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SOAH DOCKET NO. 473-23-21357  
DOCKET NO. 55114

APPLICATION OF TEXAS-NEW	§	BEFORE THE STATE OFFICE
MEXICO POWER COMPANY TO	§	
AMEND ITS CERTIFICATE OF	§	
CONVENIENCE AND NECESSITY	§	OF
FOR THE PROPOSED PILOT POINT	§	
138-KV TRANSMISSION LINE	§	
PROJECT IN COLLIN, GRAYSON	§	
AND/OR DENTON COUNTIES	§	ADMINISTRATIVE HEARINGS

**ROUTE 11 INTERVENORS' EXCEPTIONS TO PROPOSAL FOR DECISION**

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APPLICATION OF TEXAS-NEW MEXICO POWER COMPANY TO AMEND ITS CERTIFICATE OF CONVENIENCE AND NECESSITY FOR THE PROPOSED PILOT POINT 138-KV TRANSMISSION LINE PROJECT IN COLLIN, GRAYSON AND/OR DENTON COUNTIES	§ § § § § § § §	BEFORE THE STATE OFFICE      OF      ADMINISTRATIVE HEARINGS
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**ROUTE 11 INTERVENORS' EXCEPTIONS TO PROPOSAL FOR DECISION**

**TO THE HONORABLE COMMISSIONERS AND ADMINISTRATIVE LAW JUDGES  
("ALJs"):**

Route 11 Intervenor, Sennett Kirk, Trustee, of the Clayton D. Skiles and Claire Elizabeth Skiles Trust ("Skiles Trust"); Four Seasons Ranch, Ltd. ("Four Seasons"); Gene McCutchin Ltd III and The Gene McCutchin 2015 Living Trust ("McCutchin Family"); and Pilot Point Independent School District ("Pilot Point ISD"), timely file their Exceptions to the November 7, 2023, Proposal for Decision in this docket (the "PFD") and would respectfully show as follows:

**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

**A. Overview**

The PFD errs in selecting Route 11, rather than Route 4, because:

- The estimated cost of Route 11 is substantially greater than that of Route 4—significantly greater on the undisputed facts in the record than even the PFD credits. Based upon an estimated cost of right-of-way acquisition crediting TNMP's estimations of potential condemnation proceedings, the evidence shows that the estimated cost of Route 4 is between [BC]<sup>1</sup> [REDACTED] [EC] less than Route 11.
- Route 4 and Route 11 at 42 and 27 habitable structures, respectively, are both high performers in the gross number of structures affected by the multitude of alternative routes offered in the Application, which range from a low of 15 habitable structures affected to more than 125.
- The choice of Route 11 over Route 4's modestly higher number of habitable structures would cost between [BC] [REDACTED] [EC] or more

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<sup>1</sup> The Route 11 Intervenor will use the designations "[BC]" and "[EC]," respectively, to indicate the beginning and end of confidential content, which will be redacted in the public version of these exceptions.

- Route 11's relatively higher degree of paralleling, 92% to 74% (18%), is outweighed by Route 4's much shorter length. Route 4 is 3.25 miles, or more than 21%, **shorter** in length than Route 11.

[BC]

[illegible]

**B. Applicable Standards and Summary of Argument.**

**SOAH Docket No. 473-23-21357**  
**PUC Docket No. 55114**  
**Route 11 Intervenor's Exceptions to PFD**

n.r.e.)(internal quotation marks omitted). As the court held in *Dunn v. Public Utility Commission of Texas*, “The plain language of [PUC Proc. R. § 25.101(b)(3)] grants the PUC the authority to consider and weigh a variety of factors—engineering constraints, costs, grid reliability and security, along with the criteria in PURA section 37.056. . . . No one factor is dispositive.” 246 S.W.3d 788, 795 (Tex. App.—Austin 2008, no pet.).

But among the factors the Commission has determined are most important are costs and the impact of the line upon the people across whose land the transmission line will cross, quantified in part by the numbers of habitable structures affected, but moderated by the Commission’s policy of prudent avoidance, which is defined as “[t]he limiting of exposures to electric and magnetic fields that can be avoided with reasonable investments of money and effort.”<sup>2</sup> See Docket No. 30168, *Application of TXU Delivery Company to Amend a CCN for a Proposed Transmission Line within Jack, Wise and Benton Counties, Texas*, Final Order at 2. The decision in this Docket, as was the case in Docket No. 30168, is dominated by the estimated cost of competing routes, the numbers of habitable structures and the costs of avoiding them, and the length of right-of-way required. These factors differentiate certain routes—particularly Route 4—from others, including Route 11. Because other factors under consideration are different in only minor ways, this case is largely controlled by three factors—the estimated costs of competing routes; the Commission’s policy of prudent avoidance—including appropriate consideration of the economic cost of avoiding the marginal difference in structures; and length of the proposed routes.

**C. Cost considerations overwhelmingly support Route 4, not Route 11.**

As the PFD correctly determines, the Applicant, Texas-New Mexico Power Company (“TNMP”) **“failed to provide a consistent methodology across all routes” in estimating the cost of right-of-way acquisition, the dominating differential component of cost in this case, leading to the ALJs’ recommendation that “TNMP’s ROW acquisition cost estimates [not be used] when evaluating the cost of routes in this case.”** PFD at 33. Whether or not the failure to file a consistent, reliable, good-faith estimate of costs is a deficiency in the as-filed Application and TNMP’s direct case

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<sup>2</sup> P.U.C. SUBST. R. § 25.101(a)(6).

that merits denial of the CCN amendment (the Route 11 Intervenor contend that it is<sup>3</sup>), the record supports a determination that Route 4 be selected and that the Commission not adopt the ALJs' recommendation that Route 11, the costs of which are prohibitively higher than those Route 4, be selected.

