Control Number: 51023

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SOAH DOCKET NO. 473-21-0247
PUC DOCKET NO. 51023

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**

REPLY TO OPPOSITIONS TO JOINT REQUEST FOR CERTIFIED ISSUES

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") file this pleading to address the responses to the following interrelated issues:

- Motion to Compel discovery from CPS related to Route R1 Modified;
- Joint Request for Certified Issues;
- Objections and Motions to Strike Testimony related to Route R1 Modified.

I. THESE ISSUES ARE ALL INTERRELATED

Over the past several days, the parties have filed a large number of requests for relief with the Administrative Law Judges ("ALJs"). This pleading is an attempt to pull the separately-filed pleadings together into one comprehensive summary and response with the hope of relating the issues to one another and simplify the pending motions.

Route R1 Modified has been proposed by three parties as an improvement to Route R1 because it reduces the number of habitable structures and costs less. Route R1 Modified was developed recently in consultation with numerous landowners as a way to simplify the issues in this case by finding a route that would be agreeable or at least unopposed by the landowners on Toutant Beauregard.

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To ensure consideration of the modifications, Anaqua Springs HOA, Jauer, Strait Promotions and the Rose Palace (together, the "Strait Parties") took the following actions either separately or jointly:

- Anaqua Springs HOA and Jauer filed lay witness and expert testimony regarding Route R1 Modified.
- Anaqua Springs HOA asked CPS to produce discovery on Route R1 Modified so that the parties could evaluate CPS's costing and analysis of the route.
- Anaqua Springs HOA, Jauer and the Strait Parties filed a Joint Request for Certified Issues to seek clarity from the Commission on whether Route R1 Modified may be presently considered, without landowner consent and without CPS amending its application.

The responses to the above actions were as follows:

- Bexar Ranch, L.P. ("Bexar Ranch"), Save Huntress Lane Area Association ("SHLAA"), and Clearwater Ranch POA ("Clearwater") filed objections and motions to strike the testimony related to Route R1 Modified.
- CPS refused to answer discovery related to Route R1 Modified but did not object to it.
- Bexar Ranch, SHLAA, and Clearwater filed responses and opposition to the Joint Request for Certified Issues.
- CPS filed a responses and opposition to the Joint Request for Certified Issues.

II. CPS CANNOT HAVE IT BOTH WAYS

CPS did not object to the discovery requests on Route R1 Modified, yet it has not provided responsive information to those requests. At the same time, CPS has indicated its opposition to the Joint Request for Certified Issues. Much of CPS's opposition relies on the following:

- The Application was filed more than seven months ago. This statement is accurate but incomplete. The Amended Application, which is the live pleading, was filed on December 22, 2020, just over two months ago.

- CPS states it is not willing to grant any further extensions to the one-year deadline. The Joint Parties have not asked for an extension.
- CPS asserts the modifications proposed by the Joint Parties should have been raised in the route adequacy hearing. The Joint Parties and the unopposed landowners had not reached any agreement regarding the modifications at the time of the route adequacy hearing, and CPS does not cite any requirement that modifications may only be raised at the route adequacy hearing because no such requirement exists.
- CPS then states that the ALJs may rule without certifying the issue as to whether Route R1 Modified may be considered. Without waiving the certified issue, if that is CPS's position, then CPS should respond to discovery regarding Route R1 Modified so that the ALJs and all other parties may consider Route R1 Modified. CPS cannot on the one hand refuse to provide discovery on Route R1 Modified and on the other hand say that it is permissible for the ALJs to consider it without providing the necessary information for the ALJs to do so.
- CPS indicates that the Commission can determine whether unanimous consent of all impacted landowners is required to consider Route R1 Modified at the time it takes up the Proposal for Decision. The Commission could certainly do that. However, by referring the issue on a matter of policy that remains unclear, the Joint Parties were attempting to ***save*** time by letting the Commission clearly establish policy that could impact the Route R1 Modification testimony.
- The issue of whether CPS should be required to amend its Application is only ripe if the Commission determines both that the landowners must consent (which they have stated they will not) and that Route R1 Modified should be considered as a viable option. Contrary to what CPS alleges in its motion, this is not an attempt at a second bite at the apple. Rather, this is the product of lengthy discussions and work among numerous

landowners over months to find a route that they can agree to. Yes, the route moves the line farther away from Anaqua Springs. But it does so to move it away from impacted landowners who have habitable structures within 300 feet of the line into an area with no impacted habitable structures, at a reduced cost, all of which are established Commission routing criteria. Why CPS is opposed not only to moving the line away from homes but also providing discovery as to the details of that proposed modification is unclear.

III. THERE IS NO HARM IN HAVING ADDITIONAL INFORMATION

CCN applications benefit from a robust number of routing alternatives. In this case, several parties agree that Route R1 Modified is a viable routing alternative. CPS has not indicated to the contrary, yet it has refused to produce any data regarding the modification. If CPS were to provide robust data regarding the modification, many issues in the Joint Request for Certified Issues might be moot. The data would be provided, and the ALJs could evaluate the route. Whether the opposing landowners would be required to provide consent would still be in front of the Commission. But CPS has indicated no opposition to the route itself, only opposition to potential delay from a certified issue. And CPS has indicated its belief that the ALJs can consider the modification. Therefore, if CPS were to provide the information, the Joint Parties would be in a position to discuss amending the request for certified issues.

