Control Number: 51023

Item Number: 819

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

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	§ § § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

CPS ENERGY'S SUPPLEMENTAL 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 supplemental brief in response to the appeal of SOAH Order No. 10 filed by intervenor Steve Cichowski. As demonstrated herein and in CPS Energy's initial brief, Mr. Cichowski's appeal should be denied.

I. DISCUSSION

A. Summary

Although the issues had previously been briefed by the parties, the appellant, Mr. Cichowski, recently filed a reply brief that completely mischaracterizes CPS Energy's arguments, makes false, inflammatory accusations, and attempts to mislead the Commissioners. Therefore, CPS Energy finds it necessary to file this supplemental brief to fairly and accurately depict the evidence in this case and CPS Energy's arguments in this appeal.

This appeal involves a simple and straightforward issue: may parties to a contested case hearing reach settlement agreements that bind each of them? For decades, the Public Utility Commission has concluded the answer is clearly "yes," as the authorities cited in CPS Energy's initial response brief demonstrate. But now Mr. Cichowski would have the Commissioners find that an agreement by a landowner ***to support a modification it requested*** is against "public policy" because it limits that party's right to take certain legal positions. This argument is incredulous in light of decades of legal precedent recognizing parties' rights to release claims, waive legal arguments, and contractually bind themselves to support certain positions. That is the very nature of settlement agreements in litigation.

Mr. Cichowski's reply to CPS Energy's response brief is littered with inflammatory accusations that attempt to paint a picture of CPS Energy acting like a mob boss strong arming landowners into accepting a route that CPS Energy desires in this case. None of Mr. Cichowski's accusations have any factual support. Rather, the evidence demonstrates that CPS Energy acted as an accommodating public utility, working with a landowner at the landowner's initiation and request to make route changes that benefitted the landowner.[1] In exchange, CPS Energy simply required that landowner to support the routing modifications it requested. Rather than address the critical issue presented by this appeal—whether landowners can request modifications that benefit them and then be allowed to turn around and argue against those modifications—Mr. Cichowski instead tries to argue that CPS Energy did not address the issues he raised. Specifically, Mr. Cichowski asserts:

> CPS energy devotes the entirety of its brief addressing issues not raised in the appeal in an attempt to mold the issue into something it is not. The actual issue on appeal is not whether the parties to these proceeding can enter into settlement or modification agreements, but rather, can CPS use its condemnation leverage to prevent a party to such an agreement from advocating, prior to a final route selection by the Public Utility Commission, for a Route that is already a part of the Application but not on his property. CPS never addresses this issue.

First, there is no evidence to support the baseless and spurious assertion that CPS Energy used "condemnation leverage" to prevent a party from advocating a route. To the contrary, the evidence indisputably shows that Toutant Ranch, Ltd. (Toutant) approached CPS Energy to request route modifications in this case and CPS Energy accommodated the request. Moreover, CPS Energy has not required Toutant to support a particular route, but only support routes using the segments on Toutant's own property. Toutant has filed testimony in the underlying proceeding demonstrating this, as well as a statement regarding this appeal further showing this and reflecting Toutant's belief that it remains free to not oppose other routes. But, instead of relying on the actual evidence, Mr. Cichowski creates a false narrative that does not match any reality in this case. And then he accuses CPS Energy of not addressing the substance of his appeal.

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[1] The Commissioners need only review Interchange Filings 557 and 751, reflecting the settling landowner's positions in this case, to see that Mr. Cichowski's allegations have no factual support.

To the contrary, CPS Energy did directly address the issue raised by Mr. Cichowski's appeal, citing numerous prior cases where the Commission found it entirely appropriate for intervenors to enter into settlement agreements whereby they agreed to "support" a particular route or segment. If the Commission has found such actions to be appropriate and acceptable many times in the past, then such clearly is not "against public policy." Moreover, this is also supported by the Commission's own rules, which allow landowners to consent to transmission lines on their property. Mr. Cichowski's contentions, if accepted, would essentially nullify transmission line settlements in the future, as any party would be able to challenge a utility's ability to enter into an agreement with another landowner to support any particular route. Such an outcome should not be allowed by the Commission.

B. Mr. Cichowski's Reply Presents Legally and Factually False Arguments.

In his reply, Mr. Cichowski offers three reasons why the settlement agreement in this case is against public policy.[2] Each of those arguments is factually false and legally unsupported.

First, Mr. Cichowski makes the bald assertion that an agreement requiring a landowner to support a particular route "contravenes the legislative intent that all landowners fully participate in these proceedings and advocate for routes not impacting their property."[3] This is an absurd depiction of the legislative intent in these types of cases. There is no legislative intent whatsoever that landowners advocate for NIMBY – "not in my back yard." Mr. Cichowski cites no support for this concept because there is none. Rather, the legislative intent, as demonstrated by the notice requirements in PURA,[4] is that landowners have the opportunity to have their voices heard. Ironically, in this case, Mr. Cichowski seeks to contravene this intent—by nullifying the choices made by Toutant to have its voice heard and its desires put into effect.

Second, Mr. Cichowski argues that the settlement agreement "undermines the Commission's position that all landowners are on equal footing by preventing full participation by the restrained party and mooting the participation of other parties by pitting them against CPS

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2 Mr. Cichowski's Reply and Request for Oral Argument, at 2-3. (Mr. Cichowski states "Paragraph 5 of the Agreement violates public policy and should be declared void for the following reasons" and then proceeds to identify three enumerated reasons. Each is addressed herein.).