The record reflects that TNMP's engineers manipulated TNMP's estimated right-of-way ("ROW") acquisition cost, which is the dominating factor in TNMP's estimated costs. TNMP did so by choosing a wholly unjustified and unjustifiable, rounded, averaged number from somewhere within the range of data TNMP's outside experts provided for only one "zone" of routes TNMP evaluated—the "Blue Zone," from PPOI H at an existing substation in Aubrey to Pilot Point. The record is clear that TNMP, having no internal expertise in evaluating the cost of right-of-way acquisition, nevertheless disregarded the multi-layer, detailed analysis its outside experts provided to improperly accommodate a single landowner/intervenor and to materially diminish the apparent—not real—economic viability of Blue Zone routes. The record is also clear that TNMP undertook extraordinary efforts to avoid producing data relevant to this analysis to the intervenors, Commission Staff, and their witnesses. Fortunately, the credible evidence in the record, albeit obtained via intervenor testimony and cross-examination of TNMP witnesses and intervenor

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<sup>3</sup> In briefing to the ALJs after the hearing on the merits, the Route 11 Intervenor urged the ALJs to deny the Application, because despite being submitted as a sworn application, the record reflects, first, that TNMP did not file nor advocate uncorrupted evidence of right-of-way acquisition costs—among the largest components of estimated costs TNMP was obliged to prove. The record unequivocally supports the proposition that TNMP provided what it has acknowledged were right-of-way acquisition cost data not guided solely by professional opinions, but forced upward in one corridor and forced downward in all others to pacify one landowner allegedly following one meeting between that landowner's lawyer and TNMP's President—a meeting that was not disclosed in the Application or anywhere else until a vague reference in TNMP's rebuttal testimony days before the hearing on the merits. Even then, the content of the meeting was not disclosed in whole or in part until cross-examination of TNMP's engineer in the hearing on the merits. TNMP's data, as presented in its Application and in its testimony, is inherently unreliable and should not be considered as support for approval of the Application.

The ALJs generally agreed with this proposition in issuing the PFD. The Application and TNMP's direct case, therefore, contain no credible evidence of estimated costs, and TNMP's Application should be denied.

For the Commission not to take a stance on this case is to permit CCN applicants to devise the route they want, to manipulate the costs to support it, and to face no consequences. Specifically, if estimated costs at the time of filing are to be substantive and meaningful to the Commission's decision on routing, they must be provided in good faith and with sufficient support to provide the parties, the ALJs, and the Commissioners with a basis for comparison of what has become one of the most meaningful determining factors in CCN cases, the estimated cost of competing routes. TNMP did not provide a basis for decision, and its Application should be denied.

witnesses, is compelling that the cost differential among routes overwhelmingly supports Route 4.

1. The ALJs in the PFD correctly recommend that the Commission disregard the Application's estimations of ROW acquisition costs.

As the PFD finds, the Applicant did not “apply a consistent methodology across all routes,” but instead manipulated the costs in response to a single meeting between its President and a landowner. PFD at 33. In fact, the record shows that the ROW acquisition costs reflected in the Application were corrupted by unsupportable revisions that unreasonably subordinate the expert valuations that TNMP obtained. Why were the expert valuations manipulated? Because of direction given to TNMP staff as the output of a meeting between a single landowner and the President of TNMP was “a data point [TNMP engineers] could not ignore.”<sup>4</sup> TNMP demonstrated no principled basis for its manipulation of the data, and the ALJs rightly recommend that it be disregarded.

2. The math is compelling.

As the product of its meeting, TNMP multiplied its estimates of the cost of one corridor of routes—the corridor that includes Route 4—by a factor of [BC] [REDACTED] [EC] times or, under the cost model TNMP claims to have used, **by calculating those costs as if more than [BC] [REDACTED] [EC] of the landowners in that corridor would force condemnation proceedings.** For the “Blue Zone” landowners, TNMP literally calculated its estimates of ROW acquisition value as if **every landowner would sue it** [BC] [REDACTED] [REDACTED]. [EC]

By contrast, for all other corridors, including the corridors dominating the cost of Route 11, TNMP estimated for ROW acquisition purposes that **zero landowners would oppose the taking of their property.** The results of TNMP’s manipulations of the ROW cost-estimation process yielded values for Route 11 that were tens of millions of dollars too low, and values for Route 4 that were tens of millions of dollars too high.

3. Zero-condemnation values for Route 11, which the PFD credits, are unsupported in the record, and the costs that are supported by evidence are substantially higher.

Even under the PFD’s flawed selection of a substitute BPO cost estimate, the

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<sup>4</sup> Tr. (Aug. 24) at 270 (O’Brien).



selection of Route 11 over Route 4 will cost [BC] [REDACTED] [EC] more in total. But more, using assumptions that TNMP built into its cost model regarding the likelihood of condemnation proceedings on all routes, the selection of Route 11 will yield an estimated cost of ROW acquisition alone that is [BC] [REDACTED] [EC] higher than the cost of ROW acquisition for Route 4 under the same methodology. All in, the cost of Route 11—even under the TNMP assumptions—is [BC] [REDACTED] [EC] higher than Route 4.

**D. The Commission's policy of prudent avoidance is best met with Route 4, not Route 11.**

"Prudent avoidance," being the Commission's policy of "limiting . . . exposures to electric and magnetic fields *that can be avoided with reasonable investments of money and effort*," PUC PROC. R. § 25.101(a)(6) (emphasis added), provides for a balancing of the numbers of habitable structures a line may directly affect against the costs of avoiding them. The multitude of routes offered in the Application include counts of habitable structures ranging from a low of 15 to a high of 129. Both Route 4 and Route 11 affect well below the average number of habitable structures of the routes in the Application. See TNMP Ex. 1, TNMP Ex. 1A (Confidential), which contain routing data, habitable structure counts. The low and relatively comparable numbers of habitable structures each competing route affects, and the high cost of accommodation in comparison to Blue Zone routes, makes clear that Route 4 best meets the Commission's prudent avoidance policy.

Specifically, when cost estimates taking into account the level of condemnation proceedings TNMP actually anticipates are employed in its model, the true cost of prudent avoidance overwhelmingly favors Route 4, not Route 11, because the credible evidence of the cost of avoiding the 15 additional habitable structures establishes that it will cost [BC] [REDACTED] [EC] *for each additional structure avoided*.