IV. THE PARTIES HAVE NOT ASKED FOR AN ABATEMENT

CPS has stated its concern about delay. The Joint Parties have not asked for an abatement. Whether one would be required would depend on the speed at which the certified issue is taken up. So long as CPS provides discovery, the Joint Parties are unlikely to ask for an abatement of the case pending the certified issue.

V. SPECIFIC RESPONSE TO BEXAR RANCH, SHLAA, AND CLEARWATER'S OPPOSITION TO THE CERTIFIED ISSUE

Bexar Ranch, SHLAA, and Clearwater ("Bexar Ranch et al.") site numerous PUC Dockets in support of their position. A closer review of those dockets indicates that they do not stand for those propositions.

- **Docket No. 49523**

Bexar Ranch, et al. cite Docket No. 49523 as constituting a rejection of the Joint Parties' certified issues. First, the Commissioners' Order in Docket No. 49523 does not say that "the Commission would not modify a segment without the consent of the affected landowners," as claimed by Bexar Ranch, et al..[1] Instead, it merely requires the utility to "engage and cooperate with Creek House Ranch LLC and surrounding landowners to implement, if possible, an agreed deviation" *after the route selection process* and *during the construction process.*[2] This in no way constitutes a precedent for disallowing modifications during the *routing process* without the consent of noticed landowners who are represented by counsel and actively participating in the case.

Perhaps even more importantly, the Commissioners' deliberation of Docket No. 49523 serves as an endorsement of why the Joint Parties' certified issues are warranted, because they give the Commissioners the opportunity to address policy issues of consequence *prior to* being confronted with a PFD that presents a Hobson's Choice of remanding the case for modifications at additional expense to the parties or issuing a final order that is untenable or otherwise contrary to the "best meets" objective of the routing process. The following transcription of the salient

[1] *See Application of LCRA Transmission Services Corporation to Amend its Certificate of Convenience and Necessity for the Mountain Home 138 - kV Transmission Line in Gillespie, Kerr, and Kimble Counties*, Docket No, 49523, Order at 1 (July 6, 2020), cited by Bexar Ranch, et al. in Footnote No. 7 of their Response (requiring LCRA to engage and cooperate with Creek House Ranch LLC and surrounding landowners to implement, if possible, an agreed deviation.

[2] *Id.*

portions of the Commissioners' open meeting discussion of Docket No. 49523 fully illustrates this point:[3]

> Chr. Walker: "I am fairly bothered by a lot of things in this one, and it makes it more difficult because it is a reliability project. . . . I think that we need to move forward with a decision for two purposes, reasons. One, is that it is a reliability project. The other is . . . the landowners who have been involved in this and hired these attorneys and paying them, I am concerned about keeping the litigation going on a remand or anything else, because it will continue to take more of their resources. . . . And, I am very compelled by the people in Creek House Ranch house. . . . So, I'm not sure we get to where we need to be. I'm leaning towards the PFD, but I would really like some modifications to try to accommodate the Creek House Ranch owners, because I think that putting a brand-new line in the place that it is being proposed is very burdensome on them. But, if the landowners to the west are just simply unwilling to have those discussions, I'm really not sure on how to move forward, and, again, I am concerned for a remand for the two reasons I started on. . . .
>
> Comm'r Botkin: "So, I agree . . . This is really hard. . . ."
>
> Comm'r D'Andrea: "Yeah, I obviously agree with both of you on Creek House. . . . We're presented with a couple of really bad solutions around there. . . ."

From the exchange of motions on the underlying issues to date, the Certified Issues presented in Joint Parties' Motion are policy issues that are in dispute and ripe for resolution, and referring them to the Commissioners at this juncture will obviate the dilemma with which they were confronted in Docket No. 49523.

- **Docket No. 48095**

Bexar Ranch, et al. also cite Docket No. 48095 as authority for their request that the Joint Parties' Motion for referral of Certified Issues be denied. There are several reasons that Docket No. 48095 is not appropriate authority for the disposition of Joint Parties' request for referral of Certified Issues in the present case.

First and foremost, Docket No. 48095 involved a completely different fact situation. There, the landowner had received the requisite notice but chose not to participate in the hearing. (See

[3] Transcribed from the taped broadcast of the June 12, 2020 Open Meeting (Agenda Item No. 1), http://www.adminmonitor.com/tx/puct/open_meeting/20200612/.

"Occidental Permian Ltd., Centurion Pipeline LP, Oxy USA WTP LP, and Oxy USA Inc.'s Motion to Reopen the Record to Admit Supplemental Evidence and Motion for Rehearing," Docket No. 48095).[4] In contrast, the present case involves affected landowners (on both sides), who not only have received the requisite notice, but also are actively participating in the case with experienced legal counsel.

