificate of convenience and necessity to construct a proposed transmission line in Henderson and Van Zandt Counties. The administrative law judge's proposal for decision, which recommended the approval of modified route 1 as the best alternative for the transmission line, was filed January 16, 2008. Staff supported that proposal. However, on/about March 4, 2008, the Commission remanded this matter back to the State Office of Administrative Hearings (SOAH) for further proceedings consistent with the Commission's decision. Specifically, the case was remanded to develop evidence regarding the environmental impacts of Modified Route 1. On/about March 18, 2008, the administrative law judge (ALJ) issued Order No. 43 concerning the scope of the hearing and explicitly setting forth the parameters for discussion on remand. That order states:

"The purpose of this proceeding is to consider environmental issues related to the recommended Modified Route 1. These environmental issues include: whether the proposed right-of-way will cross known habitat for bald eagles or endangered or threatened species; activities in response to the U.S. Fish and Wildlife Service letter dated June 29, 2005; activities in response to the Texas Parks and Wildlife Department's letter dated July 29, 2005; and assessment of Modified Route 1's impacts on wetlands, bottomland forest habitat, riparian habitat, and other sensitive communities or special habitat features."

On August 6, 2008, a hearing on the merits was held in this matter. Several parties participated in the hearing. After taking part in the hearing and reviewing the evidence and the testimony offered with respect to the environmental impacts, Staff continues to recommend the approval of Modified Route 1 as the best alternative for the proposed transmission line project.

The testimony on remand establishes that Modified Route 1 is environmentally acceptable. Additionally, the evidence establishes that the route will not adversely impact any threatened or endangered species, and that the environmental impacts of Modified Route 1 can

be reduced or eliminated by erosion control measures, flagging and hand-clearing of any sensitive areas, and spanning the streams and wetlands. As such, Staff asserts that the evidence and testimony admitted in this remand proceeding establish that Modified Route 1 is acceptable from an environmental perspective.

II. ISSUES ON REMAND

1. Does the proposed right-of-way for Modified Route 1 cross known habitat for endangered or threatened species or bald eagles?

Modified Route 1 does not cross the known habitat of any federally listed endangered or threatened species.¹ Modified Route 1 crosses reported habitat of the bald eagle, and possibly that of the alligator snapping turtle, both of which are on the state list of threatened species.² However, Staff points out that consultants retained by Rayburn and the Wises observed no threatened or endangered species in the Modified Route 1 ROW, including the ROW on the Wise, Gremmels or Arena properties.³ Further, Modified Route 1 will not adversely impact the bald eagle, or any other endangered or threatened species.

Bald Eagle

Texas law affords some protection to state listed threatened species including the bald eagle. And while the Texas Parks and Wildlife Code provides that a person shall not “capture, trap, take, or kill” any threatened animal, or attempt to do so, without a permit,⁴ there is no evidence in the record that Rayburn will capture, trap, take or kill bald eagles, *or even attempt to do so*, as a part of its proposed transmission line project. Additionally, Staff observes that even while the broadest of these acts, “take,” is defined to mean “collect, hook, hunt, net, shoot, or snare”,⁵ no evidence was presented establishing that the construction of the proposed project on Modified Route 1 will result in collecting, hooking, hunting, netting, shooting, or snaring of a bald eagle. As such, Staff asserts that the Texas Parks and Wildlife Code does not prohibit the construction of the proposed transmission line. Additionally, while the Bald eagle is afforded

¹ Compare Rayburn Ex. 2B (EA, Appendix B at 401) (determining the bald eagle as the only federally listed species) & Rayburn Ex. 1-R, at 52-57 (Exhibit RRR-3S) (recognizing that the bald eagle was de-listed in August 2007); Rayburn Ex. 3-R, at 21; Wise Ex. 23-R, at 23.

² Rayburn Ex. 1-R, at 8.

³ Rayburn Ex. 1-R, at 9; Wise Ex. 23-R, at 19-21 & 50.

⁴ See TEXAS PARKS AND WILDLIFE CODE § 68.015.

protection by Federal law, that law also does not prohibit the construction of Rayburn's proposed transmission line along Modified Route 1. The Federal Bald and Golden Eagle Protection Act prohibits the taking of bald eagles. Pursuant to that statute "take" is defined as "pursue, shoot at, poison, wound, kill, capture, trap, collect, molest, or disturb."⁶ While a central distinction between the federal and state statutes is that disturbing bald eagles is not prohibited under state law,⁷ the evidence does not support a finding that bald eagles will be "taken" or "disturbed," by construction of the project on Modified Route 1.

