

CAUSE NO. D-1-GV-11000324

CITY OF KERRVILLE, ET AL.,  
PLAINTIFFS,

vs.

PUBLIC UTILITY COMMISSION OF  
TEXAS,  
DEFENDANT,

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

98<sup>TH</sup> JUDICIAL DISTRICT

**BRIEF IN SUPPORT OF AGENCY'S DECISION**  
**BY INTERVENORS SIX MILE RANCH AND VANDER STUCKEN RANCH**

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## INTRODUCTION

Six Mile Ranch and Vander Stucken Ranch (collectively “Six Mile Ranch”) are Intervenor in this appeal by the City of Kerrville, Kerrville Public Utility Board, and the City of Junction (referred to jointly as “Plaintiffs”)<sup>1</sup> of the decision of the Public Utility Commission of Texas (“PUC” or “Commission”) in its Docket No. 38354. The PUC’s Final Order directed the Lower Colorado River Authority Transmission Service Corporation (“LCRA”) to build a proposed 345-kV CREZ transmission line using Route MK63, as modified by the Final Order.

Six Mile Ranch is aligned with the position of the PUC and LCRA, as well as the overwhelming majority of Intervenor in this proceeding.<sup>2</sup> Six Mile Ranch is supportive of the arguments in those parties’ respective response briefs, and rather than duplicate the arguments made in those briefs, Six Mile Ranch provides certain salient observations to assist the Court in its review of the PUC’s decision. Each of those parties’ response briefs, as well as what follows, show that the Final Order of the PUC was in all respects proper and should be affirmed.

### SUMMARY OF THE ARGUMENT SUPPORTING AFFIRMANCE

With multiple route choices, hundreds of actively participating parties, many (and at times conflicting) “community values” expressed, numerous routing criteria and policies to consider, and no clear best choice for routing this transmission line, the PUC was faced with a difficult decision in this proceeding. Yet, contrary to Plaintiffs’ assertions, the PUC carefully considered and balanced each and all of the routing criteria and policies specified in the Public Utility Regulatory Act (“PURA”) and the PUC’s rules when it selected Route MK63, as modified by the Final Order. And although the PUC modified certain proposed findings and

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<sup>1</sup> Kerr County, an Intervenor in this appeal, joined in the Plaintiffs’ Brief on the Merits.

<sup>2</sup> This includes but is not limited to the P-Line Intervention Group, Bill Neiman, et al., Tierra Linda Ranch Homeowners Association, Trey Whichard et al., Alliance for A3 et al., Texas Historical Commission, Preston Interests, Ltd. et al., Gillespie County, and the City of Fredericksburg.

conclusions of the Administrative Law Judges (“ALJs”), in doing so the PUC complied with the requirements of TEX. GOV’T CODE § 2003.049(g), as those modifications were based on a discretionary balancing of the various relevant policy considerations. Moreover, as detailed more fully in the PUC’s and LCRA’s briefs, the decision to select MK63, as modified, is supported by more than substantial evidence, including with regard to its modification of Link Y11, which was made pursuant to its established practice concerning “route deviations” on noticed or consenting landowner property. At bottom, Plaintiffs seek to have this Court re-weigh the evidence, consider certain routing criteria in isolation, strike a different balance on the application of the PUC’s various routing criteria and policies, and thereby substitute its judgment for that of the PUC.

### ARGUMENT & AUTHORITIES

- I. Reply Point No. 1 (in Response to Point of Error No. 1): The Commission reasonably selected Link Y11, based on the record evidence about the Kimble County Airport and North Llano River concerns, and, consistent with its “route deviation” policies, properly aligned it on noticed or consenting landowner property to further mitigate those concerns.**

Plaintiffs claim that the PUC erred by allegedly considering extra record evidence when it decided to supposedly “re-route” Link Y11 south of the airport near Junction. This is without merit. First, as LCRA’s brief will catalogue, there is ample evidence in the hearing record to support the decision to select Link Y11 and to allow LCRA to place the link’s exact location – for safety and reliability reasons – on the south side of the Kimble County Airport and as far away from the North Llano River as possible. So even assuming the PUC did hear extra record evidence, such error would be harmless and not a basis for remand.<sup>3</sup>

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<sup>3</sup> See *ASAP Paging, Inc. v. Public Util. Comm’n*, 213 S.W.3d 380, 392 (Tex. App.—Austin 2006, pet. denied) (citing TEX. GOV’T CODE ANN. § 2001.174(2)(E)) (“We will reverse and remand the cause to the agency when substantial rights of the appellant have been prejudiced by an agency’s findings that are not reasonably supported by substantial evidence considering the reliable evidence in the record as a whole.”).

