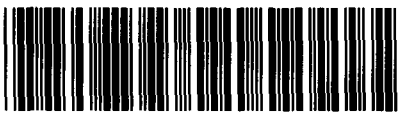

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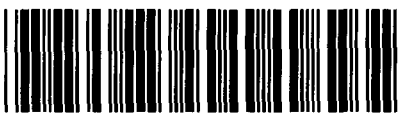

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SOAH DOCKET NO. 473-17-1552
PUC DOCKET NO. 46429

APPLICATION OF BRAZOS ELECTRIC POWER COOPERATIVE, INC. TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY FOR A 138-KV TRANSMISSION LINE IN COLLIN COUNTY, TEXAS	§ § § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TMF INTERVENORS' INITIAL POST-HEARING BRIEF

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

Allen Economic Development Corp., Briar Ridge Investments, Ltd., Cottonwood Creek Baptist Church, Johnson Centre, Ltd., Meadow Road/Ford, L.P., and The P. Bush Elkin Property Co., Ltd. ("TMF Intervenors") respectfully file their Initial Post-Hearing Brief in connection with the application ("Application") submitted by Brazos Electric Power Cooperative, Inc. ("Brazos"), as follows:

I.
PRELIMINARY STATEMENT

The Application seeks to amend a certificate of convenience and necessity to include construction of a new 138-kV transmission line ("HVTL") connecting a new approximately five-acre substation sited along or near SH 121 (Sam Rayburn Tollway) near Alma Drive and Exchange Parkway in western Collin County. The transmission line would connect the substation to an interconnection point located along an existing transmission line either to the east, northeast, west, or southwest of the substation, depending on the route selected. The Application presents twenty-five alternate routes approximately 2.04 to 4.96 miles in length.

Brazos has selected Route 11 as the route it believes best meets the Public Utility Commission guidelines for routing.[1] Route 11 runs along the south side of State Highway 121 (Sam Rayburn Tollway) in Allen, Texas. The TMF Intervenors are owners of the bulk of the land along the Route 11 corridor.[2] Their land is generally zoned for commercial use.[3] The TMF Intervenors are mostly comprised of investors or developers who have been waiting many years

[1] *See* Brazos Ex. 1 at 16-17 (Application).

[2] See TMF Exs. B-G.

[3] *Id.*

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for the community to benefit from the kind of growth it is only now experiencing.[4] They have been joined in this effort by the City of Allen and the Allen Economic Development Corporation ("AEDC"), which owns land along the corridor itself and has worked for decades with the other landowners to develop the corridor into a vibrant, highly-dense commercial gateway to the city with thousands of people living and working there.[5]

TMF Intervenors submit that the Application should be denied for the reasons set forth in the following sections of this brief.

TMF Intervenors join in the objections and proofs of the City of Allen and PUC Staff showing the lack of need in response to Questions 2 and 3 of the Order Of Referral and Preliminary Order (the "Referral Order").[6]

TMF Intervenors also submit that the Application fails to meet Brazos' burden of proving "route adequacy" under Question 1, which proposed route is best in light of the factors set out in PURA §37.056(c) and P.U.C. Subst. R. 25.101(b)(3)(B) under Question 3, whether there are alternative routes or configurations that would have less negative impact on landowners under Question 4, and what would be the cost of such alternatives under Question 5.

Finally, if any proposed route is chosen, it should be Route 17 and not Routes 7, 8, or 11, the routes in Allen most discussed at the hearing on the merits. As described below, Routes 7, 8, and 11 would have a major negative impact on the community values of the TMF Intervenors and the City of Allen and its residents and is similar enough in cost and other factors that those factors do not outweigh the great harm that would result from Routes 7, 8, or 11 being selected by the Commission.

