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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 RESPONSE TO
THE MOTION FOR CONTINUANCE**

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 continuance filed by Anaqua Springs Homeowners’ Association (Anaqua Springs HOA), Steve Cichowski, Brad Jauer & BVJ Properties, LLC (collectively, Jauer), The San Antonio Rose Palace, Inc. (Rose Palace) and Strait Promotions, Inc. (Strait Promotions) (collectively, Movants). As set out below, the motion is entirely without merit and should be denied.

I. DISCUSSION

No good deed goes unpunished. It is regrettable and disappointing that Movants elected to proceed in the manner presented in their motion. At best, the pleading represents a fundamental misunderstanding of CPS Energy’s recent clarifying filings. At worst, it represents a deliberate attempt to mislead the Administrative Law Judges (ALJs) as part of Movants’ ongoing efforts throughout this proceeding to use any effort whatsoever to delay this case. Such efforts should not be rewarded by the ALJs.

CPS Energy’s recent clarifications to previously filed discovery responses and the rebuttal testimony of Mr. Scott Lyssy are very simple—they *clarify* CPS Energy’s use of the phrase “right of way” in this docket. CPS Energy’s filings were made out of an abundance of caution and to attempt to avoid confusion at the upcoming hearing on the merits. As was described in the cover pleading to CPS Energy’s April 26, 2021 filing, during preparation of discovery responses to the Jauer fifth set of requests for information, CPS Energy determined a clarification of its use of the term “right of way” was necessary to avoid confusion. Not one

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piece of data in this proceeding relevant to the claims of Movants was changed on April 26, 2021.¹

The facts in this proceeding relevant to Movants' claims are the following:

- CPS Energy's Application in this proceeding, from the date it was filed on July 22, 2020, up to the filing of this Response, *always has and continues to delineate each segment of the routes presented with 100 feet of operational clearance for the proposed transmission line.*² At times, CPS Energy has described this 100 feet of operational clearance as "100 feet of right of way," which it is.³
- CPS Energy's cost estimates in this proceeding, from the date the Application was filed on July 22, 2020, through the filing of this Response, always have and continue to present *estimated costs for acquiring 75 feet of easement width on private property* for all segments adjacent to roadways. CPS Energy has not hidden this fact and has consistently described this fact in discovery responses and Mr. Lyssy's pre-filed Rebuttal Testimony.⁴ At times CPS Energy described the easement areas it will require and obtain from private property owners as "right of way," which it is.
- Other than the segment modifications approved by the ALJs in Order No. 5, *not one foot of the segments presented in the Application in this proceeding have been moved or modified.* The detailed property maps presented as Attachment 6 to the Application and the Attachment 6 amended maps included in the Application Amendment on December 22, 2020, (reflecting only the segment changes ordered in SOAH Order No. 5), have clearly and unambiguously delineated every foot of each

¹ On Friday, April 23, 2021, CPS Energy filed estimated cost data responsive to a request from Bexar Ranch, L.P. Following a call from counsel for Jauer, CPS Energy reviewed the data and discovered a correction was necessary. CPS Energy filed the corrected data before noon on Monday April 26, 2021, the next business day of the Public Utility Commission of Texas. The data correction had nothing to do with Movants' claims in their motion.

² Operational clearance is the area necessary for a transmission line to be operated safely without obstruction. This right of way area can be secured through easements on private property but can also be achieved by crossing or locating adjacent to roadways and using the roadway as a cleared area without trees, houses, or other aerial obstructions.

³ See e.g., *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*, Docket 51023, Application at 6 (referring to CPS Energy's response to Question 6 in the Application) (Jul. 22, 2020).

