

NO.D-1-GV-11-000324

City of Kerrville, Kerrville Public Utility
Board, and City of Junction,

Plaintiffs,

v.

Public Utility Commission of Texas,
Defendant.

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

98th JUDICIAL DISTRICT

**INITIAL BRIEF OF INTERVENORS TREY WHICHARD,
KERRY BRENT SCOTT TRUST (4C RANCH),
AND KIMBERLY FRANCES HIRMAS**

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Intervenors Trey Whichard, Kerry Brent Scott Trust (4C Ranch), and Kimberly Frances Hirmas, and file this Initial Brief pursuant to Travis County Local Rule 10.5.1.

Statement of Facts

Intervenors have only a few minor points of disagreement, or clarification, with the facts presented by Plaintiffs in their Brief.

On page 4 of their Brief, Plaintiffs' describe I-10 as a "highly scenic highway." The highway itself, of course, is not scenic at all. It is more accurate to state that I-10 is a highway that passes through some highly scenic portions of the Texas Hill Country. As described in the testimony of Dr. Clary from the Texas Parks and Wildlife Department, the highway has already irrevocably altered the landscape of the Hill Country¹, along with the billboards, infrastructure and commercial and industrial development that accompany it.

On page 5 of their Brief, Plaintiffs state that the PUC modified route MK63 "in several places." It should be pointed out that with the exception of the Y11 link, all of these modifications were those requested by the landowners being crossed by the route, and were not

¹ TPWD Exhibit 4, pp. 14, 19-20, Admin. R. Binder 32

modifications initiated by PUC, its Staff, or LCRA TSC. These modifications include those requested by parties in and around the cities of Junction and Kerrville.

Finally, on page 5 the Plaintiffs describe Route MK63 Modified as “crossing directly through” both Junction and Kerrville. It is clear from the maps in the record that even with the modification to Link Y11, Route MK63 only crosses the northern edge of the city of Junction, and avoids the developed portions of the city.²

Reply Point 1: Plaintiffs Misrepresent PUC Final Order
(Responsive to Plaintiffs’ Point 1)

Plaintiffs’ arguments surrounding the modification of Link Y11 are predicated upon two fatal errors. These errors are contrary to the text of the Final Order and the comments from the Commissioners during their consideration of Link Y11.

Plaintiffs erroneously state on page 11 of their Brief that “the Commission ultimately adopted the LCRA TSC Modification to Link Y11,” which they christen the “Link Y11 Reroute.” This is not, in fact, what the PUC ordered. The language in the Final Order is absolutely unmistakable. Ordering Paragraph 2, on page 24 of the Final Order, does not adopt a specific modified route. It states in relevant part that:

LCRA shall, in the vicinity immediately south of the Kimball County Airport, move link Y11 as far south as safely and reliably possible using overhead construction while still affecting only noticed landowners. This modification to Y11 shall not affect LCRA’s ability to safely and reliably operate the line, nor shall it affect the safe use of the Kimball County Airport.³

As with typical CREZ and non-CREZ CCN cases, the Commission included in its Final Order the standard ordering paragraphs giving LCRA TSC the discretion to make minor and major deviations to the route.⁴ In Ordering Paragraph 2, the Commission did not design or approve a specific modification to Link Y11, but guided and placed additional restrictions on the ability of LCRA to implement minor route deviations in the vicinity immediately south of the Kimball County Airport.

² LCRA Exhibit 21, Admin. R. Binder 29.

The second fatal flaw in the arguments of Plaintiffs' is their insistence that the Commissioners based their decisions on information received during public comments after the evidentiary record was closed. Plaintiffs stubbornly cling to the mistaken notion that the PUC based its routing decision on public comments regarding the links north of the Kimble County Airport, often referred to as the B19 links.