Brazos' support for the southern side of the highway (Route 11) is based on a wooden, check-the-box application of the statutory and regulatory factors. For example, Route 11 is only the least expensive route if Brazos is permitted to use a one-size fits all estimate of right of way costs which are based only on the wholly conclusory "experience" of Brazos and not on actual comparable sales, analyses of sales price trends, or other factors employed by experts in the real estate valuation field. Similarly, counting the number of habitable structures—without taking into account scheduled development, calling for thousands of people living and working under or

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[4] *Id.*

[5] TMF Ex. F.

[6] *Order of Referral and Preliminary Order*, Docket No. 456 (Dec. 7, 2016).

near the proposed lines—exalts form over substance with respect to the HVTL's impact on the community and therefore artificially favors Route 11 over Route 17. Finally, Route 17 does not need to cross the highway at any point while Route 11 does twice—yet another factor in support of choosing Route 17 over Route 11.

II.

QUESTION NO. 1: THE APPLICATION IS NOT "ADEQUATE"

Question 1 of the Order of Referral asks whether Brazos' Application is "adequate." The Order directs that the "adequacy" issue involves consideration of whether the Application contains "an adequate number of reasonably differentiated alternative routes to conduct a proper evaluation." The Order also specifically instructs that, when answering Question No. 1, consideration "may . . . be given to the facts and circumstances specific to the geographic area under consideration . . . ."

TMF Intervenors submit that Brazos has not met its burden of showing that the Application is "adequate" for at least two reasons.

First, no consideration was given by Brazos to an underground route. Undergrounding is a reasonably differentiated alternative route. TMF Intervenors offered to discuss contributing the value of their right of way easement towards the underground option.[7] If such contributions were accepted at values based on actual comparable sales, additional costs of the underground option could have been bridged (thus putting this alternative route option at the top of the list of "preferred" routes).

Second, Brazos failed to meet its burden of showing "adequacy" by relying on wholly illusory estimates of its right-of-way acquisition costs. This deficiency is addressed in more detail below with respect to Questions 3 through 6 below.

III.

QUESTION NOS. 2 AND 3: ANY PURPORTED "NEED" CAN BE MET THROUGH A DISTRIBUTION SOLUTION

Questions 2 and 3 of the Referral Order ask whether the proposed facilities are "necessary for the service, accommodation, convenience, or safety of the public within the meaning of PURA § 37.056(a) taking into account the factors set out in PURA § 37.056(c)" and whether the project the better option to meet the need when compared to a combination of

[7] Tr. at 333-34.

distributed generation and energy efficiency." The answer to both of these questions is no.

The City of Allen and the PUC Staff have submitted detailed evidence in support of their position that Brazos has not established need for a new transmission line along any of the proposed routes. TMF Intervenors join in their objections with respect to an inadequate showing of need and incorporate their position on that issue. In addition to the technical issues concerning need, TMF Intervenors submit that installation of a transmission line should not be approved as a matter of public policy when the asserted "need" can be addressed through changes in distribution. This is especially true where, as here, installation of the transmission line will be devastating to community values in heavy density areas like the routes along Highway 121 proposed in the Application.

IV.

QUESTION NOS. 4, 5 & 6: ROUTE 17 IS THE BEST ALTERNATIVE

Questions 4, 5, and 6 of the Referral Order ask which proposed route is best in light of the factors set out in PURA §37.056(c) and P.U.C. SUBST. R. 25.101(b)(3)(B), whether there are alternative routes or configurations that would have less negative impact on landowners, and what would be the cost of such alternatives.

Section 37.056(c) of PURA sets out statutory factors that must be considered by the Commission when ruling on a CCN application.[8] The essence of these factors is that the Commission "must consider the impact on affected landowners when deciding the routing of transmission lines."[9] The factors are "stated in the broadest possible terms and are intended as legislative standards to guide the Commission and its administration of the certification process."[10] "None of the statutory factors is intended to be absolute in the sense that any one shall prevail in all possible circumstances."[11] The Commission must therefore consider and weigh all of the factors when "determining the most reasonable route for a transmission line. . . .

