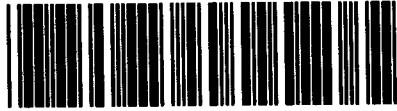


Control Number: 37448



Item Number: 443

Addendum StartPage: 0

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

**APPLICATION OF LCRA TRANSMIS-
SION SERVICES CORPORATION TO
AMEND ITS CERTIFICATE OF CON-
VENIENCE AND NECESSITY FOR THE
GILLESPIE TO NEWTON 345-KV CREZ
TRANSMISSION LINE IN GILLESPIE,
LLANO, SAN SABA, BURNET, AND
LAMPASAS COUNTIES**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

FILED
DEC 23 2009
PUC
3:00

**LCRA TRANSMISSION SERVICES CORPORATION'S
OBJECTIONS TO CJ RANCH'S SECOND AND THIRD
RFIS AND YANCEY CREEK RANCH'S FIRST RFI**

TO THE HONORABLE WENDY K.L. HARVEL:

Applicant, LCRA Transmission Services Corporation (LCRA TSC) hereby files these Objections to CJ Ranch's Second and Third RFIs and Yancey Creek Ranch's (YCR's) First RFI (Objections), and in support thereof would respectfully show the following:

I. Introduction

LCRA TSC filed its application to amend its Certificate of Convenience and Necessity (CCN) with the Public Utility Commission (PUC) on October 28, 2009. On December 17, LCRA TSC received the second set of Requests for Information (RFI) from CJ Ranch, consisting of three questions.¹ On December 17, LCRA TSC was served with the first RFI from YCR, consisting of eight questions.² On December 21, LCRA TSC was served with the third RFI from CJ Ranch, also consisting of eight questions.³ Under Order No. 1, parties must file objections to discovery requests within five working days of receipt.⁴ Therefore, these Objections are timely filed.

II. Certificate of Conference

Counsel for LCRA TSC, Bill Medaille, conferred with counsel for Yancey Creek Ranch by telephone on Wednesday, December 23 regarding the question (1-7) to which objection is

¹ PUC Interchange Item No. 334.

² PUC Interchange Item No. 339.

³ PUC Interchange Item No. 410.

⁴ Order No. 1 at 7.

made herein. Counsel for YCR agreed that his RFIs did not seek discovery of documents covered by the attorney-client privilege, but did not otherwise agree to withdraw Question 1-7.

Counsel for LCRA TSC, Bill Medaille, conferred with counsel for CJ Ranch, William Steele, by telephone at 6pm on Wednesday, December 23. Counsel for CJ Ranch clarified that these RFIs did not seek documents covered by the attorney-client privilege. However, the parties were unable to come to further agreement. Therefore, LCRA TSC is filing these Objections.

III. LCRA TSC's objections to ten questions

While intervenors possess a broad right to discovery, the right is not unlimited. Intervenors have the right to seek discovery on a subject matter that is not privileged and is relevant to the pending docket. However, and critical to the current issue, any requests must be "reasonably calculated to lead to the discovery of admissible evidence."⁵ "[R]equests must show a reasonable expectation of obtaining information that will aid the dispute's resolution. *In re American Optical*, 988 S.W.2d 711 at 713 [Tex. 1998]. Thus, discovery requests must be 'reasonably tailored' to include only relevant matters."⁶ In this case, the RFIs seek information regarding continuing and ongoing discussions and communications between LCRA TSC and the U.S. Fish & Wildlife Service (FWS) regarding mitigation for potential impacts to endangered species. However, not only are these discussions considered "pre-decisional" by FWS, and therefore not obtainable under the federal Freedom of Information Act (FOIA), they are irrelevant to this CREZ CCN proceeding because LCRA TSC has already estimated mitigation costs for endangered species on all its proposed routes and nothing in the FWS administrative process currently under discussion between FWS and LCRA TSC will affect those estimated costs.

