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PUC DOCKET NO. 37448
SOAH DOCKET NO. 473-10-1097

APPLICATION OF LCRA TRANSMISSION SERVICES CORPORATION TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY FOR THE GILLESPIE TO NEWTON 345-KV CREZ TRANSMISSION LINE IN GILLESPIE, LLANO, SAN SABA, BURNET, AND LAMPASAS COUNTIES, TEXAS	§	**PUBLIC UTILITY COMMISSION OF TEXAS**

COMMISSION STAFF'S RESPONSE TO MIKE WILLATT'S LETTER TO THE COMMISSIONERS

COMES NOW Staff (Staff) of the Public Utility Commission of Texas (Commission), representing the public interest, and files this Response to Mike Willatt's Letter on behalf of Kane-Glensprings Ranch, Ltd. to the Commissioners filed on April 19, 2010.

I. There Are No Legal Impediments to the Consideration of Route GN10 Modified

Mr. Willatt asserts generally that because Link 21 and Route GN 10 modified are not part of the certificate of convenience and necessity (CCN) application filed by LCRA TSC in this case and were not included in the notice provided by LCRA TSC of its application, they cannot be selected by the Commission. In support, Mr. Willatt cites the notice requirements of P.U.C. PROC. R. 22.52 (a)(1)(B) and makes assorted other legal and equitable arguments.[1] There is no notice issue in relation to Staff's recommendation of Route GN10 modified. The modification of Route 10 by the use of Link 21 in Staff's recommendation was a response to a landowner request for accommodation and that landowner is the only party directly affected by the use of Link 21. No Commission rule imposes notice requirements on Staff's recommendation or the Commission's consideration and implementation of that recommendation, and the Commission has incorporated landowner accommodations which result in routes different than any included in the application in numerous CREZ CCN cases.[2]

[1] Letter to the Commissioners by Mike Willatt at 2. (April 19, 2010).
[2] *See, for example,* Docket Nos. 37408, 37409, and 37464.

Mr. Willatt's assertion that "every landowner on modified Route GN10 was affected by the change because they now have a route going through their land that did not previously exist" is simply incorrect. Staff's recommended Route GN10 modified directly affects every landowner in a manner precisely as they were noticed by LCRA TSC as part of either Route 10 or Route 11 with the exception of Barnes Keith Ranch, the landowner that proposed the addition of Link 21 as an alternative to Link 20. Mr. Willatt argues, incongruously, that the Commission can create routes in addition to the noticed routes by combining noticed links.[3] Thus, were the Commission to adopt a route that followed LCRA TSC's preferred Route 11 until the termination of Link C22, then used Link C24 to go to the intersection with Link C23 and then proceed northward, this would not run afoul of any of the "legal constraints" Mr. Willatt asserts prevent consideration of GN10 modified.[4] Yet Staff fails to understand how the landowners on Link C23 in this example would be any less affected by a route "that did not previously exist" in the CCN application than are the landowners on links C15 and C22 (those directly before and after Link 21) in Staff's recommendation.

The sole basis for the objection seems to be that because the route modification recommended by Staff is a link (Link 21) that LCRA TSC had studied, but not included in its application, it cannot be considered. The entirety of Link 21 parallels the Seminole pipeline right of way (ROW) from the termination of Link 15 to the start of Link 22. Because P.U.C. SUBST. R. 25.101(b)(3)(B) identifies the paralleling of existing compatible ROW as a factor to be considered in these cases, it is entirely possible that Staff, or Barnes Keith Ranch, would have recommended a modification to Link C20 that paralleled the Seminole pipeline to the start of Link C22 even if no Link 21 had ever been contemplated by LCRA TSC. In this hypothetical, the recommendation would have been considered exclusively as a modification of Link 20, directly affecting only a single landowner, so as to parallel existing ROW rather than following no existing ROW along Link C20 as proposed in the application and crossing the Colorado River at a non-cleared location, as opposed to a location already cleared for the pipeline ROW.

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[3] Letter to the Commissioners by Mike Willatt at 1. (April 19, 2010).
[4] *Id.* at 2.

Mr. Willatt asserts five arguments that Staff's recommended route GN10 modified cannot be considered by the Commission[5], summarized as follows:

1. P.U.C. PROC. R. 22.52(a)(1)(B) requires notice of all preferred and alternative routes;
2. P.U.C. SUBST. R. 25.101(b)(3)(B) restricts consideration of modified routes to instances when *all* affected landowners agree to the modification;
3. The Order of Referral and Preliminary Order prevents new routes from being created during the course of the proceeding;
4. Texas Parks and Wildlife Department (TPWD) has not had the opportunity to provide a recommendation on Route GN10 modified; and
5. Order No. 4 in this case denying a request to require LCRA TSC to notice additional landowners prevents consideration of GN10 modified.

None of these arguments are persuasive.