Second, the PUC has on many occasions ordered route deviations, both major and minor, during open meetings, and it also routinely gives a utility the authority to make such deviations in its CCN final orders in order to accommodate landowner concerns, or to deal with environmental and archaeological concerns encountered during construction, so long as, among other things, the route remains on noticed or consenting landowners.<sup>4</sup> This flexibility is consistent with the formal notice LCRA provided to all affected landowners:

Please Note: While LCRA TSC is required to propose a “preferred route,” the PUC may and often does select an alternate route. As discussed in the enclosed brochure, any one of the proposed routes or a new combination of route segments filed in this application may be selected by the Commission. Additionally, *the Commission may modify the proposed routes and segments into different configurations than those proposed, so long as they affect only noticed landowners.*

LCRA TSC 1, Application at Attachment 6, page 2 (emphasis added).

All the PUC did in this instance was direct a specific route deviation for Link Y11 in its Final Order, rather than grant LCRA the authority to do so at a later time. Importantly, the deviation was for a segment that remained on noticed landowners, who all had the opportunity to participate in the proceeding, as LCRA’s brief documents. Thus, there was nothing improper in the PUC’s decision to modify the exact location of Link Y11 as it did.

Third, comments of the public at an open meeting held under the Open Meetings Act are just comments, not extra record evidence. As long as the record evidence supports the decision, any open meeting “color commentary” by the public in attendance cannot be used to overturn a decision that otherwise complies with the Texas Administrative Procedure Act (“APA”).

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<sup>4</sup> See, e.g., *App. of Sharyland Util., LP to Amend Its CCN for the Hereford to White Deer 345-kV CREZ Trans. Line*, Docket 38290, Order at 19-21, Ordering Paras. 2, 12-13 (Dec. 13, 2010), available at [http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/38290\\_775\\_687015.PDF](http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/38290_775_687015.PDF) (providing utility authorization for minor and major route deviations); *App. of Oncor Elec. Del. Co., LLC to Amend Its CCN for the Brown to Newton 345-kV CREZ Trans. Line*, Docket 37464, Order at 27-29, Ordering Paras. 1 & 7 (Apr. 5, 2010), available at [http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/37464\\_809\\_647168.PDF](http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/37464_809_647168.PDF) (ordering specific route deviations in final order).

**II. Reply Point No. 2 (in response to Point of Error No. 2): The Final Order changed findings of fact and conclusions of law from the Administrative Law Judges' recommendation in full compliance with the applicable provisions of the Texas Government Code and PUC rules.**

Plaintiffs claim that the Final Order changed some proposed findings of fact and conclusions of law by the Administrative Law Judges in alleged violation of the APA and PUC rules. To the contrary, the PUC was within its authority in making such changes. While the PUC and LCRA will address in detail this point of error, Six Mile Ranch notes that the applicable provision, TEX. GOV'T CODE § 2003.049(g)(1)(A), allows the PUC to change an ALJ's finding or conclusion if it determines that the ALJ did not properly "apply . . . [the PUC's] rules or policies." In other words, the PUC can make its own policy calls when balancing its various (and even competing) rule criteria and policies on transmission line routing.

**III. Reply Point No. 3 (in response to Point of Error No. 3): The Commission fully considered and complied with its policy of prudent avoidance.**

Plaintiffs next argue that the Final Order completely disregards the PUC's policy of prudent avoidance.<sup>5</sup> To the contrary, the Final Order does not fail to comply with the policy, it instead reflects the implementation of that one policy consideration in balance with all other relevant considerations. As the more-than-substantial record evidence shows, *each* of the routes LCRA proposed comply with the policy of prudent avoidance. This is confirmed by the ALJs, who state that "[i]t is undisputed that all of LCRA TSC's filed routes are consistent with the Commission's prudent avoidance policy." Admin. R. Item 412, Proposal for Decision at 73. As the ALJs found, "[b]ecause all filed routes comply with the Commission's policy on prudent avoidance, no route can be completely excluded on the basis of prudent avoidance alone." *Id.* at 74. Further, because LCRA routed each of the various segments in a way that sought to

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<sup>5</sup> Prudent avoidance is defined as "[t]he limiting of exposures to electric and magnetic fields that can be avoided with reasonable investments of money and effort." PUC Substantive Rule § 25.101(a)(4).

minimize the impact on habitable structures through reasonable investments in money and effort, any routes utilizing these segments would comply with the policy of prudent avoidance. *See* Admin. Rec. Transcripts, Vol. K (Oct. 26, 2010, Tr. Vol. 2), at p. 402.

In this appeal, the burden is on Plaintiffs to show that substantial evidence does not support the PUC's findings.<sup>6</sup> Plaintiffs do not meet this burden. Rather, what Plaintiffs are really arguing is that, in their point of view, other routes comply with the policy *better* than the route the PUC selected. This, however, misinterprets the policy of prudent avoidance, since the policy does not require the PUC to choose the route with the least impacted habitable structures.<sup>7</sup> Their argument also fails to show that substantial evidence does not support the PUC's finding that Route MK63 as modified complies with the policy. As noted above, all links in the application that make up all the possible routes, including Route MK63 as modified, undisputedly complied with the prudent avoidance policy. The Final Order merely balanced the degree of compliance with the prudent avoidance policy against other relevant considerations, which is a matter for the PUC's discretion.<sup>8</sup> Accordingly, this issue is not grounds for reversal.