[8] Tex. Util. Code § 37.056(c).

[9] *Malone v. Pub. Util. Comm'n of Texas*, No. 03-11-00815-CV (Tex.App.—Austin, Aug. 28, 2013).

[10] *Hammack v. Public Util. Comm'n of Texas*, 131 S.W.3d 713, 722-23 (Tex. App.-Austin 2004, pet. denied).

[11] *Pub. Util. Comm'n of Texas v. Texland Elec. Co.*, 701 S.W.2d 261, 267 (Tex. App.—Austin 1985, writ ref'd n.r.e).

no one factor controls or is dispositive." [12] In fact, the Referral Order itself states at page 5 that its "list of issues is not intended to be exhaustive."

A. A Route Along The Allen 121 Corridor Is Completely Contrary To The Community's Values

The Commission has defined "community values" as "a shared appreciation of an area or other natural or human resource by a national, regional, or local community. Adverse effects upon community values consist of those aspects of a proposed project that would significantly alter the use, enjoyment, or intrinsic value attached to an important area or resource by a community."[13] Here, the evidence shows overwhelmingly that installation of an HVTL along the Highway 121 southern corridor in Allen, Texas is contrary to the community values of the City of Allen, its residents, and the TMF Intervenors.

The community values of the TMF Intervenors are expressed in part by the City of Allen's Comprehensive Plan. The Comprehensive Plan is an expression of the community values of its citizens as the plan has been developed through significant citizen engagement and input.[14] At least since 1985, the comprehensive plan called for the preservation of the 121 corridor for commercial development that would provide employment and other economic opportunities for people in the area.[15] As explained by Mr. Battle, a community develops according to a three-step process: the first two steps, residential development and the retail services that move in to support the new residents, have occurred in the City of Allen; the final step, the development of a local employment base bringing job opportunities for the residents, is necessarily only occurring now, as the three-step process enters its final phase.[16]

The 1985 plan identified the 121 corridor in Allen as the ideal location for such employer development and it has been preserved continuously through the decades in order to ensure the final element was present in the community when the time for that development came.[17] As

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[12] *Dunn v. Pub. Util. Comm'n of Texas, 246 S.W.3d 788, 796* (Tex. App.—Austin 2008, no pet.).

[13] *Application of LCRA Transmission Services Corporation to Amend its Certificate of Convenience and Necessity for a 345-kilovolt Double-circuit Line in Caldwell, Guadalupe, Hays, Travis and Williamson Counties, Texas*, Docket No. 33978, Order at FoF 118 (Oct. 10, 2008).

[14] Tr. at 568.

[15] Tr. at 569-70.

[16] Tr. at 570.

[17] Tr. at 570-71.

described by Daniel Bowman in his testimony at the hearing on the merits, the community is now "on the cusp of what's been planned and meticulously maintained for decades."[18]

1. Corporate Headquarters/Campus-Style Office Class "A" Development

There have been multiple large corporations that have moved their headquarters to cities north of Dallas, including JPMorgan Chase, Liberty Mutual, FedEx Express, and Frito-Lay.[19] These corporate headquarters are similar to the Legacy development at the Dallas North Tollway in Plano.[20] Plano's Legacy West development has millions of square feet of office space, high-density residential condominiums, apartments, and townhouses.[21] These campus-style offices are the kind of development that TMF Intervenors envision for their land and that the City of Allen has planned for decades.

2. The Allen 121 Corridor is Perfectly Suited To Take Advantage Of Corporate Campus Development

Fortunately for the City of Allen and its residents, the properties along the south side of Highway 121 have the potential for this type of corporate campus development. The potential for this type of corporate campus development exists along the entire corridor south of 121 and could accommodate multiple corporate campuses.[22] One expert in the case went so far as to state that the area is the next "logical path for major office uses to consider locating in because of their location relative to the trade workforce, and accessibility to the airport, the DFW Airport."[23]

But in order to qualify for those types of corporate developments, a parcel must have a certain minimum number of acres available. In the opinion of Mr. Bulmash, that number is at least 50 acres.[24] That amount of acreage is required in part because those kinds of Class A office buildings often have an area of 500,000 to 1 million square feet each and require attendant parking spaces at a density of 4-7 cars per square foot.[25] The City of Allen and its landowners have purposely maintained large amounts of contiguous acreage, like TMF Intervenors'

[18] Tr. at 321-22.

