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APPLICATION OF THE CITY OF	§	BEFORE THE STATE OFFICE
SAN ANTONIO TO AMEND ITS	§	<small>FILED IN CLERK</small>
CERTIFICATE OF CONVENIENCE	§	OF
AND NECESSITY FOR THE	§	
SCENIC LOOP 138-KV TRANSMISSION	§	ADMINISTRATIVE HEARINGS
LINE IN BEXAR COUNTY	§	

CPS ENERGY’S RESPONSE TO STEVE CICHOWSKI’S MOTION FOR REFERRAL OF CERTIFIED ISSUES

COMES NOW the City of San Antonio, acting by and through the City Public Service Board (CPS Energy) and files this response to the motion for referral of certified issues filed by intervenor Steve Cichowski. As set out below, CPS Energy opposes the referral of certified issues to the Commission. The issues raised by Mr. Cichowski are already decided by prior precedent of the Public Utility Commission of Texas (Commission) and there is no basis for referring such issues or for delaying this proceeding. Mr. Cichowski’s request for referral of certified issues should be denied.

I. BACKGROUND

The application in this case was filed more than seven months ago. Under Tex. Util. Code § 37.057, the Commission was required to rule on the application by July 2021. However, consistent with the procedural schedule agreed to the by the parties and ordered by the ALJs, numerous parties made route adequacy challenges and requested modifications to routes. As a result of communications with landowners, particularly Toutant Ranch, Ltd. (Toutant), CPS Energy agreed to make modifications to the application to include revised routes, some of which involved modifications requested by Toutant, occurring wholly on Toutant’s property. CPS Energy agreed to such modifications, but required as part of a contractual agreement (Agreement) that Toutant support the segments containing the modifications.¹ Namely, CPS Energy did not want to make modifications to accommodate Toutant only to have the landowner later complain and oppose the modifications. Such is not an unusual request, as a basic fundamental principle of all compromise agreements is that both parties support the agreement.

¹ The Agreement is attached to Mr. Cichowski’s motion and therefore is not attached to this response.

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Because some modifications, including those requested by Toutant, required amendment of the application, CPS Energy filed an amended application on December 22, 2020, and agreed to a 2-month extension of the one-year deadline for this case.

On March 10, 2021, intervenor Steve Cichowski filed a motion for referral of the following two issues:

1. Should an agreement in a CCN case between the utility applicant and a landowner, requiring the landowner to support certain routes, be void or voidable as a matter of public policy. If so, then should paragraph 5 in the agreement between CPS and Toutant Ranch LTD be void as a matter of public policy, allowing Toutant Ranch to advocate for other routes and donate other right of way?
2. Should an agreement in a CCN case between the utility applicant and an affected landowner, preventing the affected landowner from fully exercising his right to participate in the contested case hearing, be void or voidable as a matter of public policy? If so, then should paragraph 5 in the agreement between CPS and Toutant Ranch LTD be void as a matter of public policy, allowing Toutant Ranch to advocate for other routes and donate other right of way?²

Pursuant to 16 Tex. Admin. Code § 22.78(a) (TAC), responsive pleadings shall be filed within five business days of receipt of the pleading to which the response is made. The fifth business day following receipt of Mr. Cichowski's motion is March 17, 2021. Therefore, this pleading is timely filed.

II. DISCUSSION

Reduced to its fundamental core, Mr. Cichowski's argument is basically that settlement agreements should not be allowed in transmission line cases. While he may argue that is not his position, it is very clearly the practical implication of his proposed certified questions. Any settlement agreement that requires a landowner to support the settlement will limit that landowner's positions in the case—an outcome Mr. Cichowski appears to dislike and argues is “against public policy.” Yet that is what settlements do—they result in agreements that each party must support. Thus, a settlement agreement that results in modifications to routes will result in the applicant offering the modifications as viable routing, and the landowner agreeing to support the routing modifications.

² *Motion for Referral of Certified Issues*, at 1.

There is a long line of precedent from the Commission and the courts supporting settlement agreements that require parties to support a route,³ as well as non-unanimous settlements by parties.⁴ The Commission's rules recognize the ability of parties to reach settlements in cases and recognizes that such settlements may limit the settling party, but cannot limit other parties.⁵ It is a routine practice for parties to reach compromise agreements in transmission line CCN cases whereby the parties agree to support certain routes, segments, or modifications. This is simply not an unusual practice, despite Mr. Cichowski's assertions, and it is not a practice for which clarification is needed from the Commission. The Commission has made clear on many occasions its acceptance of such agreements, even when they require a landowner to support a particular route or segment.

