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

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

**TEXAS-NEW MEXICO POWER COMPANY’S REPLY TO EXCEPTIONS TO PROPOSAL
FOR DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

Texas-New Mexico Power Company (“TNMP”) files this Reply to Intervenor’s Exceptions to the Proposal for Decision (“PFD”) issued by the Administrative Law Judges (ALJs) in this docket. Pursuant to Commission Counsel’s Memorandum dated November 15, 2023, all Replies to Exceptions to the Proposal For Decision must be filed by December 19, 2023. This reply is therefore timely filed.

I. INTRODUCTION

At this stage of the proceeding, the sole disputed issue has come down to whether TNMP’s proposed Route 11 or Route 4 best meets the statutory and Commission criteria for a transmission line. As the ALJs confirmed in the PFD, “[f]rom the breadth of the uncontested issues, it is apparent that the sole dispute in this proceeding concerns specific routing factors for the proposed transmission line.”¹ Indeed, the PFD noted that no party contested the need for TNMP’s proposed transmission line.² No party challenged the sufficiency or diversity of the routes.³ And Commission Staff and the ALJs found the Application and required notice substantively

¹ PFD at 14.

² *Id.* at 13.

³ *Id.*

sufficient.⁴ Accordingly, the only disputed issue left is *where* the transmission line should be constructed, not *if* it should be constructed.

Despite the widespread support for this project, the acknowledgment of the crucial need for this project, and the extensive evidence in support of TNMP's Application, one group of intervenors still opposes the project and the PFD. Among all intervenors, the Route 11 Intervenors⁵ are the only ones who filed exceptions to the ALJs' PFD disagreeing with the outcome of the PFD. In their Exceptions to Proposal for Decision, the Route 11 Intervenors zealously argue that the credible evidence in the record supports Route 4, not the PFD's recommendation of Route 11. At the same time, the Route 11 Intervenors make a contradictory recommendation (without precedent or legal authority) that TNMP's Application should be denied based on their allegations of lack of credible evidence in the record. Notably, however, the PFD states, "[n]o other party supports this recommendation."⁶ And the ALJs previously rejected several challenges that the Route 11 Intervenors have repeatedly raised throughout this proceeding and the Commission has denied hearing them on appeal.⁷ As set forth in the PFD, most intervenors either support or do not oppose Route 11.⁸

With this in mind, TNMP's Reply to the Route 11 Intervenors' Exceptions is brief and only to reiterate important record evidence and confirm the findings from the PFD. TNMP's Reply

⁴ *Id.*

⁵ "The Route 11 Intervenors" is comprised of the following intervenors who share common counsel of record: (1) Sennett Kirk, Trustee of the Clayton D. Skiles and Claire Elizabeth Skiles Trust; (2) Four Seasons Ranch, Ltd.; (3) Gene McCutchin Ltd. III and the Gene McCutchin 2015 Living Trust; and (4) Pilot Point ISD.

⁶ PFD at 6.

⁷ See Emergency Motion to Abate Schedule, Cancel Hearing on the Merits, and Compel Production (Aug. 1, 2023) (D.I. 334); Emergency Motion for Leave to Obtain Late Discovery of TNMP's Direct Case and to Shorten Time for Response or For Modification of Procedural Schedule to Permit Requested Discovery (Aug. 7, 2023) (D.I. 361); Appeal of SOAH Order No. 8 Denying Emergency Motion to Abate Schedule, Cancel Hearing on the Merits, and Compel Production (Aug. 18, 2023) (D.I. 410); Motion to Stay Proceedings Pending Appeal to Commissioners of SOAH Order No. 8 Denying Emergency Motion to Abate Schedule, Cancel Hearing on the Merits, and Compel Production (Aug. 18, 2023) (D.I. 412); Initial Post-Hearing Brief of Route 11 Intervenors (Sept. 1, 2023) (D.I. 516-517).

⁸ PFD at 3.

addresses the following issues, which the PFD and the uncontested record evidence established: (1) TNMP supports any route the Commission determines best meets the required criteria; (2) TNMP has unfailingly complied with all application and discovery obligations; (3) all parties agree that the record evidence includes reasonable and reliable Right-of-Way (“ROW”) land acquisition cost estimates; and (4) the Route 11 Intervenor’s proposed Findings of Fact that should be denied. These issues will be addressed in turn below.