[19] Tr. at 346.

[20] Tr. at 385-87.

[21] Tr. at 345.

[22] Tr. at 389.

[23] Tr. at 355-56.

[24] Tr. at 348-49.

[25] Tr. at 348-49.

property, for this type of Class A development that would otherwise not be possible on smaller sites.[26]

3. The Successful Development Of The 121 Corridor Would Have Region-Wide Benefits

There was evidence presented at the hearing on the merits that this type of corporate campus development is immensely beneficial to a community.[27] The primary benefits are the salaries that would be provided by the employer, which would provide residents in the surrounding cities, including Allen and McKinney, money to buy houses in those cities and patronize local businesses.[28] The cities benefit from the increase in their tax bases as a result of those activities. In addition, the community would benefit from the infrastructure improvements done in connection with the development.[29] Importantly, most of these benefits would not be limited to the municipal boundaries in which the corporate headquarter(s) were located.[30] Residents of the surrounding cities have the opportunity to benefit from the increased number of good jobs and the increased number of people with good jobs that now have money to spend. It would be a regional benefit.

4. Such Development Is "Unique" As The 121 Corridor Is The Last Area In Allen Suitable For It

The area south of 121 is the last area where the City of Allen can install this kind of high-end development.[31] Counsel for Lake Forest-McKinney Investors, Ltd. attempted to argue that there is nothing unique about the development planned for the commercial corridor south of 121 in Allen.[32] But, as even he stated, this is the last area in which the City of Allen and the landowners are able to develop the high-end corporate campus locations desired by both.[33] The fact that there is only one such location left in the City of Allen by definition makes it unique. The fact that there are other office campuses along highways in other cities or that there are other

[26] Tr. at 321-22.

[27] Tr. at 386.

[28] Tr. at 387.

[29] *Id.*

[30] *Id.*

[31] Tr. at 514.

[32] Tr. at 515-16.

[33] Tr. at 515-16.

commercial corridors in the local area is immaterial.

Also, the fact that the corridor along which the developments will occur does not equate to world-famous streets in Paris, France or Beverly Hills, California does not make it any less important to the future of this Texas town and its residents.[34]

The fact is that only 15% of the land in the City of Allen remains vacant today; if the corridor is unable to be developed correctly due to the presence of a transmission line running across the properties adjacent to Highway 121, then the City of Allen and its residents will suffer from the lack of a robust employment center necessary to provide the entire area's residents will increased job opportunities.[35]

5. The Johnson/Hines Development

The type of development for which the City of Allen planned is exemplified by the ongoing development of the property owned by Bob Johnson and his family through Johnson Centre, Ltd., the entity that intervened in this proceeding as part of the TMF Intervenors group. Johnson has contracted to develop his 135-acre tract of land south of Highway 121 and Alma Road in a joint venture with Hines Development.[36] Hines is one of the largest private developers in the world with around $45 billion in assets.[37] It owns property in practically every major city in the United States.[38]

The Johnson/Hines development will ultimately have 1.5 million square feet of office space, 300,000 square feet of retail, and some urban residential areas.[39] Johnson has already invested approximately $700,000 in developing the property.[40]

As can be expected, the City of Allen and the Allen Economic Development Corporation are supportive of the Hines project and have worked extensively with Johnson and Hines with respect to their plans for the tract.[41] Johnson and Hines have submitted a request for approval of

[34] *See* Tr. at 514 ("But the fact that Allen plans to put high quality development there doesn't make it the Champs-Elysees or Rodeo Drive, does it?").