The Final Order itself sets forth the Commission's reasons for selecting Route MK63 Modified rather than the Staff MK15 Modified listed as the primary recommendation in the PFD. In the Discussion section on page 2 of the Final Order, the Commission explains why it chose MK63 modified:

[B]ecause the Commission finds that in the area around Junction and Kerville, it is more desirable to parallel or closely follow Interstate 10 (I-10) rather than cutting through less developed land. Particularly, in this study area, the Commission finds that I-10 is a more compatible right-of-way for paralleling purposes than the alternative paralleling opportunities available.⁵

Plaintiffs look beyond the clear statement in the Final Order and argue that the Commissioners actually based their decision on "extra-evidentiary representations, most notably the January 19, 2011 letter filed by LCRA TSC."⁶ Plaintiffs' sole citation to support this allegation that the PUC acted improperly and misrepresented the rationale for their decision is contained in their footnote 66. Plaintiffs quote the Chairman's call for a motion at the conclusion of the January 20, 2011 Open Meeting. However, the Chairman makes no reference at all to either the public comments referred to by Plaintiffs as "extra-evidentiary representations," nor to the LCRA letter.

Chairman Smitherman calls for a motion to adopt Route MK63 "as modified pursuant to our discussion today."⁷ It is significant that he did not refer to the discussion at the prior Open Meeting on January 13, 2011. The vast majority of the so-called "extra-evidentiary representations" – including those referring to flight safety on the B19 links north of the airport –

³ PUC Final Order, Admin. R. Binder 10, Item 455

⁴ PUC Final Order, Ordering Paragraphs 5 & 6 (pp. 24-25), Admin. R. Binder 10, Item 455

⁵ PUC Final Order, p. 2, Admin. R. Binder 10, Item 455

⁶ Plaintiffs' Brief, p. 14

⁷ Open Meeting Tr. at 193, Plaintiffs' Brief - Attachment F

were made at the January 13 meeting. The discussion had by the Commissioners of January 20, referenced by the Chair, includes discussion by both Commissioners Nelson and Anderson that they were *not* persuaded by the comments at the January 13 meeting because their independent review of the evidentiary record revealed that the comments were not supported by the evidence in the record.⁸

Chairman Smitherman never mentions the LCRA letter in his call for a motion. He does refer to “your memo.” However, reading the transcript in context reveals that this reference is not to the LCRA letter. Chairman Smitherman’s call for a motion was directed to Commissioner Nelson, who responded “So move.”⁹ The reference to “your memo” was actually to a Memo filed prior to the Open Meeting by Commissioner Nelson.¹⁰ This memo contained for discussion a number of potential changes to the draft final order, and was discussed in detail by the Commissioners during the January 20 Open Meeting, with the discussion concluding with Commissioner Anderson stating that he would support the changes suggested in the memo.¹¹ The Chairman’s call for a motion – and the resulting Final Order - is consistent with the discussion of Commissioner Nelson’s memo and not the LCRA letter.

The Final Order sets forth the rationale of the Commission in selecting the MK63 Modified route. That rationale is supported by the statements of the Commissioners during the January 20 Open Meeting. In asking this Court to challenge the integrity of the Final Order’s recitals and the veracity of the PUC Commissioners, it was incumbent on Plaintiffs to present compelling evidence that there were concealed motives or reasons behind the PUC decision. They have failed completely. Absent evidence from Plaintiffs proving that the PUC based its Final Order on information outside the record, this Court should evaluate the Final Order based on its face and the evidentiary record developed by SOAH.

Accordingly, there is no need to analyze the due process concerns of Plaintiffs, because the public comments at the open meeting were not considered as evidence. On the other hand, it also means that the policy decisions in the PUC Final Order must be supported solely by evidence in

⁸ Open Meeting Tr. at 41-44, Plaintiffs’ Brief - Attachment F

⁹ Open Meeting Tr. at 193-194, Plaintiffs’ Brief - Attachment F

¹⁰ Admin. R. Binder 10, Item 450

¹¹ Open Meeting Tr. at 109-115, Plaintiffs’ Brief - Attachment F

the record, and all statements and documents outside the Administrative Record should be disregarded. It is on this basis that the Whichard Intervenors will present argument in support of the PUC Final Order.