**IV. Reply Point No. 4 (in response to Point of Error No. 4): The Commission's Order fully considered and weighed all the statutory criteria, including community values.**

Finally, Plaintiffs argue that the PUC, in selecting Route MK63 as modified, supposedly disregarded certain expressions of community values about avoiding habitable structures and developed areas. This is not grounds for reversal, as there were *many* community values expressed in the case, some differing or contradictory, and the PUC explicitly and appropriately weighed the various, often competing, community values in selecting Route MK63 as modified.

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<sup>6</sup> *Dunn v. Public Utility Comm'n*, 246 S.W.3d 788, 791 (Tex. App.—Austin 2008, no pet.).

<sup>7</sup> *See* PUC SUBST. RULE § 25.101(a)(4) (defining prudent avoidance as “[t]he limiting of exposures to electric and magnetic fields that can be avoided with reasonable investments of money and effort.”).

<sup>8</sup> *Dunn*, 246 S.W.3d at 794 (stating that court will not substitute its judgment for that of the PUC on whether one potential issue should outweigh the PUC's findings of fact on other statutory factors).

While it is true that avoiding habitable structures and developed areas were values expressed by certain members of the community, there were many other expressed community values in this case. For example, the hundreds of members of the community joined under the name Clear View Alliance expressed the community values of avoiding the virgin ranch land of the Texas Hill Country and paralleling compatible rights of way like state and federal highways (which already fragment the natural terrain). In addition, many members of the community favored avoidance of the areas near historic Fort McKavett. This included not only many individuals who attended the LCRA public meetings, but state, county, and local governmental entities, including Menard County, the Texas Parks & Wildlife Department, and the Texas Historical Commission.<sup>9</sup> Not surprisingly, Plaintiffs only focus on the community values that would support selecting a route that would not affect them. However, the route the PUC selected best balances all of the expressed community values, including the widely held values of avoiding the virgin ranch land of the Hill Country, paralleling compatible rights of way like highways, and avoiding historic Fort McKavett.

Moreover, community values is only one factor that the PUC considers under PURA Section 37.056(c). “None of the statutory factors is intended to be absolute in the sense that any one shall prevail in all possible circumstances.”<sup>10</sup> The Court should not substitute its judgment for that of the PUC on whether the impact to more habitable structures or developed areas should outweigh the PUC’s balancing on other statutory factors.<sup>11</sup> As detailed in other response briefs in support of the Commission’s decision, there is substantial evidence in the record that the selected route takes into consideration and makes reasonable accommodation for all of the

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<sup>9</sup> See, e.g., LCRA TSC 1, Application pp. 25, 27 & Environmental Assessment pp. 6-9 to 6-10, 6-17 to 6-18, 6-31, 6-41, 6-66 to 6-67, 6-80; LCRA TSC 2, Direct Testimony of Sara Morgenroth, pp. 17-19.

<sup>10</sup> *Public Util. Comm’n v. Texland Elec. Co.*, 701 S.W.2d 261, 267 (Tex. App.—Austin 1985, writ ref’d n.r.e.).

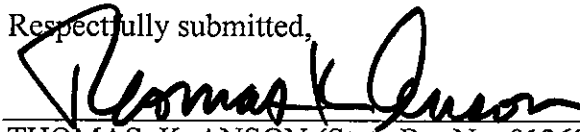
<sup>11</sup> *Dunn*, 246 S.W.3d at 794; *ASAP Paging, Inc. v. Public Util. Comm’n*, 213 S.W.3d 380, 392 (Tex. App.—Austin 2006, pet. denied) (“[W]e may not substitute our judgment for that of the agency on the weight of the evidence.”).

various factors required by the applicable statute and rules involved in locating the transmission line at issue. Accordingly, the decision of the PUC should be affirmed.

**CONCLUSION AND PRAYER FOR RELIEF**

Substantial evidence in the record supports the PUC's selection of Route MK63 as modified, which is based on its careful balancing of the applicable statutory criteria and policy considerations. Accordingly, the PUC's decision should be affirmed.

Respectfully submitted,



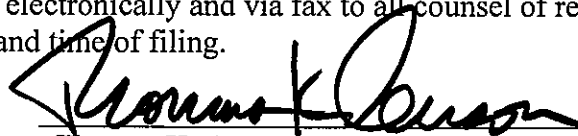
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**CERTIFICATE OF SERVICE**

I hereby certify that on June 17, 2011, I electronically filed the foregoing with the Travis County District Clerk using the TexasOnline E-File system and certify that a true and correct copy of the foregoing has been forwarded electronically and via fax to all counsel of record as reflected on the E-File system at the date and time of filing.



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Thomas K. Anson