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PUBLIC UTILITY COMMISSION
BEFORE THE STATE OFFICE

APPLICATION OF THE CITY OF SAN §
ANTONIO ACTING BY AND THROUGH §
THE CITY PUBLIC SERVICE BOARD §
(CPS ENERGY) TO AMEND ITS §
CERTIFICATE OF CONVENIENCE §
AND NECESSITY FOR THE PROPOSED §
SCENIC LOOP 138-KV TRANSMISSION §
LINE §

BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

JOINT MOTION FOR REFERRAL OF CERTIFIED ISSUES AND REQUEST FOR EXPEDITED RULING

COMES NOW, Anaqua Springs Homeowners' Association ("Anaqua Springs HOA"), Brad Jauer and BVJ Properties, LLC ("Jauer"), The San Antonio Rose Palace, Inc. ("Rose Palace"), Strait Promotions, Inc. ("Strait Promotions") (collectively "Joint Parties") and file this Motion for Referral of Certified Issues. Pursuant to 16 Tex. Admin. Code § 22.127(b)(3), issues appropriate for certification include whether Commission policy should be established or clarified as to a substantive or procedural issue of significance to the proceeding.

The Joint Parties respectfully request that the ALJs expeditiously certify to the Public Utility Commission of Texas the following issues that are of both substantive and procedural significance to this proceeding:

1. **Whether Route R1 Modified and the modifications that it contains, as presented in the testimony of Mark Anderson and other witnesses for the Anaqua Springs Homeowners' Association and the Jauer parties, can be included in the record and considered by the ALJs and the Commission absent an amendment of the CCN application.**
2. **Whether unanimous consent of all landowners who are impacted by the Route R1 Modified modification is required to approve Route R1 Modified when those landowners are already noticed and actively participating in this docket.**
3. **If the answer to either certified issue no. 1 or 2 is no, then whether CPS should be ordered to amend its application to include Route R1 Modified.**

I. BACKGROUND

On July 22, 2020, the City of San Antonio acting by and through the City Public Service Board (“CPS Energy”) filed an application in this proceeding to amend its certificate of convenience and necessity (“CCN”) in order to authorize construction of a proposed 138 kV transmission line in Bexar County, Texas. On December 22, 2020, CPS Energy filed an Amended Application, moving one route to the east onto different landowners, due to the construction of a home in the proposed right-of-way after the community Open House and the filing of the Application. In making that modification, CPS did not re-notice the landowners impacted by the route change, all but one of whom had previously received notice and had been participating in this case. CPS did receive a waiver of notice from the one landowner who had purchased property between the time CPS filed its Application and the time CPS filed its Amended Application.

Two-thirds (2/3) of the routes in this case, including CPS’s “best meets” route, are sited along the same road, impacting a high number of habitable structures. From the beginning of this case, several parties have desired to find a route that, if not agreeable to all parties, would at least narrow the issues for consideration for the Administrative Law Judges. Several intervenors have agreed to a proposed modification that would impact the least number of habitable structures of all routes and impact no new landowners and no new habitable structures. As a result, the proposed modification would not require new notice under 16 Tex. Admin. Code §22.52(a)(2), as demonstrated by CPS not issuing new notice when it rerouted Segment 26/26a onto the properties of different landowners who were noticed and actively participating in the case. Anaqua Springs HOA and its homeowners, which have property within 300 feet of the centerline of Segments 38 and 43, along with Brad Jauer and Rose Palace, have developed a proposed modification along Segments 26a, 38, and 43 that would be agreeable to them and to a number of other intervenors. Anaqua Springs HOA has approached CPS Energy to seek an agreement to consider the proposed

modification, but CPS has not agreed to modify the segments or amend its application. Anaqua Springs HOA also propounded discovery in an attempt to present specific routing criteria for Route R1 Modified, but CPS did not provide the information in its response. The land where the modifications would occur is owned by two parties who are represented by legal counsel and are actively participating in this docket—Save Huntress Lane Area Association (“SHLAA”) and Bexar Ranch.

The proposed modification is unlikely to increase the cost of the segments and route proposed to be modified. In fact, Mr. Anderson testifies that the modification will be less expensive. Moreover, the proposed modification would distance the line from an existing subdivision; it would reduce the number of habitable structures by three on any route using the proposed modification; it would not impact new landowners or any new habitable structures; and it is a modification that is agreed to or unopposed by the following parties:

Anaqua Springs HOA

Brad Jauer and BVJ Properties, LLC

Rose Palace and Strait Promotions

Charlene Jean Alvarado Living Trust

Steve Cichowski

Lauren Pankratz

Sunil Dwivedi

Raul Figueroa

Toutant Ranch, Ltd. and ASR Parks, LLC (“unopposed”)

The Barrera Family

Primarily Primates, Inc.