In addition, between the Final Order and the Order on Rehearing containing the language cited by Bexar Ranch, et al.,[5] all parties with affected property interests entered into a modification consent agreement,[6] thereby obviating any need or basis for a ruling on the legal question as to whether a proposed modification must receive affirmative consent from all previously noticed landowners, whether actively participating in the case or not. Any language in the Order on Rehearing to the contrary is merely dicta.[7]

Moreover, the only authority cited in Docket No. 48095 regarding the need for landowner consent for a route modification is a Commissioner Memorandum[8] citing the Order in Docket No. 37530, the pertinent pages of which are attached and highlighted as Exhibit B. However, the cited language in the Order in Docket No. 37530 has no bearing or precedential relevance to the present case (or Docket No. 48095, for that matter) because it pertains to landowner consent relative to a special allowance granted in the Order for "more than a minor deviation" during the transmission

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[4] The party in question was "Plains Scurlock Permian, LP," which is referenced on page one of Exhibit 1. A search of Docket No. 48095 will confirm that there were no filings by Plains Scurlock Permian, LP.

[5] Both the Final Order and the Order on Rehearing contain the language cited by Bexar Ranch, et al.

[6] *See* Exhibit A at pages 1-2. (See "Occidental Permian Ltd., Centurion Pipeline LP, Oxy USA WTP LP, and Oxy USA Inc.'s Motion to Reopen the Record to Admit Supplemental Evidence and Motion for Rehearing," pages 1-9 without attachments, Docket No. 48095).

[7] Notably, since all affected parties had signed onto the modification consent agreement, there were no affected parties left to appeal the dicta, including Oxy.

[8] *Commissioner Memorandum* from Chr. Walker, "Application of Oncor Electric Delivery Co., LLC to Amend a Certificate of Convenience and Necessity for a 345-kV Transmission Line in Crane, Ector, Loving, Reeves, Ward, and Winkler Counties, Texas," Docket No. 48095 (Item No. 175), Page 1, Footnote 2 (Sept. 13, 2018) (*citing* "Application of Oncor Electric Delivery LLC to Amend its Certificate of Convenience and Necessity for the Proposed Bluff Creek to Brown 345-kV CREZ Transmission Line in Taylor, Runnels, Coleman, and Brown Counties, Texas, Docket No. 37530, Order at 2 (Apr. 26, 2010)).

line's construction -- after the hearing process is concluded and the route is approved.[9] It does not pertain to the route selection process (i.e., the present case), wherein all parties that are noticed and participating have the opportunity to propound discovery, conduct cross-examination and brief the issues so the best possible route possible can be selected. Again, as addressed in Joint Parties' Joint Motion for Referral of Certified Issues, all the Commission's rules require for a route modification is the following: "Before final approval of any modification in the applicant's proposed route(s), applicant shall provide notice as required under subparagraphs (A) and (B) of this paragraph to all directly affected landowners who have not already received such notice." Such notice has been provided to Bexar Ranch, et al., and each of them is represented by counsel and actively participating in the case.

This issue is of such significance to the route selection process, it should be decided upon by the Commissioners as requested in Joint Parties' Motion Joint Motion for Referral of Certified Issues.

- **Docket No. 38354**

Finally, Bexar Ranch, et al. also address the Commission's *own* re-route of a line on a landowner without its consent in Docket No. 38354. Bexar Ranch, et al. try to characterize the Commission's action as being limited to FAA compliance issues. There simply is no basis for such a restrictive reading.

In addition to the inaccurate analysis of case law, Bexar Ranch et al. do not cite to the relevant portion of the landowner notice packet. The relevant part states that "In addition to the routes proposed by the application 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 landowner notice packet

[9] 16 Tex. Admin. Code ("TAC") § 22.52(a)(3).

clearly states that other routes may be developed that could affect property in a different manner than the original routes. In other words, routes may change and impact your property differently.

Further, Bexar Ranch et al. contend that allowing Route R1 Modified would lead to a "Pandora's Box of problems for the Commission" where future cases would be inundated with intervenor-proposed segments. Any hypothetical issue this may lead to is far outweighed by the benefit of giving the Commission greater flexibility in choosing a route that bests comport with the requirements of PURA and the TAC. There is no reason to reach Bexar Ranch's "slippery slope" argument. In this case, CPS has already agreed that the ALJs can take up Route R1 Modified. Furthermore, Anaqua Springs HOA is an impacted landowner. This is not a situation of a landowner proposing new routes in other locations. Rather, a landowner with directly impacted habitable structures is challenging routes that impact that those structures. At a minimum, an impacted landowner should have the ability to challenge routes and propose modifications that impact that landowner, even if the modifications change the way other landowners are impacted. That exact scenario is anticipated by the Commission's own brochure.

Finally, the Joint Parties believe the issue of considering a route, such as Route R1 Modified, without an amendment or unanimous landowner approval, is not prohibited by law. There are essentially two intervenors impacted by this proposed modification: Bexar Ranch and SHLAA. Clearwater would have less line on its property and the routing would not change, other than turning west sooner. This opposition is really an opposition to the route on its property because R1 Modified has many people behind it.