**E. All Blue Zone routes are shorter than others offered in the Application, and Route 4 is nearly the shortest, being more than 3.25 miles or more than 21% shorter than Route 11; this difference on balance best meets the Commission's standards for length and paralleling.**

Notwithstanding TNMP's apparent disregard of means of mitigation, which,

ironically (or strategically), would also make Route 4 materially shorter, materially less costly, and materially less impactful of the land it crosses, Route 4 is among the very shortest of routes offered in the Application and far shorter than Route 11.<sup>5</sup> Moreover, while Route 11 has a relatively higher degree of paralleling, 92% to 74% for an 18% difference, Route 11's paralleling is outweighed by Route 4's much shorter length. Route 4 is 3.25 miles, or more than 21%, **shorter** in length than Route 11. As a result of their shorter spans and other environmental factors, the Blue Zone routes, including Route 4, are supported in the Texas Parks & Wildlife Department's analysis.

\* \* \*

At bottom, while Route 4 passes a modestly larger number of habitable structures than Route 11 and some other routes, its very low costs and substantially shorter length yield a result that not only satisfies the Commission's prudent avoidance policy, but also satisfies the Commission's environmental, aesthetic, and community values criteria on par with other routes costing far, far more. The Commission should modify the PFD and approve Route 4.

## II. ARGUMENT AND AUTHORITIES

### A. Issues Relating to the Application

#### 1. Public Input (Preliminary Issue No. 4); PFD Findings of Fact at 63.

##### a. Argument.

The record evidence in this case establishes that public input into the Application was an exercise in futility, unless a member of the public had access to the TNMP C Suite.<sup>6</sup> TNMP's Application and prefiled testimony is driven by its unadulterated

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<sup>5</sup> The lengths of the "Blue Zone" or "5E" routes are shorter by far even by the measurements in the Application, but when unmarred by inexplicable routing that makes those routes as unattractive as possible in the context of this Docket, they become materially shorter and less costly using simple landowner accommodations and geometry. Not only do 5E routes become less expensive than already portrayed by reducing their length, multiple right-angle turns can be removed, reducing the cost of any such route by \$200,000 per turn. See *generally* Tr. (Aug. 23) at 66:14-67:1 (O'Brien).

<sup>6</sup> Tr (Aug. 24) at 270 (O'Brien):

Q Right. So the one landowner that could get into see the CEO and tell them they really hated it, they got the budget jacked up over 500 percent for land acquisition for the entire area, not just their part, but the entire area of their part of the study area. Right?

A The entirety of the blue zone was increased.

Q The whole length?

preferences for “Blue Zone” landowners. Indeed, the undisputed influence of one specific Blue Zone landowner upon the pre-Application process and the right-of-way acquisition cost analysis underlying TNMP’s Application is so contaminating that the ALJs found that the Application and TNMP direct case testimony fail to constitute credible evidence of one mandatory element of TNMP’s case, namely that the Application establishes a true estimated cost of the proposed line, regardless of its route. PUC PROC. R. § 25.101(b)(3)(B); TNMP Ex. 1, Application at ¶13, Att. 25; PFD at 33-34.

Moreover, after the Application was filed, TNMP’s apparent bias drove it to advocate—not merely describe or provide credible data regarding—routing alternatives that are markedly more expensive than the Blue Zone routes. TNMP went still further to attempt crush through the use of disparate litigation tactics any party opposing Route 11 or inquiring into TNMP’s cost estimates. When the Route 11 Intervenor dared to inquire into TNMP’s obviously unreliable right-of-way acquisition cost numbers, TNMP undertook actions to conceal its disreputable data and to punish the intervenors by imposing unmerited discovery upon the Route 11 Intervenor—and the Route 11 Intervenor alone; frivolously objecting the the testimony of witnesses for the Route 11 Intervenor; requiring the Route 11 Intervenor’s presence at the hearing on the merits for cross-examination, but requesting no other intervenors<sup>7</sup>; and, performing generally useless cross-examination when the Route 11 Intervenor appeared.

Each of these tactics required Route 11 Intervenor to incur otherwise unnecessary attorney’s fees and costs. And, while the bulk of TNMP’s abuse was directed at the Route 11 Intervenor, its discovery abuse extended directly to intervenor 10,000 Celina Road and derivatively to all intervenors who would have been privy to real, timely cost data in the absence of such abuse. These issues did not in the end preclude the construction of a record proving that Route 4, not Route 11, should be selected. But no

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A Yes.

Q Okay. So sounds like getting in to see the CEO before the filing is a pretty important step if you're a potentially affected landowner in a TNMP case, isn't it?

A I would say it is a data point that we could not ignore.

<sup>7</sup> E Real Estate’s witness Mark Turnbough is on TNMP’s list, but it apparently waived him.

party should be subjected to the abuse TNMP heaped upon the Route 11 Intervenors and no one else.

Only in TNMP's Rebuttal Testimony of Michael O'Brien filed days before the hearing on the merits did TNMP provide a glimpse into why it withheld the data: the right-of-way acquisition cost data had been manipulated for the "Blue Zone" to reflect the undue influence of one landowner pursuant to his visit with the President of TNMP. TNMP Ex. 10 at 9:10 (O'Brien). In doing so, TNMP effectively cost-estimate immunized the primarily-Blue Zone alternative routes, including Route 4, against any reasonable prospect that any routes in that corridor would be selected as meeting the Commission's cost standards—unless the real data were uncovered.

b. Proposed Additional Findings of Fact.

