

**CAUSE NO. D-1-GV-11-000324**

**CITY OF KERRVILLE, KERRVILLE  
PUBLIC UTILITY BOARD, AND CITY  
OF JUNCTION**

**Plaintiffs,**

**vs.**

**PUBLIC UTILITY COMMISSION OF  
TEXAS**

**Defendant.**

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**IN THE DISTRICT COURT OF**

**TRAVIS COUNTY, TEXAS**

**98th JUDICIAL DISTRICT**

**PLAINTIFFS' AND INTERVENOR KERR COUNTY'S  
JOINT BRIEF ON THE MERITS**

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**MAY 17, 2011**

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CITY OF KERRVILLE, KERRVILLE	§	IN THE DISTRICT COURT OF
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Plaintiffs,	§	
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vs.	§	TRAVIS COUNTY, TEXAS
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PUBLIC UTILITY COMMISSION OF	§	
TEXAS	§	
Defendant.	§	98th JUDICIAL DISTRICT

**PLAINTIFFS' AND INTERVENOR KERR COUNTY'S  
JOINT BRIEF ON THE MERITS**

**TO THE HONORABLE JUDGE LIVINGSTON:**

COME NOW, the City of Kerrville, Kerrville Public Utility Board, and the City of Junction ("Kerrville, *et al.*" or "Plaintiffs"), and Kerr County, Intervenor, referred to jointly with Plaintiffs, and file this joint initial brief in support of Plaintiffs' Original Petition and Application for Temporary Restraining Order and Temporary and Permanent Injunctive Relief, seeking judicial review of the Final Order of the Public Utility Commission of Texas ("PUC" or "Commission") entered in *Application of LCRA Transmission Services Corporation to Amend Its Certificate of Convenience and Necessity for the Proposed McCamey D to Kendall to Gillespie 345-kV CREZ Transmission Line in Schleicher, Sutton, Menard, Kimble, Mason, Gillespie, Kerr and Kendall Counties, Texas*, PUC Docket No. 38354. Plaintiffs would respectfully show the following:

**STATEMENT OF THE NATURE OF THE CASE**

This suit is an appeal from the January 24, 2011 Final Order of the Public Utility Commission of Texas in PUC Docket No. 38354 and is filed pursuant to §§ 2001.171 and

2001.176 of the Texas Government Code<sup>1</sup> and §§ 15.001 and 33.026 of the Public Utility Regulatory Act (“PURA”).<sup>2</sup>

### STATEMENT OF FACTS

The administrative proceeding in PUC Docket No. 38354 concerned one overarching issue: the proper route for construction of a 345 kilovolt (“kV”) transmission line through the Texas Hill Country. The Lower Colorado River Authority Transmission Services Corporation (“LCRA TSC”) filed an application (“Application”) to amend its certificate of convenience and necessity (“CCN”) on July 28, 2010. LCRA TSC’s Application sought authority from the Commission to construct a transmission line to transport electricity from LCRA TSC’s McCamey D substation, located in Schleicher County, north of Eldorado, to LCRA TSC’s Kendall substation, located in Kendall County, near Comfort.<sup>3</sup>

Transmission line routes are constructed from a series of smaller links or segments to connect two substations. LCRA TSC proposed many different combinations of links in its Application to form a total of 60 potential routes for the McCamey D to Kendall transmission line.<sup>4</sup> The length of the proposed routes varied between 128 and 166 miles.<sup>5</sup> The proposed routes were all to be located within the “study area,” consisting of an area inside Schleicher,

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<sup>1</sup> Tex. Gov’t Code Ann. §§ 2001.171 and 2001.176 (West 2008 & Supp. 2010).

<sup>2</sup> Tex. Util. Code Ann. §§ 15.001 and 33.026 (West 2007 & Supp. 2010) (PURA).

<sup>3</sup> Application, LCRA TSC Ex. 1 at 11, Admin. R. Binders 16-22. Plaintiffs would note that LCRA TSC originally proposed construction of not one, but two transmission lines: the McCamey D to Kendall line, as well as the Kendall to Gillespie line. The Commission ultimately removed the proposed Kendall to Gillespie line from the project, on the basis that the need for that particular line could be met through infrastructure upgrades to the existing lines connecting the Kendall to Gillespie substations. Order on Certified Issue, (recognizing new PUC Docket No. 38577, which would ultimately remove the Kendall to Gillespie line from the project at issue in this proceeding), Admin. R. Binder 6, Item No. 297.

<sup>4</sup> Application, LCRA TSC Ex. 1 at 14, Admin. R. Binders 16-22. The record contains a list of all the links forming the sixty filed routes. Application, LCRA TSC Ex. 1 at Attachment 6 at 4 through 65, Admin. R. Binders 16-22.

<sup>5</sup> Application, LCRA TSC Ex. 1 at 9, Admin. R. Binders 16-22.

Sutton, Menard, Kimble, Mason, Gillespie, Kerr, and Kendall Counties.<sup>6</sup> Of its 60 filed routes, LCRA TSC designated Route MK 13 as LCRA TSC's "preferred" route for construction of the McCamey D to Kendall transmission line.<sup>7</sup> The designation of a route as a "preferred" route represents LCRA TSC's determination that the preferred route best met the routing criteria contained within the statutes and regulations governing the route selection process.

The proposed routes filed in LCRA TSC's Application in PUC Docket No. 38354 may be grouped into three general categories according to their geographic locations. The first category includes routes concentrated in the northern portion of the study area, generally referred to as the P-Line routes (named after links that begin with the letter P), which would be constructed near (but not through) the cities of Menard and Mason, following an existing 138 kV transmission line.<sup>8</sup>

The second and largest category of LCRA TSC's filed routes, including LCRA TSC's preferred route MK 13,<sup>9</sup> would be constructed through the center of the study area.<sup>10</sup> These routes would not be constructed near or through cities or highly developed areas. Instead, these routes would be constructed largely on undeveloped land. The routes in this second category are generally much more direct and therefore are shorter than the other two categories of routes. They also generally pass nearer to fewer habitable structures (homes and other buildings suitable for human habitation) than other routes.

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<sup>6</sup> Application, LCRA TSC Ex. 1 at 11-12, Admin. R. Binders 16-22.

<sup>7</sup> Direct Testimony of Rob R. Reid, LCRA TSC Ex. 9 at 23, Admin. R. Binder 28. "Preferred route" is a term of art in PUC proceedings that indicates which route the applicant utility believes best meets the statutory and rule criteria applicable to transmission line routing.

<sup>8</sup> Application, LCRA TSC Ex. 1 at Attachment 6 at 4 through 65, Admin. R. Binders 16-22. Such routes are MK 22, MK 23 and MK 24.

<sup>9</sup> The use of "MK" in the designation of a proposed route identifies that route as originating at the McCamey D substation and terminating at the Kendall substation.

<sup>10</sup> Application, LCRA TSC Ex. 1 at Attachment 6 at 4 through 65, Admin. R. Binders 16-22.



The third category of proposed routes are those routes that largely parallel U.S. Highway 277 and/or Interstate 10 (“I-10”) in the southern portion of the study area.<sup>11</sup> Interstate I-10 is a highly scenic highway through the Texas Hill Country<sup>12</sup> that boasts two of the best Scenic Overlooks and Rest Areas in Texas.<sup>13</sup> The cities of Junction and Kerrville are both bisected by I-10, and I-10 also spans across Kerr County. In addition, these routes would generally impact a greater number of habitable structures than the other two categories of routes.

On July 30, 2010, LCRA TSC’s Application was transferred to the State Office of Administrative Hearings (“SOAH”) for a hearing on the merits.<sup>14</sup> On August 6, 2010, the City of Kerrville, Kerr County, and Kerrville Public Utility Board intervened in the proceeding.<sup>15</sup> The City of Junction intervened in the proceeding on August 26, 2010. The City of Junction subsequently filed a Statement of Position on September 27, 2010.<sup>16</sup> The City of Kerrville, Kerr County, and Kerrville Public Utility Board submitted prefiled direct testimony on September 28, 2010.<sup>17</sup> Two SOAH Administrative Law Judges (“ALJs”) conducted a full hearing on the merits on the question of the proper route for the proposed McCamey D to Kendall transmission line. That hearing on the merits lasted from October 25, 2010 to November 2, 2010.<sup>18</sup>

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<sup>11</sup> Application, LCRA TSC Ex. 1 at Attachment 6 at 4 through 65, Admin. R. Binders 16-22. Examples of such routes are MK 32 and MK 33.

<sup>12</sup> Kerr County Ex. 1, Direct Testimony of Judge Pat Tinley, Attachments B and E, demonstrate that while there are small pockets of development near I-10, it is largely scenic in nature, Admin. R. Binder 15.

<sup>13</sup> Application (Environmental Assessment), LCRA TSC Ex. 1 § 2.11 at 2-73, Admin. R. Binders 16-22; Tr. at 246-247, Admin. R. Binder 33, Transcripts, Vol. J.

<sup>14</sup> Order of Referral and Preliminary Order, Admin. R. Binder 1, Item No. 7.

<sup>15</sup> Pursuant to agreement between the parties, Motions to Intervene were not compiled as a portion of the Administrative Record.

<sup>16</sup> Statement of Position by City of Junction, Attachment H to this Brief.

<sup>17</sup> Direct Testimonies for City of Kerrville, Kerrville Public Utility Board and Kerr County; Kerrville Ex. 1, KPUB Ex. 1, Kerr County Exs. 1 and 2, Admin. R. Binder 15.

<sup>18</sup> Hearing on the Merits (“HOM”) Transcript Volumes 1-7, Admin. R. Binder 33, Transcripts, Vols. J-Q.

During the hearing on the merits, the parties recommended a number of routes, and numerous parties also suggested additional combinations of links to create new routes that had not been filed in LCRA TSC's Application.<sup>19</sup> On November 1, 2010, the ALJs admitted an exhibit providing information on a number of these "new" routes that had not initially been filed in LCRA TSC's Application.<sup>20</sup> Among these new routes were Routes MK 61, MK 62, and MK 63.

After the conclusion of the hearing on the merits, the ALJs issued a Proposal for Decision ("PFD") on December 16, 2010.<sup>21</sup> The ALJs recommended the selection of PUC Staff's proposed route, "Route MK 15 Modified," for construction of the proposed McCamey D to Kendall transmission line.<sup>22</sup> Route MK 15 Modified avoids the cities of Junction and Kerrville, and the developed areas of Kerr County.<sup>23</sup>

The Commission considered the ALJs' PFD at two of its open meetings, held on January 13 and January 20, 2011. At those meetings, the Commission rejected the ALJs' selected route and instead selected Route MK 63 for construction of the transmission line, and then modified this route in several places. The Commission christened the resulting route "Modified Route MK 63."<sup>24</sup> Modified Route MK 63 belongs to the third category of routes; it would be located primarily through the southern portion of the study area, largely following I-10 and crossing directly through the cities of both Junction and Kerrville.

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<sup>19</sup> See generally, HOM Transcript Volumes 1-7, Admin. R. Binder 33, Transcripts, Vols. J-Q. There were over 1100 parties to the contested case hearing. Many of these parties participated in conjunction with a coalition or other type of group. Proposal for Decision ("PFD") at 4 (Dec. 16, 2010), Admin. R. Binder 9, Item No. 412.

<sup>20</sup> Tr. Vol. 6 at 1177, Admin. R. Binder 33, Transcripts, Vol. P; Criteria for Selected Routes (Excluding Modifications), LCRA TSC Ex. 26, Admin. R. Binder 29.

<sup>21</sup> PFD at 111 (Dec. 16, 2010), Admin. R. Binder 9, Item No. 412.

<sup>22</sup> PFD at 3 (Dec. 16, 2010), Admin. R. Binder 9, Item No. 412.

<sup>23</sup> Direct Testimony of Mohammed Ally, PUC Staff Ex. 1 at 18, Admin. R. Binder 31. For a map of Route MK 15 Modified, see Weinzierl Ranch Ex. 3, Admin. R. Binder 32.

<sup>24</sup> Order at 2 (Jan. 24, 2011), Admin. R. Binder 10, Item No. 455.

## POINTS OF ERROR AND ARGUMENT

The Order adopted by the Commission in PUC Docket No. 38354 contains numerous legal and procedural errors because the Order was derived from a “results driven” approach. While the ALJs recommended a route that negatively impacted only a moderate number of people, the Commission ordered a route that negatively impacts the greatest number of people of all the filed routes. The Commission was clearly motivated by a desire to route the transmission line along Interstate 10, despite the evidence in the record that demonstrated the inadvisability of doing so. As a result of the Commission’s “results driven” approach, the Order contains a number of errors. As further detailed herein, the Order is not supported by substantial evidence, is in violation of Constitutional and statutory provisions, was made through unlawful procedure, is affected by other error of law, and is arbitrary and capricious and marked by an unwarranted abuse of discretion. Accordingly, Plaintiffs and Intervenor Kerr County respectfully request this Honorable Court to reverse the Commission’s Order.

### POINT OF ERROR NO. 1

**The Commission erred in materially rerouting Link Y11 after the closing of the evidentiary record and without providing affected parties the opportunity to examine witnesses or present evidence on the impact of the rerouting.<sup>25</sup>**

- 1. No evidence in the evidentiary record as a whole supports the Commission’s decision to materially reroute Link Y11 through the City of Junction.**

There is no evidence in the record to support the Commission’s material and illegal decision to reroute a substantial portion of Modified Route MK 63. Under the Texas Administrative Procedure Act (“APA”), agency actions must be based upon the probative and reliable evidence in the record as whole.<sup>26</sup> The Commission ordered a substantial modification to

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<sup>25</sup> Order at 2-3, FOFs 110, 113, 115, 118a, 135, 159, 160 and COLs 9, 10 (Jan. 24, 2011), Admin. R. Binder 10, Item No. 455. Motion for Rehearing of the City of Kerrville, Kerr County, Kerrville Public Utility Board, and the City of Junction at 13-17 (Attachment A), Admin. R. Binder 10, Item No. 459.

<sup>26</sup> Tex. Gov’t Code Ann. § 2001.174(2)(E) (West 2008 & Supp. 2010).

Route MK 63 over two months after the close of the evidentiary record on November 2, 2010,<sup>27</sup> and based on evidence that was not presented by any party until after the close of the record. Therefore, there is no evidence in the record to support the Order.

The APA unambiguously requires that agency orders must have a basis in the evidentiary record.<sup>28</sup> Orders “not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole...” are reversible by a reviewing court.<sup>29</sup> In conducting a substantial evidence review, the court must determine whether the evidence as a whole supports the agency’s conclusion. The test is not whether the agency reached the correct conclusion, but whether some reasonable basis exists in the record to support the agency’s conclusion.<sup>30</sup> That reasonable basis is wholly lacking here.