3 Mr. Cichowski's Reply and Request for Oral Argument, at 2.

4 *See* Tex. Util. Code §37.054.

and its proxy advocate, the coerced landowner."[5] This is utterly false. As noted in (1) CPS Energy's initial response brief on appeal, (2) Toutant's statement on appeal, and (3) the evidence on file in this docket, CPS Energy has coerced no one. Toutant approached CPS Energy for modifications to route segments. Moreover, Toutant is not CPS Energy's "proxy advocate." The undisputed evidence demonstrates that CPS Energy has no preferred route or segments in this case.[6] It will readily accept any route the Commission chooses. Mr. Cichowski continually asserts this is not true, but all of the evidence contradicts his bald assertion. To be clear: **CPS Energy favors no route in this case**. The settlement agreement of which Mr. Cichowski complains is simply intended to ensure that Toutant supports the modifications it requested. CPS Energy does not favor any route using segments on Toutant's property and any statement to the contrary by Mr. Cichowski has **zero support in the record**. It is simply false and intended to mislead the Commissioners.

Lastly, Mr. Cichowski alleges that the settlement agreement "allows CPS to use its unrestrained threat of condemnation to go from a neutral observer to an advocate for its preferred route to the prejudice of all affected landowners along that route."[7] Again, as noted above, this contention has no factual support as CPS Energy has no preferred route in this case. Moreover, there is no evidence whatsoever that CPS Energy made any threats of condemnation, let alone to induce any action by Toutant. This is a figment of Mr. Cichowski's imagination, one which is contradicted by the evidence in this case, including the testimony of Toutant's principal, Tom Dreiss, which reflects that Toutant approached CPS Energy for changes to routing and does not see itself as a strong-armed innocent party, but a sophisticated party that negotiated for its business interests.[8]

C. The Commission has Recognized a Party's Ability to Agree to Accept Transmission Facilities.

Mr. Cichowski alleges that CPS Energy has mischaracterized his position. He then states his argument as this: "what is against public policy is the requirement that, once made, the

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5 Mr. Cichowski's Reply and Request for Oral Argument, at 2.

6 Rebuttal testimony of Adam Marin, at 4:13-16. (Interchange Filing No. 726).

7 Mr. Cichowski's Reply and Request for Oral Argument, at 3.

8 Testimony of Tom Dreiss on behalf of Toutant, at 5-7. (Interchange Filing No. 557).

landowner party must support the line on his/her land."[9] If the landowner does not agree to support routing on the modifications it requests, then it is not clear what consideration it can offer when it approaches a utility for route modifications that result in potential additional cost and delay. The obligation represented in Toutant's agreement with CPS Energy—about which Mr. Cichowski complains—is not a novel one. The Commission's rules clearly and unequivocally recognize a landowners' right to agree to take a transmission line on its property.[10] It is completely incongruous to argue that a landowner can agree to take a transmission line on its property (guaranteeing it will receive a transmission line), but cannot agree to support a route that uses a transmission line segment on its property (resulting in only a possibility it will receive a transmission line). Such is simply nonsensical. In fact, if Mr. Cichowski's position were accepted, it is not clear that landowners could ever agree to accept a transmission route on their property (indeed, if their mere "support" of the use of their land is against public policy, then surely their agreement to actually allow the use of their land is against public policy as well!).

Mr. Cichowski also makes the incorrect assertion that "Every Final Order, Proposal for Decision, and Appeals Court Opinion CPS cites deals with the enforceability of pre-decision agreements after a final route has been proposed by the ALJs and/or accepted by the Commission. The enforceability of pre-decision agreements, including the one at issue here, is not the subject of this appeal."[11] This argument shows a fundamental misunderstanding of administrative law. Decisions in contested case hearings cannot be appealed to the courts until the parties have exhausted their administrative remedies. Thus, parties challenging those settlement agreements in the cases cited by CPS Energy could not have their enforceability decided until after the Commission had rendered a final decision. But, the agreements in those cases are similar to the agreement challenged by Mr. Cichowski here.

For example, in Docket No. 38140, Final Order at Finding of Fact No. 33 (Oct. 29, 2010), the Commission noted that "The proposed transmission line project will be constructed on the settlement route that the *settlement parties of the [non-unanimous stipulation] agreed to*

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[9] Mr. Cichowski's Reply and Request for Oral Argument, at 4.

[10] *See, e.g.,* 16 Tex. Admin. Code §§ 25.101(c)(5)(B)(ii); 25.101(c)(5)(C)(ii); 25.101(c)(5)(D)(ii); and 25.101(c)(5)(E), among others. Each of those provisions allow landowners to consent to receive transmission facilities on their own property.

[11] Mr. Cichowski's Reply and Request for Oral Argument, at 7.

support . . ." That case involved a non-unanimous stipulation, so it involved an agreement by some parties to support a route even when other parties did not agree. Further, in that case, the United States Air Force entered into an agreement similar to that entered into by Toutant in this case. Specifically, the Administrative Law Judge noted there that "Sheppard AFB agreed to support the Settlement Route using links D3, E3, F2, and F3a for the Proposed Transmission Line Project . . ."[12] That is no different than this case, where a landowner has agreed to support certain segments, even though other parties do not. Thus, even the federal government has engaged in the actions that Mr. Cichowski now claims are "against public policy."

It is clear that the types of agreements of which Mr. Cichowski complains are routine in the utility regulatory space.[13] 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. These sorts of agreements are efficient and they allow for transmission line cases to be settled frequently. Removing a requirement that a party actually support routing modifications it requests will put an end to such settlements, as a utility will have little incentive to reach agreements in which the other party has no obligation to support the modifications it requests. 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 and Mr. Cichowski's appeal should be denied.

II. 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 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

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12 Docket No. 38140, Proposal for Decision, at 16.

13 *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). 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).

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/ Craig R. Bennett

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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
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