



Control Number: 51023



Item Number: 750

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April 16, 2021

Via Interchange Filing

Public Utility Commission of Texas
1701 N. Congress Avenue
PO Box 13326
Austin, Texas 78711

APR 16 11:51 AM '21

Re: PUC Docket No. 51023; SOAH Docket No. 473-21-0247 - *Application of the City of San Antonio To Amend its Certificate of Convenience and Necessity for the Scenic Loop 138-kV Transmission Line in Bexar County*

To the Public Utility Commission of Texas:

Attached to this letter is a filing by the City of San Antonio, acting by and through the City Public Service Board (CPS Energy), addressing the legal issues raised by the appeal of SOAH Order No. 10 filed by intervenor Steve Cichowski. CPS Energy believes the appeal is frivolous, as the issue of whether parties to a case can enter settlement agreements that require the parties to take or support certain positions in regulatory proceedings is well-established over decades of prior cases and orders from the Commission. Because of this, CPS Energy did not believe it initially necessary to burden the Commission with an additional filing in light of all the other pressing matters the Commission is currently addressing. However, now that the Commission has added the appeal to the agenda for the May 6th open meeting, CPS Energy finds it appropriate to provide the attached briefing on the issue.

Counsel for CPS Energy will be available at the May 6th open meeting to address any questions the Commissioners might have at that time regarding this matter.

Sincerely,

/s/ Kirk Rasmussen

Kirk D. Rasmussen

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

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

**CPS ENERGY’S BRIEF IN RESPONSE TO
STEVE CICHOWSKI’S APPEAL OF SOAH ORDER NO. 10**

COMES NOW the City of San Antonio, acting by and through the City Public Service Board (CPS Energy) and files this brief in response to the appeal of SOAH Order No. 10 filed by intervenor Steve Cichowski. As set out below, CPS Energy asserts that Mr. Cichowski’s appeal should be denied as the issues raised by him are well-settled by longstanding precedent of the Public Utility Commission of Texas (Commission) and the courts in the State of Texas.

I. BACKGROUND

This case involves an application by CPS Energy for a certificate of convenience and necessity (CCN) for 138-kV transmission line in Bexar County, Texas. 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 Administrative Law Judges (ALJs) of the State Office of Administrative Hearings (SOAH), 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 this response as Exhibit 1.

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 as certified questions 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

On March 26, 2021, the SOAH ALJs issued Order No. 10 which, among other things, denied Mr. Cichowski's request for referral of certified issues. On April 6, 2021, Mr. Cichowski appealed SOAH Order No. 10. On April 14, 2021, the Commission notified the parties that Commissioner Arthur D'Andrea had voted to add the appeal of SOAH Order No. 10 to the Commission's agenda of May 6, 2021. This brief addresses the issues raised by Mr. Cichowski's appeal, so the Commission can properly rule on the appeal.

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

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

result in the applicant offering the modifications as viable routing, and the landowner agreeing to support the routing modifications.

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. Therefore, the SOAH ALJs properly declined to certify the issues to the Commission.

Moreover, in his request for certified issues and his other filings in this docket, Mr. Cichowski has presented 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

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.

property. CPS Energy had previously worked with Toutant to make route modifications after the 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

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.

from Toutant, CPS Energy has attempted to maintain its neutrality and such commitments by 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 Intervenors.

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.

III. CONCLUSION

Although Mr. Cichowski may not like the fact that Toutant reached a settlement agreement and supports routing he does not like, this was simply not a basis for certifying issues

⁸ See Paragraph 5 of the Agreement.

to the Commission and the ALJs properly denied Mr. Cichowski's request. 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 appeal of SOAH Order No. 10 be denied.