In administrative hearings, the officer presiding over the contested case hearing controls the evidentiary record and officially closes the record at the completion of the contested case hearing. The PUC procedural rules grant to the officer presiding over the hearing a limited ability to reopen the record after it had been officially closed.<sup>31</sup> However, the presiding officer’s authority to do so expires upon the issuance of a Proposal for Decision.<sup>32</sup> Once the ALJ issues a PFD, the record is closed.

The facts of the case at hand establish that no evidence in the record supports the Order because it is based in part on facts first presented over two months after the close of the evidentiary record. The ALJs conducted a seven-day contested case hearing beginning on

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<sup>27</sup> Tr. Vol. 7 at 1489, Admin. R. Binder 33, Transcripts, Vol. Q.

<sup>28</sup> Tex. Gov’t Code Ann. § 2001.174(2)(E) (West 2008 & Supp. 2010).

<sup>29</sup> *Id.*

<sup>30</sup> *City of El Paso v. Pub. Util. Comm’n of Tex.*, 883 S.W.2d 179, 186 (Tex. 1994).

<sup>31</sup> 16 Tex. Admin. Code § 22.202(c) (1998) (Pub. Util. Comm’n of Tex., Presiding Officer); 16 Tex. Admin. Code § 22.203(b)(7) (2001) (Pub. Util. Comm’n of Tex., Order of Procedure).

<sup>32</sup> *Id.*

October 25, 2010, and ending on November 2, 2010.<sup>33</sup> During that hearing, evidence was admitted into the administrative record.<sup>34</sup> The ALJs specifically closed the record on November 2, 2010.<sup>35</sup> The ALJs issued a Proposal for Decision on December 16, 2010.<sup>36</sup>

The Commission first considered the PFD at its open meeting held on January 13, 2011. At that meeting, the Commission deliberated as to the proper solution for alleged construction and engineering constraints near the Kimble County Airport in the City of Junction, an issue which had been intensely litigated during the contested case hearing.

In its Application, LCRA TSC proposed numerous routes containing links that would impact the Kimble County Airport, and presented two alternatives for routing the transmission line around the airport. One option was to utilize the Y11 Link through the City of Junction and south of the airport.<sup>37</sup> The Commission did not consider the Y11 Link to be an attractive option because construction along this link potentially placed the transmission line in a flood plain.<sup>38</sup> The second option was to route the line to the north of the airport using Links b19b, b19c and b23a.<sup>39</sup> However, some intervenors argued that routing the transmission line north of the airport

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<sup>33</sup> Tr. Vols. 1-7, Admin. R. Binder 33, Transcripts, Vols. J-Q.

<sup>34</sup> *Id.*

<sup>35</sup> Tr. Vol. 7 at 1489, Admin. R. Binder 33, Transcripts, Vol. Q.

<sup>36</sup> PFD at 111 (Dec. 16, 2010), Admin. R. Binder 9, Item No. 412.

<sup>37</sup> PFD at 68 (Dec. 16, 2010), Admin. R. Binder 9, Item No. 412. A portion of one of LCRA TSC's filed Application maps illustrating the location of these links is attached to this Brief as Attachment B. Application, LCRA TSC Ex. 1, excerpt from fig. 6-1f, Admin. R. Binders 16-22.

<sup>38</sup> Direct Testimony of Curtis D. Symank, P.E., LCRA TSC Ex. 7 at 35, Admin. R. Binder 28. "Segment Y11 follows IH 10 on the north side of Junction. The segment is in the 100-year flood plain and close to the Kimble County Airport...[I]ts location on the south side of IH 10 between the TXDOT ROW and the northern bank of the Llano River does raise concerns. The Llano River is slowly eroding the north bank at that location, in the direction of IH 10 and the potential transmission line. At some point in the future the river could threaten the potential transmission line location, and possibly IH 10...."

<sup>39</sup> PFD at 66-67 (Dec. 16, 2010), Admin. R. Binder 9, Item No. 412.

would result in flight hazard issues due to the steep topography of the area.<sup>40</sup> The Commission discussed both options at its open meeting on January 13, 2011.

At that same open meeting, Mr. Bill Neiman of intervenor group Clear View Alliance (“CVA”) suggested a third alternative, albeit one that had not been the subject of any testimony or examination at the hearing on the merits: landowners to the south of the airport (and south of Link Y11) might be willing to accept the line on their properties (the “Neiman Modification”).<sup>41</sup> Mr. Neiman suggested this modification to Link Y11 outside of the evidentiary record.<sup>42</sup> At that open meeting, the Chairman warned the other Commissioners about hearing more concerning the Neiman Modification, stating: “I want to be careful going too far along this line, because we don’t have that in evidence.”<sup>43</sup> Despite this warning, however, the Commission continued to discuss the Neiman Modification to Link Y11 for an extensive portion of the January 13 open meeting.<sup>44</sup> The Commission took no action to determine any route for the McCamey D to Kendall transmission line during its January 13 open meeting and informed the parties it would make a decision at its next open meeting, scheduled for January 20.<sup>45</sup>

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<sup>40</sup> Intervenor Clear View Alliance (“CVA”) submitted prefiled Direct Testimony of Mr. Frank O. McIlwain, P.E. to the effect that construction of the transmission line along Link B19c (an alternative to Y11) would constitute an obstruction for the purposes of Federal Aviation Administration’s regulations. CVA Ex. 7 at 8-9, Admin. R. Binder 12. *See also* Attachment B.

<sup>41</sup> Open Meeting Tr. at 111 (Jan. 13, 2011), attached to this Brief as Attachment C and submitted to this Court for review pursuant to the APA, Tex. Gov’t Code Ann. § 2001.175(e) (West 2008 & Supp. 2010). Although Mr. Neiman was the spokesman for the CVA group, he also owned property north of the Kimble County Airport that would be impacted by the use of Link b23a. Application, LCRA TSC Ex. 1 at Attachment 4, Admin. R. Binders 16-22.

<sup>42</sup> In fact, at that Open Meeting, the Commissioners made it clear to the audience that comments made at the open meeting are “not evidence” and continued by stating that “[t]he record is closed in this case.” Open Meeting Tr. at 62 (Jan. 13, 2011) (Attachment C).

<sup>43</sup> Open Meeting Tr. at 111 (Jan. 13, 2011) (Attachment C).

<sup>44</sup> Open Meeting Tr. at 111-118, 128-133, 256-264, 296-297 (Jan. 13, 2011) (Attachment C).

<sup>45</sup> Open Meeting Tr. at 301 (Jan. 13, 2011) (Attachment C).

Following the open meeting held on January 13, LCRA TSC personnel performed a field evaluation of the Neiman Modification in Junction on January 15, 2011.<sup>46</sup> On January 19, 2011, LCRA TSC filed a letter with the Commission reporting the results of its field reconnaissance.<sup>47</sup> While LCRA TSC's engineers determined that the exact modification proposed by Mr. Neiman at the January 13, 2011 open meeting was not safe, LCRA TSC proposed its own alternative version of that newly-proposed and extra-record modification in its January 19, 2011 letter (the "LCRA TSC Modification").<sup>48</sup>

Neither the Neiman Modification nor the LCRA TSC Modification were ever proposed or discussed at the hearing on the merits for PUC Docket No. 38354, nor were they ever submitted for admission into the record prior to the issuance of the PFD. Both of these modifications are very different from the modification to Link Y11 proposed at the contested case hearing. Intervenor group CVA did indeed propose a modification of Link Y11 at the contested case hearing.<sup>49</sup> Plaintiffs cannot adequately describe the differences in these proposed modifications in words. Only a visual examination of CVA's modification proposed at the contested case hearing adequately demonstrates the large and dramatic differences between it and both the Neiman Modification first birthed at the open meeting and the LCRA TSC Modification designed subsequent to the first open meeting.<sup>50</sup>

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<sup>46</sup> LCRA TSC letter to PUC Commissioners at 2 (Jan. 19, 2011), Admin. R. Binder 10, Item No. 454, attached hereto to this Brief as Attachment D and submitted to the Court for review pursuant to Tex. Gov't Code Ann. § 2001.175(e) (West 2008 & Supp. 2010).

<sup>47</sup> LCRA TSC letter to PUC Commissioners at 1 (Jan. 19, 2011), Admin. R. Binder 10, Item No. 454 (Attachment D).

<sup>48</sup> LCRA TSC letter to PUC Commissioners at 2, Exhibit A and Exhibit B (Jan. 19, 2011), Admin. R. Binder 10, Item No. 454 (Attachment D).

<sup>49</sup> Map of Proposed Hearing Modification to Link Y11, CVA Ex. 55, Admin. R. Binder 13 (Attachment E).

<sup>50</sup> *Cf. id.* with Attachment D, LCRA TSC letter to PUC Commissioners at Exhibit A and Exhibit B (Jan. 19, 2011), Admin. R. Binder 10, Item No. 454.

In fact, LCRA TSC's letter proves on its face that neither the Neiman nor the LCRA TSC Modifications were considered at the hearing on the merits. LCRA TSC attached two maps to the letter, marked by LCRA TSC as Exhibits A and B. Exhibit A to the letter represented the Neiman Modification first suggested by CVA representative Mr. Neiman at the January 13 open meeting, while Exhibit B represented the new LCRA TSC Modification.<sup>51</sup> LCRA TSC's January 19 letter further states that LCRA TSC's proposal is a "new proposed configuration."<sup>52</sup> Finally, LCRA TSC's counsel admitted at the open meeting on January 20 that neither of the modifications were part of the evidentiary record:

Mr. Rodriguez: Yes, Mr. Chairman. That modification [the Neiman Modification]—that proposed modification was not part of the record. We finished the case without having the ability or the chance to look at this. Mr. Bayliff [counsel for Neiman] contacted us sometime in December and asked if we would be willing to look at a modification. Brad [Bayliff] came over and met with Mr. Mettie (phonetic) and myself, and this was our understanding of what they were proposing....<sup>53</sup>

The facts are obvious and unassailable: the two modifications were not proposed until months after the administrative record closed; therefore, the evidentiary record contains no facts to support either modification. These facts are crucial because the Commission ultimately adopted the LCRA TSC Modification to Link Y11, which Plaintiffs will herein refer to as the "Link Y11 Reroute."

On January 20, 2011, the Commission again considered the McCamey D to Kendall transmission line at an open meeting.<sup>54</sup> The Commissioners discussed LCRA TSC's letter filed

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<sup>51</sup> LCRA TSC letter to PUC Commissioners at 2 (Jan. 19, 2011), Admin. R. Binder 10, Item No. 454 (Attachment D).

<sup>52</sup> *Id.*

<sup>53</sup> Open Meeting Tr. at 47 (Jan. 20, 2011), attached to this Brief as Attachment F and submitted to this Court for consideration pursuant to Tex. Gov't Code Ann § 2001.175(e) (West 2008 & Supp. 2010).

<sup>54</sup> Open Meeting Tr. at 41 (Jan. 20, 2011) (Attachment F).



the previous day at length throughout the meeting.<sup>55</sup> Despite the fact that LCRA TSC's proposal lay wholly outside of the evidentiary record,<sup>56</sup> the Commissioners expressed their approval of the LCRA TSC Modification, and voted to order the construction of Route MK 63 using the Link Y11 Reroute, and even rechristened the route "Modified Route MK 63."<sup>57</sup> The result of the Link Y11 Reroute will be construction of the transmission line much closer to downtown Junction than any routes that were examined at the hearing and on the record, thereby materially and substantially prejudicing the rights of Plaintiff City of Junction.<sup>58</sup>

Proponents of the Commission's Order will no doubt argue that because the Y11 Reroute will be constructed only on property noticed by LCRA TSC in its initial Application, the Commission was within its bounds to order such a reroute. However, while the Y11 Reroute will be located only within the notice corridor, the location, manner, cost and impact of the Y11 Reroute is so very different from Link Y11 as proposed in LCRA TSC's Application that it essentially constitutes a brand new link.<sup>59</sup> Therefore, any arguments as to notice issues will be beside the point because there is not one piece of evidence in the administrative record to suggest that the new link is either feasible or advisable.

As demonstrated above, there is not even a scintilla of evidence to support the Link Y11 Reroute because this route modification was not proposed until after the administrative record had closed. Though the Commission acknowledged that the record did not contain evidence on the modification, the Commission nevertheless incorporated that modification into its Order. In

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<sup>55</sup> Open Meeting Tr. at 44-64, 71 (Jan. 20, 2011) (Attachment F).

<sup>56</sup> The Commissioners even considered reopening the administrative record, but decided against that course of action. Open Meeting Tr. at 200 (Jan. 13, 2011) (Attachment C).

<sup>57</sup> Open Meeting Tr. at 71, 193-94 (Jan. 20, 2011) (Attachment F). Order at FOFs 115, 118a, 160 (Jan. 24, 2011), Admin. R. Binder 10, Item 455.

<sup>58</sup> LCRA TSC letter to PUC Commissioners at Exhibit B (Jan. 19, 2011), Admin. R. Binder 10, Item No. 454 (Attachment D). The original Link Y11 is shown in blue and yellow, while LCRA TSC's Y11 Reroute is shown in green.

<sup>59</sup> Cf. Attachment B to this Brief with Attachment D at Exhibit B.

violation of APA § 2001.174(2)(E), the Order is completely unsupported by substantial evidence considering the reliable and probative evidence in the record as a whole. Therefore, Plaintiffs respectfully request this Honorable Court to reverse the Order and remand this matter to the Commission.

**2. The Commission's Order prejudices Plaintiffs' substantial rights because the Order violates constitutional and statutory provisions, was made through unlawful procedure and is affected by other error of law.**

The Commission's Order must be reversed because it substantially prejudices the rights of Plaintiffs City of Kerrville, Kerrville Public Utility Board, and City of Junction, and of Intervenor Kerr County. A court "shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (A) in violation of a constitutional or statutory provision... (C) made through unlawful procedure; [or] (D) affected by other error of law..."<sup>60</sup> The Order is based upon representations made at the Commission's open meetings, months after the evidentiary record had closed, without the opportunity for other parties to inspect and respond to such representations, contrary to the mandates of due course of law. Therefore, the Order was issued illegally and must be reversed.

The Commission's consideration of assertions made outside of the evidentiary record denied Plaintiffs their fundamental right to due course of law under the Texas Constitution.<sup>61</sup> Due course of law requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner.<sup>62</sup> The Commission's own procedural rules incorporate this fundamental right to due course of law. The rules regarding the submission of late evidence requires that "evidence shall not be admitted without an opportunity for inspection, objection, and cross-

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<sup>60</sup> Tex. Gov't Code Ann. §§ 2001.174(2)(A),(C) and (D) (West 2008 & Supp. 2010).

<sup>61</sup> Tex. Const. art. I, § 19.

<sup>62</sup> *University of Texas Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 930 (Tex. 1995).

examination by all parties.”<sup>63</sup> Therefore, in order to be afforded due course of law, Plaintiffs are entitled to a meaningful opportunity to respond to all evidence the Commission considers, even if such evidence is late-admitted.