[35] Tr. at 571.

[36] Tr. at 306.

[37] Tr. at 305-06.

[38] Tr. at 321.

[39] Tr. at 546-47.

[40] Tr. at 307.

[41] Tr. at 307.

zoning to the City of Allen on June 20, 2017, which is expected to win easily approval in September 2017.[42]

But Johnson is very concerned that Hines will back out of their joint venture if a transmission line or substation is placed on his property, testifying that it is more than a mere possibility that Hines does back out if the property is burdened by a transmission line or substation.[43] He has rejected prior offers for the property[44] because they were offers to acquire only a portion of his property, which would not fit with his vision for it.[45] His plan has always been to develop his property as a large campus office and the installation of a transmission and/or a substation on his property would threaten that plan.[46]

Johnson Centre is competing to attract large corporations and others to its property with locations across the United States that could house those corporations; it will be severely disadvantaged in that high-stakes competition by the presence of transmission lines on the property.[47]

B. "Aesthetic" Values

The aesthetics factor weighs in favor of selecting a McKinney 121 Route because those routes do not cross the highway, necessitating infrastructure that harms the aesthetic value of the property on which it is located as well as surrounding property. Although Brazos witness Cox Brazos considers highway crossings to be a neutral factor in route selection,[48] there was testimony given at the hearing that the infrastructure needed for a highway crossing has a negative aesthetic value.[49] In the case of Route 11, the structure that would be installed at the end point of the highway crossing on Mr. Johnson's property would be 150 feet tall and would be visible from his property.[50] This structure would negatively impact Mr. Johnson's property as

[42] Tr. at 306.

[43] Tr. at 322.

[44] Tr. at 328.

[45] Tr. at 330-31.

[46] Tr. at 330-31.

[47] Tr. at 321.

[48] Tr. at 195.

[49] Tr. at 483.

[50] Tr. at 565.

that infrastructure would be in the viewshed of his property.[51]

C. Cost

Although Route 11 has been characterized as the "least expensive" route, the cost per mile of Route 11 is unusually high.[52] Approximately 70% of the estimated cost of Route 11 cost is made up of right-of-way acquisition costs.[53] This percentage is even higher at 73% for Route and 72% for Route 8.[54] By contrast, right-of-way acquisition costs for Route 17 are only 66% of the total estimated cost.[55]

As the largest driver of cost for Routes 7, 8, and 11, one would think that right-of-way acquisition would receive the same granular analysis that weather patterns and engineering designs have received in this proceeding. One would be wrong.

Brazos admits that it did not adjust its right-of-way acquisition cost estimates to take into account the possible variations in land value across the study area.[56] Whether required to do so by Commission rules or not, the evidence shows that Brazos did not analyze any actual sales data,[57] contact any brokers to determine if the right-of-way acquisition costs might be different along different routes,[58] or make any effort to update its estimate of right-of-way acquisition cost after its application was filed.[59] In fact, Brazos admitted that it would not have updated its estimate even if presented with actual sales data after it filed its application.[60]

Instead, Brazos witness Chambers admitted that the $15 per square foot figure was essentially a "plugged number" good enough in Brazos' eyes to comply with the Commission's instructions to estimate costs.[61] It is obvious that Brazos is not concerned with estimating the cost of right-of-way acquisition with any real degree of accuracy because it will recover its costs from

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[51] Tr. at 351-52.

[52] Tr. at 282-83.

[53] Brazos Ex. 1 (Application), Appendix B – Table B (Summary of End-to-End Routes)

[54] *Id.*

[55] *Id.*

[56] Tr. at 200-01.

[57] Tr. at 204.

[58] *Id.*

[59] Tr. at 211.

[60] Tr. at 214-15.

[61] Tr. at 202-03.