Respectfully submitted,

/s/ Kirk D. Rasmussen

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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

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

APPLICATION OF THE CITY OF	§	BEFORE THE STATE OFFICE
SAN ANTONIO TO AMEND ITS	§	
CERTIFICATE OF CONVENIENCE	§	OF
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SCENIC LOOP 138-KV TRANSMISSION	§	ADMINISTRATIVE HEARINGS
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**CPS ENERGY'S BRIEF IN RESPONSE TO
STEVE CICHOWSKI'S APPEAL OF SOAH ORDER NO. 10**

Exhibit 1

Agreement Regarding Agreed Route Modifications and Amendment to Application
CPS Scenic Loop CCN, Docket No. 51023

Parties:

- CPS Energy
- Toutant Ranch, Ltd., Pinson Interests LTD LLP, and Crighton Development Co. (collectively, "Developers")

Background:

- Developers are in the process of developing residential communities in the northwestern portion of the study area, including along proposed Segments 42, 46, 48, and 49. The presence of multiple potential transmission line paths across Developers' property has severely impacted Developers' business such that Developers believe they need relief before litigation will conclude in Docket No. 51023.
- Developers have asked CPS Energy to amend its Application to eliminate one of the four potential transmission line paths that impact Developers' properties. In exchange, Developers are willing to accept the transmission line on their properties, donate additional ROW as necessary to minimize the impact of their requested modifications, and compromise on the proposed condemnation value of any ROW that is not donated pursuant to this or a prior agreement. The proposed modifications will only impact properties that Developers own or control through various development agreements.

Terms:

- 1) **Prior Agreements:** Developers will honor all prior agreements with CPS Energy, independently of the terms of this agreement, specifically with respect to Developers agreement to donate approximately 2,059 feet of ROW on Segment 42 in the location previously agreed upon.
- 2) **Route Adequacy Proposal:** Developers will present a route adequacy proposal on November 24, 2020 requesting CPS Energy be ordered to amend its application in the manner shown on Exhibit A.
 - a) **It is the parties' intention that the changes shown on Exhibit A will only directly impact land owned by one of the Developers. All ROW for new segments or modifications will fall on land owned by one of the Developers, and the centerline of the new segments or modifications will not pass within 300 feet of any habitable structure.**
 - b) The modifications depicted on Exhibit A are as follows:
 - i) **Segment 49a:** Segment 49a will connect Segment 46 to Segment 49. Segment 49a will originate at the northeastern corner of Developers' Tract B-004, and all associated ROW for Segment 49a will be contained within Tract B-004. Segment 49a will head south from Segment 46 to Segment 49, and will include a single angle



- at the southern end to match the existing curve of Segment 49 as Segment 49 heads to the west.¹
- ii) **Partial Removal of Segment 49:** Segment 49 to the east the interconnection with new Segment 49a will be removed. The western portion of Segment 49 will remain as proposed.
 - iii) **Creation of Alternative Segment 46a:** Two angles will be incorporated into Segment 46 to create alternative Segment 46a on Developers' Tracts B-005 and B-007 such that the centerline of Segment 46a will stay at least 300 feet from the boundary of Tract B-013 (the "Reyes Tract") and well over 300 feet from Habitable Structure 15 (the "Reyes Home").
 - iv) **Creation of Segment 42a:** A new Segment 42a will be created to connect the existing node of Segments 41, 46, and 48 directly to existing Segment 42 on Tract B-041 before Segment 42 turns from the northwest to the west. This new segment will travel as straight as possible while retaining all ROW on Developers' property and staying at least 300 feet from any habitable structure.
 - v) **Elimination of Segment 48:** Segment 48, which would be unnecessary following the addition of Segment 42a and the partial removal of Segment 49 will be removed.
- 3) **CPS Energy Agreement to Route Adequacy Proposal:** CPS Energy will file a pleading following the filing of Developers' route adequacy proposal acknowledging the proposal and expressing support and agreement with the changes proposed. CPS Energy agrees, following issuance of an order from the ALJs requiring the proposed adjustments, to amend its Application in Docket No. 51023 to incorporate the modifications depicted on Exhibit A.
 - 4) **Staff Non-Opposition:** CPS Energy's agreement to file in support of the Developers' route adequacy proposal is contingent on Staff expressing support for the proposal, or at a minimum agreeing not to oppose the proposal.
 - 5) **Agreement to Support Routing Options:** Developers² agree to support the Commission routing the line down either Segment 46 Modified (full length) or Segments 46 Modified (partial)-49a-49 (western portion), but do not commit to a position regarding the remainder of the route to the south or east of the eastern node of Segment 46. Developers reserve their right to argue that the Commission should reach Segment 46 Modified by following a path that includes Segment 41.
 - 6) **No Net Cost Increase:** Developers agree to donate additional ROW as necessary to offset any net cost increase that results from Developers' requested modifications. The parties agree that the "net cost increase" will be calculated as follows:
 - a) If the Commission uses Segment 42a-46 Modified (full length):
 - i) The cost of Segment 42a minus the cost of proposed Segments 42 and 48; plus

¹ At its closest point, the centerline of Segment 49a will be approximately 917 feet from the western boundary of Tract B-004.