The Commission did not afford Plaintiffs the chance to inspect and respond to all information the Commission considered in reaching its decision in PUC Docket No. 38354. While the Commission never reopened the record,<sup>64</sup> the Commission heard what amounted to “new evidence” from various parties. The Commission entertained extra-evidentiary comments from a number of parties at its open meetings, including CVA representative Bill Neiman, LCRA TSC counsel Fernando Rodriguez, and even LCRA TSC’s engineer Curtis Symank.<sup>65</sup> The Commission’s Order is based upon these extra-evidentiary representations, most notably the January 19, 2011 letter filed by LCRA TSC (discussed at length above).<sup>66</sup>

The Commission’s reliance on new evidence filed on January 19 and further presented at the open meeting on January 20, 2011 substantially harmed and prejudiced the rights of all parties to a fair hearing. Had the parties had the opportunity to review the new evidence submitted regarding the Y11 Reroute, they could have objected to this evidence or performed other tests of its veracity, through cross-examination. However, no party was afforded the opportunity to review the new evidence and challenge it; the information was not filed until one day prior to the Commission open meeting. Even had the information been filed earlier, the

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<sup>63</sup> 16 Tex. Admin. Code § 22.203(b)(7) (2001) (Pub. Util. Comm’n. of Tex., Order of Procedure).

<sup>64</sup> See Attachments C and F.

<sup>65</sup> Open Meeting Tr. at 103-135 (Jan. 13, 2011) (Attachment C); Open Meeting Tr. at 46-64 (Jan. 20, 2011) (Attachment F). At the beginning of the January 13, 2011 open meeting, the Chairman chastised the audience that comments taken at the open meetings would be considered merely comments, rather than evidence. Open Meeting Tr. at 62 (Jan. 13, 2011) (Attachment C). However, if the Commission were truly taking public comment, rather than attempting to gather new evidence, it would have no need to hear from LCRA TSC’s expert engineer.

<sup>66</sup> Open Meeting Tr. at 193 (Jan. 20, 2011) (Attachment F) “I think Chair will entertain a motion to approve Route MK 63 as modified pursuant to our discussion today, your memo, the changes that we have discussed for the ordering paragraphs and the findings of fact, and delegate to staff the ability to make nonsubstantive changes.”

Commission itself noted that “[t]he record is closed”<sup>67</sup> and therefore, the parties’ opportunity to lodge objections or enter evidence in the record was similarly terminated.<sup>68</sup> The Link Y11 Reroute forces the transmission line much closer to the heart of downtown Junction than Link Y11 as originally proposed by LCRA TSC in its Application.<sup>69</sup> Therefore, Plaintiffs have been substantially prejudiced by the submission of new evidence without the opportunity to fully examine, contest, or respond to that evidence.

Additionally, the transcripts of the Commission’s January 13 and January 20, 2011 open meetings further establish that the “testimony” heard by the Commission during those meetings swayed the ultimate decision of the Commission. There may be no better example of this than the case of Tierra Linda. Tierra Linda is a rural subdivision in Gillespie County. The ALJs’ selected route, MK 15 Modified, would have been constructed through the Tierra Linda subdivision.<sup>70</sup> The Commission heard extensive and extremely emotional pleas from residents within Tierra Linda at its January 13, 2011 open meeting.<sup>71</sup> As with the Link Y11 Reroute, no parties were able to cross-examine the residents of the Tierra Linda subdivision, or otherwise examine, contest, or respond to the statements provided by the Tierra Linda residents. However, there can be no doubt that the Commission considered these statements when making their decision. While the ALJs’ selected route would have constructed the transmission line through the Tierra Linda subdivision, the Commission selected a route that does not impact the Tierra

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<sup>67</sup> Open Meeting Tr. at 62 (Jan. 13, 2011) (Attachment C).

<sup>68</sup> The Commission prevented cross-examination by parties to the contested case hearing at its open meetings. The Chairman even stopped an intervenor’s comments, stating: “[s]ir, I’m going to have to stop you here. I mean, this is not really an opportunity for you to cross examine LCRA.” Open Meeting Tr. at 281 (Jan. 13, 2011) (Attachment C).

<sup>69</sup> LCRA TSC letter to PUC Commissioners at Exhibit B (Jan. 19, 2011), Admin. R. Binder 10, Item No. 454 (Attachment D). The original Link Y11 is shown in blue and yellow, while the LCRA Modification is shown in green.

<sup>70</sup> PFD at 2 (Dec. 16, 2010), Admin. R. Binder 9, Item No. 412.

<sup>71</sup> Open Meeting Tr. at 169-213 (Jan. 13, 2011) (Attachment C).

Linda subdivision. The Commission's Order itself proves that the Commission illegally relied upon the highly emotional representations made at the open meetings, rather than the evidence within the record which established the inadvisability of constructing the transmission line through Kerrville.<sup>72</sup>

Plaintiffs' substantial rights to fair consideration of the proposed route for the McCamey D to Kendall transmission line were prejudiced because the Commission based its Order on extra-record and non-evidentiary representations of various parties, well over two months after the evidentiary record had closed. The Order is in violation of a constitutional or statutory provision, made through unlawful procedure, and affected by other error of law because it violates Plaintiffs' constitutional rights to due course of law. Therefore, Plaintiffs respectfully pray this Honorable Court reverse the Commission's Order.

#### **POINT OF ERROR NO. 2**

**The Order illegally changes findings of fact and conclusions of law from the Administrative Law Judges' recommendation, in violation of the Texas Administrative Procedure Act and Commission rules.<sup>73</sup>**

The Order illegally changes a number of findings of fact and conclusions of law from the Administrative Law Judges' recommendation in violation of the Texas Administrative Procedure Act and Commission rules. When an agency delegates a matter to the State Office of Administrative Hearings, the APA limits the manner by which an agency may modify or vacate the findings of the SOAH administrative law judge.<sup>74</sup> Additionally, the Commission's own rules limit when it may modify or vacate the findings of an administrative law judge in a contested case proceeding, in a manner similar to the APA. Under both the APA and the Commission

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<sup>72</sup> See Points of Error 3 and 4, below.

<sup>73</sup> Order at 2-3, FOFs 24, 25, 30, 40, 44, 52, 52a, 77, 79, 83, 100, 102, 121, 125, 126, 151, 159 and COLs 9, 10 (Jan. 24, 2011), Admin. R. Binder 10, Item No. 455.

<sup>74</sup> Tex. Gov't Code Ann. § 2001.058(e) (West 2008 & Supp. 2010).

rules, an agency must provide specific, delineated explanations for changing an ALJ's recommendation. In the case at hand, the Commission's Order fails to provide even one of the specific, delineated reasons contained in the APA and Commission rules. Therefore, the Order violates both the APA and the Commission's rules, and must be reversed and remanded.

The Texas Administrative Procedure Act limits agencies' ability to modify decisions made by administrative law judges. It is not enough that an agency does not like the results of an ALJ's decision. Rather:

(e) A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines:

(1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions;

(2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or

(3) that a technical error in a finding of fact should be changed.<sup>75</sup>

Texas courts have interpreted this statutory provision to mean that state agencies, such as the Commission, must respect the findings of an administrative law judge. The Texas Supreme Court has held that "[i]f a board could find additional facts, resolving conflicts in the evidence and credibility disputes, it would then be serving as its own factfinder despite delegating the factfinding role to a hearing examiner, and the process of using an independent factfinder would be meaningless."<sup>76</sup> The Third Court of Appeals has similarly held that an agency may not arbitrarily change findings of fact made by a SOAH administrative law judge, because the ALJ has heard all of the evidence and is best suited to making credibility determinations.<sup>77</sup> The court

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<sup>75</sup> *Id.*

<sup>76</sup> *Montgomery Indep. School Dist. v. Davis*, 34 S.W.3d 559, 564 (Tex. 2000).

<sup>77</sup> *Flores v. Employees Ret. Sys. of Texas*, 74 S.W.3d 532, 540 (Tex.App.—Austin 2002, pet. denied).

stressed the importance of the SOAH ALJ as an independent factfinder, noting that SOAH was “created in response to fairness concerns raised by the fact that hearing examiners employed by the interested agency were directly accountable to it and, thus, did not have the appearance of disinterested hearings officers.”<sup>78</sup> Precedent clearly establishes that because ALJs are independent factfinders, state agencies may not modify ALJs’ decisions with impunity. Rather, the agency’s role is more akin to an appellate court reviewing an agency decision under the substantial evidence rule — deference is to be given to the factfinder.

Further, if an agency has rules concerning the modification of an ALJ’s decision, the Texas Third Court of Appeals looks to the agency’s rules to determine whether an agency appropriately modified a decision. In the case of *Flores*, the Employees Retirement System of Texas (“ERS”) had promulgated rules requiring it to provide a written explanation for any change it makes to an ALJ’s findings of fact or conclusions of law, similar to the requirements of APA § 2001.058(e).<sup>79</sup> Those rules limited the ERS Board’s ability to change findings of fact or conclusions of law made by a hearings examiner.<sup>80</sup> The case concerned the denial of occupational disability retirement benefits to plaintiff Flores. While the ALJ found that Flores was eligible to receive such benefits, the ERS Board disagreed.<sup>81</sup> Notably, the ERS Board substantially modified the findings of the ALJ to support a conclusion that Flores was not eligible for disability retirement benefits.<sup>82</sup>

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 541-42. The Board could only change an ALJ’s finding or conclusion if it was: clearly erroneous or illogical; against the weight of the evidence; based on misapplication of the rules of evidence or insufficient review of the evidence; inconsistent with the terms or intent, as determined by the board, of benefit plan or insurance policy provisions; or not sufficient to protect the public interest, the interests of the plans and programs for which the board is trustee, or the interests, as a group, of the participants covered by such plans and programs. The Board’s rules further stated that the Board’s Order must contain a written statement of the reason and legal basis for each change made based on the policy reasons listed in the rule. *Id.* at 542.

<sup>80</sup> *Id.* at 541-42.

<sup>81</sup> *Id.* at 536-38.

<sup>82</sup> *Id.* at 538-39.

In *Flores*, the court held that ERS failed to follow its own rules. Specifically, ERS' written explanations for deleting findings proposed by the ALJ stated only that the changed findings were "not relevant" or related to facts that were not in dispute.<sup>83</sup> ERS deleted portions of other findings without providing any explanation at all.<sup>84</sup> ERS also deleted a conclusion of law and substituted another in its place without support in the decision's findings of fact; this new conclusion of law was, in fact, contrary to the great weight of the evidence in the proceeding.<sup>85</sup> The court held that these actions gave the appearance that the Board was arriving at a predetermined result, regardless of the facts in evidence.<sup>86</sup> ERS' failure to follow its own rules was determined to be arbitrary, capricious, and reversible.

The case at hand is markedly similar to *Flores*. Like ERS, the Public Utility Commission has promulgated a rule governing when it may modify the decision of an administrative law judge. Under that rule, the Commission may change a finding of fact or conclusion of law made by the administrative law judge, or vacate or modify an order issued by the administrative law judge *only* if the Commission:

- (1) determines that the administrative law judge:
  - (A) did not properly apply or interpret applicable law, commission rules or policies, or prior administrative decisions; or
  - (B) issued a finding of fact that is not supported by a preponderance of the evidence; or
- (2) determines that a commission policy or a prior administrative decision on which the administrative law judge relied is incorrect or should be changed.<sup>87</sup>

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<sup>83</sup> *Id.* at 542.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 542-43.

<sup>86</sup> *Id.* at 542.

<sup>87</sup> 16 Tex. Admin. Code § 22.262(a) (2011) (Pub. Util. Comm'n of Tex., Commission Action after a Proposal for Decision).



Like ERS, the Commission must give one of the listed specific explanations for modifying administrative law judges' findings of fact and conclusions of law.<sup>88</sup>

Similar to ERS' action giving rise to the *Flores* case, the Commission dramatically changed the decision of the ALJs in the case at hand. In PUC Docket No. 38354, the ALJs recommended construction of the McCamey D to Kendall transmission line along PUC Staff's recommended route, Route MK 15 Modified.<sup>89</sup> Route MK 15 Modified avoids the developed areas of the cities of Junction and Kerrville, and of Kerr County. However, the Commission ordered a very different route: Modified Route MK 63,<sup>90</sup> which will bisect *both* Junction and Kerrville.

Despite completely changing the decision of the ALJs, the Commission did not find that the administrative law judges did not properly apply or interpret applicable law, commission rules or policies, or prior administrative decisions.<sup>91</sup> Neither did the Commission find that the ALJs issued findings of fact not supported by a preponderance of the evidence.<sup>92</sup> Finally, the Commission did not determine that a commission policy or a prior administrative decision on which the administrative law judge relied is incorrect or should be changed.<sup>93</sup> Even though the Commission's rules mandate that the Commission find at least one of the foregoing reasons in order to change the ALJ's findings, the Order does not contain a single one of the required explanations for the complete change in the ALJs' findings.<sup>94</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> PFD at 3, 92 (Dec. 16, 2010), Admin. R. Binder 9, Item No. 412.

<sup>90</sup> Order at 2 (Jan. 24, 2011), Admin. R. Binder 10, Item No. 455.

<sup>91</sup> 16 Tex. Admin. Code § 22.262(a)(1)(A) (2011) (Pub. Util. Comm'n of Tex., Commission Action after a Proposal for Decision).

<sup>92</sup> *Id.* at § 22.262(a)(1)(B).

<sup>93</sup> *Id.* at § 22.262(a)(2).

<sup>94</sup> Specifically, the Commission deleted FOFs 27-29, 31, 58, 59, 111, 112, 130, 139; added new FOFs 31a, 52a, 118a, 159-161; and modified FOFs 26, 30, 33, 48, 83, 92-94, 100, 108, 115, 120, 122-125, 144 and COL 10.

The Order only provides the following explanation for the substantial and numerous changes to the ALJ's decision: "the Commission finds that I-10 is a more compatible right-of-way for paralleling purposes than the alternative paralleling opportunities available."<sup>95</sup> The Commission's use of the word "finds," in particular, demonstrates that the Commission essentially stepped into the shoes of the ALJs in order to create these new findings. Just as in the *Flores* case, the Commission's decision lacks sufficient explanation and appears to be designed to achieve a predetermined result to route the transmission line along I-10.<sup>96</sup>

With regard to the Link Y11 Reroute discussed above, the Commission made no explanation for its modification of the ALJs' decision, other than stating that the Reroute is technically feasible.<sup>97</sup> The Order provides no justification for the modification, contrary to the mandates of P.U.C. Proc. R. 22.262(a). Again, similar to the *Flores* case, the Commission changed findings of fact for "unauthorized and unexplained" reasons.<sup>98</sup>

As the court held in *Flores*, such action is arbitrary and capricious; the Commission's actions in this case are no less arbitrary and capricious. The Commission acted arbitrarily and capriciously by reweighing facts and changing the ALJs' findings of fact and conclusions of law for unauthorized and unexplained reasons, in violation of its own rules and the APA, substantially prejudicing the material rights of Plaintiffs. Therefore, the Commission's Order should be reversed and remanded.