The Commission should adopt the following additional findings of fact, which are supported in the record:

**FOF 24a. One intervenor—alone among intervenors—arranged a pre-Application-filing meeting with the TNMP President to discuss its unwillingness to accept the line. At the hearing on the merits, no TNMP witness had knowledge of how the meeting was arranged, when it occurred, who was present (other than "representatives" of the landowner and the TNMP President), or what was discussed—other than the landowner's alleged threat not to settle, but to require condemnation proceedings, if the project was constructed on its property.**

**FOF 24b The result of that landowner/TNMP President meeting was that the team evaluating costs was instructed to increase the values of the "Blue" zone of routes. Based upon the TNMP President's instruction, the "Brokers Price Opinion" value of the Blue Zone was multiplied by [BC] [REDACTED] [EC], while no other zone was modified.**

2. TNMP's Proposed Alternative Routes; PFD at 64.

The PFD sorts the parties into supporters or non-opposers of Route 11, the route the ALJs recommend. PFD at 65. Commission Staff and others are listed as favoring Route 11. But primary among Staff's criteria for recommending Route 11 is its argument that "Route 11 is the least costly of all proposed alternative routes." PUC Staff Brief at 11 (citation omitted). Staff, like all intervenors, did not have timely access to the right-of-way cost information. And, now, the ALJs have agreed that the Application's cost data is

unreliable. Neither Staff nor any other intervenor undertook the cost analysis the Route 11 Intervenor performed in cross-examination of the TNMP witnesses, and none analyzed the actual data on which the PFD relies for its cost determination and examination of other cost-related criteria, such as “prudent avoidance.”

Additional Findings of Fact should be adopted, including:

- FOF 38a.** Of course, no party who supports or does not oppose Route 11 is directly affected by it. The same is true of those who support or do not oppose Route 4.
- FOF 38b.** While not all supporters or non-opposers of Route 11 were cross-examined, Staff was subjected to a brief cross-examination on its position on the routes—and costs, in particular. Staff, on cross-examination, stated that it had not studied the cost data the Applicant provided, but accepted it at face value. Specifically, Staff did not review the cost data that the ALJs found credible, the Market Study and Budget Study, or their impacts on the estimated costs of routes, before testifying in support of Route 11.<sup>8</sup>
- FOF 39a.** However, Route 4 may affect one or more intervenors in ways that may be mitigated through modifications to segments that straighten or shorten them, potentially further reducing the already low cost of Route 4.

The following findings of fact should be amended to read as follows:

- FOF 40** Route 4 presents an appropriate balance of routing factors and no negative attributes exist that could not be addressed with mitigation, the application of best-practice engineering design and construction methods, or minor modifications to routing.
- FOF 41** Route 4 best meets the applicable routing criteria and should be approved.

And, **FOF 42, 43, 44, and 45 should be deleted**, because they are relevant only to routes in which PPOI A is used. PPOI A is a component of Route 11, not Route 4, which uses PPOI H, and discussion of modifications to PPOI A is surplusage.

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<sup>8</sup> Tr. 195-197 (Aug. 24)(Roelse).

**B. Routing Criteria (Which Transmission Line Route is the Best Alternative, Weighing the Factors in PURA § 37.056(c) and PUC Subst. R. § 25.101(b)(3)(B) (Preliminary Order Issue Nos. 8, 9))**

**1. Cost of Alternative Routes.**

The Route 11 Intervenor has contended through the development of the record that the proposed transmission line should be built, if at all, on a route in “Blue Zone” portions of the Study Area, and in particular, on Route 4. The record in this Docket—in contrast to the conclusion reached in the PFD—supports that proposition.

**a. A proper analysis of estimated costs leads to Route 4, not Route 11**

The ALJs, having correctly found that TNMP presented no credible evidence of the cost of ROW acquisition, determined that the only evidence in the record of the cost of ROW acquisition comes in the form of the Market Study and Budget Study TNMP’s outside real estate professionals, O’Brien Right-of-Way Valuation (“OBRWW”),<sup>9</sup> produced for TNMP (collectively, the “Real Estate Studies”). The Route 11 Intervenor offered the Real Estate Studies into evidence as Exhibit R11-13C (Confidential) (“Market Study”) and Exhibit R11-12C (Confidential) (“Budget Study”) (Excel format) during cross-examination of TNMP’s engineering witness, Michael O’Brien.

On cross-examination of TNMP’s witness, Mr. O’Brien, as well as other intervenor-presented experts, the Real Estate Studies were worked in combination with TNMP’s cost study, TNMP Exhibit 1, Attachment 4, produced in complete, unredacted form late as a discovery response and admitted as Exhibit R11-10C (Confidential) (also admitted as TNMP Exhibit 12A (Confidential))(Excel format).<sup>10</sup> Aside from the Route 11 Intervenor’s and other parties’ cross-examination of Mr. O’Brien, and the exhibits used with that witness and others, there is no credible evidence in the record of the cost of ROW acquisition. See PFD at 33-34; FOF 72.

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<sup>9</sup> TNMP sponsored no O’Brien Right of Way Valuation witness, but Michael O’Brien testified about the documents and their uses.

<sup>10</sup> See Exhibit R11-10C (Confidential), also admitted as TNMP Exhibit 12A (Confidential), TNMP’s Response to E Real Estate Group RFI 2-2 (Confidential).

The record on cross-examination of TNMP's Mr. O'Brien, including the use of the Excel versions of the Real Estate Studies, established the following facts regarding TNMP's "analysis" of ROW acquisition costs it submitted with the Application:

- i. OBRWW produced the Market Study as [BC] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] [EC] See Ex. R11-13C (Confidential) at 3 (also admitted as TNMP Ex. 12B (Confidential) (Response to E Real Estate Group's RFI 2-5.1)). [BC]  
[REDACTED]  
[REDACTED]  
[EC] *Id.* The "Market Study" was a market study of real estate, not a potential condemnation award study.
- ii. Without in-house expertise in ROW acquisition costs,<sup>11</sup> TNMP nevertheless chose four routes composed of proposed links that TNMP decided without the guidance of OBRWW were exemplary of the real estate zones of the Study Area. TNMP designated the northernmost portion of the Study Area the "White" Zone, the middle portion of the Study Area the "Yellow" Zone, the southeastern portion of the Study Area the "Red" Zone, and the western portion of the Study Area the "Blue" Zone. See TNMP Ex. 10, O'Brien Rebuttal at 8-9; Ex. R11-11 (TNMP Res. E-RE RFI 2-4); Exhibit R11-10C (Confidential), Tab "Real Estate" (TNMP Cost Estimation Spreadsheet); Exhibit R11-12C (Confidential) (the Budget Study). TNMP has not disclosed the basis of its selection of zones.
- iii. Leveraging the data it presented in the Market Study, OBRWW produced an analysis of ROW acquisition values for TNMP's four "zones" based upon a set of assumed steps for ROW acquisition, including condemnation, which OBRWW called the "Budget Study." Ex. R11-10C (Confidential). The

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<sup>11</sup> Tr. (Aug. 23) at 73:3-8; 74:17-25; 82:3-83:22 (O'Brien) (O'Brien acknowledges that TNMP has no in-house expertise in ROW valuation, but relied entirely on OBRWW for the data and model necessary to estimate those costs).