For clarity, the Joint Parties have requested a binding legal decision from the Commission. Route R1 Modified is supported, or not opposed, by a significant number of the parties. It is in the interest of all parties to promptly resolve this issue.

Respectfully submitted,

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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 4th day of March 2021, pursuant to SOAH Order No. 3 issued in this docket.

Wendy K.L. Harvel

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SOAH DOCKET NO. 473-18-2800
PUC DOCKET NO. 48095

2018 OCT 12 PM 1:48

APPLICATION OF ONCOR ELECTRIC DELIVERY COMPANY, LLC TO AMEND A CERTIFICATE OF CONVENIENCE AND NECESSITY FOR A 345-KV TRANSMISSION LINE IN CRANE, ECTOR, LOVING, REEVES, WARD, AND WINKLER COUNTIES (ODESSA EHV - RIVERTON AND MOSS - RIVERTON CCN)	§ § § § § § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

OCCIDENTAL PERMIAN LTD., CENTURION PIPELINE LP, OXY USA WTP LP, AND OXY USA INC.'S MOTION TO REOPEN THE RECORD TO ADMIT SUPPLEMENTAL EVIDENCE AND MOTION FOR REHEARING

I. INTRODUCTION

Occidental Permian Ltd., Centurion Pipeline LP, Inc., OXY USA WTP LP, and OXY USA, Inc. (collectively, "Oxy") respectfully request rehearing for two purposes. First, Oxy requests that the Commission adopt Oxy's proposed "Option 5" modification to Links F1 and G5, which is supported by all persons with affected property interests, as memorialized in the attached route modification consent agreement.[1] Second, and independently, Oxy requests that the Commission amend its Order to reserve judgment on whether its authority to adopt a proposed modification is contingent upon receiving affirmative consent from previously noticed landowners who chose not participate in the case.

In its Final Order, the Commission did not adopt the "Option 2" modification proposed by Oxy or the "Option 4" modification proposed by Oxy and the Sealy Smith Foundation (Sealy Smith) because a previously noticed surface owner, Plains Scurlock Permian, LP (Plains), had not provided affirmative consent to either modification.[2] However, the Commission indicated that it would be open to adopting a modification on rehearing if Plains signed a route

[1] *See* Attachment 1.

[2] *See* Docket No. 48095, Final Order at 1 (Sep. 17, 2018).

modification consent agreement.[3] Plains has now signed a route modification consent agreement for "Option 5," which differs only slightly from the Option 4 modification presented by Oxy and Oncor (and supported by the Sealy Smith Foundation) in their September 7th filing.[4] Oxy respectfully requests that the Commission reopen the record to admit Oxy Exhibit 2,[5] which is a route modification consent agreement for Option 5 memorializing the agreement of every entity with affected property rights. Oxy also requests that the Commission grant rehearing and adopt the Option 5 modification, which (1) mitigates the impact of the line on all entities with affected property rights (including mineral interest owners), (2) does not affect any additional habitable structures, and (3) ***reduces*** the line's cost by approximately $840,000 relative to the approved route as filed in the application.[6]

Oxy also requests that the Commission grant rehearing to remove statements from its Order indicating that the Commission's authority to adopt a routing modification is contingent upon obtaining consent from previously noticed landowners who chose not to participate in the case.[7] In light of the unanimous Option 5 modification discussed above, that issue is now moot, and the Commission no longer needs to reach it. Rather than unnecessarily tying its hands in future cases, the Commission should remove the portion of its Order "reject[ing] the proposal for decision's recommended modification to link F1 . . . because the parties have not obtained landowner consent from all affected landowners"[8] and reserve judgment on that issue until a later date. As discussed in detail below, the Commission has adopted route modifications in prior

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[3] *See* Docket No. 48095, Memorandum from Chairman Walker at 2 (Sep. 13, 2018) ("[S]hould the parties obtain consent from Plains Scurlock Permian LP after the issuance of the Commission's order, the parties may address this issue through the filing of a motion for rehearing."); *see also* September 14, 2018 Open Meeting Transcript at 10:8-12 (Commission voting to adopt an order consistent with Chairman Walker's memorandum).

[4] *See* Docket No. 48095, Joint Motion to Reopen Record, Admit Supplemental Evidence Regarding Route Consent Agreement, and Adopt Modification to Link F1 (Sep. 7, 2018). The Consent Agreement was signed by Plains' parent company, Plains Pipeline, L.P. *See* Attachment 1.

[5] *See* Attachment 1.

[6] *See* Attachment 1, Oxy Ex. 2 at 2.

[7] *See* Docket No. 48095, Final Order at 1 ("[T]he Commission deletes finding of fact 71 to reflect its decision to reject the proposal for decision's recommended modification to link F1 (option 2) because the parties have not obtained landowner consent from all affected landowners."); *see also* Memorandum from Chairman Walker at 1 (Sept. 13, 2018) ("I do not believe that the Commission can approve either of the proposed modifications to link F1 without consent from Plains Scurlock Permian LP in accordance with Commission precedent.").