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<sup>95</sup> Order at 2 (Jan. 24, 2011), Admin. R. Binder 10, Item No. 455.

<sup>96</sup> The Chairman even stated at the January 13, 2011 open meeting: "I mean, I'll cut to the chase on this. From sort of day one I've been in favor of using as much of I-10 as possible." Open Meeting Tr. at 260 (Jan. 13, 2011) (Attachment C).

<sup>97</sup> Order at 2 (Jan. 24, 2011), Admin. R. Binder 10, Item No. 455. "The Commission has modified MK 63 in the vicinity immediately south of the Kimball County Airport by moving link Y11 as far south as safely and reliably possible using above ground construction while still affecting only noticed landowners."

<sup>98</sup> Order at FOFs 115, 118, 118a (Jan. 24, 2011), Admin. R. Binder 10, Item No. 455.

### POINT OF ERROR NO. 3

**The Commission erred by disregarding its own policy of prudent avoidance.<sup>99</sup>**

**1. The Commission arbitrarily and capriciously disregarded its own policy of prudent avoidance.**

The Commission acted arbitrarily and capriciously by completely disregarding its own policy of prudent avoidance when selecting Modified Route MK 63. Agencies must follow their own policies; the failure to do so is arbitrary and capricious and constitutes reversible action.<sup>100</sup> Modified Route MK 63 does not comply with the Commission's own policy of prudent avoidance. Therefore, the Commission's selection of Modified Route MK 63 must be reversed.

Agencies are not at liberty to disregard their own policies when it suits them. Instead, courts construe agency rules in the same manner as statutes.<sup>101</sup> While courts generally defer to an agency's reasonable interpretation of its own rules, agencies are prohibited from creating broad amendments or exceptions to its rules through administrative adjudication, rather than the agency's rulemaking authority.<sup>102</sup> To do otherwise would violate the provisions of the Administrative Procedure Act.<sup>103</sup> Therefore, "[t]he failure of an agency to follow the clear, unambiguous language of its own rules is arbitrary and capricious, and will be reversed."<sup>104</sup> The Public Utility Commission is no exception; it must also follow the policies that it creates.

The Commission promulgated the policy of prudent avoidance in order to minimize the impact of radiation on humans from high voltage transmission lines. Commission Substantive Rule 25.101(a)(4) defines "prudent avoidance" as "[t]he limiting of exposures to electric and

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<sup>99</sup> Order at 2-3, FOFs 22, 23, 24, 25, 30, 159 and COL 10 (Jan. 24, 2011), Admin. R. Binder 10, Item No. 455.

<sup>100</sup> *Frank v. Liberty Ins. Corp.*, 255 S.W.3d 314, 324 (Tex.App.—Austin 2008, pet denied).

<sup>101</sup> *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999).

<sup>102</sup> *Id.* at 255.

<sup>103</sup> *Id.*

<sup>104</sup> *Frank*, 255 S.W.3d at 324.

magnetic fields that can be avoided with reasonable investments of money and effort.”<sup>105</sup> The rule mandates that the Commission consider whether an application for a new transmission line conforms with the policy of prudent avoidance. In contested case hearings for certificates of convenience and necessity, the policy of prudent avoidance is applied by measuring habitable structures within a certain distance of the transmission line easement’s centerline.<sup>106</sup>

Compliance with the policy of prudent avoidance is generally one of the key factors for Commission consideration of transmission line routing. The Commission had a duty to follow its own policy of prudent avoidance in this case and to select a route that minimized impacts to habitable structures with a reasonable investment of money and effort.

However, the Order proves that the Commission turned the policy of prudent avoidance on its head. Modified Route MK 63 impacts 134 habitable structures, more than almost all of the routes proposed in LCRA TSC’s Application. Only two of LCRA TSC’s 60 proposed routes impact more habitable structures.<sup>107</sup> The average route would only impact 51.5 habitable structures and some routes impacted as few as 17 habitable structures.<sup>108</sup> The ALJs recommended Route MK 15 Modified largely because of its impact to only 55 habitable structures.<sup>109</sup> Similarly, LCRA TSC selected Route MK 13 as its preferred route partially because it would impact the “second-fewest habitable structures (18) within 500 ft” compared to the other routes proposed in the Application.<sup>110</sup> Rather than selecting any number of proposed

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<sup>105</sup> 16 Tex. Admin. Code § 25.101(a)(4) (2011) (Pub. Util. Comm’n of Tex., Certification Criteria).

<sup>106</sup> For the case at hand, habitable structures were counted if they were located within 500 feet of the proposed route’s centerline. Application, LCRA TSC Ex. 1 at 33, Admin. R. Binders 16-22.

<sup>107</sup> Application, LCRA TSC Ex. 1 at 33-34, Admin. R. Binders 16-22.

<sup>108</sup> *Id.*

<sup>109</sup> Criteria for Selected Routes (Excluding Modifications), LCRA TSC Ex. 26, Admin. R. Binder 29; PFD at 3, Admin. R. Binder 9, Item No. 412. “The ALJs recommend Staff’s MK15 because it affects fewer habitable structures and does not have any habitable structures within the ROW [right-of-way].”

<sup>110</sup> Application (Environmental Assessment), LCRA TSC Ex. 1 at 6-96, Admin. R. Binders 16-22.

routes that would have impacted fewer habitable structures, the Commission chose Modified Route MK 63, which negatively impacts 134 habitable structures.<sup>111</sup>

Crucially, Modified Route MK 63 does not simply impact a high number of habitable structures. Rather, because the route will be constructed within the relatively dense areas of both Junction and Kerrville, the route's impacts to habitable structures is much more detrimental than elsewhere in the study area. LCRA TSC acknowledged in its prefiled direct testimony that "along IH-10 and near Kerrville, it became increasingly difficult to avoid populated areas directly along IH-10 and the IH10 [sic] corridor because of the population density and presence of businesses and rural subdivision developments in the immediate area of Kerrville."<sup>112</sup> As Modified Route MK 63 enters Kerrville, it comes into close proximity to 59 newly affected habitable structures. Of those 59 structures, 17 are located "within the proposed right-of-way."<sup>113</sup> These habitable structures must be "relocated" (in essence, demolished), before construction of the transmission line may take place.<sup>114</sup> Habitable structures in this instance includes homes. Construction of the transmission line through Kerrville will force some homeowners to lose their residences. In fact, the configuration of links along I-10 through Kerrville is the *only* configuration proposed in PUC Docket No. 38354 that would require the condemnation of citizens' homes. Those habitable structures that are allowed to remain will be much closer to the line than habitable structures would be along other routes.

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<sup>111</sup> Order at FOFs 120, 124, 125 (Jan. 24, 2011), Admin. R. Binder 10, Item No. 455.

<sup>112</sup> Direct Testimony of Rob R. Reid, LCRA TSC Ex. 9 at 19, Admin. R. Binder 28.

<sup>113</sup> Application (Environmental Assessment Table 6-78), LCRA TSC Ex. 1 at 6-293, Admin. R. Binders 16-22. Plaintiffs note that the number of habitable structures within the right of way must be extrapolated from the habitable structure statistics for Route MK 33 because the Commission ordered Modified Route MK 63 was not filed in the LCRA TSC's Application—thus, specific statistics regarding the route are not available in the record. Route MK 33 contains many of the same links as Modified Route MK 63, including Links Y16 through Y20, which are the only filed links that list any habitable structures within the transmission line right-of-way.

<sup>114</sup> Tr. Vol. 1 at 245, Admin. R. Binder 33, Transcripts, Vol. J; Direct Testimony Curtis D. Symank, P.E., LCRA TSC Ex. 7 at 31, Admin. R. Binder 28.

The second component of prudent avoidance is minimizing effects on habitable structures through reasonable investments of money and effort, generally measured by project cost. The Commission's selected route Modified Route MK 63 costs more money to construct, in addition to impacting more habitable structures in a more negative manner than virtually any route proposed. LCRA TSC's preferred route MK 13 would cost only approximately \$266 million to construct.<sup>115</sup> Modified Route MK 63 would cost approximately \$360.5 million to construct.<sup>116</sup> By contrast, the route recommended by the ALJ (Route MK 15 Modified) would cost only \$302.3 million to construct.<sup>117</sup> The average cost to construct one of LCRA TSC's 60 proposed routes is \$297.0 million.<sup>118</sup> Modified Route MK 63 clearly violates the Commission's policy of prudent avoidance because it costs much more to construct and negatively impacts more habitable structures in a worse manner than virtually all other routes.

Therefore, the Commission's Order disregards the Commission's own policy of prudent avoidance. Modified Route MK 63 will be very expensive to construct and will negatively impact many habitable structures in an extremely detrimental manner. The Order fails to comply with the Commission's own rules and thus constitutes arbitrary and capricious action. Plaintiffs respectfully pray the Commission's Order be reversed and remanded.

**2. The Commission's Order constitutes an abuse or clearly unwarranted exercise of discretion.**

The Commission's Order further errs because it is characterized by an abuse of discretion or clearly unwarranted exercise of discretion. An agency errs if it reaches a completely

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<sup>115</sup> Criteria for Selected Routes (Excluding Modifications), LCRA TSC Ex. 26, Admin. R. Binder 29.

<sup>116</sup> Order at FOFs 120, 124, 125 (Jan. 24, 2011), Admin. R. Binder 10, Item No. 455.

<sup>117</sup> Criteria for Selected Routes (Excluding Modifications), LCRA TSC Ex. 26, Admin. R. Binder 29.

<sup>118</sup> Direct Testimony of Curtis D. Symank, P.E., First Errata, Att. No. 2, LCRA TSC Ex. 1B at 2 of 12, Admin. R. Binder 25.

unreasonable result after weighing only relevant factors.<sup>119</sup> The Order considers both cost and impact of the line on humans, measured by impacts to habitable structures.<sup>120</sup> Cost and impact of the line on humans are both relevant factors as to prudent avoidance. However, as discussed above, the Order selects a route that impacts almost 80 habitable structures more than the route selected by the ALJs, at an increased cost of approximately \$60 million.<sup>121</sup> In light of the Commission's policy of prudent avoidance, the Commission's choice of Route MK 63 Modified is completely unreasonable and is therefore marked by an abuse of discretion or a clearly unwarranted exercise of discretion. Therefore, Plaintiffs respectfully request this honorable court to reverse the Order.

**3. The Commission's Order lacks an evidentiary basis for the assertion that Route MK 63 comports with the policy of prudent avoidance.**

As a consequence of the Commission's disregard for its own policy of prudent avoidance, the Order suffers from a procedural defect: portions of it are not supported by evidence. An agency's action is reversible if it is not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole.<sup>122</sup> In the course of the substantial evidence review, the court will examine whether an agency's factual findings are reasonable in light of the evidence in which they were inferred.<sup>123</sup> The Commission's Order is completely unreasonable in light of the evidentiary record, because no evidence supports the assertion that Modified Route MK 63 comports with the policy of prudent avoidance. In fact, the great preponderance of the evidence in the record establishes the opposite.

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<sup>119</sup> *TGS-NOPEC Geophysical Co. v. Combs*, 268 S.W.3d 637, 651-52 (Tex.App.—Austin 2008, pet. granted).

<sup>120</sup> Order at FOFs 120, 124, 125 (Jan. 24, 2011), Admin. R. Binder 10, Item No. 455.

<sup>121</sup> Criteria for Selected Routes (Excluding Modifications), LCRA TSC Ex. 26, Admin. R. Binder 29; Order at FOFs 120, 124 (Jan. 24, 2011), Admin. R. Binder 10, Item No. 455.

<sup>122</sup> Tex. Gov't Code Ann. § 2001.174(2)(E) (West 2008 & Supp. 2010).

<sup>123</sup> *Hammack v. Pub. Util. Comm'n of Tex.*, 131 S.W.3d 713, 725 (Tex.App.—Austin 2004, pet. denied).

Due to the fact that the selected route was not proposed in LCRA TSC's Application, there is no evidence in the record to support the Order's finding that Modified Route MK 63 comports with the policy of prudent avoidance. Route MK 63 (as of yet unmodified) was not proposed until near the end of the hearing on the merits. It was first proposed as part of LCRA TSC's Exhibit 26, admitted on November 1, 2010, the day before the hearing concluded.<sup>124</sup> While LCRA TSC presented evidence that all of its filed proposed routes in its Application comport with the policy of prudent avoidance,<sup>125</sup> Route MK 63 (unmodified) was not proposed in LCRA TSC's Application.<sup>126</sup> As Route MK 63 was modified at the Commission's January 20, 2011 open meeting as discussed above, Modified Route MK 63 will certainly impact additional habitable structures, although the exact ramifications of the Link Y11 Reroute are undetermined due to the fact that the illegal Link Y11 Reroute was suggested outside of the evidentiary record. As established above, Modified MK 63 negatively impacts more habitable structures in a worse manner and at a higher cost than the ALJs' selected route and virtually all routes proposed in the Application. The route clearly does not comport with the policy of prudent avoidance. To the contrary, the great preponderance of the evidence in the record proves that the selected route violates the policy because only two routes impact more habitable structures at a higher cost.<sup>127</sup>

Therefore, Commission Order Findings of Fact Nos. 125 and 126 are not supported by any of the reliable and probative evidence in the administrative record as a whole, in violation of APA § 2001.174(2)(E). Plaintiffs respectfully request this Court reverse and remand the Commission's Order.

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<sup>124</sup> Tr. Vol. 6 at 1177, Admin. R. Binder 33, Transcripts, Vol. P.

<sup>125</sup> Direct Testimony of Sara Morgenroth, LCRA TSC Ex. 2 at 30, Admin. R. Binder 25.

<sup>126</sup> Application, LCRA TSC Ex. 1 at 33-34, Admin. R. Binders 16-22.

<sup>127</sup> *See generally*, Point of Error No. 3, above.



#### POINT OF ERROR NO. 4

**The Commission erred by disregarding statutory criteria.<sup>128</sup>  
The Commission's Order arbitrarily and capriciously  
disregarded the statutory criteria of community values.**

The Commission's disregard of expressed community values within the study area constitutes arbitrary and capricious action, and is further characterized by an abuse of discretion. Agency action is reversible by a court when such agency action is arbitrary or capricious or characterized by an abuse of discretion.<sup>129</sup> An agency acts arbitrarily and capriciously or abuses its discretion when it fails to consider a factor the legislature required it to consider.<sup>130</sup> PURA specifically lists "community values" as a factor that the Commission must consider when considering the potential placement for a new transmission line.<sup>131</sup> However, in the case at hand, the Commission clearly disregarded the community value factor the legislature requires the Commission to consider in cases of this nature.