⁴ See Rebuttal Testimony of Scott D. Lyssy, P.E. at 10 (Apr. 7, 2021).

segment presented in the Application in relation to both roadways paralleled and crossed and the private property adjacent to such roadways.⁵

- Although CPS Energy has continuously sought to evaluate the data presented in the Application and has readily corrected any missing data (e.g., habitable structures or water wells not included in the Application or not identified as habitable), **on April 26, 2021, CPS Energy did not change, correct, or adjust a single measurement presented in the Application, testimony, or discovery responses in this proceeding.**
- Although CPS Energy supplemented several discovery responses and provided an errata to the Rebuttal Testimony of Mr. Lyssy on April 26, 2021, to clarify its use of the term “right of way,” **CPS Energy did not modify or change a single number, measurement, or data point previously provided in the Application, Amended Application, testimony, or discovery responses.**

Not one aspect of Movants’ preparation for this proceeding changed with CPS Energy’s filing on April 26, 2021. Except, perhaps, that Movants are now better informed of CPS Energy’s clear intentions in this proceeding. Namely, for portions of some segments, as has been apparent from the property maps included as Attachment 6 to the Application since the filing of the Application, CPS Energy intends to use a portion of road right of way for achieving the 100 feet of operational clearance (right of way) necessary to safely operate the proposed transmission line facilities. Because CPS Energy can and intends to utilize road right of way for the necessary clearance, it was appropriate for the cost estimates presented in this proceeding to reflect an anticipated acquisition cost of less than 100 feet of right of way *on private property*. CPS Energy’s discovery responses and Mr. Lyssy’s rebuttal testimony have not been changed on this point.

Contrary to Movants’ assertions, CPS Energy *has not changed the right of way to 75 feet in some areas*. In fact, Movants cannot point to a single filing or supplement in which CPS Energy misstated its intentions or changed the right of way width that it anticipates in this proceeding. Rather, CPS Energy has *clarified* that in some areas less than the necessary 100 feet

⁵ Compare, for example, Sheet 8 of Attachment 6 to CPS Energy’s Application filed on July 22, 2020, with Exhibit SDL-3R attached to the errata to Mr. Lyssy’s Rebuttal Testimony filed on April 26, 2021, showing the location of Segment 54 along Toutant Beauregard Road in the exact same location.

of the right of way to operate the proposed facilities will be obtained through private property easements *because CPS Energy will utilize existing road right of way for the remaining clearance necessary to safely operate within 100 feet.* In fact, a number of the discovery responses that Movants complain of are those in which CPS Energy originally clarified (and clarified further in its supplemental responses) that CPS Energy was intending to operate the proposed facilities with 100 feet of right of way (clearances) and not the 75 feet claimed in the questions.⁶ CPS Energy's response to Jauer's second set of requests for information (RFI) is particularly descriptive of CPS Energy's intentions. As originally filed on February 11, 2021, CPS Energy's response to Jauer RFI 2-2 stated:

. . . In some areas along road right of way, CPS Energy may be able to utilize narrower than typical rights-of-way *or may be able to utilize up to 25 feet of the road right-of-way for the clearances necessary to safely operate the transmission line facilities* (emphasis added).

In light of this RFI response from February 2021, it is not clear how Movants can assert that CPS Energy told them that it "was not going to use road right-of-way."⁷ That is simply not true. Rather, Movants misunderstood that CPS Energy's intention to construct and operate the proposed transmission line facilities with 100 feet of right of way meant that CPS Energy would acquire 100 feet of easement on private property. Movants were incorrect. They either misunderstood or are attempting to misrepresent CPS Energy's intention to operate the proposed facilities within 100 feet of right of way. They assumed, incorrectly, that meant CPS Energy would not use road right of way for some of the necessary 100 feet of clearance. CPS Energy's stated intent to use 100 feet of right of way clearance for the proposed transmission line facilities was true in July 2020,⁸ it was true in January and February 2021,⁹ and it remains true today.¹⁰

⁶ See, e.g., CPS Energy's Response to Anaqua Springs HOA's Second Request for Information (referencing CPS Energy's responses to RFIs 2-5 and 2-7 through 2-12) (Jan. 22, 2021).

⁷ Movants' Motion for Continuance and Other Relief and Notice of Issue at Open Meeting at 1 (Apr. 27, 2021).