1. P.U.C. PROC. R. 22.52(a)(1)(B) Imposes No Limitations on Staff's Recommendations or the Commission's Selection of a Route

P.U.C. PROC. R. 22.52 instructs *applicants* for CCNs to provide notice in a prescribed manner. Specifically, P.U.C. PROC. R. 22.52(a) states: "Notice in electric licensing proceedings. In all electric licensing proceedings except minor boundary changes, ***the applicant shall give notice in the following ways***". (Emphasis added). Nothing in the rule restrains the recommendations that Staff may make as to modifications to any proposed route or the Commission's ability to act on Staff's recommendation, or the recommendation of another party, or on the Commission's own judgment that a modification may be an improvement to the route as presented in the application.

PUC PROC. R. 22.52 (a)(3)(C) contemplates modifications to an applicant's routes after an application has been filed. That rule states: "Before final approval of any modification in the applicant's proposed route(s), applicant shall provide notice as required under subparagraph (A) and (B) of this paragraph to all directly affected landowners *who have not already received such*

[5] *Id* at 2.

notice." (Emphasis added). Staff's recommendation of GN10 modified satisfies Rule 22.52(a)(3)(C) because the only directly affected landowner has not only received notice of the proposed modification, but himself proposed it.[6] Even if Mr. Willatt's argument is accepted, *arguendo*, that other landowners are directly affected by GN10 modified, all such landowners have received notice in accordance with Rule 22.52(a)(3)(A) and (B), which requires that the applicant describe its preferred and alternate routes but imposes no requirement that modifications proposed by parties in a CCN case be separately noticed to landowners already directly affected by one of the applicant's proposed routes.

2. P.U.C. SUBST. R. 25.101(b)(3)(B) Does Not Restrict Consideration of Modifications to Routes in the Absence of Unanimous Landowner Consent

P.U.C. SUBST. R. 25.101(b)(3)(B) states, in relevant part, that "[t]he following factors shall be considered in the selection of the utility's preferred and alternate routes ***unless*** a route is agreed to by the utility, the landowners whose property is crossed by the proposed line, and owners of [directly affected habitable structures] and otherwise conforms to the criteria in PURA §37.056(c)." (Emphasis added). This provision of the rules simply allows the Commission to accept unanimous settlements of transmission line routes without applying the factors of the rule related to paralleling ROW and prudent avoidance. Nowhere does the rule say, as Mr. Willatt asserts, that "affected parties have to agree to the change."[7] No one has asserted that Route GN10 modified has unanimous support and no one has asserted that the Commission will not apply the factors of P.U.C. SUBST. R. 25.101(b)(3)(B) in analyzing the proposed routes and reaching its decision as to which should be constructed. There is simply nothing in the rule that restricts the consideration or implementation of modifications to routes as proposed in LCRA TSC's application.

3. The Issue of Route Adequacy is Irrelevant to the Modification of Routes

Item 11 of the Order of Referral and Preliminary Order speaks to an instance where the ALJ determines that LCRA TSC has not presented an adequate number of routes for

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[6] As it has in other pleadings, Staff would point out that Barnes Keith Ranch's first preference is for no line to cross its property. The modification was offered as an alternative preferable to Route GN10 as described in the application.

[7] Letter to the Commissioners by Mike Willatt at 2. (April 19, 2010).

consideration. No such determination has been made in this case. Item 11 is therefore irrelevant to the issue of whether Route GN10 modified may be selected by the Commission. The modification of routes to respond to landowner requests for accommodation does not imply an inadequacy of route presentation by the applicant.

4. Section 12.001 of the Texas Parks and Wildlife Code Does Not Require the Commission to Submit All Route Modifications for TPWD Analysis

Section 12.001 of the Texas Parks and Wildlife Code requires the Commission to provide a written response to TPWD within a prescribed time after making a final decision in relation to any recommendation made by TPWD. That response will be provided in the Final Order in this case, just as it has been in each of the CREZ CCN dockets to date.[8] Section 12.001 does *not* require the Commission to submit every proposed route modification to TPWD for analysis or approval. Mr. Willatt simply fails to state any authority in support of this position.

5. Staff's Recommendation of Route GN10 Modified Does Not Directly Affect Any Non-Noticed Landowners

Order No. 4 in this case denied the request of the Gillespie Substation Intervenors that additional notice be provided to landowners on a route not proposed that they wished to be considered. No route or link in the application directly affected those additional landowners. That order has no applicability to Staff's recommendation of GN10 Modified because every landowner other than Barnes Keith Ranch, which raised the issue of making the modification endorsed by Staff as a reasonable accommodation to its interests, is not directly affected by any link in a manner not included in LCRA TSC's notice of its CCN application. It is simply impossible for any other landowner to state that Route GN10 modified will directly affect them in a manner not shown on LCRA TSC's notice maps, except to state that the route is a different combination of links than those proposed in LCRA TSC's application. Yet that complaint amounts to one against a route created by noticed links in a manner not in the application, and Mr. Willatt has indicated that such a route is unobjectionable.[9]

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[8] *See, for example*, Docket Nos. 37463, 37464, 37407, 37408, and 37409.