The Gutierrez Family

II. THESE ISSUES ARE APPROPRIATE FOR CERTIFICATION TO THE COMMISSION

Whether a proposed modification made to a filed route may be considered by the Administrative Law Judges and ultimately the Commission, without a formal amendment to a CCN Application and/or the consent of noticed, actively participating landowners impacted by the modifications, is a matter of Commission policy. The Joint Parties intend to present evidence that Route R1 Modified is the route that best meets the applicable routing criteria. If the ALJs and ultimately the Commission were not to agree with the Joint Parties, and the modified route is not included in the application, then CPS is at risk of having its application denied. A denial would result in landowners who have already invested significant time and expense into this docket being forced back into litigation, a scenario that the Joint Parties, and presumably CPS, seek to avoid.

CPS may argue that this case has already been delayed due to the Amendment made to reroute Segment 26/26a, and that now granting the certified issues would only serve to further delay the proceeding. To minimize the delay, the Joint Parties respectfully request that the ALJs refer these certified issues to the Commission expeditiously. Because no additional landowner notice is needed, there should not be a notice delay. While there may be some discovery on the modification, if CPS provides the data for the modification and the affected routes, then there may not be significant discovery or delay. The Joint Parties would note that discovery on CPS Energy's direct case ended on February 12, 2021, and very few intervenors served discovery on CPS Energy. Specifically, the parties who filed a motion to strike testimony related to Route R1 Modified (Bexar Ranch, SHLAA, and Clearwater Ranch) did not serve discovery on CPS Energy.

III. NOTICE AND ROUTE MODIFICATIONS

Consistent with the Commission's requirements for notice, CPS Energy sent individual notice to impacted landowners. A sample notice letter is included as Attachment 7 to the

Environmental Assessment and includes the Commission-issued brochure: “Landowners and Transmission Line Cases at the PUC.” Page 3 of that brochure under the section titled “Application to Obtain or Amend a CCN” states “In addition to the routes proposed by the applicant in its application, the possibility exists that additional routes may be developed, during the course of a CCN case, that could affect property in a different manner than the original routes proposed by the applicant.” Thus, the Commission’s brochure anticipates that there may be changes to routes impacting property in a different manner than the original routes. And this scenario has occurred in this case already. Segment 26 became Segment 26a because a home was constructed directly under Segment 26, necessitating a move of the Segment onto land that previously would have been unencumbered by the transmission line. However, because the line originally ran within 300 feet of the newly-impacted properties, they had already been noticed, and CPS did not provide additional notice to them. But these landowners did not consent to the modification moving the line onto their properties. Similarly, Route R1 Modified changes the impact to previously-noticed, participating landowners, but it does not route the line over landowners who were not previously burdened with the line. Thus, the impact to these landowners, who are already burdened, would not be as significant as to the landowners who are now burdened by 26a, whereas prior to the amendment, they were adjacent but not crossed. For these reasons, the Joint Parties assert that the ALJs and the Commission should be able to consider Route R1 Modified without requiring a CCN application amendment, without requiring additional notice to the previously-noticed landowners, and without requiring consent of those landowners.

The Commission’s procedural rule on landowner notice also anticipates that routes may be modified. Before final approval of any modification in a route, a utility must provide notice to the landowner only if that landowner has not been noticed.¹ There is no legal requirement for the

¹ 16 TAC § 22.52(a)(3)(C).

utility to obtain landowner consent prior to a modification. CPS has applied this rule with its Segment 26a modification. It did not notice the landowners because they had already been provided notice under 16 TAC § 22.52. CPS could have kept Segment 26 in its original configuration and condemned the house that was built under it (now labeled Habitable Structure 198) if Segment 26 were approved. However, CPS modified Segment 26 without landowner consent and without notice to landowners who are now crossed by 26a instead of adjacent to 26, all because one house in a subdivision included in the SHLAA intervenor group was built directly under the proposed segment. The Joint Parties' proposed modification keeps the line on the property of the noticed, participating landowners and simply moves it farther south on the same properties, lowering the habitable structure count by three (3).

IV. COMMISSION PRECEDENT

Understandably there has been concern about modifications proposed on routes where landowners do not give consent. However, as the Commission's own pamphlet and notice requirements indicate, and as CPS Energy's practice demonstrates, so long as an intervenor has notice of the proceeding, and is participating in the case, there is no due process concern about notice of a modification when that modification occurs during the proceeding and prior to construction. At this point in the proceeding, Route R1 Modified could be included without any harm to any party in this case. The hearing is set in May; all parties have been made aware of the proposed modification through pre-filed testimony, and there are no newly impacted landowners. Route R1 Modified reduces the number of habitable structures, will reduce the cost of the as-filed Route R1, and does not impact any new landowners.