As noted above, LCRA TSC was served with these three sets of RFIs from the two intervenors. Of nineteen questions, ten questions (nine by CJ Ranch, one by YCR) request descriptions of, or all documents reflecting, regarding, or relating to LCRA TSC's communications with the U.S. Fish & Wildlife Service (FWS). The ten objectionable questions are: portions of CJ Ranch 2-1, 2-2, and 2-3⁷; CJ Ranch 3-1, 3-2, 3-3, 3-4, 3-5, and 3-8; and YCR 1-7. The questions read as follows:

⁵ TEX. R. CIV. P. 192.3(a).

⁶ *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003).

⁷ LCRA TSC does not object to those portions of CJ Ranch's Second RFI, Questions 2-1, 2-2, and 2-3, which relate to the Texas Parks & Wildlife Department.

CJ Ranch's Questions.

2-1: Please refer to the Loomis Partners report dated June 1, 2009, referenced in LCRA's response to Question 12 in Hinckley's Second Set of RFIs ("Loomis Report"). Has LCRA or any of its consultants, including but not limited to PBS&J, provided a copy of the Loomis Report to U.S. Fish & Wildlife Service ("F&W") or to Texas Department of Parks & Wildlife ("TPWD")? If not, please explain why the Loomis Report was not furnished to one or both of these agencies.

2-2: Has LCRA or any of its consultants, including but not limited to PBS&J, discussed the Loomis Report or any portion of the contents of the Loomis Report with F&W or TPWD? If not, please explain why such discussions have not occurred.

2-3: If LCRA, PBS&J, or any other consultant to LCRA either furnished a copy of the Loomis Report to or discussed any portion of the contents of the Loomis Report with either F&W or TPWD, please (i) identify by date and name of person contacted at the agency each such communication, (ii) describe the subject matter and a summary of the contents of each such communication, and (iii) provide copies of all documents reflecting communications with either F&W or TPWD regarding the Loomis Report of its contents.

3-1: Please refer to page 11 of Dennis Palafox's Direct Testimony, lines 7 through 9, wherein he mentions initiating discussions with U.S. Fish & Wildlife Service ("USFW") with respect to the Endangered Species Act ("ESA") prior to filing the Application. Please describe in detail the first such discussion by identifying date of discussion and persons participation (including the entity with whom the person is affiliated), and by describing in detail the content of the discussion.

3-2: Please identify and describe in detail in the same fashion as in 3-1 above all subsequent discussions with USFW, whether involving LCRA or PBS&J personnel or any other consultant to LCRA, regarding the ESA or the construction of the transmission lines contemplated in the Application.

3-3: Please produce copies of all documents reflecting such discussions in 3-1 and 3-2 above.

3-4: Please produce all documents reflecting communications between USFW, on one hand, and LCRA or PBS&J, on the other hand, regarding or relating to the Application, the contents of the Application, the topics addressed in the Application, or the construction of the transmission lines that are the subject of the Application.

3-5: Please produce all documents reflecting communications between USFW, on one hand, and LCRA or PBS&J, on the other hand, regarding or relating to the Case.

3-8: To the extent not covered by 3-3 through 3-7 above, please produce all documents between either USFW or TPWD, on one hand, and any consultant to LCRA or PBS&J, on the other, regarding or relating to the Application, the contents of the Application, the topics addressed in the Application, the construction of the transmission lines that are the subject of the Application, or the Case.

Yancey Creek Ranch's Question.

1-7: See EA at page 1-6. Please identify all communications with USFWS regarding potential impacts to endangered species. To the extent not already provided in LCRA's Application or Environmental Assessment, please provide a copy of such communications and all recordings, notes or other documents pertaining thereto.

All ten of these questions focus on the same issue, and so LCRA TSC is addressing all ten questions in a single set of Objections.

A. The nature of the questions and of LCRA TSC's communications with FWS.

The ten objectionable questions cover virtually every conceivable aspect of LCRA TSC's communications with FWS, and all documents reflecting, regarding, or relating thereto. They ask for all communications regarding the Loomis Report⁸ (CJ Ranch questions 2-1, 2-2 and 2-3), relating to potential impacts on endangered species (YCR question 1-7), all meetings with FWS (CJ Ranch questions 3-1, 3-2, and 3-3), the "case" (CJ Ranch question 3-5), and "regarding or relating to the Application, the contents of the Application, the topics addressed in the Application, the construction of the transmission lines that are the subject of the Application, or the Case." (CJ Ranch questions 3-4 and 3-8 (quoted)).