II. ARGUMENTS

1. TNMP supports any route the Commission determines best meets the statutory and Commission criteria.

The Route 11 Intervenor’s allege an elaborate conspiracy theory in which TNMP had an “apparent bias” which “drove it to advocate . . . routing alternatives that are markedly more expensive than the Blue Zone Routes.”⁹ TNMP then allegedly used “disparate litigation tactics” to “crush” any party opposing Route 11.¹⁰ And they also claim that TNMP ignored any and all public input except for the input from one Blue Zone landowner.¹¹

Not only are those complaints untrue and unsupported by the record evidence, but even the Route 11 Intervenor’s admit that “[t]hese issues did not in the end preclude the construction of a record proving that Route 4, not Route 11, should be selected.”¹² To be clear, TNMP has no route that it prefers, favors, or for which it otherwise advocates, and would support the selection of Route 4. TNMP witness Michael O’Brien testified at the Hearing on the Merits that TNMP has “no incentive” to advocate for any particular route, and that TNMP has “zero preference on which route is selected.”¹³ The Route 11 Intervenor’s statements that TNMP had an apparent bias or

⁹ *Id.* at 10

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Hearing Tr. (Aug. 24) at 236:1-7; *see also* PFD at 22.

advocated for the routes outside of the Blue Zone are incorrect. To the contrary, TNMP supported all routes and the transmission line project as a whole and any advocacy was to oppose the Route 11 Intervenor's various inflammatory emergency motions filed to abate or derail this project.

Moreover, the Route 11 Intervenor's assertion that TNMP's public meetings and other opportunities for public input were "an exercise in futility" is also a misrepresentation and not based on the evidence.¹⁴ As the PFD noted in Findings of Fact numbers 15 - 24, TNMP hosted two in-person public meetings and a virtual public meeting.¹⁵ The purpose of the meetings was to solicit comments, concerns and input from residents, landowners, public officials and other interested parties for the purpose of identifying optimal routing for the transmission line.¹⁶ TNMP had 286 people in attendance between the two in-person public meetings,¹⁷ and received 123 separate responses to its questionnaire that was circulated.¹⁸ In response to the feedback it received at the meetings, the answers to the questionnaire that was collected, and other communications with landowners in the area voicing concerns about routing and other constraints, TNMP made modifications, removals, and additions to the proposed alternative links prior to filing the 109 proposed routes.¹⁹ TNMP thoroughly considered all concerns that were raised in the development process.

2. TNMP has unfailingly complied with all application and discovery obligations.

The Route 11 Intervenor's Exceptions to the PFD also reassert the same arguments that they have raised previously, incorrectly alleging that TNMP somehow committed "discovery abuse" by improperly masking and withholding discovery.²⁰ Without lending too much credence

¹⁴ Route 11 Intervenor's Exceptions to Proposal for Decision at 9.

¹⁵ PFD at 15.

¹⁶ *Id.* at 16.

¹⁷ *Id.* at 19.

¹⁸ *Id.* at 21.

¹⁹ *Id.* at 24.

²⁰ Route 11 Intervenor's Exceptions to Proposal for Decision at 21.

to an argument that has been raised and rejected multiple times (and for which the Commission has denied hearing on appeal),²¹ TNMP feels compelled to respond, once again, because it acted properly throughout the discovery process and complied with all discovery obligations.

As has been explained countless times, TNMP reached an agreement with an intervenor to narrow the scope of certain requested information and that agreement was filed publicly in TNMP's responses to the intervenor's requests for information.²² Weeks later, the Route 11 Intervenors demanded (informally and not through a valid RFI) that TNMP produce the information originally requested.²³ Because the Route 11 Intervenors blatantly failed to comply with the applicable discovery rules and deadlines, there was no requirement for TNMP to produce any information at that time. More importantly, TNMP produced the information in response to a timely filed valid RFI.²⁴ The ALJs concluded that the Route 11 Intervenors "had an opportunity to timely propound their own discovery on TNMP," yet failed to do so.²⁵ Ultimately the Route 11 Intervenors propounded their own valid RFIs on TNMP and TNMP produced numerous responsive documents within a couple days.²⁶

The Route 11 Intervenors also continue to suggest that *all* of the direct testimony filed in this docket was tainted.²⁷ This too egregiously misrepresents the record evidence in this