Reply Point 2: Evidence Supports Link Y11 Modification
(Responsive to Plaintiffs' Point 1)

Based upon their mistaken belief that the Final Order adopts a specific path for a modified link Y11, Plaintiffs' argue that the record does not contain evidence about the specific route. As addressed above, this argument is flawed because the PUC did not choose a specific path in Ordering Paragraph 2. It is further flawed because it assumes that such evidence is required.

The Application filed by LCRA TSC contained 60 potential routes varying in length between 128 and 166 miles each.¹² The Application contains general statistical information regarding each link, including Link Y11. It does not, and could not, contain detailed information about each linear foot of all 60 potential routes. It is even more unreasonable for Plaintiffs to argue that in order for the Commission to be able to make any modifications, the record must contain evidence about the entirety of noticed tracts, not just the proposed original links. In short, in reviewing the Commission's Final Order, a reviewing court need not search for evidence to support each linear foot of a proposed route or modification, but should expect evidence in the record to support the policy choice reflected by the modification and the general nature of the modification.

In the instance of the Link Y11 "modification," the Commission – having already chosen to parallel I-10 as much as possible - ordered that Link Y11 be shifted to the south in the immediate vicinity of the Kimble County Airport. There is more than sufficient evidence in the record to support the decision to move Link Y11 further south.

LCRA TSC provided testimony that explained that the Y11 link was proposed solely to provide a link that strictly paralleled I-10.¹³ Unfortunately, that effort to maintain a route that strictly paralleled I-10 resulted in a location for link Y11 that was beset with problems. The

¹² LCRA Exhibit 1, Admin. R. Binders 16-22

¹³ HOM Tr. vol. 7, p. 1462, Admin. R. Binder 33, vol. Q

testimony revealed that the location was constricted between I-10, the Llano River and its flood plain, and the Kimble County Airport.¹⁴ LCRA testified repeatedly that it could provide engineering solutions for any one of the obstacles in the Y11 location, but the combination of obstacles gave them concerns about the proposed link.¹⁵

Multiple witnesses testified regarding the Kimble County Airport and the FAA regulations restricting obstacles constructed in the flight path of its runways.¹⁶ LCRA's expert explained the angled clearance slopes that are measured from the end of the runway and angle upwards as they get further from the airport.¹⁷ Both the airport experts testified that the further away from the airport the transmission line was located, the higher it could be constructed without interfering with airport operations.¹⁸ LCRA's engineer testified that only an additional eight or nine feet in height would be necessary to alleviate concerns about flood levels threatening the reliability of the transmission line.¹⁹

In summary, the evidence in the record reflected that at the specific location of Link Y11 immediately south of the Kimble County Airport, there was a unique combination of obstacles that raised engineering concerns. The record also reflected that a minor deviation away from I-10 and further south would remove the constriction between I-10 and the Llano River, move the line out of the flood channel, and allow for taller structures without interfering with the airport operations. All of this evidence in the record developed by SOAH supports the decision of the PUC to instruct LCRA TSC to make such a minor deviation in Link Y11 to the south, so long as it can be done on only noticed tracts of land and in a safe and reliable manner with respect to both line operation and the airport.

In short, by attempting to strictly parallel the course of I-10, LCRA routed themselves into multiple obstacles along Link Y11. In reviewing the evidentiary record, the PUC found it

¹⁴ Sybank rebuttal, LCRA Ex. 14 at 36-38, Admin. R. Binder 28; HOM Tr. vol. 1, p. 167, Admin. R. Binder 33, vol. A; HOM Tr. vol. 6, pp. 1211-1213 and 1304-1305, Admin. R. Binder 33, vol. O; HOM Tr. vol. 7, p. 1462, Admin. R. Binder 33, vol. Q

¹⁵ Sybank rebuttal, LCRA Ex. 14 at 38, Admin. R. Binder 28; HOM Tr. vol. 6, p. 1216, Admin. R. Binder 33, vol. O