Moreover, in his motion, Mr. Cichowski presents a factual picture very different from what has transpired in this case. Mr. Cichowski paints CPS Energy as strong-arming Toutant to agree to routes and segments and then silencing Toutant from arguing its rights as a landowner. Such could not be further from the truth.

The prefiled testimony of Tom Dreiss on behalf of Toutant sets out the chronology of events that led to the segment modifications made on Toutant's property.⁶ CPS Energy was approached by Toutant to make modifications to accommodate Toutant's intended use of its property. CPS Energy had previously worked with Toutant to make route modifications after the

³ See, e.g., Docket No. 38140, Final Order at Finding of Fact No. 33 (Oct. 29, 2010) ("The proposed transmission line project will be constructed on the settlement route *that the settlement parties of the [non-unanimous stipulation] agreed to support* ") (emphasis added); See also, the Proposal for Decision in that same docket, at page 16, wherein the ALJ noted "With respect to Sheppard AFB, Sheppard AFB *agreed to support the Settlement Route using links D3, E3, F2, and F3a for the Proposed Transmission Line Project . . .*" (emphasis added); see also Docket No. 30659, Final Order at Finding of Fact No. 72 (Apr. 5, 2005) (Noting that 21 of the 24 parties supported the settlement route).

⁴ See *City of El Paso v Public Util. Comm'n*, 883 S.W.2d 179 (Tex. 1994) (upholding the PUC's ability to rely on a non-unanimous stipulation agreed by some parties but opposed by others); *City of Corpus Christi v. Public Util Comm'n of Tex.*, 51 S.W.3d 231 (Tex. 2001) (upholding PUC reliance on a non-unanimous settlement even when PUC did not give the non-settling parties a hearing on the issues); *Office of Pub Util Counsel v Texas-New Mex. Power Co.*, 344 S.W.3d 446 (Tex.App.—Austin 2011, pet. den'd) (affirming PUC's ability to rely on non-unanimous settlement despite opposition from some parties and an ALJ's recommendation to reject the settlement);

⁵ See 16 Tex. Admin. Code § 22.206 entitled "Consideration of Contested Settlements."

⁶ See Interchange Filing No. 557.

open house to address Toutant's concerns.⁷ While CPS Energy believed it had addressed Toutant's concerns regarding the routes across its property, as Mr. Dreiss notes in his testimony Toutant later approached CPS Energy with additional concerns. In the same spirit of cooperation that CPS Energy has with all landowners regarding the routing *on their own property*, CPS Energy was willing to continue to work with Toutant regarding additional modifications.

However, agreeing to Toutant's additional proposed modifications was going to have significant impacts to this case, as the modifications would require amendment of the application and delay this proceeding. Because of this significant impact, CPS Energy agreed to work with Toutant, but needed to ensure that any modifications agreed to would be fully supported by Toutant. Therefore, Toutant agreed, as part of the compromise, to support routing on the modified segments. This is simply a standard part of any settlement—that the parties each support the agreement. Yet, Mr. Cichowski argues it is something unusual and novel and is a reflection of strong arm tactics or bullying by CPS Energy. This is just not true.

Mr. Dreiss has demonstrated his appreciation for CPS Energy's accommodations in his testimony. Although not required under any agreement with CPS Energy, Mr. Dreiss testifies, "I would like to express my appreciation for the time and effort that CPS Energy put into developing the various modifications that were necessary across the Companies' tracts." Such does not reflect a landowner being strong-armed or bullied, because that simply did not occur.

Mr. Cichowski asserts that the settlement agreement with Toutant "fundamentally alters CPS's position in this case, which should be a disinterested applicant arguing that any route can be constructed but taking no side in the determination of which route beyond filing the application with an analysis of what the 'best meets' route is." In fact, CPS Energy's position has not changed at all—it remains entirely disinterested in the route selected and it is ready, willing, and able to construct any of the routes presented in the application (as amended). The settlement agreement merely requires Toutant to support the modifications it requested, and the requirement that Toutant donate property is simply intended to ensure that ratepayers are not later forced to bear the cost of modifications that benefit a single landowner. By requiring these commitments from Toutant, CPS Energy has attempted to maintain its neutrality and such commitments by

⁷ The earlier modifications occurred prior to the application being filed, at a time when community input was being taken and modifications made to address such concerns. Therefore, no formalized agreement was required. However, once the application was filed and notice provided, additional modifications requiring amendment of the application required formalized terms and a formal settlement agreement.