²¹ See Emergency Motion to Abate Schedule, Cancel Hearing on the Merits, and Compel Production (Aug. 1, 2023) (D.I. 334); Emergency Motion for Leave to Obtain Late Discovery of TNMP's Direct Case and to Shorten Time for Response or For Modification of Procedural Schedule to Permit Requested Discovery (Aug. 7, 2023) (D.I. 361); Appeal of SOAH Order No. 8 Denying Emergency Motion to Abate Schedule, Cancel Hearing on the Merits, and Compel Production (Aug. 18, 2023) (D.I. 410); Motion to Stay Proceedings Pending Appeal to Commissioners of SOAH Order No. 8 Denying Emergency Motion to Abate Schedule, Cancel Hearing on the Merits, and Compel Production (Aug. 18, 2023) (D.I. 412); Initial Post-Hearing Brief of Route 11 Intervenors (Sept. 1, 2023) (D.I. 516-517); *see also* PFD at 5.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ SOAH Order No. 8 – Denying Motion to Abate Schedule, Cancel Hearing, and Compel Production at 5 (Aug. 9, 2023) (D.I. 367).

²⁶ See TNMP's Objections and Responses to Route 11 Intervenors' Second Request for Information (Aug. 23, 2023) (D.I. 492).

²⁷ Route 11 Intervenors' Exceptions to Proposal for Decision at 9; *see also Id.* at 21.

proceeding. It bears repeating that the ALJs have addressed these arguments several times and have found no merit to them. First, not all direct testimony related to ROW cost estimates, which are only part of the cost estimates in a CCN proceeding and a small part of all the interrelated factors the Commission must consider. Second, the Commission has not determined how cost estimates must be calculated. TNMP provided ROW cost estimates in its Application and detailed explanations of those estimates in its direct and rebuttal testimony.²⁸ And no intervenor filed an errata to their testimony despite the need to do so if they believed their direct testimony was incorrect. In fact, as the PFD notes, Brian C. Andrews, the expert witness that the Route 11 Intervenor rely upon to say that intervenors were misled, “even testified that he would *not* say that TNMP’s estimates are ‘wrong.’”²⁹ Many other intervenors and Staff have supported TNMP’s cost estimates as reasonable *estimates*, including after the full Hearing on the Merits, with the knowledge that all such estimates change.³⁰ Moreover, the Route 11 Intervenor admit that the record contains credible evidence of TNMP’s cost estimates, including “via intervenor testimony and cross-examination of TNMP witnesses”³¹ so any perceived issues with the intervenors’ direct testimony is moot. The Route 11 Intervenor are not justified in their critique that TNMP did not comply with application and discovery obligations in this docket.

3. All parties agree that the record evidence includes reasonable and reliable ROW land acquisition cost estimates.

The amount of scrutiny that TNMP’s ROW cost estimates have undergone throughout this application process, led primarily by the Route 11 Intervenor, has been unprecedented. To start, TNMP produced in its Application a table of cost estimates, including estimates for the ROW land

²⁸ See TNMP Exs. 6, 10.

²⁹ See PFD at 28.

³⁰ See, e.g., Highpoint Consortium’s Initial Post-Hearing Brief; RCI Pilot Point, LP’s Initial Post-Hearing Brief; Venable Royalty, Ltd., Venable Estate, Ltd., and Aubrey Ranch LLC’s Initial Brief; Commission Staff’s Initial Brief.

³¹ Route 11 Intervenor’s Exceptions to Proposal for Decision at 6.

acquisition costs it anticipated for each proposed alternative route.³² Through discovery, TNMP ultimately produced the entire workbook of cost estimates, with formulas intact, showing calculations for each Route.³³ Additionally, TNMP produced a market report and budget study developed by its retained ROW valuation company, O'Brien Right of Way Valuation ("OBRWV").³⁴ The market report and budget study set forth a range of cost estimates within which TNMP set its estimated ROW acquisition costs.³⁵ TNMP also included detailed explanation of its cost estimates methodology in its direct and rebuttal testimonies,³⁶ as well as provided hours of testimony on the subject during the Hearing on the Merits. Compared to other recent CCN proceedings that have been approved by the Commission, the amount of evidence produced by TNMP on cost estimates is above and beyond what is required or produced in CCN proceedings.³⁷

In any event, even the Route 11 Intervenors agree that TNMP has produced credible evidence of ROW acquisition cost estimates.³⁸ Ultimately, the Route 11 Intervenors assert that OBRWV's Budget Study should be used to compare cost estimates, although they recommend using estimates that assume a litigation rate of 50% - 75%.³⁹ The ALJs, on the other hand,

³² TNMP Ex. 1 at 1312.