⁸ See Application at 6 (referencing CPS Energy's response to Question No. 6 in the Application) (Jul. 22, 2020).

⁹ See CPS Energy's Response to Anaqua Springs HOA's Second Request for Information (referencing RFIs 2-5 and 2-7 through 2-12) (Jan. 22, 2021); see also CPS Energy's Response to Jauer's Second Requests for Information (referencing RFI 2-2) (Feb. 11, 2021).

¹⁰ See CPS Energy's Supplemental Response to Anaqua Springs HOA's Second Request for Information (referencing RFIs 2-5 and 2-7 through 2-12) (Apr. 26, 2021); see also CPS Energy's Second Supplemental Response to Jauer's Second RFI (referencing Jauer RFI 2-2) (Apr. 26, 2021).

Because CPS Energy attempted to *clarify* that a portion of the necessary 100 feet of right of way would be utilized through roadway clearances, Movants claim all manner of injustices, prejudices, and material changes to CPS Energy’s Application.

It is simply false (and disappointing) that Movants misrepresent both the record and discussions with counsel regarding CPS Energy’s intentions. ***CPS Energy has always indicated that it anticipated using road right of way when it could.***¹¹ Mr. Lyssy’s Rebuttal Testimony filed three weeks ago made this clear:

As I have examined each segment for the Project for preliminary structure spotting, the 75 feet of right of way would likely assume the pole line is centered 25 feet from the edge of the road right of way and utilize the roadway for the additional 25 feet of clearances for the Project. Thus, the pole placement would still utilize 100 feet of transmission line clearances (75 feet on private property and 25 feet of clearances in the road right of way).¹²

Movants also assert in their motion that “In that call [occurring last week] between counsel and another that followed, the Jauer Parties’ counsel was informed, for the first time, that CPS would be using 75-foot right-of-way *and* road right-of-way.”¹³ This is shocking because, in addition to the rebuttal testimony noted above (filed three weeks ago), ***more than two months ago*** CPS Energy responded to discovery responses from Jauer, stating:

CPS Energy cannot yet identify where pole structures will be located nor whether narrower than anticipated right-of-way may be required along some portions of those segments, particularly along road rights-of-way. In some areas along road rights-of-way, CPS Energy may be able to utilize narrower than typical rights-of-way ***or may be able to utilize up to 25 feet of the road right-of-way for the clearances necessary to safely operate the transmission line facilities.***

* * *

CPS Energy delineated all route segments presented in this proceeding with a 100 foot right-of-way. ***In determining reasonably anticipated costs to construct several of the segments proposed along road rights-of way, however, CPS Energy’s real estate experts assumed a narrower right-of-way acquisition would be required (75 feet).*** Thus, there were not specific or particular constraints

¹¹ Rebuttal Testimony of Scott D. Lyssy, P.E. at 9–10 (Apr. 7, 2021).

¹² *Id.* at 10:12–19.

¹³ Movants’ Motion for Continuance and Other Relief and Notice of Issue at Open Meeting at 3 (Apr. 27, 2021).

related to utilizing a reduced right-of-way cost estimate, rather *it was based on location adjacent to existing road rights-of-way*.¹⁴

The idea that CPS Energy has somehow “sprung” this concept on the Movants is not supported by the facts.¹⁵ The proposed intent of using road right of way for the necessary operational clearance, when possible, has been consistent throughout this case and Movants knew this more than two months ago. Rather, the only thing that has “changed” is simply CPS Energy’s *clarification* that its use of the term “100 feet of right of way” encompasses, in some areas, an intended use of the road right of way to achieve 100 feet of operational clearance. This is particularly true along a portion of Segment 54 where Movants have expressed particular interest—which is why CPS Energy felt compelled to clarify its intended routing in that area.¹⁶ Even then, however, CPS Energy has been consistent throughout this process that the preliminary pole locations and use of road right of way as identified were not “set,” and were subject to the wording of a final Commission Order.