The Commission has adopted route modifications in prior cases without requiring affirmative consent from previously noticed landowners.² And in this case, Anaqua Springs HOA is proposing a modification in its direct testimony well before the hearing and long before the line is constructed. If affirmative consent is required from previously-noticed landowners for all modifications, it could thwart the Commission's obligation to route the line "to the extent reasonable to moderate the impact on the affected community and landowners unless grid reliability and security dictate otherwise."³

In Docket No. 48095, the Commission's Order on Rehearing suggests that previously noticed landowners must provide affirmative consent before the line can be moved to a different location on their property. The Order (prior to the Order on Rehearing) cited Docket No. 37530 as authority for that proposition. However, Docket No. 37530 addressed the utility's ability to move a line during construction, after approval of a final route, and did not address the Commission's ability to address and adopt modifications that are proposed and fully litigated at the hearing on routing. Due to ambiguity on the precise issue presented in this proceeding, this matter is appropriate for the Commission to consider as certified issues. Additionally, parties opposed to the modification have filed a motion to strike testimony related to the modification.

The Commission has a statutory obligation to mitigate the impact of the project on the affected community and landowners by adopting reasonable modifications.⁴ This obligation is reflected in the Commission's preliminary order, which asks: "Are there alternative routes or facilities configurations that would have a less negative impact on landowners?"⁵ There is no

² See, e.g. *Application of LCRA Transmission Services Corporation to Amend its Certificate of Convenience and Necessity for the Proposed McCamey D to Kendall to Gillespie 345-kV CREZ Transmission Line in Schleicher, Sutton, Menard, Kimble, Mason, Gillespie, Kerr, and Kendall Counties*, Docket No. 38354, Order at 2 and 24, Ordering Paragraph 2 (Jan 24, 2011) (adopting a modification that would shift a proposed line "as far south as safely and reliably possible using above ground construction while still affecting only noticed landowners").

³ See 16 Tex. Admin. Code §25.101(b)(3)(B).

⁴ See PURA §37.056(c); 16 TAC § 25.101(b)(3)(B).

⁵ Docket No. 51023, Order of Referral and Preliminary Order at 4.

dispute that all affected landowners must be given notice of the routing in this case, but there is no requirement in PURA or the Commission's rules to obtain affirmative consent from previously noticed landowners if the final route impacts their property in a different way. As discussed above, this is consistent with the Commission-authored brochure titled "Landowners and Transmission Line Cases at the PUC," which must be included with the notice.⁶

V. POLICY

For policy reasons, the Commission should also permit modifications such as the Route R1 Modification proposed in this case. There should not be a blanket prohibition against modifying or adjusting routes simply because an active, participating landowner did not consent to a modification proposed during the contested case process. The contested case process provides opportunities for the landowner to conduct discovery on the proposed modification, to review expert testimony, and to present the landowner's own evidence regarding the modification. Throughout most CCN proceedings, few landowners ever consent to the location of the line. Preventing consideration of a proposed modification without consent of all the landowners, when new landowners are not impacted, does not permit the utility to reconsider or revisit its routing options, even if the utility is unopposed to the modification or believes it might be a better route. Not permitting consideration of reasonable routing modifications supported by evidence ties the utility's hands, unnecessarily limits landowner participation in the hearings to a limited number of utility-proposed routes, thereby foreclosing the option to suggest reasonable alternatives, and places the utility at greater risk of having the application denied.

⁶ 16 TAC §22.52(a)(3)(A).

VI. CONCLUSION

For these reasons, the Joint Parties respectfully request that the ALJs expeditiously certify these issues to the Commission and that the Commission ultimately find that the type of modification proposed by the Joint Parties in Route R1 Modified should be considered in this case, without unanimous landowner consent or an amendment to the application.

Respectfully submitted,

By: Wendy Harvel (with permission)

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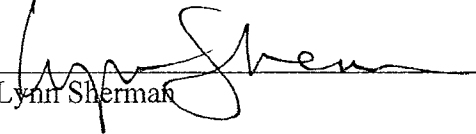
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**ATTORNEYS FOR THE SAN ANTONIO
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STRAIT PROMOTIONS, INC.**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been filed with the Commission and served on all other parties via the PUC Interchange on this 24th day of February 2021, pursuant to SOAH Order No. 3 issued in this docket.


Lynn Sherman