³³ Ex. R11-10C.

³⁴ Ex. R11-13C; Ex. R11-12C.

³⁵ PFD at 16.

³⁶ TNMP Ex. 6; TNMP Ex. 10.

³⁷ See, e.g., Application of Oncor Electric Delivery Company LLC to Amend Its Certificate of Convenience and Necessity for the Keller Wall Price-Keller Magnolia 138-KV Transmission Line and Keller Wall Price-Roanoke 138-KV Rebuild in Keller, Texas, PUC Docket No. 54733; Application of Oncor Electric Delivery Company LLC to Amend Its Certificate of Convenience and Necessity for the Ivy League 138-KV Transmission Line in Collin County, PUC Docket No. 53053; Application of Oncor Electric Delivery Company LLC to Amend Its Certificate of Convenience and Necessity for the Redland Switch-to-Lufkin Switch 345-KV Transmission Line in Angelina County, PUC Docket No. 55172; Application for the City of San Antonio, Acting By and Through City Public Service Board (CPS Energy) to Amend its Certificate of Convenience and Necessity for the Proposed O.W. Sommers Switchyard to Padua Grid Bess 138-KV Transmission Line in Bexar County, PUC Docket No. 54308.

³⁸ Route 11 Intervenors' Exceptions to Proposal for Decision at 6 (explaining that the "credible evidence" in the record supports Route 4); see also *Id.* at 13 (explaining that there is credible evidence in the record of estimated costs of ROW acquisition brought forward by Route 11 Intervenors' and other parties' cross-examination of Michael O'Brien and the Market Study and Budget Study created by TNMP's outside real estate professionals).

³⁹ *Id.* at 22.

recommend using the BPO, which is effectively a litigation rate of 0%.⁴⁰ TNMP's Application proposes estimated costs in between.⁴¹ The bottom line is that for many that review the cost estimates, they each come up with a different concluded estimate based on the same data. Each party makes different assumptions, such as the rate of expected litigation or other factors.⁴² But arriving at different conclusions does not mean that each conclusion is unsupported or "manipulated." It simply means that different rationales, all based on well-reasoned assumptions, can lead to different results because that is the nature of *estimates*.

The ALJs concluded that the BPO should be applied because it is "questionable whether the cost estimates in a CCN proceeding should account for litigation risk" due to the Preliminary Order's direction "that the Commission does not adjudicate condemnation values."⁴³ The Route 11 Intervenor, on the other hand, agree with TNMP that different assumptions for litigation risk should apply, but their interpretation of the OBRWV's Budget Study is misguided.⁴⁴ Specifically, the Route 11 Intervenor seem to argue that TNMP necessarily had to apply the Concluded Budget Estimate⁴⁵ and that "TNMP calculated its estimates of ROW acquisition value as if every landowner would sue it[.]"⁴⁶

This is not how TNMP's estimated its ROW acquisition costs. Contrary to Route 11 Intervenor's position, the Budget Study does not *require* TNMP to use the Concluded Budget Estimate, nor did TNMP manipulate its estimates. Rather, TNMP selected an estimate within OBRWV's proposed range of estimates within which the expected acquisition cost would fall

⁴⁰ PFD at 21.

⁴¹ TNMP Ex. 1 at 1312.

⁴² PFD at 17.

⁴³ PFD at 33.

⁴⁴ Although the Route 11 Intervenor's "math" is unclear, *see* Route 11 Intervenor's Exceptions to Proposal for Decision at 7-8, 18-20, 24, it does not appear that their purported "math" for condemnation, cost of avoiding habitable structures, or Figures 2, 3, 4, is fully supported by the record evidence.

⁴⁵ *See* PFD at 21.

⁴⁶ *See* Route 11 Intervenor's Exceptions to Proposal for Decision at 7.

depending on multiple factors including the resistance of the landowner and whether the landowner owned a large tract of land.⁴⁷ TNMP even testified that it would be appropriate for the Commission to select ROW cost estimates from within that range based on the study.⁴⁸ TNMP made its decision taking into consideration TNMP's experience in ROW acquisitions, landowner feedback at the in-person public meetings for the project, and a subsequent landowner meeting.⁴⁹ Nowhere in the record evidence is it supported that TNMP calculated that every landowner in the Blue Zone would sue.