Budget Study, which estimated the cost of ROW acquisition for each “zone,” resulted in four possible cost levels for each exemplar route and zone, depending upon where in the ROW acquisition process the easement was purchased:

- A) “Broker Price Opinion.” Based upon historical sales reflected in the Market Study, the Budget Study’s “BPO” represented [BC] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]. [EC] See Exhibit R11-12C (Excel version) (Confidential) at Tab “Inputs,” which provides for an adjustable level of “Estimated Litigation Rate.”
- B) “Possible Landowner Attorney Counter” or “LOA.” TNMP has represented that it would engage in “good faith” negotiations with landowners the acquisition of whose land is necessary for TNMP’s easements. TNMP Ex. 6, O’Brien Direct at 26:10-11. OBRWW’s “LOA” estimate is essentially [BC] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] [EC] See Exhibit R11-12C (Confidential); Tr. (Aug. 23) at 108:8-20 (Confidential).
- C) “50% Budget from Special Commissioners’ Hearing (‘SCH’).” The SCH value is [BC] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]



[REDACTED]  
[REDACTED] [EC].

D) "Concluded Budget Estimate at Litigated Rate" or "CBE". The CBE is [BC] [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] [EC].

iv. In addition to testifying on cross-examination that TNMP did, in fact, expect a significant degree of condemnation proceedings to arise in the context of ROW acquisition, TNMP cost estimates provided that it anticipated approximately [BC] [REDACTED] [EC] in condemnation costs. See, e.g., Exhibit R11-10C (Confidential) at Tab 4. On cross-examination, TNMP acknowledged that it estimated attorney's fees and expenses for condemnation proceedings would arise in acquisitions from [BC] [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] [EC]. Mr. O'Brien testified, and TNMP's estimated cost spreadsheet, which provided the basis for the cost estimates used in the Application states, that TNMP expected condemnation litigation in not [BC] [REDACTED] [EC] of the ROW acquisitions as the OBRWV Budget Model suggested, but [BC] [REDACTED] [EC] of them. Tr. (Aug. 23) at 126:20-129:1 (O'Brien).

Specifically, Exhibit R11-10C (Confidential), produced late in discovery, after intervenor direct was filed, is the TNMP Cost Estimate Spreadsheet. The TNMP Cost Estimate Spreadsheet contains the values TNMP used in its Application. See TNMP Ex. 1 and TNMP Ex. 1A (Confidential). The TNMP Cost Estimate Spreadsheet provides, in part, for each route, [BC]

[REDACTED]

[EC]

The use of BPO—willing-buyer/willing-seller, ordinary-market values—for the estimation of ROW acquisition costs defies OBRWW’s judgment, TNMP’s own estimation of the probability of litigation, and common sense. Literally no one thought or testified that any appreciable portion of TNMP’s ROW would be acquired through willing-buyer/willing-seller transactions. Instead, the record supports the use of estimates using a far-greater-than-zero condemnation factor.

No evidence supports the PFD’s use of the BPO, willing-buyer/willing-seller ROW acquisition values, which assume [BC] [REDACTED] [EC] percent of the ROW will be acquired through condemnation.<sup>13</sup> While using the same valuation methodology for all routes is

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<sup>12</sup> See TNMP Ex. 1A; Ex. R11-10C (Confidential), TNMP Res. to ERE-TNMP RFI 2-2 Alternative Route Costs, e.g., Tabs 4 (entirely Blue Zone), 11 (part in White, Yellow, and Blue Zones); Tr. (Aug. 23) 128:18-130:1 (O’Brien)(Confidential).

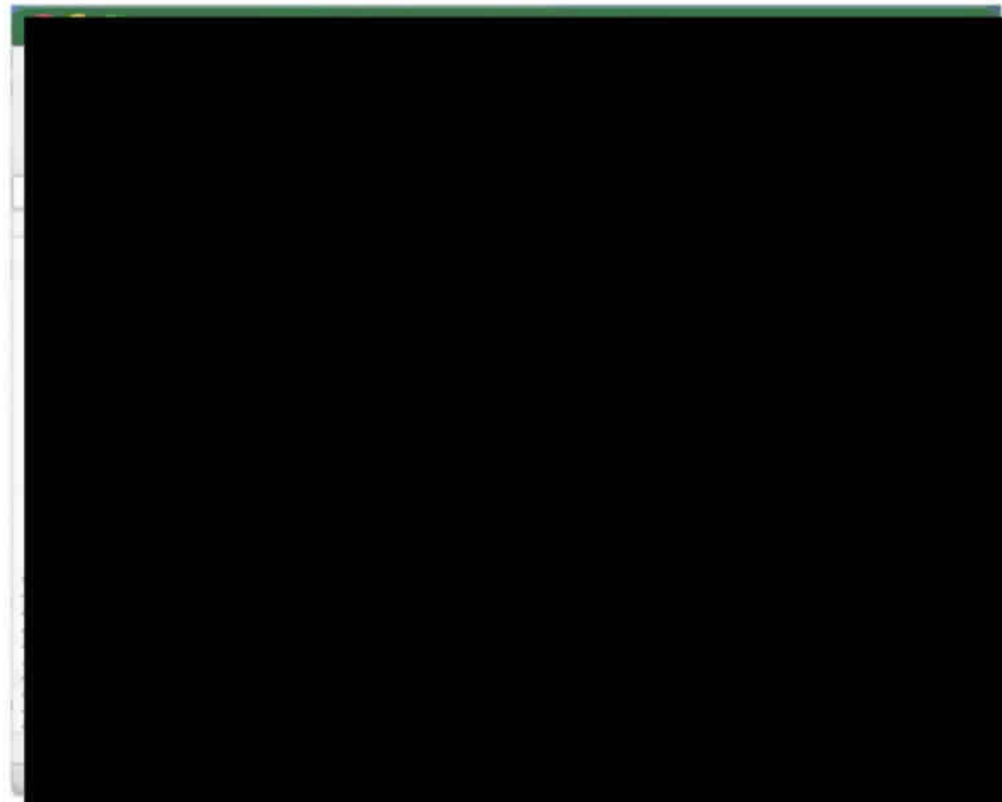
<sup>13</sup> The PFD incorrectly suggests that Chris Barnard, a witness for the Route 11 Intervenor, endorsed the use of the BPO estimates of values in this case. It is true that Mr. Barnard testified that using the BPO estimates of value yielded a very large marginal cost difference that causes Route 11 not to be the lowest-cost route, but far more costly in ROW acquisition costs alone. See Exhibit R11-2C (Confidential) at 3. In terms of “agreement” with OBRWW’s analysis overall, PFD at 26, Mr. Barnard did not opine solely on the quality of the Real Estate Studies’ estimation of the BPO; instead, Mr. Barnard opined that “Although I have some disagreements with *OBRWW’s analysis of the zones or corridors*—as reflected in my Direct Case testimony, some values attributed to routes are higher than they should be, some are lower, some are about right—they consist, on the whole, of a reasonable evaluation of the real estate market in the region comprising the Study Area.” *Id.* at 7 (emphasis added).