As LCRA TSC has stated in its CREZ CCN Application, it is in talks with FWS to "determine an appropriate regulatory mechanism under the Endangered Species Act [(ESA)] to address potential impacts on endangered species resulting from the construction of this project."⁹ As the quoted passage suggests, LCRA TSC is *not* seeking input from FWS on which routes in the Gillespie to Newton project are most preferable, or on methods to differentiate the potential impact between routes. More to the point, LCRA TSC has prepared and filed its CREZ CCN application under the routing criteria specified in PURA and the Commission's Substantive Rules. Moreover, because FWS did not decide nor affect which routes LCRA TSC filed in its CREZ CCN application in this case, and because FWS will not affect or deter the PUC from choosing whatever route it deems appropriate in this case, discovery related to LCRA TSC's discussions with FWS is irrelevant to any issue under discussion in this proceeding. Indeed, in its

⁸ This document analyzes potential habitat of endangered Golden-cheeked warblers, and a redacted version has already been provided in discovery as a response to William Hinckley's Second RFI, Question 2-12.

⁹ LCRA TSC's Environmental Analysis at 1-6.

ongoing discussions with FWS LCRA TSC is simply discussing the proper regulatory mechanism under the ESA to eventually utilize *for whatever route the PUC determines*.¹⁰

Because communications with FWS do not go to the question of differentiating between the various routes, they are irrelevant to the issues to be heard by the Administrative Law Judge (ALJ) in the current proceeding. “Environmental integrity” is indeed a concern that the PUC must consider under Texas Utilities Code Sec. 37.056(c)(4)(D). However, in the Order of Referral for this case, the PUC referenced this passage only once, *in the comparison between different routes*: “Which proposed transmission line route is the best alternative, weighing the factors set forth in PURA Sec. 37.056(c)(4), excluding (4)(E), and P.U.C. Subst. R. 25.101(b)(3)(B)?”¹¹ Thus, endangered species issues are relevant only insofar as they help the fact-finder choose between various routes. Discussions regarding future regulatory compliance do not aid in making such a choice.

B. Compliance with the Endangered Species Act is not an issue in this CREZ CCN and will not be decided in this forum.

LCRA TSC has acknowledged the existence of potential endangered species habitat along *all potential routes*. Therefore, no matter what route is eventually chosen by the PUC, action may be required to authorize impacts under the ESA. The actions that may be required are controlled by federal law and will be determined by FWS through a process that it controls. The ALJ and PUC have no control over FWS’s determinations, just as FWS has no control over the PUC’s orders. Intervenors in the current proceeding may at some point decide to involve themselves in FWS’s processes under the ESA, when FWS formally begins such a process. However, they should not be allowed to conflate or confuse the regulatory issues that will be decided in each respective forum. Discovery in the instant proceeding should be focused only on matters to be heard by the ALJ and decided by the PUC, not on issues that will be reviewed, assessed, and determined by FWS in its own proceeding at some point in the future.

¹⁰ It is also worth noting that persons who believe they have an interest in the endangered species process administered by FWS will have an opportunity to participate in that process at the appropriate time. That appropriate time is not now, nor is it in this CREZ CCN docket. That being the case, it goes without saying that the FWS scoping process will not affect the timing for the PUC’s decision in this CREZ docket, leading more forcefully to the conclusion that discovery into the areas sought by the intervenors is irrelevant to the issues being adjudicated in this CREZ CCN docket by the PUC.

¹¹ Order of Referral at page 4, Issue 6.