ERCOT ratepayers at the end of the process. Mr. Chambers admitted as much, stating:

> But please understand, Brazos is going to pay whatever the fair market value is through the process anyway. $15 and $20 was just used as an estimate for following the rules, for the guidelines – for the application, following the rules. So Brazos is going to pay whatever the market value is, whether it be 15, 8, 6, 13, 15, we're going to pay it.[62]

The ALJs and the Commission should have little confidence that $15 per square foot is a good estimate of Brazos' right-of-way costs. Brazos has been wrong about right-of-way costs in the area before. Mr. Chambers testified that Brazos has actually paid almost double the company's estimate of right-of-way acquisition costs that was made in the Craig Ranch proceeding.[63]

This lack of confidence is especially concerning in this case because right-of-way acquisition costs are the most variable of the costs typically included in an application such as engineering design, materials, and labor costs.[64]

In conclusion, because: (i) right-of-way costs are the most variable cost; (ii) Brazos has made a bad faith effort to estimate those costs; and (iii) those costs make up a larger percentage of the costs of the Route 7, 8, and 11 than Route 17, the cost factor weighs in favor of the selection of Route 17.

D. Habitable Structures

Although Route 17 "affects" fourteen habitable structures, this factor is neutral or weighs against selection of Route 11.

First, three of the fourteen are structures on a storage facility site and would be less affected by a transmission line than corporate campus style development planned along the Highway 121 corridor in Allen.[65] Second, the impact of a transmission line on the properties along the north side of Highway 121 in McKinney would be less than the impact on the properties along the south side because the segments making up Route 17 do not cross those properties; instead, the lines would be routed across the street.[66] In contrast, the segments that

[62] Tr. at 203.

[63] Tr. at 188.

[64] Tr. at 281.

[65] Tr. at 558-59.

[66] Tr. at 413-15.

make up Route 11 run directly across the properties fronting the highway in Allen. Finally, the rudimentary counting of habitable structures does not take into account the future development of structures and residents on Johnson Centre's property.[67] For all these reasons, the habitable structure factor is neutral or weighs in favor of Route 17.

E. Substation Location

In the Craig Ranch proceeding, a substation location was not pursued by Brazos because it was in the lucrative commercial corridor fronting Highway 121.[68] The ALJs should similarly decline to recommend Routes 7 or 8 because the substation locations associated with those routes directly impact the lucrative Johnson/Hines development as well as the surrounding properties fronting Highway 121 in Allen.

Instead, the ALJs should recommend Route 17, which uses Substation 3. The impact of installing Substation 3 on the property owned by Amherst Capital Investments, LLC/Texas Partners In Capital Investments, LLC may be lessened by relocating the site of the substation from its current proposed location to the easternmost side of the property. In the preliminary maps created in this proceeding, the site of Substation 3 was located at the far eastern end of Amherst's property; if Substation 3 is relocated to that eastern site on property, none of the segments of Route 17 would cross the property.[69]

Although Dr. Younas does not believe he can work with Brazos to finalize the exact location of Substation 3 on his property,[70] Brazos witness Mr. Chambers testified that Brazos is always willing to work with landowners to lessen the impact of the installation of a substation and that the site of Substation 3 can be moved to the eastern side of the property while remaining viable and constructible from an engineering perspective.[71]

There is nothing special about Amherst's property that necessitates the installation of a hospital there and not on some other property; to the contrary, Dr. Younas stated that he currently performs surgeries at an office in Lewisville, Texas[72] and testified that he has offices

[67] Tr. at 587-88.

[68] City of Allen Exhibit 2 at 106.

[69] Tr. at 563.

[70] Tr. at 444.

[71] Tr. at 640-41.

[72] Tr. at 457.

throughout the DFW Metroplex.[73] In fact, he attempted to purchase land in Allen for his planned hospital before acquiring the McKinney property.[74]

In contrast, as shown above, there is no other property remaining in the City of Allen for corporate campus-style development other than the large tracts adjacent to Highway 121. Although it would be unfortunate if Dr. Younas decides to go forward with his planned development elsewhere as a result of a substation being located on his property, the impact to the community of that loss would be nowhere near the impact of losing the type of high-quality development such as the Johnson/Hines development.