Mr. Barnard specifically criticized what TNMP did with OBRWW’s Real Estate Studies, both in terms of how they manipulated the values OBRWW found for the specific zones—and particularly TNMP’s vast inflation of “Blue Zone” values in an otherwise generally homogenous real estate market—as shown in the Market Study. *Id.* at 7-9; see also Exhibit R11-13C (Confidential). Mr. Barnard analyzes and criticizes what TNMP did using OBRWW’s numbers; he does not endorse TNMP’s numbers or any analysis derived of them, but reaches the conclusion that TNMP’s analysis is highly manipulated, and that when properly analyzed, the Blue Zone routes—Routes 1-8—are materially less costly on the ROW acquisition side—and sufficiently less costly overall to make the estimated cost of Blue Zone routes far less costly even using a willing-buyer/willing-seller set of values. *Id.* at 12-15 (Confidential). On the whole, however, the record reflects that the BPO values are not the proper values to use to estimate the cost of ROW acquisition. The record on proper method of estimation arose, if at all, in the hearing on the merits and the cross-examination

“consistent,” PFD at 33, FOF 72, there is no evidence that the ROW will be acquired in 100% voluntary sales. To the contrary, OBRWV used a [BC] [REDACTED] [EC] litigation rate based upon its Budget Study methodology as the default valuation method—its “Concluded Budget Estimate” or “CBE.” And, other levels of condemnation proceedings underpinned other parts of TNMP’s cost estimate, portrayed in Exhibit R11-10C (Confidential), and should be used as the basis of TNMP’s cost estimates, if any numbers in the record may be used at all.

The following tables reflect the TNMP cost-model-calculated, TNMP-anticipated condemnation values TNMP actually expected:

[BC] [REDACTED]



[REDACTED] [EC]

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of TNMP witness O'Brien and other witnesses—and from the mechanisms of the Real Estate Studies and the TNMP Cost Estimation Spreadsheet.

[BC]

[REDACTED]

[REDACTED]

[EC]

As was established on cross-examination of TNMP witness O'Brien, TNMP chose a number it felt good about for the Blue Zone values of [BC] [REDACTED] [EC] per square foot of easement acquired. Tr. (Aug. 23) at 254:8-16, 255:8-17 (O'Brien) (Confidential). But while TNMP chose an arbitrary figure for its Blue Zone budgeting, it simultaneously budgeted for condemnation litigation based upon entirely different assumptions. Specifically, for the TNLP Cost Estimate Spreadsheet, Exhibit R11-10C (Confidential) to provide estimated costs for all routes "consistently" with TNMP's adjustment to Blue Zone routes, ***the condemnation rate must be ratcheted up to over*** [BC] [REDACTED] [EC] the rate that would apply if ***every parcel*** were subject to condemnation.

That is, to equalize the ROW acquisition valuation methodology for the White, Yellow, and Red Zones to that used in the TNMP cost study to that used for the Blue Zone requires the use of a [BC] [REDACTED] [EC] litigation rate. As Figure 4 shows, use of that formula "consistently" yields a cost of ROW acquisition for Route 4 of [BC] [REDACTED] [EC]—

slightly below TNMP's sworn estimate—but also yields a cost of ROW acquisition for Route 11 of [BC] [REDACTED] [EC]. The total cost of Route 11 balloons from [BC] [REDACTED] [EC] as provided in the Application to [BC] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [EC]

“Consistency” unstaked to ROW acquisition expectations is not an appropriate standard to apply to the cost estimate; rather, the decision should rest upon the Market-Study-based model OBRWV built, using TNMP's expectations about condemnation proceedings for inputs. When the data is reviewed in that light, Route 11 becomes tens of millions of dollars more costly than Route 4.

- b. Intervenor witnesses' and PUC Staff's analysis of cost and other factors is a product of TNMP's misleading data and discovery abuse, and to the extent that they support Route 11, that support is the product of disinformation.

Intervenor experts who recommended Route 11 did so in reliance upon the cost data filed with the Application. Ex. E-RE 2, Turnbough Direct at 8:19 (reviewed Application Att. 4 "Total Estimated Costs"); 12:10-16 ("considerations unique to the TNMP cost analysis"); 14:6-7, 23 ("Route 11 has the lowest total estimated cost of the 109 alternative routes . . ."); 10,000 Celina Road Ex. 1, Andrews Direct at 9:1-7; 19:9-20:14; Venable Ex. 2, Hughes Direct at 6:20; 9:5-11; 10:2, 17; 11:3-7; 12:18-23; 13:4-16; Vol. 2 Tr. 115:15-118:15 (Hughes).

All of these witnesses—all parties and witnesses—were misled.