[9] Letter to the Commissioners by Mike Willatt at 1. (April 19, 2010).

II. There Is No "Fairness" Issue in the Consideration of Route GN10 Modified

Mr. Willatt makes a number of arguments that amount to an attack on the fairness of the Commission's consideration or approval of a Route not configured in the same manner as any described in LCRA TSC's application. The first complaint is that neither Staff witness Mr. Almon nor LCRA TSC witness Mr. Reid could "recall an instance when a new link has been created across land owned by a single owner and then used to connect segments of two noticed routes."[10] This complaint, even if true, has no merit. Transmission line CCN cases are very fact specific and require analysis of facts not only as known by the CCN applicant at the time the application is filed, but of facts brought to the attention of parties, the ALJ, and the Commission in the course of discovery and hearing on the merits. Simply because a fact situation precisely like Staff's incorporation of Link 21 into its recommended route has not occurred in a case previously does not mean that it is legally impermissible for it to do so. To restrict Staff's recommendation to the use of links precisely as presented by a transmission line CCN applicant would prevent it from attempting to accommodate landowner concerns and requests for accommodations that are brought to its attention subsequent to the filing of the application. By extension, the Commission would also be prohibited from implementing modifications in response to such landowner concerns. This result would be hostile to landowner interests and is not supported by PURA or the Commission's rules.

Mr. Willatt next attempts to distinguish the two transmission line CCN cases cited by LCRA TSC in support of the validity of Route GN10 modified as inapplicable. These attempts fail. In reference to Docket No. 33978, Mr. Willatt concludes that the significant modification of a link affecting a single landowner's property was appropriate because "landowners on that route whose links were not modified or substituted were not affected because they were on the route before the modifications and they were on the route after the modifications."[11] Yet that is precisely the situation in this case. The complaint that GN10 modified is different because the other landowners were on links that used different routes is a distinction without a difference. In both cases, no landowner not requesting the modification is directly affected by any link in a manner different than described in LCRA TSC's application.

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[10] *Id.* at 3.
[11] *Id.*

The same is true in Docket No. 33844, where Staff recommended replacement of a link on a route with two links taken from another noticed route. Mr. Willatt asserts that this was appropriate because "all of the links on [the route] were noticed."[12] This argument seems incongruous with that made in relation to Docket No. 33978 because in that case the recommended modification was essentially an *unnoticed* link. By the logic of this second argument, that link would not be permissible.

These "fairness" arguments boil down to a complaint that while it may be appropriate for the Commission to modify routes to accommodate landowner preferences, the Commission must approve a route that directly affects only sets of landowners as packaged by the applicant in its presentation of a preferred and alternate routes. In other words, if the company presents one route that directly affects landowners A, B and C and another that directly affects D, E, and F, any modifications must result in a route that directly affects only one set. A route modified on C's property that then directly affects C, E and F cannot be considered. But then it is impossible to reconcile the statement "everyone agrees that the Commission can create routes in addition to the noticed routes, by combining noticed links."[13]

Mr. Willatt complains that "looking at the notice [a landowner] would not have the slightest idea that there could be a modified Route GN10" and "[t]he noticed links provided a maximum of twenty-seven (27) routes."[14] However, neither Mr. Willatt nor anyone else can possibly argue that any landowners directly affected by any link of Staff's recommended Route GN10 modified is directly affected in a different manner than as noticed by LCRA TSC's CCN application, except for Barnes Keith Ranch, which is directly affected by Link 21 of the route instead of Link 20, at its own recommendation. The complaint that "I thought my land would be directly affected by Route 11, not Route 10 modified" (as would be the case for a landowner directly affected by Link 22) does not amount to a legal impediment for considering or selecting the modified route.

The argument that the recommendation of GN10 modified makes it more likely that a landowner will be directly affected by this transmission line project and will intervene in the

[12] *Id.*
[13] *Id.* at 1.
[14] *Id.*

proceeding because "there are two routes that could affect me now instead of one", though not raised by Mr. Willatt in his letter, was raised by him at the Open Meeting on April 15, 2010.[15] While it is difficult to address such a speculative argument without engaging in further speculation, Staff cannot agree that a landowner receiving notice that his or her property may be directly affected by a given link of a transmission line proposal would be any more likely to intervene simply because two of twenty-eight routes use the link instead of one of twenty-seven. No landowner directly affected by GN10 modified will be directly affected in a different manner by any link, except for Barnes Keith Ranch. If such a landowner did not intervene in this proceeding after receiving LCRA TSC's notice, it is difficult to conceive that they would have done so if the link directly affecting them were used by an additional route out of the more than twenty alternatives.

III. CONCLUSION

For the above listed reasons, Staff's recommended Route GN10 modified is legally permissible and may be selected as the transmission route ordered to be constructed in this case.

[15] Transcript of April 15, 2010 Open Meeting at 204-206.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on April 21, 2010 in accordance with P.U.C. Procedural Rule 22.74, and Order No. 5 in this docket.

Andres Medrano