VI.

BILL OF EXCEPTIONS

TMF Intervenors' evidence on the issue of right-of-way acquisition costs (both before the evidentiary proceeding and at the evidentiary proceeding) was excluded on the ground that the Referral Order and the Commission's interpretation of PURA and its regulations precluded such evidence. A bill of exceptions was made on the record before the close of the evidence. These rulings were erroneous and should be reversed for at least two reasons.

First, precluding indisputably relevant evidence from an MAI expert about the most significant economic factor in the Application is not required by the PURA statute, regulations, or the Referral Order itself. PURA §37.056(c) and P.U.C. SUBST. R. 25.101(b)(3)(B) specifically require the Commission to determine whether there are alternative routes or configurations that would have less negative impact on landowners and what would be the cost of such alternatives. The Referral Order also itself states at page 5 that its "list of issues is not intended to be exhaustive." The preclusion ruling was therefore based on an erroneous interpretation of the requirements of PURA, the regulations, and the Referral Order.

Although it is true that it is long-standing practice that the Commission will not decide the actual fair market of the land subject to the proposed right of way (and will leave that issue to subsequent eminent domain proceedings), that is not why TMF Intervenors offered the precluded evidence. The record shows that Route 11 would not be the least expensive route by far if Brazos' plugged $15 assumption for the southern easement is rejected and the accurate assumption of $22.50 to $30.00 per foot is used; in other words, evidence about the inaccuracy

[73] Tr. at 458.

[74] Tr. 446-47.

of the $15 across-the-board assumption of cost would be virtually outcome determinative as to route selection.

TMF Intervenors have been unable to find any cases holding that the Texas legislature intended to preclude interested persons from contesting highly material facts concerning an application through competent evidence. In fact, such an interpretation of the statute would mean that the legislature intentionally left a huge hole in the detailed analysis the legislature expected to be made when the Commission considers a CCN application. If Brazos's "experience" is sufficient to decide critical cost questions about the right of way, then why is such "experience" not enough for every other issue (technical requirements, environmental, etc.)? The answer is that the legislature clearly expected the Commission to decide all of the factors upon a contested presentation of *facts* relevant to those factors.

Second, to the extent the preclusion ruling was premised on a correct interpretation of the PURA, the regulations, and the Referral Order, the ruling was unconstitutional in the manner in which the ALJs applied them. "A litigant raising only an 'as applied' challenge concedes the general constitutionality of the statute, but asserts that the statute is unconstitutional as applied to his particular facts and circumstances."[75] A statute or regulation can be facially constitutional yet still violate the open courts provision "*as applied to a particular category of people*" if the restriction of that group's access to the courts is unreasonable or arbitrary.[76]

Article I, section 13 of the Texas Constitution provides: "All courts shall be open, and every person for an injury done him, and his lands, goods, person or reputation, shall have remedy by due course of law." This provision, known as the "open courts" provision, is premised upon the rationale that the legislature "has no power to make a remedy by due course of law contingent upon an impossible condition."[77] The open courts provision ensures that all litigants receive the opportunity to redress their grievances and receive their day in court.[78] The preclusion ruling in this case violates the open courts provision.[79]

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[75] *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011); *see also City of Corpus Christi v. Public Util. Comm'n of Tex.*, 51 S.W.3d 231, 240-41 (Tex. 2001) (Owen, J., concurring).

[76] *In re Hinterlong*, 109 S.W.3d 611, 631 (Tex. App.—Fort Worth 2003, orig. proceeding [mand. denied]) (emphasis in original).

[77] *Morrison v. Chan*, 699 S.W.2d 205, 207 (Tex.1985).

[78] *Oak v. Arlington Mem'l Hosp. Found.*, 934 S.W.2d 868, 871 (Tex. App.—Fort Worth 1996, writ denied).