The Route 11 Intervenor also appear to suggest that TNMP's Application should be denied alleging that there is "no credible evidence of estimated costs," yet they simultaneously advocate for the approval of Route 4 because "the credible evidence in the record of this case supports the selection of Route 4."⁵⁰ The Route 11 Intervenor's novel argument proposes a dangerous modification to the CCN application process. CCN applications are frequently longer than a thousand pages in length, but for Route 11 Intervenor, the applications should contain even more documentation. Yet, to require an applicant to anticipate every dispute or challenge that may arise throughout a CCN proceeding is neither feasible nor required in statute or the Commission's Rules. Indeed, for some intervenors, there will never be enough information to satisfy them.

Moreover, the Route 11 Intervenor cite no precedent or legal authority, nor is there any, permitting denial of a CCN application simply because new or different information is produced through discovery or testimony. To the contrary, it is common for new information to be produced during discovery by any party that the Commission considers when determining factors in a CCN

⁴⁷ PFD at 16.

⁴⁸ Hearing Tr. (Aug. 24) at 259:20-22 ("And as O'Brien provided the range, any of those values inside that range are open to the Commission to use.").

⁴⁹ PFD at 16.

⁵⁰ Route 11 Intervenor's Exceptions to Proposal for Decision at n. 3.

proceeding, including changes to habitable structure counts, costs, and environmental factors. There are also many instances where applicants file an errata to their CCN applications to change information after initially filing an application.⁵¹ Similarly, landowners often propose modifications to routes, which presumably change the applicants' initial cost estimates for the routes, that are approved by the Commission. It certainly does not provide a basis for denial of the CCN application. Accordingly, the Route 11 Intervenor's arguments should be wholly rejected.

4. Route 11 Intervenor's proposed Findings of Fact should be denied.

The Route 11 Intervenor proposed additional findings of fact, several of which are wholly unsupported by the record. Specifically, there is no evidence supporting the following modified findings of fact proposed by the Route 11 Intervenor: 24a, 24b, 38a, 39a, 68, 73, 74, 106a, and 107. For example, the Route 11 Intervenor fails to cite any evidence in support of this proposed Finding of Fact. Contrary to the proposed finding of fact, the transcript from the Hearing on the Merits reflects that the TNMP representative testified regarding individuals who were present at the landowner meeting and were not asked how the meeting was arranged or the date.⁵² Additionally, the Route 11 Intervenor's proposed additional Finding of Fact number 38a is incorrect. Sharon Pelzel, Trustee for the Virgil Berend Living Trust, is located along Route 11 on Link 2Y and is in support of Route 11.⁵³ M&J Duesman Farms, LLC is located on Link 1Z and is also in support of Route 11.⁵⁴ Similarly, the Route 11 Intervenor has cited no record evidence for their conclusion in proposed Finding of Fact number 39a that actual modifications to Route 4

⁵¹ See, e.g., Application of Oncor Electric Delivery Company LLC to Amend its Certificate of Convenience and Necessity for the Ivy League 138-KV Transmission Line in Collin County, PUC Docket No. 53053 (D.L. 41).

⁵² Hearing Tr. (Aug. 23) at 123:17-23, 124:1-3.

⁵³ See Sharon Pelzel Ex. A at 5.

⁵⁴ See M&J Duesman Ex. A at 5.

were proposed to straighten or shorten the route, nor were any environmental factors considered for any theoretical modifications.

III. CONCLUSION

Based on robust evidentiary record evidence, the ALJs correctly found that TNMP has demonstrated all factors required to approve a CCN application. Based on that same record, the ALJs also appropriately recommended that Route 11 be selected as the route to be constructed. TNMP respectfully requests that those recommendations be adopted and that TNMP's Application be approved.

Respectfully submitted,

/s/ Stephanie Sparks

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CERTIFICATE OF SERVICE

A copy of this document is being filed on December 19, 2023, in the Public Utility Commission's Interchange system as provided by SOAH Order No. 2 in this proceeding.

/s/ Stephanie Sparks

Stephanie C. Sparks