In PUC Docket No. 38354, the community clearly expressed its preference that the proposed McCamey D to Kendall transmission line avoid developed areas and habitable structures. At public open house meetings held by LCRA TSC prior to the contested case hearing, attendees expressed their common concern about the impact of the proposed transmission line on development and subdivisions.<sup>132</sup> The Environmental Assessment ("EA") prepared for LCRA TSC in preparing its Application provides specific details about expressed community values at public open house meetings. A chart compiling the attendees' ranked

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<sup>128</sup> Order at 2-3, FOFs 124, 125, 126, 159, 160 and COLs 9, 10 (Jan. 24, 2011), Admin. R. Binder 10, Item No. 455.

<sup>129</sup> Tex. Gov't Code Ann. § 2001.174(2)(E) (West 2008 & Supp. 2010).

<sup>130</sup> *City of El Paso v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d 179, 184 (Tex. 1994).

<sup>131</sup> Tex. Util. Code Ann. § 37.056(c)(4)(A) (West 2007 & Supp. 2010).

<sup>132</sup> Application, LCRA TSC Ex. 1 at 24-27, Admin. R. Binders 16-22. The Environmental Assessment prepared for LCRA TSC in preparing its Application provides specific details about expressed community values at public open house meetings.

preferences from the EA is attached hereto and incorporated herein as Attachment G.<sup>133</sup> This chart demonstrates overwhelming community support for avoiding developed areas and habitable structures.

Additionally, community leaders within the study area testified as to the importance that the proposed transmission line avoid developed areas. The testimony of community leaders is extremely persuasive evidence as to values within a community. In our society of representative government, there are few better ways in which to demonstrate the sentiment of a community than through the public testimony of the officials elected to represent that community.

The City of Kerrville submitted direct testimony about the impact of the proposed transmission line on existing habitable structures and impending development within the City.<sup>134</sup> The prefiled Direct Testimony of Kerrville Mayor Wampler established the City's concern that "existing homes and businesses will relocate due to the transmission line" if the line were to be constructed through Kerrville.<sup>135</sup> Similarly, Kerr County submitted direct testimony regarding its concerns over the impacts of the transmission line on existing homes and businesses in both Kerrville and Kerr County, as well as on potential future development.<sup>136</sup> Kerr County also submitted cross-rebuttal testimony, establishing a pattern of development along I-10, particularly along major intersections, such as Highway 16 and Harper Road.<sup>137</sup> Other intervenors submitted similar evidence during the contested case hearing. Cecil Atkission, a Kerrville businessman, submitted direct testimony regarding his concern that portions of the proposed transmission line

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<sup>133</sup> Attachment G has been created from LCRA TSC's Application, and specific pages from the Application have been indicated within Attachment G, Admin. R. Binders 16-22.

<sup>134</sup> Direct Testimony of David Wampler, Kerrville Ex. 1 at 4-7, Admin. R. Binder 15.

<sup>135</sup> *Id.* at 7.

<sup>136</sup> Direct Testimony of Pat Tinley, Kerr County Ex. 1 at 5-7, Admin. R. Binder 15.

<sup>137</sup> Cross-Rebuttal Testimony of Pat Tinley, Kerr County Ex. 2 at 4-5, Atts. A and B, Admin. R. Binder 15.

would traverse “directly through areas with a great deal of habitable structures.”<sup>138</sup> Therefore, the substantial evidence in the record establishes a strong community value of avoiding building the transmission line through developed areas of high habitation.

The Commission’s Order correctly identifies that the evidence reflects strong community values for “reducing the effect of the line on habitable structures, particularly in developed areas...”<sup>139</sup> However, the Commission’s Order completely disregards that value. The Order selects the route with the greatest impact on developed areas and upon the habitable structures within those areas, despite a multitude of proposed routes that would not affect any developed areas.

The study area for the McCamey D to Kendall transmission line is largely rural in nature, and consequently very few of LCRA TSC’s proposed routes impact developed areas. LCRA TSC’s Application states that “[c]attle, sheep, and goat ranching, along with wild game hunting (deer, antelope, turkey, javelina, quail, and a few exotic species), is the current primary form of land use for most of the project area. The majority of the land use within the project area consists of rangeland, but some areas do contain cropland and improved pastureland used for grazing, seed, and hay production.”<sup>140</sup> The Application similarly notes the lack of municipalities within the study area, noting that the majority of routes do not pass within the city limits of any municipalities.<sup>141</sup> Only eight of the sixty routes proposed in LCRA TSC’s Application would be located within the city limits of any municipality. Further, the only municipalities “at risk” for

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<sup>138</sup> Direct Testimony of Cecil Atkission, Atkission Ex. 1 at 8, Att. A, Admin. R. Binder 11.

<sup>139</sup> Order at FOF 22 (Jan. 24, 2011), Admin. R. Binder 10, Item No. 455.

<sup>140</sup> Application, LCRA TSC Ex. 1 at 12, Admin. R. Binders 16-22. *See also*, Application (Environmental Assessment), LCRA TSC Ex. 1 at 2-61 “[l]and use within the study area is predominantly agricultural, specifically rangeland.” Admin. R. Binders 16-22.

<sup>141</sup> Application, LCRA TSC Ex. 1 at 16, Admin. R. Binders 16-22.

construction of the McCamey D to Kendall transmission lines within city limits were the City of Junction and the City of Kerrville.<sup>142</sup>

Despite the fact that the majority of the routes proposed in the Application did not impact Junction or Kerrville, the Commission's Order places the McCamey D to Kendall transmission line through the city limits of both municipalities. As Modified Route MK 63 passes through the City of Kerrville, it will impact no fewer than 59 habitable structures.<sup>143</sup> Just within Kerrville alone, Modified Route MK 63 impacts more habitable structures than for the entire route of the ALJs' recommended route, MK 15 Modified, which would impact only 55 habitable structures.<sup>144</sup> While the impact on habitable structures in the City of Junction is unknown due to the Commission's illegal Link Y11 Reroute discussed above, it is certain that the impact to Junction will be worse, because maps demonstrate that the line is to be constructed much closer to the heart of the city than the originally proposed Link Y11.<sup>145</sup>

Further, as discussed above, the impact to habitable structures within the developed areas of Junction and Kerrville will be much more severe because the line will be constructed much closer to those habitable structures than elsewhere in the rural study area. While the community values in the record supported placing the transmission line as far away from habitable structures as possible, the Commission ordered construction of the transmission line through the most developed areas possible within the study area.

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<sup>142</sup> *Id.*

<sup>143</sup> Application (Environmental Assessment Table 6-78), LCRA TSC Ex. 1 at 6-293, Admin. R. Binders 16-22. Plaintiffs note that the number of habitable structures within the right of way must be extrapolated from the habitable structure statistics for Route MK 33 because the Commission ordered Modified Route MK 63 was not filed in the LCRA TSC's Application—thus specific statistics regarding the route are not available in the record. Route MK 33 contains many of the same links as Modified Route MK 63, including Links Y16 through Y20, which are the only filed links that list any habitable structures within the transmission line right-of-way.

<sup>144</sup> PFD at 73 (Dec. 16, 2010), Admin. R. Binder 9, Item No. 412.

<sup>145</sup> LCRA TSC letter to PUC Commissioners at Exhibit B (Jan. 19, 2011), Admin. R. Binder 10, Item No. 454 (Attachment D).

The Order completely disregards the expressed community value of maximizing distance from residences and developed areas, in violation of PURA § 37.056(c)(4)(A). Therefore, Plaintiffs respectfully request the court reverse the Commission's Order.

**PRAYER FOR RELIEF**

For the reasons set forth above, Plaintiffs City of Kerrville, Kerrville Public Utility Board, City of Junction and Intervenor Kerr County respectfully pray that the Court reverse the Commission's Order, remand this matter to the Commission, and for any and all other relief to which they are justly entitled.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing Plaintiffs' and Intervenor Kerr County's Joint Brief on the Merits was served by Certified Mail, Return Receipt Requested, on this 17<sup>th</sup> day of May 2011, to the following counsel of record.

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**PUC DOCKET NO. 38354  
SOAH DOCKET NO. 473-10-5546**

<b>APPLICATION OF LCRA</b>	<b>§</b>	<b>BEFORE THE</b>
<b>TRANSMISSION SERVICES</b>	<b>§</b>	
<b>CORPORATION TO AMEND ITS</b>	<b>§</b>	
<b>CERTIFICATE OF CONVENIENCE AND</b>	<b>§</b>	
<b>NECESSITY FOR THE PROPOSED</b>	<b>§</b>	
<b>MCCAMEY D TO KENDALL TO</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>GILLESPIE 345-KV CREZ</b>	<b>§</b>	
<b>TRANSMISSION LINE IN SCHLEICHER,</b>	<b>§</b>	
<b>SUTTON, MENARD, KIMBLE, MASON,</b>	<b>§</b>	
<b>GILLESPIE, KERR, AND KENDALL</b>	<b>§</b>	
<b>COUNTIES</b>	<b>§</b>	<b>OF TEXAS</b>

**MOTION FOR REHEARING  
OF  
THE CITY OF KERRVILLE, KERR COUNTY,  
KERRVILLE PUBLIC UTILITY BOARD,  
AND THE CITY OF JUNCTION**

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AND THE CITY OF JUNCTION**

**February 16, 2011**

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**PUC DOCKET NO. 38354  
SOAH DOCKET NO. 473-10-5546**

<b>APPLICATION OF LCRA</b>	<b>§</b>	<b>BEFORE THE</b>
<b>TRANSMISSION SERVICES</b>	<b>§</b>	
<b>CORPORATION TO AMEND ITS</b>	<b>§</b>	
<b>CERTIFICATE OF CONVENIENCE AND</b>	<b>§</b>	
<b>NECESSITY FOR THE PROPOSED</b>	<b>§</b>	
<b>MCCAMEY D TO KENDALL TO</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>GILLESPIE 345-KV CREZ</b>	<b>§</b>	
<b>TRANSMISSION LINE IN SCHLEICHER,</b>	<b>§</b>	
<b>SUTTON, MENARD, KIMBLE, MASON,</b>	<b>§</b>	
<b>GILLESPIE, KERR, AND KENDALL</b>	<b>§</b>	
<b>COUNTIES</b>	<b>§</b>	<b>OF TEXAS</b>

**MOTION FOR REHEARING  
OF THE CITY OF KERRVILLE, KERR COUNTY,  
KERRVILLE PUBLIC UTILITY BOARD,  
AND THE CITY OF JUNCTION**

**TO THE PUBLIC UTILITY COMMISSION OF TEXAS:**

COME NOW, the City of Kerrville, Kerr County, Kerrville Public Utility Board, and the City of Junction (collectively herein the "Movants") and file this Motion for Rehearing, and in support hereof would show the following:

**I. INTRODUCTION**

On January 24, 2011, the Public Utility Commission ("Commission") signed its Order in this docket approving the application of LCRA TSC to amend its certificate of convenience and necessity ("CCN") for the proposed McCamey D to Kendall to Gillespie 345-kV CREZ transmission line in Schleicher, Sutton, Menard, Kimble, Mason, Gillespie, Kerr, and Kendall Counties (the "Application"). The Order directed LCRA TSC to build the project using Route MK63, as modified by the Order.

The Order was mailed to parties and their counsel on January 26, 2011. The undersigned counsel for Movants received the Order on January 27, 2011 via the United States Postal

Service. Under the provisions of Tex. Gov't Code § 2001.146, this Motion for Rehearing is timely filed.

The Commission erred in its selection of modified Route MK 63 on a number of grounds: the Commission erroneously relied upon information outside of the evidentiary record; the Order is not supported by substantial evidence; the Order is based upon unlawful procedure; the Order disregards criteria that must be considered under provisions of the Public Utility Regulatory Act ("PURA") and the Commission's Substantive Rules; and the Order arbitrarily and capriciously modifies the Administrative Law Judges' ("ALJs") findings of fact and conclusions of law without explanation. Movants respectfully request rehearing on the points of error detailed in this filing, and urge the Commission to revise its Order to select Route MK13.

## **II. GROUNDS FOR REHEARING**

### **POINT OF ERROR NO. 1**

**The Commission erred in disregarding the expressed community values of avoiding habitable structures and developed areas.<sup>1</sup>**

The Commission erred because it disregarded expressed community values and therefore, the Order is not supported by substantial evidence, and is arbitrary and capricious and characterized by an abuse of discretion. An agency acts arbitrarily and capriciously when it: (1) fails to consider a factor the legislature required it to consider; (2) considers a legally irrelevant factor; or (3) weighs only relevant factors but reaches a completely unreasonable result.<sup>2</sup> The Legislature requires the Commission to consider "community values" when determining the appropriate route for a transmission line.<sup>3</sup> However, the Commission failed to

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<sup>1</sup> Order at 2-3 (Jan. 24, 2011); FoFs 22, 23, 24, 25, 30, 40, 44, 48, 52, 52a, 159, 160; CoLs 9, 10.

<sup>2</sup> *City of El Paso v. Public Utility Commission*, 883 S.W.2d 179, 184 (Tex. 1994).

<sup>3</sup> Public Utility Regulatory Act, Tex. Util. Code Ann. § 37.056(c)(4)(A) (West 2007 & Supp. 2010) (PURA).

appropriately consider community values at all, as evidenced by the findings of fact contained in the Order.

The Order contains several findings of fact that conflict; this conflict demonstrates a failure to consider community values. Specifically, the Order contains the following conflicting findings of fact:

- 22. Based on input from the open houses and throughout the proceeding, strong community values included: avoiding the Texas Hill Country; *reducing the effect of the line on habitable structures, particularly in developed areas*; reducing the effect on rural residential subdivisions; and building the line with monopoles.
- 23. The community values of avoiding habitable structures in developed areas and avoiding the Hill Country are competing values.
- 30. MK 63 as modified by this Order provides the best balance between the community values of avoiding the Hill Country and avoiding habitable structures and cities.
- 44. The alternative routes that follow all or portions of I-10 will be much more visible to more people than any of the alternative routes away from I-10.
- 48. MK13 has a length of 8.46 miles visible from U.S. and State highways. Staff MK15 Modified would be visible for a length of 49.11 miles from U.S. and State highways. MK33 has a length of 157.87 miles that would be visible along U.S. and State highways. MK63 will be visible for a length of 86.24 miles from U.S. and State highways.<sup>4</sup>

The decision of the Commission to select a modified Route MK 63 is not supported by substantial evidence; no "balancing" of community values was accomplished by the selection of MK 63 as suggested by Finding of Fact No. 30. In fact, and to the contrary, the adoption of modified Route MK 63 could only be accomplished by the complete disregard for the

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<sup>4</sup> Order, FoFs 22, 23, 30, 44, 48 (emphasis added) (Jan. 24, 2011).

community value of avoiding habitable structures and developed areas. Route MK 63 has a greater impact on developed areas *than any other proposed route*, it would be visible to more people than routes off of I-10, and it clearly does not balance the community values at all.