[79] The statute, regulation, and order should be construed to avoid any question that they may be unconstitutional as applied.

In order to establish an "open courts" violation, a litigant must satisfy a two-part test: first, he must show that he has a well-recognized common-law cause of action that is being restricted; and second, he must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute.[80]

Here, the Texas legislature has essentially bifurcated the issue in an eminent domain proceeding, by having the Commission determine what property is "needed" for a taking and leaving the issue of what should be paid to the landowners as compensation for that "needed" land under Article I section 19 of the Texas constitution and common law. The Texas Supreme Court has already recognized that the open courts provision can be applied to PURA proceedings involving potential takings.[81] Thus, the first prong of the as-applied challenge is met in this case.

The second prong of the as-applied challenge—is the restriction unreasonable or arbitrary when balanced against the purpose of the statute—is also met here. The TMF Intervenors were required by the statute to be served so that they could appear and address their interest as owners of land within 300 feet of a proposed route. TMF Intervenors' precluded evidence showed that Brazos' plugged $15 assumption about the cost of the proposed right of way running through their land—i.e., the very reason they are necessary parties to the proceeding—was made out of whole cloth and is contradicted by real world, actual historical comparables and other evidence accepted by experts in the real estate industry. Such evidence shows that Route 11 is by no means the least expensive route—a key factor in deciding a CCN application. No such limitations are imposed on any other factor under consideration in the CCN process. Thus, as applied in the preclusion ruling, PURA §37.056(c) and P.U.C. SUBST. R. 25.101(b)(3)(B), and the referral Order unreasonably and arbitrarily restrict TMF Intervenors from having the day in court granted to them under the open courts provision.

This conclusion is not changed by any argument that the Commission is not empowered to make decisions about the fair market value of any individual landowner's land or that it is reasonable to keep out any evidence concerning value as a matter of administrative convenience. The CCN process is tried to ALJs and the Commission—not a jury. The evidence offered by the TMF Intervenors was specifically tailored to the same limited issue—estimated cost of right of

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[80] *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex.1988); *Sax v. Votteler*, 648 S.W.2d 661, 666 (Tex.1983).

[81] *City of Corpus Christi v. Public Util. Comm'n of Tex.*, 51 S.W.3d 231, 240-41 (Tex. 2001) (Owen, J., concurring).

way—as Brazos' stated assumption. The ALJs and the Commission are more than capable of receiving and understanding the evidence for that narrow purpose and can expressly limit their findings about such evidence to that issue (thereby ensuring that it will have no impact on the specific fair market value question to be tried in state court if and when there is a formal eminent domain proceeding). By precluding TMF Intervenors' cost evidence, the process has deprived them of the right to contest Brazos's assertions given to all other interested parties on issues important to them.

Finally, the unconstitutional as-applied preclusion ruling deprives the public of the process their elected representatives required to be undertaken under PURA. In this case—like many where HVTLs are being sought to be installed in high density areas—cost is a primary if not the most significant factor in the application. The assumption underlying the entire process is that every route is different for many reasons and each route must be compared to the others so that an accurate assessment can be made about their impact on the relevant communities, including the landowners who may be forced to give up some of their land for the routes. Essentially assuming that the proposed right of way for every route will be the same when no such assumption is made for any other PURA factor does a disservice to the landowners themselves and the public. It should not be countenanced as a matter of PURA and it is prohibited as a matter of constitutional law.

VI.

CONCLUSION

WHEREFORE, for the above-mentioned reasons, the TMF Intervenors respectfully request that the Application be denied due to a lack of need or other deficiencies, or, alternatively, that the ALJs recommend to the Commission that it should select Route 17 as the route that best meets the requirements of PURA.

Dated: August 11, 2017

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CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on August 11, 2017, in accordance with Public Utility Commission Procedural Rule 22.74.

Thomas J. Annis