¹⁶ LCRA Exhibits 7, 14 and 15, Admin. R. Binder 28; CVA Exhibit 7, Admin. R. Binder 12

¹⁷ HOM Tr. vol. 7, at 1287-1288, Admin. R. Binder 33, vol. Q

¹⁸ McIllwain Direct, CVA Exhibit 7 at 8, Admin. R. Binder 12; HOM Tr. vol. 6, at 1314-1315, Admin. R. Binder 33, vol. O

prudent to allow LCRA the flexibility to make a minor deviation to avoid those obstacles while still paralleling I-10 as much as reasonably possible. The decision of the Commission to allow this minor deviation was already covered by their standard ordering paragraphs on minor deviations,²⁰ and was fully supported by the evidence in the Administrative Record. Ordering Paragraph 2 of the Final Order should be affirmed.

Reply Point 3: Changes to Findings and Conclusions Were Proper
(Responsive to Plaintiffs' Point 2)

In presenting their Point of Error 2 on page 16 of their Brief, Plaintiffs identified in footnote 73 a number of findings of fact and conclusions of law that they allege were “illegally changed.” However, 9 of the 17 findings of fact listed by Plaintiffs are actually adopted by the Commission in its Final Order verbatim from the PFD issued by the ALJs.²¹ Of greater significance, these nine findings are actually findings entered by the administrative judges that support the Commission’s selection of Route MK63 modified. These findings prove that plaintiffs are incorrect in their assertion that the Commission “completely chang[ed] the decision of the ALJs.”²²

It is important in reviewing the Commission’s decision in this case to keep in mind that CREZ routing cases do not lend themselves to black-and-white choices. The Administrative Law Judges and the PUC Commissioners are not tasked with developing clear-cut facts and applying straightforward statutory elements. The decision-makers are asked to weigh and balance competing, and sometimes contradictory, factors in choosing between many potential routes which each present strengths and weaknesses under the various factors. The process is inherently discretionary and dependent on the unique facts presented by each study area. A review of the Proposal for Decision reveals the struggle faced by the ALJs. As indicated above, even while they selected Staff Modified MK15, the ALJs entered findings of fact that supported routes like MK63 Modified that parallel I-10.

¹⁹ HOM Tr. vol. 6, p. 1209, Admin. R. Binder 33, vol. O

²⁰ Open Meeting Tr. at 57-58, Plaintiffs’ Brief - Attachment F

²¹ Findings of Fact 40, 44, 52, 77, 79, 102, 121, 126 and 151 -- PUC Final Order, Admin. R. Binder 10, Item 455 and PFD, Admin. R. Binder 9, Item 412

²² Plaintiffs’ Initial Brief, p. 20

In its Final Order, the Commission states that it chose MK63 Modified over the route recommended by the ALJs because the PUC felt it was more important in this particular study area “to parallel or closely follow Interstate 10 (I-10) rather than cutting through less developed land.”²³ While the Final Order does not quote the APA or the Commission rules, it is clear that the Commission decided that in the complex balancing of competing public policy concerns, the ALJs “did not properly apply or interpret” the factors set forth in PURA and PUC Rules by giving insufficient weight to the factor of paralleling compatible right-of-way.

In the end, the Commission did not reach a radically different conclusion. It did not reject or reverse the findings of the ALJs or ignore the evidentiary record. The decision by the Commission was supported by the evidentiary record and by several of the findings entered by the ALJs. The resulting Final Order was not a rejection or disregard of the work done by the administrative judges, but simply a re-balancing of the competing policy concerns discussed by the ALJs in their Proposal for Decision. The Commissioners must be allowed to exercise such discretion in routing decisions that are not susceptible to strict statistical analyses and seldom involve choices between one route that clearly satisfies all of the routing factors over other options that clearly do not. The Commission appropriately exercised its discretion. It’s alterations to the findings and conclusions were supported by the evidentiary record and many of the findings recommended by the ALJs, and were necessary to explain and support the different weighing and balancing of the factors adopted by the Commission. The Final Order should be affirmed.