² As well as all other legal entities owned or controlled by Developers.

- ii) The cost of Segment 46 Modified (full length) minus the cost of proposed Segment 46.
 - b) If the Commission uses Segments 42a-46 Modified (partial)-49a-49:
 - i) The cost of Segment 42a minus the cost of proposed Segment 42; plus
 - ii) The cost of Segment 46 Modified (full length) minus the cost of proposed Segment 46;³ plus
 - iii) The cost of Segment 49a and the portion of Segment 49 to the west of the interconnection with Segment 49, minus the cost of proposed Segment 49.
 - c) If the Commission uses Segment 41-46 Modified (full length):
 - i) The cost of Segment 46 Modified (full length) minus the cost of proposed Segment 46.
- 7) **Maintain Existing Cost Differentials:** Developers agree to donate additional ROW as necessary to maintain the existing cost differential between routes that use Segment 46 and Segment 49.⁴ There are two possible scenarios:
- a) **Scenario 1:** The Commission selects a route that uses a variation of Segment 42.
 - i) In the current Application, starting at the node of Segment 36 and Segment 42, using Segments 42-48-46 costs \$57,133 less than using Segments 42-49.⁵
 - ii) If the Commission selects a route that uses a variation of Segment 42, Developers commit to donating additional ROW as necessary to make the estimated cost of using Segments 42a-46 Modified (full length) \$57,133 less than the estimated cost of using Segments 42a-46 Modified (partial)-49a-49.
 - b) **Scenario 2:** The Commission selects a route that uses Segment 41.
 - i) If the Commission selects a route that uses Segment 41, Developers commit to donate additional ROW as necessary to make the estimated cost of using Segments 41-46 Modified (full length) \$57,133 less than the estimated cost of using Segments 41-46 Modified (partial length)-49a-49.
- 8) **ROW Acquisition:** If the Commission selects a route that uses any of the modified segments shown on Attachment A. Developers agree to provide all necessary ROW across Developers' property (including any necessary access easements) that has not been donated pursuant to this (or an earlier) agreement to CPS Energy without resorting to a contested condemnation process. Developers will agree to provide all necessary, non-donated ROW across Developers' property to CPS Energy at the lower value of (1) \$0.40 per square foot, which is a 20% discount off of CPS Energy's assumed cost of ROW along the segments that impact Developers' property; or (2) the value of the ROW along the segments that impact Developers' property pursuant to an independent appraisal for the property right by an one or more appraisers agreed to by

³ This captures the cost of avoiding the Reyes Tract on 46 Modified (partial).

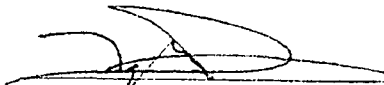
⁴ The magnitude of any associated ROW donation will be determined after CPS develops cost estimates for the new and modified segments described in this agreement.

⁵ This is the difference between CPS's cost estimates for proposed Route Z (Sub 7-54-20-36-42-48-46) and Proposed Route AA (Sub 7-54-20-36-42-49). See Application Attachment 3.

the parties. Additionally, Developers will not seek any recovery for damages to the remainder value of any tracts that are impacted by the transmission line, including where Segment 46 Modified crosses Developers' Pecan Springs Ranch. Unit 3 development on Tract B-005.

- 9) CPS agrees that, consistent with the Commission's final order, if a route is approved by the Commission that includes Segment 42a, CPS Energy will work with Developers to make minor route deviations to Segment 42/42a as appropriate to minimize impacts to Developers' activities in the area.

Signed this 23rd day of November, 2020.

 (Sign)

TAYLOR DREISS (Print)
For Developers

 (Sign)

PAUL BARHAM (Print)
For CPS Energy