[8] Docket No. 48095, Final Order at 1.

cases without requiring affirmative consent from previously noticed landowners,[9] and should preserve its authority to do so in future cases. Requiring affirmative consent from previously noticed landowners creates a perverse incentive for surface owners to ***not*** intervene as a tactic to block modifications by neighboring surface owners or underlying mineral interest owners. Requiring such consent from previously noticed landowners would elevate the preferences of surface owners who choose not to intervene—despite being noticed—over parties who participated in the case to protect their interests, including owners of dominant mineral estates. This approach does not comport with the Commission's obligation to moderate the impact of new transmission facilities on the affected community and landowners.[10] Accordingly, the Commission should grant rehearing to remove findings and conclusions that limit its authority to adopt proposed modifications without affirmative consent from previously noticed landowners.

Attachment 2 to this motion is a redline of the Commission's Order that Oxy believes would accomplish both of these objectives.

II. ARGUMENT

A. The Commission should reopen the record to admit Oxy Exhibit 2 and grant rehearing to adopt the Option 5 modification to Links F1 and G5.

As shown in Oxy Exhibit 2, all entities with affected property rights have now consented to the "Option 5" modification to Links F1 and G5,[11] which is a slightly altered version of the "Option 4" modification Oxy and Oncor presented in the joint motion filed on September 7, 2018.[12] Given this agreement, the Commission should re-open the record to accept Oxy Exhibit

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[9] *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 link "as far south as safely and reliably possible using above ground construction ***while still affecting only noticed landowners***.") (emphasis added).

[10] *See* 16 TAC § 25.101(b)(3)(B) ("An application for a new transmission line shall address the criteria in PURA §37.056(c) and considering those criteria, engineering constraints, and costs, ***the line shall be routed to the extent reasonable to moderate the impact on the affected community and landowners*** unless grid reliability and security dictate otherwise.") (emphasis added).

[11] That modification is depicted by the blue line on Oxy Ex. 2, Attachment A.

[12] That modification was also supported by the Sealy Smith Foundation. *See* Docket No. 48095, Joint Motion to Reopen Record, Admit Supplemental Evidence Regarding Route Consent Agreement, and Adopt Modification to Link F1 (Sept. 7, 2018).

2 into evidence[13] and adopt the unanimous Option 5 modification. In addition to moderating the impact of the line on all entities with affected property rights,[14] the Option 5 modification will ***decrease*** the cost of this project by approximately $840,000[15] without creating engineering constraints or affecting any additional habitable structures.[16] For these reasons, the Commission should grant rehearing and adopt the Option 5 modification. Attachment 2 to this motion is a complete redline of the Commission's Order that Oxy believes would accomplish this objective.

B. The Commission should reserve judgment on whether previously noticed landowners must affirmatively consent to routing modifications.

The Commission's Order suggests that previously noticed landowners must provide affirmative consent before the line can be moved to a different location on their property.[17] In light of the agreed-upon Option 5 modification, this finding is no longer needed and will unnecessarily tie the Commission's hands in future cases. If a landowner is given notice that the line may cross a particular tract and chooses not to participate in the routing case, the Commission should not require affirmative consent from that landowner before adopting reasonable modifications proposed by other parties, including mineral interest owners. Importantly, Docket No. 37530 (which was cited as authority)[18] does not require the Commission to obtain affirmative consent from previously noticed landowners before adopting a routing modification during a CCN case. Instead, that docket addressed the utility's ability to

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[13] Texas courts have been clear that the Commission has the discretion to reopen the administrative record to allow additional evidence, including on rehearing. *See, e.g., Office of Pub. Util. Counsel v. Pub. Util. Comm'n of Tex.*, 303 S.W.3d 904, 917 (Tex. App.—Austin 2010, no pet) ("The question of whether to reopen an administrative record to allow additional evidence is one addressed to the discretion of the administrative body.") (quoting *El Paso v. Pub. Util. Comm'n of Tex.*, 609 S.W.2d 574, 578 (Tex. Civ App.—Austin 1980, writ ref'd n.r.e.)).

[14] As discussed in detail in prior briefing, proposed Link F1 would bisect a critical portion of Oxy's rapidly expanding Sealy Smith production area, which would substantially interfere with Oxy's ongoing drilling operations and cause significant economic harm. *See* Oxy Ex. 1 (Mendoza Dir.) at 8-11. The Option 4 modification would shift the line to a different portion of the Sealy Smith production area where Oxy believes it could effectively mitigate the impact of the line on its operations.

[15] *See* Oxy Ex. 2 at 2.

[16] *Id.*

[17] *See* Docket No. 48095, Memorandum from Chairman Walker at 2 (Sept. 13, 2018) ("[S]hould the parties obtain consent from Plains Scurlock Permian LP after the issuance of the Commission's order, the parties may address this issue through the filing of a motion for rehearing."); *see also* September 14, 2018 Open Meeting Transcript at 10:8-12 (Commission voting to adopt an order consistent with Chairman Walker's memorandum).