The Proposal for Decision (“PFD”) appropriately acknowledged the expressed community value of avoiding close proximity to a large number of habitable structures and avoiding developed areas, and also balanced that interest with the community value of minimizing the impact to the Texas Hill County.<sup>5</sup> The PFD actually specifically addressed the “top three” community values – Texas Hill Country, habitable structures, and cities, and determined that the route known as Staff MK 15 “strikes a good balance between those interests.”<sup>6</sup> The PFD’s proposed Finding of Fact 28, deleted by the Commission without explanation, provided the “balancing” of community values that the Order now lacks:

28. Kerrville and the Kerrville Public Utility Board have spend [sic] over \$1 million in infrastructure for development along I-10 in the vicinity of Links Y16, Y17b, Y18, Y19b, and Y20, which are included in Routes MK32, 33, 61, and 62.<sup>7</sup>

Modified Route MK 63 passes *directly through* the developed areas within the City of Kerrville, and directly through the area planned for development in Kerrville, which will be served by the plant investment already made by the City of Kerrville and the Kerrville Public Utility Board, as noted by the PFD, and contrary to the expressed community value. Route MK 63, prior to its modification by the Commission on January 20, 2011, affects 134 habitable

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<sup>5</sup> PFD at 20-21. The PFD noted that “the communities of Mason, Fredericksburg, and Kerrville provided testimony that their communities did not want the transmission line through their towns. Staff MK 15 avoids the communities of Eldorado, Sonora, Mason, Menard, and Fredericksburg. Staff MK 15 also circumvents the community of Kerrville and avoids 99 habitable structures (including 17 within the ROW).” PFD at 21. [Footnotes omitted.]

<sup>6</sup> PFD at 23.

<sup>7</sup> PFD at Finding of Fact 28.

structures, 131 of which are newly affected, and 17 of which are *within the right-of-way*.<sup>8</sup> There is no evidence in the record concerning the modifications made to Route MK 63 at the Commission's second open meeting (see Point of Error No. 3, below), therefore there is no evidence regarding whether additional habitable structures will be impacted by the late modifications, or whether the number of affected habitable structures has been thereby reduced. However, it is clear and uncontroverted in the record that the 17 habitable structures that are located within the right-of-way in Route MK 63 are those habitable structures located on Links Y18 and Y19b, adjacent to I-10 in the City of Kerrville, in Kerr County.<sup>9</sup>

Also ignored by the Commission is the fact that Route MK 63 routes the line directly through the Buckhorn Lake Resort, a mobile home community west of Kerrville at the intersection of I-10 and Goat Creek Road (FM 1338) along Link Y16.<sup>10</sup> As Judge Tinley testified, there are over 200 permanent residents of this community, all of whom will be negatively impacted by the location of the transmission line right next to their properties along I-10.<sup>11</sup> These citizens of Kerr County were ignored by the Commission, and the negative impact on their homes did not even rate a comment by the Commission, much less a finding that impacting these habitable structures comports with the community values of the area.

Other routes proposed in the Application impact between 17 and 153 habitable structures.<sup>12</sup> The impact on the habitable structures along I-10 in Kerrville is much more severe

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<sup>8</sup> LCRA TSC Ex. 26 (Criteria for Selected Routes (Excluding Modifications)).

<sup>9</sup> LCRA TSC Ex. 1, Application (Environmental Assessment at 6-293 through 6-295, Table 6-78).

<sup>10</sup> Direct Testimony of Judge Pat Tinley, Kerr County Ex. 1 at 6-7, Att. H.

<sup>11</sup> Hearing on the Merits Tr. at 960 (Cross-examination of Judge Pat Tinley), Oct. 29, 2010.

<sup>12</sup> LCRA TSC Preferred Route MK 13 impacts the second fewest habitable structures at only 18. Rebuttal Testimony of Rob R. Reid, LCRA TSC Ex. 20, Exhibit RRR-3R. Route MK 33 impacts the most at 152. LCRA TSC Ex. 26 (Criteria for Selected Routes (Excluding Modifications)).

than the impact to other habitable structures elsewhere in the study area.<sup>13</sup> The Commission has not ordered the line rerouted away from habitable structures on Segments Y18 and Y19b, and as a result a number of habitable structures stand within the right of way, including at least two permanent, single family residences (not mobile homes).<sup>14</sup> LCRA TSC Ex. 1, Application, Attachment 4 identifies these habitable structures as being located along Link Y18, used in modified Route MK 63. The 18 habitable structures impacted by Route MK 13 are an average distance of 2,553 feet from the centerline, and none of those appear to be located within the route's actual right-of-way.<sup>15</sup> Clearly, the Commission gave no consideration to the community values of avoiding habitable structures and cities because it selected the route that most negatively impacts the most number of habitable structures and the developed areas in Junction and Kerrville.

The Order deleted Finding of Fact 28 in the ALJs' Proposal for Decision. However, the Commission's ability to modify the ALJs' findings is limited by the Administrative Procedure Act,<sup>16</sup> and deleting or modifying such findings in violation of these statutory provisions constitutes arbitrary and capricious action by the agency.<sup>17</sup> There is no support in the Order for the Commission's decision to delete Finding of Fact 28. The Commission did not find that the ALJs did not properly apply applicable law, rules or policies. The Commission did not find that the ALJs relied on an incorrect prior administrative decision, nor did the Commission find a

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<sup>13</sup> Direct Testimony of Curtis D. Symank, P.E., LCRA TSC Ex. 7 at 31. ("If habitable structures exist within the proposed ROW of the final route approved by the Commission, people may be relocated or the line rerouted away from habitable structures depending on costs and Commission directives, in order to comply with the policy of prudent avoidance.")

<sup>14</sup> LCRA TSC Ex. 1, Application (Environmental Assessment, Table 6-35, p. 6-178, habitable structures 294-297 (two single family residences and two mobile homes)).

<sup>15</sup> LCRA TSC Ex. 1, Application (Environmental Assessment, Table 6-3, p. 6-101).

<sup>16</sup> Administrative Procedures Act, Tex. Gov't Code Ann. § 2001.058(e) (West 2008 & Supp. 2010). See, also P.U.C. Proc. R. 22.262(a)-(b).

<sup>17</sup> *Flores v. Employees Retirement System of Texas*, 74 S.W.3d 532, 538-545 (Tex. App.—Austin 2002, pet denied).



technical error in Finding of Fact 28 that warranted its deletion. Therefore, the deletion of Finding of Fact 28 constitutes arbitrary and capricious action on the part of the Commission.

The Commission's failure to appropriately weigh the community values of the entire study area is reflected in the disregard shown to the community values expressed by the elected representatives of over 48,000 residents of Kerr County and the City of Kerrville. No mention was made of the strong expressions of community values by the Mayor of Kerrville and the Kerr County Judge that these communities valued the I-10 corridor for both its aesthetic appearance and the potential economic development that was poised to occur along the Gateway to Kerrville. Rather than merely showing up at the Open Meetings and attempting to sway the Commission with emotional appeals, the communities of Kerrville and Kerr County intervened in the proceeding and actively participated in the hearing on the merits. The Commission's failure to give due consideration to the explicit statements of community values provided by these local governments is arbitrary and capricious.

The Commission's failure to consider the community value of reducing the effect of the line on habitable structures, particularly in developed areas, violates Movants' substantial rights because it is: (1) in violation of a constitutional or statutory provision; (2) in excess of the agency's statutory authority; (3) made through unlawful procedure; (4) affected by other error of law; (5) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

## POINT OF ERROR NO. 2

**The Commission erred in disregarding and violating the Commission's policy of prudent avoidance.<sup>18</sup>**

The Commission erred because it disregarded the Commission's policy of prudent avoidance, and therefore its Order is arbitrary, capricious, and characterized by an abuse of discretion or clearly unwarranted exercise of discretion. [A]n agency acts arbitrarily and capriciously when it: (1) fails to consider a factor the legislature required it to consider; (2) considers a legally irrelevant factor; or (3) weighs only relevant factors but reaches a completely unreasonable result.<sup>19</sup> The Commission has failed to take a hard look at the salient problems and has not genuinely engaged in reasoned decision-making.<sup>20</sup> The Order completely disregards the Commission's own policy of prudent avoidance and is arbitrary and capricious because modified Route MK 63 is an unreasonable result, considering that it does not comply with P.U.C. Subst. R. 25.101(a)(4).

Prudent avoidance is defined as "the limiting of exposures to electric and magnetic fields that can be avoided with reasonable investments of money and effort."<sup>21</sup> As noted by the PFD, prudent avoidance includes the consideration of reasonable and cost-effective routing adjustments to limit EMF exposure by minimizing the number of habitable structures in close proximity to the transmission line.<sup>22</sup> This policy is aimed at avoiding, where possible, the impact of transmission lines on places where humans gather, measured generally by habitable structures within a certain distance of the transmission line easement's centerline. Rather than selecting

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<sup>18</sup> Order at 2-3 (Jan. 24, 2011); FoFs 124, 125, 126, 159, 160; CoLs 9, 10.

<sup>19</sup> *City of El Paso*, 883 S.W.2d at 184.

<sup>20</sup> *Starr County v. Starr Industrial Services Inc.*, 584 S.W.2d 352, 356 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.) (quoting *Texas Medical Association v. Mathews*, 408 F. Supp. 303, 305 (W.D. Tex. 1976)).

<sup>21</sup> P.U.C. Subst. R. 25.101(a)(4).

<sup>22</sup> PFD at 73.

any number of proposed routes that would have impacted fewer habitable structures at a lower cost, the Commission erroneously chose modified Route MK 63, impacting 134 habitable structures at a cost of approximately \$360.5 million.<sup>23</sup>

Fifty-nine newly affected habitable structures are located in the City of Kerrville alone, and 17 of these habitable structures will have to be relocated. On no other routes would any habitable structures be within the proposed right-of-way, and on no other routes would this large a number of habitable structures be impacted. On no other routes would a business employing 41 people be surrounded on three sides, as close as 85 feet, by the transmission line. Only on routes using Links Y18 and Y19b do these circumstances occur. It is not necessary to use these links; with reasonable investments of money and effort the line could be located on other links, and this developed area could be avoided entirely. Instead, the Order turns the policy of prudent avoidance on its head, and selects a route that costs approximately \$100 million more than the preferred route in order to negatively impact over 100 more habitable structures than the preferred route.

Not only does modified Route MK 63 impact more habitable structures than almost all other routes, it impacts those structures in a more detrimental manner than other routes. The evidence in the record establishes that the line approaches habitable structures much more closely along I-10 and even that certain *structures must be condemned* if the route follows I-10. LCRA TSC witness Reid testified that “along IH-10 and near Kerrville, it became increasingly difficult to avoid populated areas directly along IH-10 and the IH-10 corridor because of the population density and presence of businesses and rural subdivision developments in the immediate area of Kerrville. *In fact, segments Y18 and Y19b have habitable structures within the ROW that could not be avoided.*”<sup>24</sup> It is evident that if modified Route MK 63 is constructed,

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<sup>23</sup> Order, FoFs 120, 124, 125 (Jan. 24, 2011).

<sup>24</sup> Direct Testimony of Rob R. Reid, LCRA TSC Ex. 9 at 19 (emphasis supplied).

some landowners will indeed lose their residences and the structures that are not removed or relocated will be much closer to the line than habitable structures would be along other routes.<sup>25</sup>

Additionally, the Commission erred because there is no evidence to support Findings of Fact 125 and 126. An agency's action is reversible if it is not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole.<sup>26</sup> If the findings of underlying fact in an order do not have reasonable support in the evidence adduced in the agency proceeding, that order is not supported by substantial evidence.<sup>27</sup> As demonstrated above, in light of the number of impacted habitable structures and the ability to avoid EMF exposures accompanying the proximity to these structures, there is no evidence to support the assertion that the decision to affect *more* habitable structures at a *higher cost* complies with the policy of prudent avoidance. To the contrary, all the evidence in the record proves that the selected route violates the policy by spending over \$100 million more than the cost of the Preferred Route (Route MK 13) to impact 87% more habitable structures in a much more severe manner. Therefore, there is no evidence in the record to support Findings of Fact 125 or 126.

The Commission's error in failing to comply with the Commission's policy of prudent avoidance violates Movants' substantial rights because it is: (1) in violation of a constitutional or statutory provision; (2) in excess of the agency's statutory authority; (3) made through unlawful procedure; (4) affected by other error of law; (5) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or

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<sup>25</sup> Direct Testimony of Curtis D. Symank, P.E., LCRA TSC Ex. 7 at 31. ("If habitable structures exist within the proposed ROW of the final route approved by the Commission, people may be relocated or the line rerouted away from habitable structures depending on costs and Commission directives, in order to comply with the policy of prudent avoidance.")

<sup>26</sup> Administrative Procedure Act, Tex. Gov't Code Ann. § 2001.174 (West 2008 & Supp. 2010).

<sup>27</sup> *Texas Health Facilities Commission v. Charter Medical-Dallas Inc.*, 665 S.W.2d 446, 452-453 (Tex. 1984).

(6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

### POINT OF ERROR NO. 3

**The Commission erred in materially rerouting Link Y11 after the closing of the evidentiary hearing without providing affected parties the opportunity to examine witnesses or present evidence on the impact of the rerouting.<sup>28</sup>**

The Commission erred because its rerouting of Link Y11 lacks the support of substantial evidence in the record, is based upon unlawful procedure, is in excess of the Commission's statutory authority and is arbitrary, capricious, and characterized by an abuse of discretion. There is no evidence in the record, when considering the reliable and probative evidence in the record as a whole, to support the rerouting of Link Y11.

If the evidence as a whole is such that reasonable minds could not have reached the same conclusion that the agency must have reached in order to justify its decision, the decision is not reasonably supported by substantial evidence.<sup>29</sup> Based on the record, no reasonable mind could have reached the conclusion that "Link Y11, when moved to the southern limit of noticed property owners, can be built safely and reliably at a reasonable cost above-ground"<sup>30</sup> because there is absolutely no evidence in the record to support that conclusion.

At the Open Meeting on January 20, 2011, the Commission, for the very first time, considered a materially different routing configuration of the proposed line through the City of Junction. The evidentiary hearing in this docket ended on November 2, 2010, and the record closed on that date.<sup>31</sup> Not until January 15, 2011, did the LCRA TSC personnel design a route

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<sup>28</sup> Order at 2-3 (Jan. 24, 2011); FoFs 110, 113, 115, 118a, 135, 159, 160; CoLs 9, 10.

<sup>29</sup> *Texas Health Facilities*, 665 S.W.2d at 452-453; *Wu v. City of San Antonio*, 216 S.W.3d 1, 5 (Tex. App.—San Antonio 2006, pet. denied).

<sup>30</sup> Order, FoF 118a (Jan. 24, 2011).