Toutant have not in any way altered CPS Energy's position of neutrality on the routes presented in this case.

Mr. Cichowski also asserts, incorrectly, that the agreement "requires Toutant Ranch to support the route." This is not accurate. As the language of the agreement states, Toutant is simply required to support routing along the modifications it requested be made.⁸ Toutant is not required to support any specific route.

Mr. Cichowski also argues that Toutant was forced to agree to CPS Energy's terms. There is no basis for such assertion. Toutant could have raised its requested modifications in a route adequacy challenge apart from any agreement by CPS Energy and could have sought to get the ALJs to order the modifications desired by Toutant. It did not go that route, but instead approached CPS Energy for such modifications through mutual agreement. At no point did CPS Energy attempt to coerce or force an outcome; rather it simply agreed to cooperatively work with Toutant to make the modifications—a fact clearly reflected in the testimony of Mr. Dreiss on behalf of Toutant—provided that Toutant would agree to support routing on the modifications it requested.

Perhaps most shockingly, Mr. Cichowski makes the following assertion in his motion:

By limiting Toutant Ranch's participation, other intervenors are being denied full and fair participation in this proceeding. The interest of the Toutant Ranch parties should be aligned with several other adjoining Intervenor.

It is not clear how the other intervenors have a legal right to have Toutant share their positions in this case. Such a contention is preposterous. It is ironic that, while accusing CPS Energy of purportedly strong-arming Toutant, Mr. Cichowski argues he has a legal right to their support. Contrary to Mr. Cichowski's desires, Toutant has its own legal counsel that represents it and it has made an informed decision as to the position it wishes to take in this case. No other intervenors have any legal right to expect Toutant to support them in their arguments.

Mr. Cichowski also again raises issues related to Segment 12, a segment that was removed from the application after the open house. As noted in CPS Energy's route adequacy filings, Segment 12 had to be removed because the conservation easement across which Segment 12 was located vested the Army with very clear rights, and the Army did not grant consent to a

⁸ See Paragraph 5 of the Agreement.

segment across the conservation easement. Mr. Cichowski appears to cast doubt on the Army's interest in the conservation easement (see, e.g., his assertion that "It is a matter of record that the Army does not own the Conservation Easement"),⁹ conveniently ignoring the fact that the conservation easement was funded by the Army and contains the following language: **Due to the Army's interest in this Conversation Easement, this Conservation Easement cannot be subject to a condemnation action without the Army's prior consent.**¹⁰

There is no inconsistency in CPS Energy's handling of Segment 12 and its handling of the modifications across the Toutant property. At all times, CPS Energy has been willing to work cooperatively with landowners to minimize impacts on their property when feasible. As demonstrated in the communications cited by Mr. Cichowski, CPS Energy was willing to work with Mr. Cichowski and his homeowners' association to meet with the Army regarding Segment 12, just as it was willing to work with Toutant regarding the segments on Toutant's property. Ultimately, the Army declined such meetings and, to date, has not consented to any routing across the conservation easement in question.

III. CONCLUSION

Although Mr. Cichowski may not like the fact that Toutant reached a settlement agreement and supports routing he does not like, this is simply not a basis for certifying issues to the Commission. Settlement agreements are routine in transmission line cases, and such agreements commonly require a settling party to support a segment or route. The Commission has demonstrated its approval of this practice on many occasions, and the courts have similarly approved such on many occasions. The law in this regard is both clear and settled. Therefore, CPS Energy requests that Mr. Cichowski's *Motion for Referral of Certified Issues* be denied. This case should continue to hearing under the schedule set out in SOAH Order No. 8.

⁹ *Motion for Referral of Certified Issues*, at 7, fn. 2.

¹⁰ See paragraph 17(b) of the Conservation Easement, attached as Exhibit 1 to *CPS Energy's Response to Statements on Route Adequacy*.

Respectfully submitted,

/s/Craig R. Bennett

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ATTORNEYS FOR CPS ENERGY

CERTIFICATE OF SERVICE

I certify that a copy of this document was served on all parties of record on this date via the Commission's Interchange in accordance with SOAH Order No. 3.

/s/Craig R. Bennett

Craig R. Bennett