[18] *See* Memorandum from Chairman Walker at 1 (Sept. 13, 2018).

move a line during construction—***after*** the Commission had approved a final route—and did not address the Commission's ability to adopt modifications that are proposed and fully litigated in the routing case. The Commission has previously adopted route modifications that affected noticed tracts in a different way without obtaining affirmative landowner consent.[19] As discussed in greater detail below, any other policy would impede reasonable, efficient routing modifications and create perverse incentives by allowing landowners to block modification proposals by refusing to participate in a CCN case.

The Commission has a statutory obligation to mitigate the impact of the project on the affected community and landowners by adopting reasonable modifications.[20] The Commission's preliminary order explicitly asked: "Are there alternative routes or facilities configurations that would have a less negative impact on landowners?"[21] While all affected landowners must be given notice of the routing case, 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. This is consistent with the Commission's landowner brochure, which is provided in the utility's mailed notice. Commission rules require[22] utilities to provide all noticed landowners with a Commission-authored brochure entitled "Landowners and Transmission Line Cases at the PUC," which states that "***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.***"[23] Therefore, every potentially affected landowner has notice that a utility's proposed routes are subject to change during a CCN proceeding, and must consider that risk when choosing not to participate.

The Commission has adopted modifications in past routing cases that impacted noticed properties in a different way ***without*** requiring affirmative consent from the affected

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[19] Docket No. 38354, Order at 2 and 24, Ordering Paragraph 2 (Jan. 24, 2011).

[20] *See* PURA § 37.056(c); 16 TAC § 25.101(b)(3)(B).

[21] Docket No. 48095, Preliminary Order at 4 (Mar. 21, 2018); *see also id.* (asking certain additional questions "[i]f alternative routes or facility configurations are considered due to individual landowner preference.").

[22] *See* 16 TAC § 22.52(a)(3)(A) ("The notice must also include a copy of the "Landowners and Transmission Line Cases at the PUC" brochure prescribed by the commission.").

[23] Oncor Ex. 11 (Notice Affidavit) at Attachment 6, Page 3 (emphasis added).

landowners.[24] During the McCamey D to Kendall CCN case, the ALJs approved LCRA's practice of noticing landowners whose property was not directly affected by any of the proposed routes to give the Commission the option to adopt modifications that would directly affect those landowners.[25] Additionally, the ALJs made clear that the Commission could approve deviations from the proposed route onto those additional noticed properties, even if the landowners did not participate in the case.[26] Ultimately, the Commission adopted modifications that impacted noticed tracts in a different way than was presented in the utility's application ***without*** requiring affirmative consent from previously noticed landowners. In particular, the Commission's final order instructed LCRA to avoid an airport by shifting a proposed link "as far south as safely and reliably possible using above ground construction ***while still affecting only noticed landowners***."[27] That modification was a departure from the PFD, and because it was impossible to determine (at that point) how far south the line could be safely and reliably moved, there was no way for the underlying landowners to consent to the modification in advance. Nor was there any evidence to suggest that such consent was obtained. This and other, similar cases,[28] indicate

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[24] Chairman Walker's September 13 memorandum cites the final order in Docket No. 37530 for the proposition that the Commission cannot approve a modification without landowner consent. *See* Memorandum from Chairman Walker at 1 (Sept. 13, 2018). However, the cited portion of that order discusses the need for a ***utility*** to obtain consent from all affected landowners before adopting modifications ***after*** a CCN had already been issued, and does not speak to the ***Commission's*** authority to approve modifications ***during*** the CCN proceeding. *See Application of Oncor Electric Delivery LLC to Amend its Certificate of Convenience and Necessity for the Proposed Bluff Creek to Brown 345-kV CREZ Transmission Line in Taylor, Runnels, Coleman, and Brown Counties, Texas*, Docket No. 37530, Order at 2 (Apr. 26, 2010) ("***Oncor*** shall be permitted to deviate from route 2 along links U, E2, and GG in any instance in which the deviation would be more than a minor deviation, but only if Oncor receives consent form all of the landowners who would be affected regardless of whether the affected landowners received notice of or participated in this proceeding.") (emphasis added).

[25] Docket No. 38354, Proposal for Decision at 13-14 (Dec. 16, 2010) ("[N]othing in the rules preclude the noticing of additional property owners in order to provide the Commission with flexibility in its selection of a final route. Recognizing this fact, the ALJs issued Order No. 16 finding that ***either the ALJs or the Commission could approve a route on noticed property that is not directly affected by a proposed route.***") (emphasis added).

[26] Docket No. 38354, SOAH Order No. 16 at 8-9 (Oct. 18, 2010) ("[The noticed landowners whose property was not directly affected by any of the proposed routes] should prepare for and attend the hearing on the merits in this matter to avoid any prejudice to their interests in this proceeding.").