The direct testimony on remand of Jim Wise merely reflects that bald eagles were photographed "in or near" the proposed ROW.⁸ Further, Rayburn witness Rob R. Reid testified that Mr. Wise told him a bald eagle was occasionally seen in one tree in the right-of-way for Modified Route 1.⁹ Additionally, the Wises' bird journal does not reflect any sightings of bald eagles between April and November of any year, and in some years no sightings are recorded.¹⁰ Staff also points out that in his testimony and responses to discovery, Carl Frentress, expert for Harold and Jim Wise, indicated that only one stand of trees in the ROW, which is not even located anywhere near the lake located on the Wises' property, could "[p]ossibly" be used as a roost.¹¹ Staff asserts that this evidence does not support a finding that any trees in the ROW of Modified Route 1 are used as a regular roost or communal roost, are capable of supporting a bald eagle nest, or that removal of the trees will result in a bald eagle injury, productivity declines, or nest abandonment necessary to "disturb" a bald eagle under federal law. As such, construction of the proposed project on Modified Route 1 will not "disturb" or "take" a bald eagle. Accordingly, Staff asserts that construction of this project is not prohibited by Texas or federal law, and will not adversely affect a bald eagle.

⁵ See TEX. PARKS AND WILDLIFE CODE §1.101.

⁶ See 16 U.S.C. § 668-668(c).

⁷ Pursuant to 16 U.S.C. § 668-668c. "Disturb" means to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, 1) injury to an eagle, 2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or 3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.

⁸ Wise Exh. 22-R at 2-3.

⁹ Rayburn Exh. 3-R, at 5 & 12.

¹⁰ Rayburn Exh. 3-R, at 13; Wise Exh. 11-R.

¹¹ Rayburn Exh. 3-R, at 39; Wise Exh. 23-R, at 9-10.

Alligator Snapping Turtle

The evidence in this matter demonstrates that habitat for other state-listed threatened wildlife species that may occur in the study area, including the alligator snapping turtle, is unlikely to occur within the ROW of Modified Route 1.¹² While Mr. Frentress testified that the turtle *may* be present on the Wise or Gremmels properties, he did not testify that it would be present in the ROW or that he had actually observed any on the property.¹³ As Mr. Reid noted, the ROW for Modified Route 1 does not cross habitat in which alligator snapping turtles live, and in any event, the potential wetlands on the Gremmels property can be spanned.¹⁴

Plants

While the Wises attempted to establish the presence of, and impacts on, the dwarf pipewort, Chapman's yellow-eyed grass and the Carrizo leather-leaf, three plant species that are not on either the federal or state list of endangered or threatened species,¹⁵ there is no evidence that any state or federally listed threatened or endangered plant species has been seen or reported on the Wises' property, or any other property on Modified Route 1.

2. How will Modified Route 1 impact;

a. Wetlands

If the proposed project along Modified Route 1 is approved, there will be no loss of wetlands from Modified Route 1.¹⁶ Testimony established that the majority of the route is relatively high on the watershed, and therefore crosses few areas with potentially jurisdictional wetlands.¹⁷ Additionally, Staff notes that even those potential wetlands that might be impacted can be spanned by careful placement of structures or avoided with minor modifications in the alignment of the transmission line.¹⁸

PBS&J inspected both the Wise and Gremmel properties and determined that by spanning those areas instead of utilizing poles in the wetlands, no loss of wetlands will result from the construction of the proposed project on Modified Route 1.¹⁹ Mr. Reid testified that

¹² Rayburn Exh. 3-R, at 23; Tr. At 61-68.

¹³ Wise Exh. 23-R at 25.

¹⁴ Tr. At 61-69; Rayburn Exh. 3-R, at 23.

¹⁵ Wise Ex. 23-R, at 90-91.

¹⁶ Rayburn Ex. 3-R, at 26-27.

¹⁷ Tr. at 46

¹⁸ Tr. at 49-50; Staff Exh. 1-R at 4; Rayburn Exh. 2-R at 8-9; and Rayburn Exh. 3-R, 26-27.

¹⁹ Tr. at 49-51; Rayburn Exh. 3-R at 26-27.

wetlands on Modified Route 1 can be spanned or avoided such that, although trees in the ROW will be cleared, wetlands will not be lost.²⁰ Additionally, Staff witness Michael J. Lee agreed that small wetlands and streams can be spanned by careful placement of structures.²¹

b. Bottomland Forest

Modified Route 1 crosses 2,445 feet of bottomland forest habitat. This figure represents less than 5% of the length of Modified Route 1.²² The Wises' expert conducted site visits on the Wises and Gremmel properties, and consistent with Mr. Reid's testimony, identified no bottomland forested areas on either property.²³ Mr. Reid testified that even though the ROW through these areas will be cleared, the surrounding habitat *will not* be adversely impacted.²⁴