Reply Point 4: Proper Consideration of Factors
(Responsive to Plaintiffs’ Points 3 and 4)

In Points of Error 3 and 4, Plaintiffs accuse the Commission of disregarding its policy of prudent avoidance and the factor of community values. These arguments are predicated upon a pair of fallacies. The first is that either the policy of prudent avoidance or community values are the only factors that must be considered, or one or both are somehow predominant over any other factors such that one or both should be the sole determinant in CREZ routing cases. This is clearly not the case. Under both PURA and the PUC Rules, the Commission must consider and

²³ PUC Final Order at p. 2, Admin. R. Binder 10, Item 455

balance a number of competing factors. Neither the statute nor the rules assign any weight or significance to any one factor over others. They are all presented in the law equally and must all be considered by the Commission. Prudent avoidance is one factor among many, and there is no legal authority to support the proposition that it is of primary significance over the other factors. The same is true of community values.

The other fallacy is that the Commission is somehow required to select a route that is statistically the best in any given factor from a purely numerical standpoint. The very policy of prudent avoidance encompasses discretion by its inclusion of the term “reasonable.” The factor is not an absolute statistical measure. Finding of Fact 126, recommended by the ALJs and adopted verbatim by the Commission in its Final Order, finds based upon the evidentiary record that “LCRA TSC’s proposed alternative routes reflect reasonable investments of money and effort in order to limit exposure to electric and magnetic fields (EMF).”²⁴ Both the Administrative Law Judges and the PUC Commissioners agree – all of the proposed routes satisfy the policy of prudent avoidance. Plaintiffs’ contention is contrary to the evidentiary record, the recommendation of the ALJs, and the Final Order that incorporated both without amendment.

Community values is a very broad concept that does not lend itself to strict statistical analysis. Its application also requires the exercise of discretion. To reduce the factor to a numerical assessment would render the CREZ routing process little more than a popularity contest, with less-populated regions always being chosen over population centers due simply to the number of inhabitants. The factor requires an assessment of all community values in the study area, and not a simple head count or show of hands.

The Commission did not disregard prudent avoidance or community values, but entered detailed findings and conclusions related to both factors.²⁵ Plaintiffs simply disagree with the weight the Commission gave to these factors and the specific findings made by the Commission. The Commission is the proper body to exercise such discretion in balancing competing policy factors. The PUC Final Order should be affirmed.

²⁴ Finding of Fact 126 -- PUC Final Order, Admin. R. Binder 10, Item 455 and PFD, Admin. R. Binder 9, Item 412

²⁵ Findings of Fact 20-31a and 124-129 -- PUC Final Order, Admin. R. Binder 10, Item 455

Reply Point 5: Route MK63 Modified Is Supported by Evidence
(Responsive to Plaintiffs' Points 3 and 4)

The real complaint of the Plaintiffs is that the Commission, in its proper exercise of discretion, decided that paralleling compatible right-of-way is more important in this study area than the number of habitable structures, and that the community values evidence regarding paralleling compatible right-of-way in general and I-10 in particular is at least as important as the specific concerns of the City of Kerrville. However Plaintiffs describe their complaints, the Administrative Record contains more than enough evidence to support the decision of the Commission to select Route MK63 Modified.

In reviewing the evidence regarding habitable structures, it must be viewed in the context of the length of the proposed transmission line. While there are 134 habitable structures along Route MK63, that is spread over a project length of 138.48 miles.²⁶ Fewer than one habitable structure per linear mile is still a low figure. Undoubtedly 134 is considerably more than the 55 habitable structures along Staff MK15 Modified, but it is still an acceptable figure for a line that stretches about 140 miles.