[27] Docket No. 38354, Order at 2 and 24, Ordering Paragraph 2 (Jan. 24, 2011).

[28] *See Application of LCRA Transmission Services Corporation to Amend its Certificate of Convenience and Necessity for the Proposed Twin Buttes to McCamey D CREZ 345 kV Transmission Line in Tom Green, Irion, and Schleicher Counties, Texas*, Docket No. 37778, Order at 23, FoF 90.d (July 9, 2010) (adopting modifications that would affect tracts A16-003 and A-16-004); *cf.* Docket No. 37778, Memorandum from Commissioner Anderson at 2 (June 30, 2010) (noting that the landowners associated with tracts A16-003 and A16-004 had not intervened or participated in the case or the non-unanimous settlement).

that the Commission has authority to move links onto or within noticed tracts, without first obtaining affirmative consent from the landowners regarding the specific placement.

The Commission should also reserve judgment on this issue for policy reasons. Individual landowners who are satisfied with the utility's proposed line location should not be able to block modifications simply by refusing to participate in the routing case. Instead, as in the McCamey D to Kendall CCN proceeding, the Commission should be able to adopt modifications that affect only previously noticed landowners (on the noticed tracts) without requiring affirmative consent. Any other policy would allow a surface owner who received notice of a CCN proceeding to block any modifications proposed by its underlying mineral interest owners[29] simply by refusing to intervene or participate in the case. The same would be true of any property with multiple owners who could not agree on a modification. The party that happens to prefer the utility's filed route would win by default, regardless of the merits of the modification proposal.[30] Even in simpler ownership scenarios, requiring consent from all affected landowners could make modifications impractical, more expensive, or infeasible by limiting where the line can intersect adjacent properties. Further, situations often arise where obtaining unanimous consent for a modification is not feasible. For example, in Docket No. 47808, which is currently pending at SOAH, Oxy attempted to obtain a route modification consent agreement from a landowner, but was unable to reach that landowner despite many months of attempts at various addresses and phone numbers.[31] Requiring unanimous consent in such a situation would unduly prejudice mineral interest owners with inactive surface owners. While that particular modification is no longer at issue in Docket No. 47808, the Commission should not adopt a policy that would tie its hands if a similar situation were to arise in the future.

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[29] Despite the mineral estate being the "dominant" estate, and having a recognized right to use the surface for activities necessary to extract minerals. *See Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 60 (Tex. 2016), *reh'g denied* (Sept. 23, 2016).

[30] For example, if a parcel were owned in equal parts by two landowners who were unable to agree on an appropriate path for the transmission line, then the Commission would have no option other than to approve the utility's proposed route, even if the modification were a substantially better option under the factors that PURA requires the Commission to consider when routing transmission lines.

[31] *See Joint Application of Oncor Electric Delivery Company LLC and Brazos Electric Power Cooperative, Inc. to Amend Certificates of Convenience and Necessity for the Cogdell to Clairemont 138-kV Transmission Line in Kent and Scurry Counties*, Docket No. 47808, Supplemental Direct Testimony of Albert Mendoza at 5 (July 23, 2018).

In sum, the Commission should modify its Order to reserve judgment on whether affirmative consent from previously noticed landowners is required to approve a modification proposed and litigated by a party to the routing case. As discussed above, this issue is no longer before the Commission since all affected entities have agreed to the Option 5 modification to Links F1 and G5. Further, both prior Commission precedent and public policy support preserving this authority. Attachment 2 to this motion is a redline of the Commission's Order that Oxy believes will accomplish this objective.

III. CONCLUSION

Oxy requests that the Commission reopen the record to admit Oxy Exhibit 2, and grant rehearing to adopt the Option 5 modification to Links F1 and G5, which is supported by every affected landowner and which would ***decrease*** the cost of this project by approximately ***$840,000***. Additionally, for the reasons described above, Oxy requests that the Commission's Order on Rehearing reserve judgment on whether affirmative consent is required to adopt a modification that impacts only previously noticed landowners. Oxy has provided redlined findings of fact and conclusions of law on these two items.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael McMillin, Attorney for Oxy, hereby certify that a copy of the foregoing document was served on all parties of record in this proceeding on this 12th day of October, 2018 by hand-delivery, facsimile, electronic mail and/or First Class, U.S. Mail, Postage Prepaid.

Michael McMillin w/permission JZZ
Michael McMillin

PUC DOCKET NO. 37530
SOAH DOCKET NO. 473-10-1088

APPLICATION OF ONCOR ELECTRIC DELIVERY LLC TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY FOR THE PROPOSED BLUFF CREEK TO BROWN 345-kV CREZ TRANSMISSION LINE IN TAYLOR, RUNNELS, COLEMAN, AND BROWN COUNTIES, TEXAS	§ § § § § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER

This Order addresses the application of Oncor Electric Delivery Company, LLC to amend its certificate of convenience and necessity (CCN) to include the Bluff Creek to Brown 345-kV transmission line. The Bluff Creek to Brown line begins at AEP Texas North Company's Bluff Creek switching station in Taylor County and runs southeast to Oncor's new Brown switching station located southwest of Brownwood. The line will run through Taylor, Runnels, Coleman, and Brown Counties.