c. Riparian Habitat

Modified Route 1 crosses a number of small streams which are potentially "waters of the United States" subject to regulation by the U.S. Army Corps of Engineers ("USACE"). However, the small streams that are crossed may be spanned such that no loss of waters will occur, and the streams will not be adversely impacted.²⁵ Spanning of streams prevents the loss of jurisdictional waters.²⁶ Staff observes, though, that in the event erosion control or other measures are required to prevent a change in contour, Rayburn has stated that it will implement such measures.²⁷

d. Sensitive Communities

There is little to no evidence of the existence of sensitive plant communities in the proposed ROW of Modified Route 1. The record reflects that only Mr. Frentress *may have* observed a single "rare" plant in an area which he was told was within the proposed ROW on the Gremmels' property.²⁸ While a report contained in the NRA indicates that habitat for the Carrizo leather-leaf occurs within the proposed ROW on the Wises' property, Staff points out that the Carrizo leather-leaf is not a threatened or endangered plant species and *no threatened or*

²⁰ Tr. at 49-53, 140-141; Rayburn Exh. 3-R, at 26-27.

²¹ Staff Exh. 1-R at 3-4.

²² Rayburn Exh. 1-R Ex. RRR-5S.

²³ Wise Exh. 23-R at 2-10.

²⁴ Rayburn Exh. 3-R at 16-17.

²⁵ Rayburn Exh. 3-R at 24-25.

²⁶ See Tr. at 50-51.

²⁷ Rayburn Exh. 3-R at 16.

endangered plants were observed in that area.²⁹ Additionally, consultants for the Wises, the MacRoberts found no habitat for the Chapman's yellow-eyed grass or the dwarf pipewort within the proposed ROW on the Wises' property, and furthermore these plant species are not threatened or endangered.³⁰ However, in the event that sensitive plant communities are observed, several measures can be employed prior to construction of the proposed project along Modified Route 1 including flagging the areas, hand clearing, avoiding the areas with construction equipment, employing erosion control measures and spanning.³¹

e. Special Habitat Features

The most widespread special habitat features in this remand proceeding are wetlands and woodlands. As discussed previously in this brief, the evidence and testimony establish a marked lack of adverse impacts to wetlands and bottomland woodlands. With respect to woodlands in general, while the Wises focused to a great degree on fragmentation, the evidence shows that Modified Route 1 passes through an area that is *already* highly fragmented. As shown on the Environmental Assessment in the underlying case,³² Modified Route 1 crosses open pastures and county roads, as well as woodlands, and it avoids two residential subdivisions. The largest residential subdivision in the study area is located approximately two thousand feet south of the Wises' property and just east of Modified Route 1.³³ Further, the proposed ROW on the Wises' property abuts the Forest Ranch Estates residential subdivision on the western portion of the property.³⁴ Staff also points out that *the Wises themselves have contributed to fragmentation of their land* by constructing a thirty-five acre lake, a building and more than one residence on their property.³⁵ As such, the evidence does not establish that a one hundred foot ROW will have a significant effect on the animal and plant species in the area along Modified Route 1.

²⁸ Tr. at 174-175.

²⁹ Wise Exh. 23-R at 50-51.

³⁰ *Id.*

³¹ Rayburn Exh. 2-R at 8, 11; Staff Exh. 1-R, at 4.

³² Rayburn Exh. 2B (EA, Figures 2-1 & 6-1)

³³ *Id.* at Figure 6-1.

³⁴ *Id.*

³⁵ Rayburn Exh. 3-R at 19-20; Rayburn Exh. 1-R at Exhibit RRR-3S; Wise Exh. 23-R at 3; and Wise Ex. 22-R at A-3.

3. Activities undertaken:

- a. In response to the U.S. Fish and Wildlife Service ("USFWS) letter dated June 29, 2005; and**
- b. in response to the Texas Parks and Wildlife Department letter dated July 29, 2005**

a. Activities undertaken in response to the U.S. Fish and Wildlife Service ("USFWS) letter dated June 29, 2005

The record establishes that Rayburn Country took appropriate action in response to the USFWS letter of June 29, 2005.³⁶ Rayburn's initial investigation, conducted prior to route selection, revealed no bald eagle nest or roost sites in the study area. When contacted again by Rayburn after the remand of this matter, the USFWS agreed that the construction of the project on Modified Route 1 would not adversely affect the bald eagle.³⁷