Balanced against this low number of habitable structures per linear mile is, among other things, the evidence regarding the importance of paralleling I-10 as much as possible. The primary corridor for compatible right-of-way in the study area is IH-10.²⁷ The highway was added to the study area for this very reason.²⁸ As was repeated in the record, there is no appreciable source of compatible right-of-way elsewhere in the study area that can be paralleled.²⁹ Environmental concerns also weigh heavily in favor of paralleling I-10. The Texas Parks and Wildlife Department provided testimony on the subject of habitat fragmentation.³⁰ The evidence in the record confirms that paralleling existing corridors that already fragment

²⁶ LCRA Exhibit 26, Admin. R. Binder 29

²⁷ HOM Tr. v.5, p. 1031, Admin. R. Binder 33, vol. N

²⁸ HOM Tr. v.2, p. 347, Admin. R. Binder 33, vol. K

²⁹ HOM Tr. v.4, p. 785; v.5, pp. 1030-1032, Admin. R. Binder 33, vol. M

³⁰ TPWD Exhibits 4 & 5, Admin. R. Binder 32; PUC Staff Exhibit 7, Admin. R. Binder 32; HOM Tr. v.4, pp. 827-828, Admin. R. Binder 33, vol. M

habitat – like IH-10 – is preferable to routing through unspoiled territory and fragmenting intact blocks of habitat.³¹

A review of the evidence regarding community values also supports the policy choice to parallel I-10 as much as possible. Plaintiffs’ argument focuses solely on their favored expression of community values – distance from residences. There is ample evidence in the record that one of the more consistent expressions of community values throughout the study area is the desire to parallel compatible right-of-way, with many expressing the specific desire to parallel I-10.³² Witnesses expressed during the hearing on the merits that routing parallel to the IH-10 right-of-way is an important aspect to protect the shared community values of the Hill Country.³³ Resolutions passed by various governmental entities also supported the use of the IH-10 corridor in order to protect the unspoiled vistas of the Hill Country.³⁴

There is a distinct qualitative difference, as confirmed by the expressions of community values, between pristine ranch land and land abutting IH-10.³⁵ As noted by TPWD’s Dr. Clary, the highway has already irrevocably altered the landscape of the Hill Country³⁶, and the billboards, infrastructure and commercial and industrial development that accompany it are much more compatible with 345-kV towers than the family ranches in the rest of the study area. The evidence supports the policy choice of the Commission to parallel I-10 as much as possible rather than cutting through undeveloped portions of the Hill Country. The PUC Final Order should be affirmed.

E. Prayer

For these reasons, Intervenors Trey Whichard, Kerry Brent Scott Trust (4C Ranch), and Kimberly Frances Hirmas ask the court to render judgment against Plaintiffs’ challenge to the

³¹ HOM Tr. v.1, pp. 162-163, Admin. R. Binder 33, vol. J; HOM Tr. v.3, p. 550, Admin. R. Binder 33, vol. L; HOM Tr. v.4, pp. 827-828, 831, 834, Admin. R. Binder 33, vol. M

³² HOM Tr. v. 1 at 170, Admin. R. Binder 33, vol. J; HOM Tr. v.2 at 309-310, Admin. R. Binder 33, vol. K

³³ HOM Tr. v.1, at 170 and 347, Admin. R. Binder 33, vol. J; HOM Tr. v. 4, at 745-747 and 777-779, Admin. R. Binder 33, vol. M

³⁴ LCRA Exhibit 1, Appendix F, Admin. R. Binders 16-22; Segrest Exhibits 14 & 15, Admin. R. Binder 31; Gillespie County Exhibit 1, attachment MS-2, Admin. R. Binder 14

³⁵ HOM Tr. v.1, at 170 and 347, Admin. R. Binder 33, vol. J; HOM Tr. v. 4, at 791, Admin. R. Binder 33, vol. M; HOM Tr. v.5 at 974-975, Admin. R. Binder 33, vol. N; HOM Tr. v.6 at 1194-1195, Admin. R. Binder 33, vol. O

³⁶ TPWD Exhibit 4 at 14 and 19-20, Admin. R. Binder 32