C. The questions are not calculated to lead to relevant and admissible evidence.

Even if LCRA TSC turns over every document related to discussions with FWS, the intervenors will not have any more useable information than they did before the various RFIs objected to herein were submitted. LCRA TSC has already provided estimates of potential endangered species habitat in the application and in discovery. Conversations about the process for obtaining federal permission and for mitigating authorized impacts do not add to the debate over which route is best. Furthermore, even if one assumes the actual existence of a given level of endangered species habitat on a given landowner's property, this discovery *would still not affect the choice of routes in this case*, since LCRA TSC has planned, and included costs, for mitigating impacts to listed species on *all routes*, and has done so in a manner that assumes a "worst-case scenario." That being the case, there is nothing in the materials demanded in discovery that could make a material difference on the only issue under review by the PUC in this docket – i.e., whether LCRA TSC has calculated a reasonable estimate of habitat mitigation costs for the routes proposed in this docket. Further, there is no serious suggestion that LCRA TSC's CREZ transmission line has any potential to jeopardize the survival of an entire species. Therefore, there is no reason to believe that at the appropriate time LCRA TSC and FWS cannot complete a habitat conservation plan that appropriately mitigates for any take of endangered species on land on which construction of this proposed CREZ transmission project would occur.

D. The questions are overbroad and seek information to be used in a separate arena.

As noted above, the ten objectionable questions cover every aspect of LCRA TSC's communications with FWS, including all documents passed between LCRA TSC and FWS "regarding or relating to...the construction of the transmission lines that are the subject of the Application." (CJ Ranch Question 3-8). By reaching so broadly, and by covering the same ground ten separate times, the intervenors show that they have not tailored their requests in search of particular information, but rather are on a fishing expedition to see what can be found in discussions with an agency completely outside of the PUC's scope of authority.

E. Relevant and narrowly-tailored questions could have been asked instead.

LCRA TSC has already acknowledged that endangered species issues are relevant to this case to the extent that crossing potential species habitat results in mitigation costs. And, LCRA TSC has calculated habitat mitigation costs in a manner that assumes a higher level of habitat

than assumed in the Loomis Study that appears to give rise to these RFIs. However, these ten questions do not limit themselves to only information about endangered species. They broadly ask for all documents relating to communications with FWS, when more narrowly-tailored questions would have served as well or better.

The intervenors did not need to ask such broad and repetitive questions to seek potentially-relevant information. They could easily have asked for documents related to endangered species or potential habitat, if that was their concern. If they doubted the accuracy of LCRA TSC's estimates and calculations regarding endangered species habitat, they could easily have asked for documents concerning the sources and methodologies of such estimates and calculations.¹² As the Supreme Court explained in *In re CSX*:

A central consideration in determining overbreadth is whether the request could have been more narrowly tailored to avoid including tenuous information and still obtain the necessary, pertinent information.¹³

In the current case, the ten questions could easily have been more narrowly tailored to ask questions about endangered species, or about the sources and methods for LCRA TSC's calculations of potential habitat, rather than about discussions with FWS or documents exchanged with FWS.

IV. Prayer

WHEREFORE, PREMISES CONSIDERED, LCRA TSC objects to questions 2-1, 2-2, 2-3, 3-1, 3-2, 3-3, 3-4, 3-5, and 3-8 from CJ Ranch, and question 1-7 from Yancey Creek Ranch, and respectfully requests the ALJ to order that LCRA TSC is not required to answer these questions. LCRA TSC respectfully requests that it be granted any other relief to which it may show itself entitled.

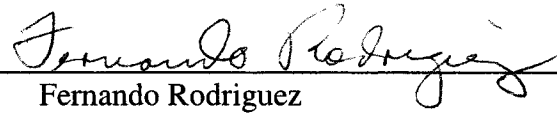
¹² See CJ Ranch's Fourth RFI for an example of this.

¹³ *In re CSX*, 124 S.W.3d at 153.

Respectfully submitted,

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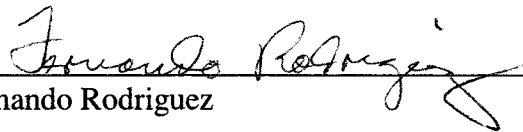
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ATTORNEYS FOR LCRA TRANSMISSION
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on all parties of record in this proceeding on this the 28th day of December 2009, by facsimile, First-Class U.S. mail, or by hand delivery.



Fernando Rodriguez