As set forth above, the relevant cost data was improperly masked and withheld, despite discovery directly addressing it—until **after** intervenor direct testimony was filed and **after** intervenor discovery of TNMP's direct case was closed. While on cross-examination, intervenor witnesses acknowledged that the estimation of right-of-way acquisition and total costs should have been calculated consistently, they also acknowledged that they were not. Tr. (Aug. 24) 99:4-100:25 (Andrews)(Confidential). Further, intervenor witnesses also acknowledged that the "credible evidence" now supports the proposition that the Blue Zone routes are likely substantially less costly than other zones. Vol. 2 Tr. 130:15-131:21 (Hughes). At bottom, none of these witnesses reviewed cost estimations untainted by TNMP's unjustified and unjustifiable manipulations in preparing their prefiled testimony.

The PUC Staff witness, too, testified that he had not reviewed the detailed cost data or evaluated the Market Study, the Budget Study, or the detailed right-of-way acquisition cost information built into the overall cost estimates at the time he provided his testimony. Staff Ex. 1; Vol. 2 Tr. 197:3-200:3 (Roelse). Staff's opinion that Route 11 is somehow superior to Route 4 or other Blue Zone routes, to the extent evaluated, is infected with TNMP's manipulated data and is, in fact, incorrect.

- c. Changes to Findings of Fact.

Additional or modified Findings of Fact should be adopted, including:



- FOF 67. OBRWV performed a parcel-by-parcel examination of each tract underlying the four exemplary routes. OBRWV produced a Budget Study that provided four separate estimates for each parcel: (1) the Broker Price Opinion, which is the lowest value, and is based formulaically upon an assumption of no condemnation proceedings; (2) the Possible Landowner Attorney Counter, which is the highest value; (3) 50% Budget from Special Commissioners' Hearing, which is the average of the first two estimates; and (4) the Concluded Budget Estimate at Litigated Rate. OBRWV then calculated the average price per square foot using each of these four methods for each of the routes.
- FOF 68. Based on the Budget Study, but compelled by the outcome of a meeting between the TNMP President and a single, "Blue Zone" landowner, a meeting that was not disclosed in the Application or anywhere else until TNMP rebuttal testimony was filed days before the hearing on the merits, TNMP selected a price per square foot for each exemplary route and applied that price per square foot to the remaining routes in the applicable Zone. Where some routes cross more than one Zone, the price per square foot applicable in the Zone is applied to the portion of the route located in that Zone.
- FOF 70. For the routes in the Blue Zone, which are Routes 1 to 8, the Application used \$8.00 per square foot as the cost of right-of-way acquisition, which is closer to the Possible Landowner Attorney Counter, the highest valuation for the Blue Zone.
- FOF 73. Consistently applying the Broker Price Opinion estimates in OBRWV's Budget Study to all Zones is one method for estimating the ROW values for the proposed transmission line routes, but use of that value, which no evidence supports, results in the lowest differential in cost among route options and fails to reasonably estimate the costs of ROW acquisition.
- FOF 74. The appropriate cost estimates to consider for the routes in issue are, under TNMP's estimated rates of condemnation, [BC] \$72.5 million for Route 4, \$72 million for Route 5, and \$85.5 million for Route 11, [EC] using a 50% litigation factor. Under a 75% litigation factor, the cost estimates rise to [BC] [REDACTED] [EC]

## 2. Community Values, Impact to Residences/Prudent Avoidance; PFD at 73

As the Commission's definition provides, "prudent avoidance" is "[t]he limiting of exposures to electric and magnetic fields that can be avoided **with reasonable investments of money and effort**."<sup>14</sup> The PFD fails to properly analyze the Commission's policy of "prudent avoidance" by failing to recognize that Route 4 is materially shorter—3.25 miles shorter—than Route 11 and by failing to account for the cost of avoiding the 15 habitable-structure difference between Route 11, with 42, and Route 4, with 27. The PFD simply disregards the second half of the definition of "prudent avoidance."

Nothing in PURA § 37.056(c) or the Commission's rules suggests that the absolute numeric count of habitable structures along the preferred or alternative routes trumps the other factors. If that were the case, thousands of pages of prefiled testimony and exhibits, the two days of live hearings on routing issues that so many parties attended, the transcript, and the reams of admitted exhibits serve absolutely no purpose. Here, it is clear that Route 4 best meets the policy of prudent avoidance and the balance of factors overall.

Other intervenors' witnesses agree with the principle. Hal Hughes, a Venable witness, testified that the data sometimes presents "showstoppers." While Mr. Hughes identified no "showstoppers" among the various criteria to be considered in his direct or cross-rebuttal testimony, he was provided neither the Market Study, the Budget Study, nor an Attachment 4 Cost Estimate that reflected the OBRWW data. On cross-examination, Mr. Hughes testified that if the cost differential between the Blue Zone and the other zones was as the testimony on cross-examination at the hearing on the merits had credibly portrayed it, the cost factor "would certainly require more careful analysis" as a potential showstopper. Tr. (Aug. 24) at 130:15-131:13; 138:4-19 (Hughes). Indeed, as Mr. Hughes conceded, the credible evidence reflects that Route 11 is underestimated in Attachment 4 by about [BC] [REDACTED], [EC] and Route 4 is overestimated by at least [BC] [REDACTED], [EC] for a total swing in costs of about [BC] [REDACTED] [EC]—an amount

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<sup>14</sup> P.U.C. SUBST. R. § 25.101(a)(6) (emphasis added).



far above Mr. Hughes' threshold for making Route 4 "competitive." Tr. (Aug. 24) at 132:2-133:12.

Moreover, Mr. Hughes conceded that the Commission has a limit on what may be spent in ratepayer dollars to avoid habitable structures. In Mr. Hughes' view, an amount exceeding "a hundred or [\$]200,000" per habitable structure avoided would exceed his threshold—and likely the Commission's—barring extraordinary circumstances. Tr. (Aug. 24) at 122:18-125:6 (Hughes). Here, Mr. Hughes conceded both that no such extraordinary circumstances are known, and a figure "two or three or four" times \$100,000-\$200,000 would be excessive under Commission precedent. ***Here, the cost of avoiding each additional habitable structure between Route 11 and Route 4*** [BC] [REDACTED] [EC]. See Ex. R11-10C (Confidential). Avoiding those structures is not prudent.