On March 24, 2010, the State Office of Administrative Hearings' administrative law judge (ALJ) issued a proposal for decision in which the judge recommended granting Oncor's application. The ALJ found that route 2 best meets the considerations set forth in the Commission's preliminary order in this docket. The Commission adopts in part and modifies in part the proposal for decision issued by the ALJ in this proceeding, including findings of fact and conclusions of law. The Commission adopts the ALJ's recommendation that route 2 be constructed and modifies the proposal for decision regarding other issues.

I. Use of Monopoles

Oncor is permitted to use monopoles if it is more cost effective to do so. In addition, the Commission requires Oncor to use monopole structures in situations where the right-of-way is extremely constrained, the right-of-way could disproportionately affect a particular landowner, or the cost of the right-of-way acquisition is extremely high.

II. Issues Raised by the Railroad Commission of Texas

The Commission acknowledges the duty of the Railroad Commission of Texas (RRC) to require that inactive oil and gas wells be properly plugged to prevent pollution of usable quality surface and subsurface water.[1] The RRC supports the language that was used in Docket No. 37464[2] and requests that the Commission adopt the same ordering language in this case.[3] Therefore, the Commission adopts in ordering paragraph 13 the language used in Docket No. 37464 regarding oil and gas wells.

III. Texas Parks and Wildlife's Written Comments and Recommendations

As noted by the ALJ, recent amendments to the Texas Parks and Wildlife Code[4] require the Commission to provide a written response to each recommendation or informational comment made by the TPWD on or after September 1, 2009. The TPWD filed such a letter on January 4, 2010. The Commission rejects the ALJ's finding that Oncor is required to have a biological monitor on hand during clearing and construction activities to protect the Texas horned lizard. In addition, the Commission modifies the proposal for decision to further develop the findings proposed by the ALJ regarding the TPWD's recommendations.

Consistent with the above discussion regarding the TPWD recommendations, the Commission revises findings of fact 79, 84, 88, and 89; deletes findings of fact 80, 83, and 87; and adds new findings of fact 87A, 89A, 89B, and 89C.

IV. Other modifications

Oncor shall be permitted to deviate from route 2 along links U, E2, and GG in any instance in which the deviation would be more than a minor deviation, but only if Oncor receives consent from all of the landowners who would be affected regardless of whether the affected landowners received notice of or participated in this proceeding. Absent consent from all

[1] Railroad Commission's Statewide Rule 14 (16 Texas Administrative Code § 3.14).

[2] *Application of Oncor Electric Delivery Company, LLC to Amend its Certificate of Convenience and Necessity for the Brown-Newton 345-kV CREZ Transmission Line in Brown, Mills, Lampasas, McCulloch, and San Saba Counties, Texas*, Docket No. 37464, Order (Apr. 5, 2010).

[3] The Railroad Commission of Texas' Reply to Exceptions to Proposal for Decision at 2.

[4] TEX. PARKS & WILD. CODE ANN. (Vernon 2002 & Supp. 2009).

affected landowners, Oncor is not authorized to deviate from the approved route. However, this does not prohibit Oncor from making deviations otherwise authorized by this Order. The Commission adds an ordering paragraph to reflect its determination of this issue.

The Commission deletes finding of fact 39 and adds new finding of fact 39A to reflect the total number of habitable structures listed for route 2. The Commission also modifies findings of fact 21, 98, 107, and 108 and conclusions of law 7 and 12 to replace references to the findings in Docket No. 35665[5] with the findings in Docket No. 37928[6] regarding designation of transmission providers to build CREZ transmission facilities and designation of CREZ priority projects.

The Commission adopts the following findings of fact and conclusions of law:

V. Findings of Fact

Procedural History

1. Oncor Electric Delivery Company LLC is an investor-owned electric utility providing service under Certificate of Convenience and Necessity (CCN) No. 30158.

2. On October 28, 2009, Oncor filed its application with the Public Utility Commission of Texas (Commission) to amend its CCN for the Bluff Creek to Brown 345-kilovolt (kV) Competitive Renewable Energy Zone (CREZ) transmission line in Taylor, Runnels, Coleman, and Brown Counties.

3. The proposed Bluff Creek to Brown 345-kV CREZ transmission line in Taylor, Runnels, Coleman, and Brown Counties consists of a new double-circuit 345-kV transmission line

[5] *Commission Staff's Petition for Selection of Entities Responsible for Transmission Improvements Necessary to Deliver Renewable Energy from Competitive Renewable Energy Zones*, Docket No. 35665, Order on Rehearing (May 15, 2009).

[6] *Priority Projects Severed from Docket No. 37902 (Remand of Docket No. 35665 (Commission Staff's Petition for Selection of Entities Responsible for Transmission Improvements Necessary to Deliver Renewable Energy from Competitive Renewable Energy Zones))*, Docket No. 37928, Order on Remand (Feb. 25, 2010).