Initially, Staff observes that the June 2005 USFWS letter was written *prior to the August 2007 removal of the bald eagle from the federal threatened and endangered list*³⁸. Staff also points out that the recommendations made by the USFWS in 2005 relate to the construction phase of the project. Regarding bald eagles, the June 2005 USFWS letter states that, before construction begins it recommends that all proposed project areas near creeks, rivers, wetlands, or other waterbodies be checked for the presence of tall trees which may serve as bald eagle roosting or nest sites, and that if eagle roost or nest sites are discovered that office should be contacted to discuss alternate construction plans.³⁹ That letter also states that should Rayburn determine the proposed action would not impact the eagle, no further coordination with that office regarding listed species is necessary.⁴⁰ Accordingly, after receipt of the letter, but prior to completing the Environmental Assessment and filing the Application, PBS&J reviewed aerial photographs and agency information, and viewed the project area from publicly accessible places. Those efforts did not reveal bald eagle nests, nesting habitat or roosting sites in the study area encompassing Modified Route 1. Additionally, during the public involvement process, no landowners or entities reported any bald eagle nest sites or roosting sites in the study area,

³⁶ Rayburn Exh. 3-R at 4-5.

³⁷ Rayburn Exh. 1-R at 56-57 (Exhibit RRR-3S).

³⁸ Rayburn Exh. 1-R at 8 and 56 – 57 (Exhibit RRR-3S).

³⁹ Rayburn Ex. 2B Appendix B at 401-402.

including the proposed ROW along what is now Modified Route 1.⁴¹ Therefore, pursuant to the June 2005 letter⁴², Rayburn did not contact the USFWS prior to the filing of the Application with the Commission. Following the remand, PBS&J again reviewed the aerial photographs and prior agency information, and conducted ground inspection from public roads. PBS&J also conducted site inspections on three properties, on one of which Wises' counsel claims bald eagles breed and nest.⁴³ Those site inspections confirmed PBS&J's initial determination that there are no bald eagle nests or roosting sites on these properties, or along Modified Route 1, and there is no evidence of bald eagles breeding or nesting on the Wises' property.

b. Activities undertaken in response to the Texas Parks and Wildlife Department letter dated July 29, 2005

The July 29, 2005, letter from TPWD contained comments and recommendations regarding routing on existing ROWs, storm water pollution prevention, restoration of pastures/rangelands, seeding of ROWs through forested areas, impacts on wildlife and vegetation, and identification of potential habitat for rare, endangered and threatened species.⁴⁴

The record indicates that Rayburn Country addressed the issues raised in the July 29, 2005 letter in evaluating the propriety of Modified Route 1. Rayburn concluded that the route is located in an area that is already highly fragmented.⁴⁵ Approximately half of the route parallels property lines, over three thousand feet parallels existing ROW, approximately six thousand, five hundred feet traverses cropland, and twenty-five thousand, two hundred and sixty feet passes through grazing lands.⁴⁶ Where wooded and non-wooded areas are adjacent to each other on Modified Route 1, Rayburn opted to place the route in the non-wooded areas or parallel to existing rights-of-way and property lines.⁴⁷ Rayburn has agreed to reseed disturbed areas with native forbs and grasses.⁴⁸ In light of the foregoing, Staff asserts that the record reflects that Rayburn has adequately considered and addressed the recommendations in the July 29, 2005 letter from TPWD.

⁴⁰ *Id.*

⁴¹ Rayburn Exh. 1-R at 8-9; Rayburn Exh. 3-R at 4-5; and Rayburn Exh. 2B at 5-1 – 5-6.

⁴² Rayburn Exh. 2B, Appendix B at 401.

⁴³ See Tr. 161:2-9.

⁴⁴ Rayburn Exh. 2B at 5-5 and Appendix B at 401.

⁴⁵ Rayburn Exh. 3-R at 19-20; Rayburn Exh. 2B Figures 2-1 & 6-1.

⁴⁶ Rayburn Exh. 1-R at 66 (Exhibit RRR-5S).

⁴⁷ Rayburn Exh. 2B Figures 2-5 & 6-1; and Rayburn Exh. 1-R at 66 (Exhibit RRR-5S).

4. Is Modified Route 1's impact as to environmental issues acceptable?

The evidence and testimony demonstrate that Modified Route 1's impact as to environmental issues is acceptable. The environmental impacts of Modified Route 1 are thoroughly examined in the remand testimonies of Staff witness Mike Lee and Rayburn Country witness Rob Reid, and for all of the reasons set forth previously in this brief, Mr. Lee and Mr. Reid testified that the environmental impacts of Modified Route 1 are acceptable.⁴⁹

III. CONCLUSION

The testimony and other evidence establish that Modified Route will not adversely impact any threatened or endangered species, and that many of the environmental impacts of Modified Route 1 can be reduced or eliminated by erosion control measures, flagging and hand-clearing of any sensitive areas, and spanning the streams and wetlands. Therefore, Staff asserts that Modified Route 1 is acceptable from an environmental perspective.

⁴⁸ Rayburn Exh. 3-R at 16.

⁴⁹ Staff Exh. 1-R at 3-4; and Rayburn Exh. 1-R at 17-18.