<sup>31</sup> Hearing on Merits Tr. at 1489, lines 4-5 (Nov. 2, 2010).

through Junction that was different from any routes previously proposed through the area. Not until January 19, 2011, were any parties apprised of the rerouting of this link, and only then were able to learn of the rerouting only if they happened to check the docket interchange on the Commission's website to discover a letter from LCRA TSC to the Commissioners, filed at 2:14 p.m. on January 19, 2011, describing the rerouting that was going to be considered by the Commission the following morning.<sup>32</sup>

The proposed links or segments contained in the Application that would pass through the City of Junction were identified as Links Y10b and Y11. The Commission was presented with essentially two alternatives for the routing of this line around the Kimble County Airport. Option One was to place the line underground for a portion of Link Y11. Option Two was to route the line to the north of the Kimble County Airport using Links b19b, b19c and b23a. At the Open Meeting on January 13, 2011, Mr. Bill Neiman of Clear View Alliance ("CVA") suggested, outside of the record, that landowners to the south of the airport might be willing to accept the line on their property.<sup>33</sup> LCRA TSC interpreted this statement and subsequent questions from the Commission as a directive to investigate a third option, one that would proceed south of the Kimble County Airport and avoid the necessity of constructing any portion of the line underground.

On January 19, 2011, LCRA TSC filed a letter with the Commission, in which it described an entirely new route for the line through the City of Junction.<sup>34</sup> As admitted by LCRA TSC in this letter, "[a]t the Open Meeting of January 13<sup>th</sup> [Clear View Alliance]

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<sup>32</sup> It is evident that even LCRA TSC felt uncomfortable about the lateness of its rerouting information, as it felt compelled to request a "good cause" exception to the Commission's rule that prohibits the filing of material within seven days of an open meeting. See, LCRA TSC letter dated January 19, 2011, (Interchange Item #3616), citing P.U.C. Proc. R. 22.71(j) ("LCRA TSC Letter").

<sup>33</sup> Open Meeting Tr. at 111, lines 14-19 (Jan. 13, 2011).

<sup>34</sup> See LCRA TSC Letter at 2. LCRA TSC admitted that the "new" route was not proposed in its original Application (p. 3), and that it did not propose an alternative such as the one described in the letter because of certain negative impacts.

suggested a routing alternative that would pass south of the Kimble County Airport and south of the North Llano River. . . . [O]n Saturday, January 15<sup>th</sup> LCRA TSC's engineers studied and photographed the area in question and designed a routing alternative . . ."<sup>35</sup> Until LCRA TSC's letter was filed with the Commission, no affected party was aware of this proposed rerouting of Link Y11 (except, perhaps, Clear View Alliance, who suggested the rerouting to LCRA TSC "sometime in December," well after the record closed on November 2, 2010),<sup>36</sup> and certainly no affected party had any opportunity to pose questions to LCRA TSC or to present any evidence to the Commission regarding the impact of this rerouting on property owners or on the City of Junction.

Had the rerouting of Link Y11 been subject to the appropriate treatment and examination, as with all the other proposed links, it would have been shown that there were miscalculations in measurements of existing obstructions, there were errors in the floodplain elevations, and there were miscalculations in the pertinent slopes. The rerouting of Link Y11 was considered to be so vastly different from the routes considered at the hearing that the City of Junction validly claimed surprise and sought to focus the Commission's attention on the routes that had been considered at the hearing. The City of Junction attempted to bring these matters to the attention of the Commission through a letter filed on January 20, 2011, which was the very first opportunity that it had to do so in light of the surprise presentation by LCRA TSC of this new route through its letter filing on January 19, 2011.<sup>37</sup> Rather than providing the parties an opportunity to develop the information about this new route, the Commission allowed unsworn

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<sup>35</sup> *Id.* at 2.

<sup>36</sup> Open Meeting Tr. at 47, lines 14-16 (Jan. 20, 2011).

<sup>37</sup> A copy of the letter filed by the City of Junction on January 20, 2011, is available on the Commission Interchange as Item # 3617.

statements at the Open Meeting, statements that clearly were taken into consideration by the Commission in its decision to approve the rerouting of Link Y11.

The Commission ultimately adopted the rerouting of Link Y11 through Finding of Facts 115, 118a, and 160 in its Order. Specifically, Finding of Fact 118a reads “Link Y11, when moved to the southern limit of noticed property owners, can be built safely and reliably at a reasonable cost above-ground.” However, there is no evidence in the record to support this finding of fact because the modification was proposed *after* the evidentiary record closed.<sup>38</sup> It is evident from the admission of LCRA TSC counsel Rodriguez that the substance of the Link Y11 modification was not considered at the evidentiary hearing,<sup>39</sup> therefore no parties were able to introduce evidence to either support or oppose such a modification.<sup>40</sup> There is no evidence in the record to support Findings of Fact 118a or 160,<sup>41</sup> because any support for these findings comes from information outside of the evidentiary record.<sup>42</sup>

The Order also errs in rerouting Link Y11 because evidence garnered in support for such rerouting was obtained during unlawful procedures. The Order bases the rerouting primarily upon a filing made by LCRA TSC between the two open meetings, after the record was closed.<sup>43</sup> The Order also relies upon representations made by various parties at the Commission’s meetings of January 13 and 20, 2011. The Commission heard what amounted to testimony from a number of parties during the open meeting, including CVA representative Bill Neiman and

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<sup>38</sup> LCRA TSC Letter at 3; Administrative Procedure Act, Tex. Gov’t Code Ann. § 2001.141(c) (West 2008 & Supp. 2010) (“Findings of fact may be based only on the evidence and on matters that are officially noticed.”).

<sup>39</sup> *Id.*

<sup>40</sup> Administrative Procedure Act, Tex. Gov’t Code Ann. § 2001.051(2) (West 2008 & Supp. 2010).

<sup>41</sup> P.U.C. Proc. R. 22.263(a)(3); Administrative Procedure Act, Tex. Gov’t Code Ann. § 2001.141(c) (West 2008 & Supp. 2010).

<sup>42</sup> LCRA TSC Letter at 3.

<sup>43</sup> LCRA TSC Letter at 3; Open Meeting Tr. at 62 (Jan. 13, 2011).



LCRA TSC counsel Fernando Rodriguez and engineer Curtis Symank.<sup>44</sup> The information offered by Mr. Neiman, Mr. Rodriguez, and Mr. Symank amounted to nothing more than either public comment or oral argument, but certainly was not evidence upon which any findings or conclusions could be based. Under the Commission's own procedural rules, "[p]ublic comment is not part of the evidentiary record of a contested case."<sup>45</sup> Therefore, the representations made at the open meetings cannot serve as an evidentiary bases for Findings of Fact 118a or 160, and these findings remain unsupported by substantial evidence.

The Commission's error in rerouting Link Y11 violates Movants' substantial rights because it is: (1) in violation of a constitutional or statutory provision; (2) in excess of the agency's statutory authority; (3) made through unlawful procedure; (4) affected by other error of law; (5) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

#### **POINT OF ERROR NO. 4**

**The Commission erred by adopting findings of fact that are not supported by substantial evidence, and give the Order an appearance of a pre-determined result.<sup>46</sup>**

The Commission erred by adopting findings of fact that are unsupported by substantial evidence, and because it changed findings of fact (from those proposed by the Proposal for Decision) without explanation. Agencies act arbitrarily and capriciously when they change

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<sup>44</sup> Open Meeting Tr. at 46, line 25 through 65, line 2 (Jan. 20, 2011). The Commission also appears to have relied upon "testimony" from Gavin Stener of the CVA group. Open Meeting Tr. at 156, line 11 through 159, line 8 (Jan. 13, 2011), ("And actually on the hills above Kimble County there was in 2005—it's not a matter of the record. No one has entered this into the record, but I would like to speak about it."). Commissioner Nelson also admitted that this information was not in the record. Open Meeting Tr. at 158 (Jan. 13, 2011).

<sup>45</sup> P.U.C. Proc. R. 22.221(e).

<sup>46</sup> Order at 2-3 (Jan. 24, 2011); FoFs 24, 25, 30, 40, 44, 52, 52a, 77, 79, 83, 100, 102, 121, 125, 126, 151, 159; CoLs 9, 10.

findings of fact and conclusions of law for unexplained reasons that give the appearance of arriving at a pre-determined result.<sup>47</sup> “A basic purpose of requiring findings of fact is to ensure that an agency’s decision comes after, not before, a careful consideration of the evidence. Agency conclusions should follow from its serious appraisal of the facts.”<sup>48</sup>

The courts focus on an agency’s rules in reviewing whether the agency appropriately changed an ALJ’s finding.<sup>49</sup> The Commission rules on this subject are very similar to the language of the Administrative Procedure Act, and likewise limit the ability of the Commission to change a finding of fact made by the Administrative Law Judge.<sup>50</sup> Therefore, this Commission must explain any modifications to the ALJs’ findings.

Several of the findings of fact contained in the Order lack explanation for deviation from the PFD, and give the Order the appearance of a pre-determined result. Finding of Fact 24 states that paralleling roadways avoids much of the Hill Country.<sup>51</sup> In fact, the evidence in the record shows that the entire eastern portion of the study area, including the area of the I-10 corridor, is located within the Hill Country.<sup>52</sup> Therefore, there is no evidence in the record to support this finding.

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<sup>47</sup> *Flores*, 74 S.W.3d at 538-545.

<sup>48</sup> *Gulf States Utilities Company v. Coalition of Cities for Affordable Utility Rates*, 883 S.W.2d 739, 750 (Tex. App.—Austin 1994), *rev’d on other grounds*, 947 S.W.2d 887, 891-92 (Tex.1997).

<sup>49</sup> *Larimore v. Employee Retirement System of Texas*, 208 S.W.3d 511, 516 (Tex. App.—Austin 2006, *pet. denied*).

<sup>50</sup> P.U.C. Proc. R. 22.262(a)-(b).

<sup>51</sup> Order, FoF 24 (Jan. 24, 2011).

<sup>52</sup> “The topography of the western portion of the study area is characterized by rather flat plains and low, rolling hills, but the eastern portion is located in the Hill Country of the Edwards Plateau, an area of the state noted for its scenic beauty.” LCRA TSC Ex. 1, Application (Environmental Assessment, § 2.11 at 2-71).

Finding of Fact 52 proposed by the PFD and adopted in the Order has no basis in the record. As the PFD notes, it is admittedly an inference drawn by the Judges without the ability to cite any record evidence as its foundation:<sup>53</sup>

52. I-10 is a means of transportation across the state, where aesthetically pleasing views are incidental. Travelers and anyone in the proximity of I-10 in the Project area will see commercial development including gas stations, convenience stores, chain and fast-food restaurants, strip malls, traffic – including heavy tractor-trailers, car lots, power lines, roadways – including feeder roads, and all of the development associated with small towns, larger municipalities, and cities like San Antonio. It is far more likely that a 345-kV line will be lost in the visual foreground along I-10 than if it were run along a central or northern route through what is undoubtedly the aesthetically pleasing and relatively undeveloped Texas Hill Country.<sup>54</sup>

This Finding of Fact 52, stating that “aesthetically pleasing views are incidental” along I-10 is also unsupported by any evidence in the record.<sup>55</sup> To the contrary, the record evidence is that I-10 is one of the most scenic drives in Texas.<sup>56</sup> There is also substantial evidence in the record that routing the proposed transmission line along I-10 will be potentially the most aesthetically disturbing route.<sup>57</sup>

This theme follows throughout the Order. The Commission improperly deleted Findings of Fact 27-29, 31, 58, 59, 111, 112, 130, and 139; added new Findings of Fact 31a, 52a, 118a, 159-161, and modified Findings of Fact 26, 30, 33, 48, 49, 83, 92-94, 100, 108, 115, 120, 122-125, and 144 and Conclusion of Law 10, all without outlining sufficient explanation for the

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<sup>53</sup> PFD at 38.

<sup>54</sup> PFD at 98; Order, FoF 52 (Jan. 24, 2011).

<sup>55</sup> Order, FoF 52 (Jan. 24, 2011).

<sup>56</sup> Two of the best Scenic Overlooks and Rest Areas in Texas are located along I-10 in the vicinity of Links Y16 and Y20 and/or c1b. LCRA TSC Ex. 1, Application (Environmental Assessment § 2.11 at 2-73); Tr. at 245-247 (Oct. 25, 2010).

<sup>57</sup> Rebuttal Testimony of Rob R. Reid, LCRA TSC Ex. 20 at 10.

deviations from the PFD. Therefore, the Order violates the Commission's rules and the Administrative Procedure Act and constitutes agency action that is arbitrary and capricious.

The Commission's willful disregard of the evidence in the record offered by the City of Kerrville, Kerr County, Kerrville Public Utility Board, and Cecil Atkission that the routing of the line down I-10 through Kerr County and Kerrville would have significant detrimental effects on the high aesthetic quality of the area (even along I-10), on the ability of the City and County to attract high-quality economic development along that corridor, and the hugely negative impact on a major business and employer in the area, indicates that the decision to route the project along I-10 had been made regardless of the facts that were presented to the Administrative Law Judge and the Commission itself. While the Commission has instructed local governmental entities in the past to actively participate in CCN CREZ proceedings rather than merely adopting resolutions, in this docket it has arbitrarily disregarded the evidence presented by the local governmental entities on behalf of their citizens and on behalf of the larger public interest, as expressed through master plans adopted by the City and economic development tools in place by the Kerrville Public Utility Board and the County Commissioners of Kerr County. The impact on a multi-million dollar investment (Cecil Atkission Motors) was completely, and arbitrarily, disregarded.

The findings give the Order the appearance of being "results driven" to use I-10 as much as possible, without regard to the record evidence. The Commission's end-first approach violates Movants' substantial rights because the result is: (1) in violation of a constitutional or statutory provision; (2) in excess of the agency's statutory authority; (3) made through unlawful procedure; (4) affected by other error of law; (5) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (6) arbitrary

or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

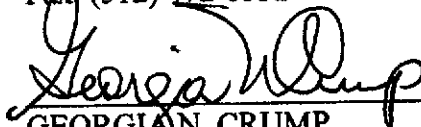
### III. CONCLUSION

The Commission erred by ordering the construction of modified Route MK 63. The Order violates PURA, the APA and the Commission's Substantive and Procedural Rules because it is: (1) in violation of a constitutional or statutory provision; (2) in excess of the Commission's statutory authority; (3) made through unlawful procedure; (4) affected by other error of law; (5) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

WHEREFORE, PREMISES CONSIDERED, Movants respectfully request that the Commission grant Rehearing and Order LCRA TSC to construct the proposed McCamey D to Kendall transmission line along LCRA's preferred Route MK 13.