To be clear, CPS Energy remains firmly committed to its consistently stated intent to use 100 feet of clearance for the proposed project segments. The only recent “change” is CPS Energy’s “clarification” that not all of the necessary 100 feet of right of way will come *from private property owners* in some areas along Toutant Beauregard Road in order to attempt to correct what it believed was a misunderstanding by Movants. This has always been CPS Energy’s position, which is why CPS Energy’s cost calculations reflected that CPS Energy anticipated acquiring only 75 feet of right of way from private property owners, even though 100 feet of right of way was proposed for the safe operation of the proposed facilities. This fact has been known by all parties for months. CPS Energy will not pay for use of the road right of way for clearance purposes; thus, in areas where road right of way is used for the necessary

¹⁴ CPS Energy’s Response to Jauer’s Second Requests for Information at 4–5 (referencing the response to RFI 2-2) (Feb. 11, 2021) (emphasis added).

¹⁵ Perhaps, in retrospect, it was a mistake for CPS Energy’s counsel to attempt to “do the right thing” and alert Jauer’s attorney on Friday afternoon that CPS Energy was (based on preparation of discovery responses for Jauer’s fifth RFIs) evaluating whether supplemental discovery responses and testimony errata were necessary to clarify CPS Energy’s intended right of way requirements—so as to not surprise the Movants with the filing on Monday. Counsel for CPS Energy further attempted, during a late night call on Sunday evening with Jauer’s attorney, to explain the nature of CPS Energy’s intended clarifying filing on Monday and that CPS Energy was willing to work with Jauer and the other Movants to accommodate their review of the clarifications, including, as described in the cover pleading, allowing the Movants to address any aspects of the clarifications during the presentation of CPS Energy’s rebuttal case. Unfortunately, Movants elected to proceed with their motion.

¹⁶ See CPS Energy’s Errata to the Rebuttal Testimony of Scott D. Lyssy, P.E., Exhibit SDL-3R (Apr. 26, 2021).

clearances, the real estate acquisition costs are lower because less than 100 feet of right of way is being acquired from private property owners. CPS Energy's recent clarifications describe its consistent intent. Thus, the recent filings did not require and did not result in a change to the cost estimates that have been previously presented in this proceeding.

To be abundantly clear, *the segment locations proposed by CPS Energy have not changed, the amount of clearance that will be used for the segments (100 feet) has not changed, and the locations of habitable structures or directly affected properties with respect to those segments have not changed. Not a single measurement, data point, or cost estimate was changed in CPS Energy's recently filed clarifications.* There simply have been no meaningful changes as a result of CPS Energy's updated rebuttal testimony and discovery responses. To wit, all of Movants' time and dollars laboriously spent preparing for the hearing based on CPS Energy's original Application materials and cost estimates, previously filed discovery responses, and testimony have not been in any way altered by CPS Energy's clarifications. As such, Movants are free to explore any assumptions, measurements, and constraints at the upcoming hearing on the merits they believe feel are relevant to CPS Energy's proposed routing. CPS Energy's clarifications do not fundamentally change any material issue in this case and are not a basis for delaying this proceeding.

Put simply, Movants attempt to make a mountain out of a molehill in an apparent attempt to delay this proceeding. There is no scintilla of a basis for delay and the hearing should continue as scheduled.

CPS Energy does, however, agree that, to the extent the hearing is not concluded prior to May 6, 2021, it should be recessed on May 6, 2021, to allow the parties to observe the Commission's open meeting at which Mr. Cichowski's appeal will be addressed. Such recess can be addressed during the hearing on May 5, 2021, at which time the parties should have more information regarding where the item will fall on the Commission's agenda.

II. CONCLUSION

In conclusion, CPS Energy requests that the motion for continuance be denied. CPS Energy also requests that Movants' other requested relief be similarly denied, with the exception of the request for a brief recess on May 6, 2021, for observation of the Commission's open meeting. CPS Energy supports such a recess.

Respectfully submitted,

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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/ Kirk D. Rasmussen

Kirk D. Rasmussen