



Control Number: 38290



Item Number: 669

Addendum StartPage: 0

SOAH DOCKET NO. 473-10-4790
PUC DOCKET NO. 38290

APPLICATION OF SHARYLAND UTILITIES, §
L.P. TO AMEND ITS CERTIFICATE OF §
CONVENIENCE AND NECESSITY FOR THE §
PROPOSED HEREFORD TO WHITE DEER §
345-KV CREZ TRANSMISSION LINE IN §
ARMSTRONG, CARSON, DEAF SMITH, §
OLDHAM, POTTER AND RANDALL §
COUNTIES §

BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

RECEIVED
NOV 23 AM 9:28
PUBLIC FILMS CLEARING HOUSE

**BUSH EMENY PROPERTIES' AND SEEWALD RANCH'S
REPLIES TO EXCEPTIONS TO THE PROPOSAL FOR DECISION**

TO THE HONORABLE COMMISSIONERS:

Bush Emeny Properties and Seewald Ranch respectfully submit these Replies to the limited exceptions filed by Currie Family Interests (“CFI”) related to the portions of the Proposal for Decision (“PFD”) that “are not in the evidentiary record.” CFI’s suggested relief is that the “unsworn comments and off-the-record statements not be included in the PFD.” Even if the ALJ were to grant CFI’s request and issue a supplemental PFD removing the offending references, Bush Emeny and Seewald submit that would not cure the unlawful procedure and due process violation that has occurred.

The parties were never afforded the opportunity to cross examine the persons whose comments the ALJ has cited in support of her recommendation, including: the persons filing comments which the PFD indicates were opposed to Link P,¹ the off-the record comments from Mayor McCartt and Representative Smithee received during the hearing,² the resolution from Deaf Smith County Commissioners’ Court³ filed on the interchange well after the reply briefs were submitted; or the 250 comment letters filed in this docket.⁴

¹ PFD at 11, fn 21.
² PFD at 11, fn. 21.
³ PFD at 19, fn 58.
⁴ PFD at 55, fn 206.

669

A plain reading of the PFD demonstrates that the ALJ's reasoning related to community values was based, at least in part, on these non-evidentiary matters, and that her conclusions concerning community values are therefore based upon an unlawful procedure, which in turn colored the route selection recommendation.⁵ The discussion of Community Values is found at PFD pages 9 - 19, and in those ten pages, and in the summary of the routing recommendation at pages 52 - 58, the Judge references the four non-evidentiary matters identified herein, in support of her conclusions that the community values: (1) "militate strongly against" the selection of routes in the Central-North (near Amarillo) and Central-South corridors (across the privately owned portions of the northern Palo Duro Canyon); (2) and to a "slightly lesser degree" the Southern corridor (the privately owned portions of the Palo Duro Canyon south of the State Park);⁶ and (3) opposition to the Northern routes (across the Canadian River Basin) is "less robust" (in comparison to the public opposition to crossing near population centers on link P and across the privately owned portions of the Palo Duro Canyon).⁷

That her conclusion about community values, which is based at least in part on non-evidentiary "facts", shaped the remainder of her analysis is evident from the following conclusions in the PFD:

- TPWD's concerns are discounted because *community values* is a factor outside the scope of that agency's analysis;⁸
- The Judge's determination that the *community values* favored crossing "undeveloped areas"⁹ and avoiding Palo Duro Canyon,¹⁰ are listed as the first two reasons to find the Northern routes are favorable from a construction standpoint;¹¹
- The ALJ's Routing Analysis¹² repeatedly relies on the conclusions concerning *community values*, for example: the most direct paths between the collection stations cross through north Palo Duro Canyon routes and the central routes closer

⁵ See, Proposed FOF on Community Values # 34 - 49 (FOF 49 is the ultimate FOF on community values).

⁶ PFD at 9.

⁷ PFD at 19.

⁸ PFD at 34

⁹ PFD at 10 and FOF 39.

¹⁰ PFD at 12 and FOF 48.

¹¹ PFD at 43.

¹² PFD at 52 - 58.

to Amarillo give rise to strongly expressed *public opposition*;¹³ the Central-South and Southern routes cross the Palo Duro Canyon and “the evidence reflects *public aversion*” to those routes,¹⁴ “considerable *public opposition*” to the Central North routes has been “aroused”;¹⁵ and, in concluding that Route 1 best meets the statutory and regulatory criteria the first two “facts” cited are: it bypasses PDC, “the focus of much *public opposition* to the routing of the line” and bypasses the Amarillo urban area, “also the focus of much *public opposition* to the routing of

The findings of fact which result from the Judge’s analysis seem undeniably to rest on the non-evidentiary “facts”, in violation of TEX. GOV’T CODE § 2001.141(c),¹⁶ which requires that findings of fact be based only on the *evidence* and on matters that are officially noticed. The reliance on non-evidentiary matters deprives the parties of the right to cross-examine the declarants, in violation of TEX. GOV’T CODE § 2001.087. This is not a situation where the parties were afforded the opportunity to conduct *limited* cross-examination but rather by inserting extra-record matters into the PFD, absolutely no opportunity to cross-examine the “commenters” was afforded. The intervenors on the northern routes were deprived of their due process rights because they were denied the right to cross-examine a “witness” and the “witnesses” whose comments are relied upon by the ALJ were not sworn. *Rector v. Tex. Alcoh. Bev. Comm’n*, 599 S.W. 2d 800, 800 (Tex. 1980).

Seewald’s and Bush Emeny’s substantial rights have been prejudiced because the Judge’s findings, inferences, conclusions and recommendation are in violation of a constitutional and statutory provision and were made through unlawful procedure.¹⁷ For these reasons, Seewald Ranch and Bush Emeny Properties respectfully urge the Honorable Commissioners to reject the Proposal for Decision, reject the recommendation contained therein, and instead enter an order approving Staff’s Route with Scivally’s modifications, and for such further relief to which they may be entitled.

¹³ PFD at 52.

¹⁴ PFD at 53.

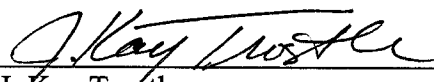
¹⁵ PFD at 55.

¹⁶ Section 2001.141(c) was designed to protect the parties’ fundamental due process rights. *West Texas Utilities v. OPUC*, 896 S.W. 2d 261 (Tex. App. – Austin 1995).

¹⁷ Tex. Gov’t Code § 2001.174.

Respectfully submitted,

SMITH TROSTLE LLP
707 West Avenue, Ste. 202
Austin, Texas 78701
(512) 494-9500 - Voice
(512) 494-9505 – Fax

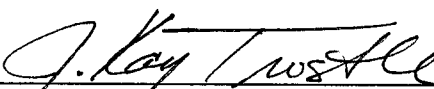
By: 

J. Kay Trostle
State Bar No. 20238300

**ATTORNEYS FOR SEEWALD RANCH AND
BUSH/EMENY PROPERTIES**

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November 2010, a true and correct copy of the foregoing document is being served via facsimile, U.S. mail or electronic mail (email) to all parties of record.



J. Kay Trostle