Within the Study Area, there are many affected habitable structures, and accommodation where feasible and economical comports with Commission policies. But because of the rapidly developing nature of both the Four Seasons property and the newly acquired Pilot Point ISD campus property, reconsideration of Route 11 and the selection of Route 4 is important for the promotion of longstanding Commission policies, including prudent avoidance.<sup>15</sup>

The Commission should, therefore, adopt the following Findings of Fact, or amend Findings in the PFD to read as follows:

**FOF 100. Route 4 affects 42 habitable structures; Route 5 affects 45 habitable structures; and Route 11 affects 27 habitable structures.**

**FOF 101. Routes 4, 5, and 11 all affect comparatively few habitable structures as among the alternative routes offered, and as such each closely**

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<sup>15</sup> See Ex. R11-4, Direct Testimony of Shula Netzer for Four Seasons at 3:4-4:5, 4:11-5:7; Ex. R11-6, Direct Testimony of Harold Colson, PhD, for Pilot Point ISD at 4:4-10, 5:24-6:10. Specifically with respect to the Four Seasons development, the undisputed testimony is that the development is advancing through the development of a municipal utility district, engineering, and other activities all undertaken before the TNMP project became public. The Four Seasons project is "shovel ready." Moreover, this proposed line was not publicly disclosed when Pilot Point ISD spent \$6.3 million in local taxpayer dollars to purchase the site for a future campus. And, while there is some question about how badly the proposed line affects the campuses, there is no doubt that, at a minimum, it cuts a corner off of the property, making a significant portion of the land less accessible. The presence of the transmission line that TNMP proposes over the campus, in particular, evokes the concern that teachers, parents, and most importantly, students, will be unnecessarily exposed to electromagnetic fields and other potential dangers.

aligns with the community's desire to avoid residential areas and subdivisions and limit the impact on countryside aesthetics and view in rural areas from residences.

**FOF 106a** Even under the "Broker Price Opinion" valuation of the cost of ROW acquisition, an estimation unsupported in the record, the selection of Route 11 over Route 4 would impose an incremental cost of [BC] [REDACTED] [EC] or more than [BC] \$414,000 [EC] per incremental affected habitable structure. Under the ROW acquisition estimates supported by TNMP's own projections of anticipated condemnations, with [BC] [REDACTED] [EC] percent of acquisitions requiring condemnation proceedings, the incremental cost of the 15 additional habitable structures exceeds [BC] [REDACTED] [EC] and is likely greater than [BC] [REDACTED] [EC] per structure. These costs greatly exceed the Commission's historical tolerance of allowing some expenditures to avoid structures.

**FOF 107** Route 4 performs better than than Route 11 regarding prudent avoidance, because while Route 4 affects incrementally more habitable structures than Route 11, the cost of avoiding the additional structures is unacceptable under the Commission's prudent avoidance policy.

3. Additional Routing Criteria, including Route Length and Paralleling ROW and Property Boundaries

The data on route length and paralleling is conflicting. First, it is undisputed that Route 4 is 3.25 miles or more than 17,000 feet shorter than Route 11. It is also undisputed that Route 11 parallels an existing transmission line for approximately one mile. All in, Route 11 parallels about 18% more of its length along "compatible corridors and apparent property boundaries." But Route 11 is also more than 27% longer overall than Route 4 (or, Route 4 is more than 21% shorter than Route 11). Literally, if Route 4 is selected, 3.25 miles of land will not have to bear the transmission line at all—whether parallel to another linear structure or not. Route 4 better meets the Commission's standards and should be selected.

The PFD's Findings of Fact should be reformed to reflect these facts:

**FOF 132a.** Route 11 is, however, 3.25 miles—or more than 27%—longer than Route 4 (or, Route 4 is more than 21% shorter than Route 11).

**FOF 133.** While Route 11 performs better than Routes 4 and 5 with regard to using or paralleling existing compatible ROW and property, it is substantially longer than Routes 4 or 5.

**FOF 134. Particularly given that it is substantially shorter than Route 11, Routes 4 and 5 use or parallel existing compatible ROW and property boundaries to a reasonable extent.**

**4. Additional or Modified Conclusions of Law, Ordering Paragraphs.**

To conform the Conclusions of Law and Proposed Ordering Paragraphs to the discussion above and to the modified Findings of Fact, if the Application is not denied, the following conclusion of law and ordering paragraph should be amended or added:

**COL 11. Construction of the transmission line on Route 4 is necessary for the service, accommodation, convenience, or safety of the public within the meaning of PURA § 37.056(a).**

**Ordering ¶ 2. The Commission amends TNMP's CCN No. 30038 to include the construction and operation of the transmission line along Route 4, which utilizes PPOI H and comprises the following links: 5E-5G-5U-6O-6K-5H-5D-5W-5K-5L-5M-2Y-2Z. The new transmission line will connect the proposed Pilot Point substation, a new load-serving electric substation in Pilot Point, Texas, to the 345/138-kV Aubrey switching station that Brazos Electric Power Cooperative.**

**III. CONCLUSION**

TNMP's Application should be denied and its request for amendment of its CCN refused for failure to provide credible estimated costs of ROW acquisition data with the Application or in its direct case. If TNMP's Application is not denied, the credible evidence in the record of this case supports the selection of Route 4, not the so-called "best meets" route TNMP put forward. The Route 11 Intervenor, therefore, alternatively support approval of Route 4 as the best route under the factors set forth in TEX. UTIL. CODE ANN. § 37.056(c)(4) and provided in PUC SUBST. R. § 25.101(b)(3)(B). For all of the reasons proven in the record and set forth in this brief, Route 11 Intervenor respectfully recommend that the ALJs and the Commission select Route 4.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I certify that a copy of this document is being filed and served on this, the 12th day of December, 2023, in the Public Utility Commission of Texas's Interchange System in accordance with the orders of the presiding officer, SOAH Order No. 2.

/s/ David F. Brown

David F. Brown