Respectfully submitted,

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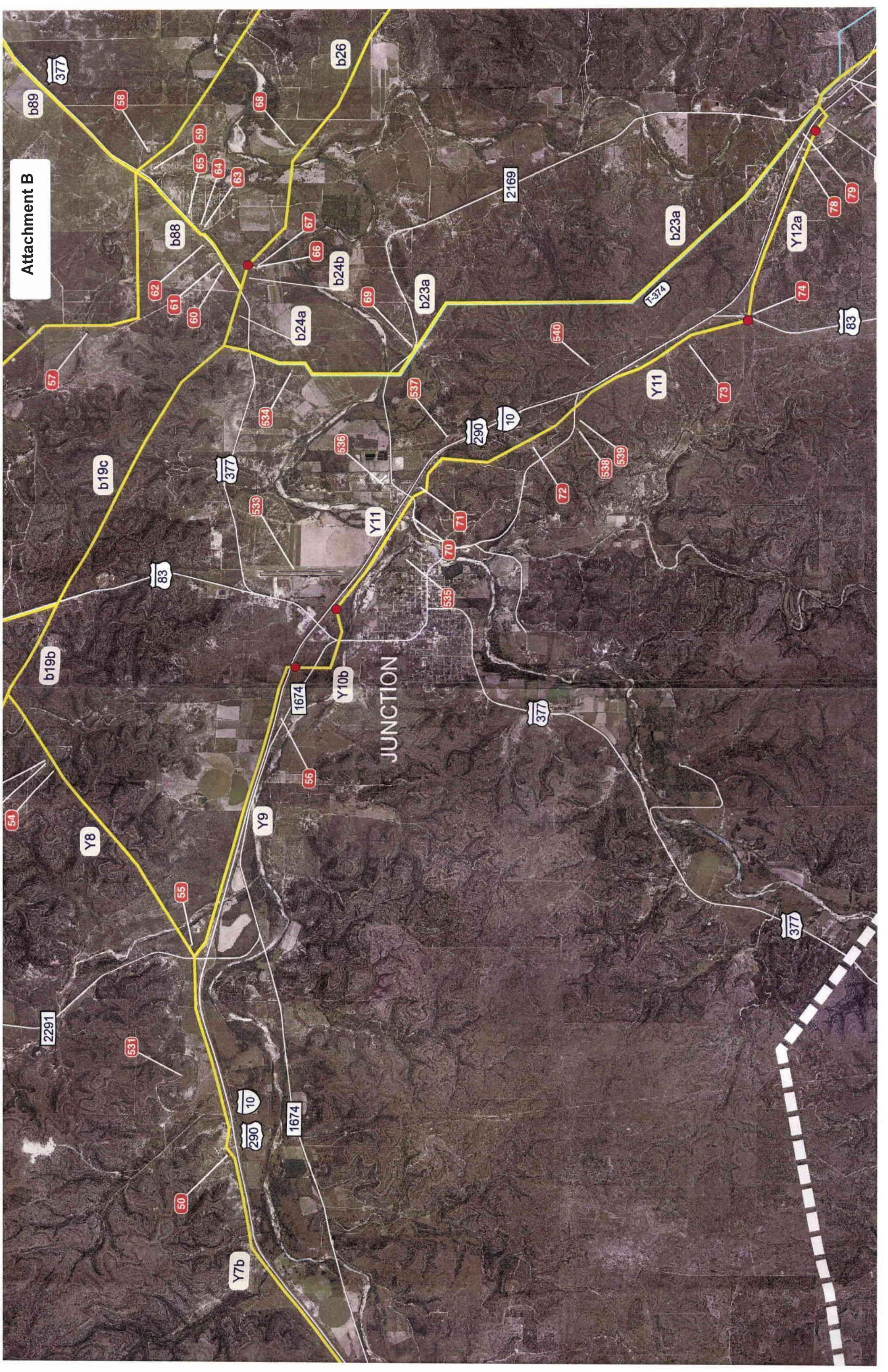
**CERTIFICATE OF SERVICE**

I, Georgia N. Crump, certify that a true and correct copy of this document was served on all parties of record in this proceeding on February 16, 2011 in the following manner: first class mail.

  
GEORGIA N. CRUMP



Attachment B





TRANSCRIPT OF PROCEEDINGS  
BEFORE THE  
PUBLIC UTILITY COMMISSION OF TEXAS  
AUSTIN, TEXAS

IN THE MATTER OF THE OPEN MEETING)  
OF THURSDAY, JANUARY 13, 2011 )

BE IT REMEMBERED THAT AT approximately 9:32 a.m., on Thursday, the 13th day of January 2011, the above-entitled matter came on for hearing at the Public Utility Commission of Texas, 1701 North Congress Avenue, William B. Travis Building, Austin, Texas, Commissioners' Hearing Room, before BARRY T. SMITHERMAN, CHAIRMAN, DONNA L. NELSON, COMMISSIONER and KENNETH W. ANDERSON, JR., COMMISSIONER; and the following proceedings were reported by Lou Ray and William C. Beardmore, Certified Shorthand Reporters.



## OPEN MEETING - ITEM 11 1/13/2011

1 CHAIRMAN SMITHERMAN: Okay. Do you need a  
2 motion?

3 MR. JOURNEAY: Need a motion to approve  
4 that, sir.

5 CHAIRMAN SMITHERMAN: All right. The  
6 Chair will entertain a motion to approve, with those  
7 adjustments and amendments.

8 COMM. NELSON: So move.

9 COMM. ANDERSON: Second.

10 CHAIRMAN SMITHERMAN: Thank you.

11 AGENDA ITEM NO. 11

12 DOCKET NO. 38354; SOAH DOCKET NO. 473-10-5546 -  
13 APPLICATION OF LCRA TRANSMISSION SERVICES  
14 CORPORATION TO AMEND ITS CERTIFICATE OF  
15 CONVENIENCE AND NECESSITY FOR THE PROPOSED  
16 MCCAMEY D TO KENDALL TO GILLESPIE 345-KV  
17 CREZ TRANSMISSION LINE IN SCHLEICHER,  
18 SUTTON, MENARD, KIMBLE, MASON, GILLESPIE,  
19 KERR, AND KENDALL COUNTIES

20 CHAIRMAN SMITHERMAN: Now let's go to the  
21 item of interest for everyone in this room. This is  
22 Item No. 11, PUC Docket 38354. The way we have  
23 conducted these CREZ proceedings in the past I would  
24 suggest is a good model for continuing today, I know for  
25 many of you who don't come to the PUC, this is the first  
time you've been here, the first time you will have seen  
us talk and deliberate these matters. For us I think  
it's the 22nd or 23rd CCN that we've been working on

## OPEN MEETING - ITEM 11 1/13/2011

1 since the beginning of 2010.

2           Because of our rules, we do not have the  
3 ability to talk among ourselves outside of an Open  
4 Meeting, so this is the first time that we will have  
5 discussed this issue. So you're going to see at some  
6 times a free-flowing discussion. You may wonder: Why  
7 didn't they work that all out in the back room? That's  
8 not the way we do business here, because if two of us  
9 talk to each other outside of an Open Meeting, that's a  
10 violation of our Open Meetings laws.

11           So we'll be discussing our impressions,  
12 our thoughts, our suggestions, as we go forward. We  
13 have the schedule for today and for our next Open  
14 Meeting. We have a statutory deadline of January the  
15 24th. And I think our interpretation of the statute is,  
16 if we do not pick a route by that time, the utility gets  
17 to pick the one they want.

18           COMM. ANDERSON: That's right.

19           CHAIRMAN SMITHERMAN: Okay. Which is  
20 probably not in the best interest of most of the people  
21 in this room. I did file a memo. There are copies of  
22 it on the table here. Filing a memo is a technique that  
23 we use in order to communicate with each other just in  
24 advance of the Open Meeting, to sort of highlight the  
25 issues that we're interested in and the questions that

## OPEN MEETING - ITEM 11 1/13/2011

1 we have and maybe some of our conclusions that we have  
2 made in order to try to shape the discussion in a  
3 particular direction. That's the only effect that it  
4 has.

5 Historically in these cases, we've asked  
6 public officials to come up and speak first. Then we've  
7 asked interested parties if they want to say something.  
8 I would encourage you to have one or two people speak on  
9 behalf of your group. We are going to be here all day  
10 long, but it doesn't really make sense for everyone from  
11 a particular group to speak, particularly if they're  
12 repeating what someone has already said.

13 And let's be clear, this is not evidence.  
14 The record is closed in this case. I know there were  
15 some expressions from some folks that were concerned  
16 that people showing up today that were not parties would  
17 somehow influence our decisionmaking. We're looking at  
18 the record. We've got maps and stacks of documents up  
19 here, which is what we will rely upon. There is an  
20 opportunity for you to express your point of view, but  
21 it is technically not part of the record.

22 COMM. NELSON: Can I just add one other  
23 thing?

24 CHAIRMAN SMITHERMAN: Yes.

25 COMM. NELSON: And before we get to these

## OPEN MEETING - ITEM 11 1/13/2011

1 opening meetings, both our staff and all of us  
2 Commissioners have spend countless hours going through  
3 all the evidence and reading exceptions and reading  
4 briefs, and sometimes that leads us to some tentative  
5 conclusions, as it did the Chairman. And so what we  
6 would ask you to do is sort of just reiterate in very  
7 brief form what you filed previously or the testimony  
8 that you filed.

9 CHAIRMAN SMITHERMAN: Ken, any opening  
10 remarks?

11 COMM. ANDERSON: Only I look forward to  
12 discussing this. And I wanted to just add that if, in  
13 fact, you are a party or a member of a group that is a  
14 party, that we have read all your filings, so there's no  
15 need to repeat what you have already put in writing. As  
16 late as midnight last night, I was still reading the  
17 last of the material, and rereading in some cases. So  
18 there's no need to repeat what you said.

19 If, however, there is a unique  
20 circumstance, then feel free. Now, that's my personal  
21 opinion. Obviously, we allow folks the freedom to say  
22 what they want generally, as long as they keep it  
23 concise.

24 CHAIRMAN SMITHERMAN: And generally we  
25 like to hear from individuals rather than from their

## OPEN MEETING - ITEM 11 1/13/2011

1 attorneys. I mean, we're all three attorneys, so this  
2 not to disparage attorneys. But the attorneys have had  
3 their opportunity repeatedly over at SOAH.

4 Now, if you're an attorney representing a  
5 party and your party is not here, that's a difference.  
6 The other thing, when you do come up, tell us whether  
7 you're a party in the case or not. I know my staff has  
8 got a listing of all of the parties. We're going to try  
9 to quickly, on the computer, pull it up and make sure  
10 that we know who is a party and who is not.

11 So with that, Katherine, would you lay out  
12 the procedural history on this for us, please.

13 MS. GROSS: This is Docket 38354. This is  
14 the application of LCRA to amend its Certificate of  
15 Convenience and Necessity for the proposed McCamey D to  
16 Kendall to Gillespie 345 CREZ line. Before the  
17 Commission today is a proposal for decision in which the  
18 SOAH Administrative Law Judge recommended that Staff's  
19 MK15 modified be approved for the McCamey D to Kendall  
20 portion of the line.

21 Subsequent to the filing of this  
22 application, the Commission determined that the Kendall  
23 to Gillespie portion of the transmission line would be  
24 replaced with a cost effective alternative; so,  
25 therefore, the ALJ's proposal for decision does not

## OPEN MEETING - ITEM 11 1/13/2011

1 recommend a routing option for the Kendall to Gillespie  
2 substations. And additionally, as you mentioned, you  
3 filed a memo in this docket and also Commissioner Nelson  
4 has filed a memo.

5 CHAIRMAN SMITHERMAN: I think the only  
6 thing I would add is, this project was designated as a  
7 priority project --

8 MS. GROSS: That's correct.

9 CHAIRMAN SMITHERMAN: -- early on. And we  
10 did that because of the need to build this project to  
11 relieve current congestion on the ERCOT grid as well as  
12 to move wind energy that's already been developed in the  
13 McCamey area. And then I think it's important to note  
14 that this case was actually filed later than the  
15 original schedule. I know Ferdie is over there. LCRA  
16 went back to expand the study area to encompass an area  
17 about the size of Connecticut.

18 Ferdie, approximately that?

19 MR. RODRIGUEZ: That's approximately.

20 CHAIRMAN SMITHERMAN: Certainly bigger  
21 than Rhode Island.

22 (Laughter)

23 So that's sort of where we are today. I  
24 filed a memo; Commissioner Nelson filed a memo. And, of  
25 course, we have the PFD in front of us.

## OPEN MEETING - ITEM 11 1/13/2011

1                   So unless you-all have other opening  
2 remarks, let's ask some of our elected officials if they  
3 would like to speak. I understand that the county judge  
4 from Kimble County is here, the county judge from  
5 Gillespie County. We try to start at the top of the  
6 food chain and work our way down. Any other judges who  
7 would like to speak, just sort of raise your hand and  
8 call out.

9                   So who wants to go first?

10                  Yes, sir. Come on down.

11                  Now, when you come up, have a seat, pull  
12 the microphone close. Tell us your name so the court  
13 reporter can get it down accurately.

14                  Thank you for coming.

15                  JUDGE TINLEY: Thank you, Mr. Chairman.  
16 My name is Pat Tinley. I am the constitutional county  
17 judge of Kerr County, and I'm here representing the  
18 interest of the citizens in Kerr County. And I  
19 appreciate the opportunity and the privilege which the  
20 Commission has given some of us to tell you what's on  
21 our mind about this situation.

22                  The proposal for decision that has been  
23 tendered to the Commission, if adopted, which selects  
24 one of the so-called I-10 routes, would have the  
25 following results: No. 1, it would expose the negative

## OPEN MEETING - ITEM 11 1/13/2011

1 aesthetics of the towers and the transmission lines to  
2 the greatest number of people, by virtue of the traffic  
3 on I-10. Some of the visitors to our Hill Country -- in  
4 fact, most of them -- travel I-10. That's their  
5 exposure of the vista that they see of our beautiful  
6 Hill Country.

7               That decision would also impact the  
8 greatest number of habitable structures, even requiring,  
9 if that line comes through Kerrville, the removal of  
10 several. In addition, that situation would eliminate or  
11 severely negatively impact some of the commercial and  
12 development property in Kerrville and Kerr County. And  
13 if it comes through Kerrville properly, up to 550 -- 500  
14 to \$550 million. It would require the construction of  
15 the longest and one of the higher cost lines.

16               Now, I submit that the process that we  
17 have underway today and the criteria which the  
18 Commission has prescribed to be followed in selecting  
19 this route are intended to achieve exactly the opposite  
20 of what I just indicated.

21               In its proposal for decision, the  
22 Administrative Law Judge necessarily, after reaching a  
23 conclusion which indicated the I-10 routes or one of the  
24 I-10 routes, necessarily had to negate the propriety of  
25 other routes, particularly the preferred route of LCRA



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1 TSC. That route, of course, is a route which would be  
2 one of the shortest, lowest cost, impact the fewest  
3 habitable structures and expose the fewest number of  
4 people to the negative aesthetics. That route was  
5 dismissed by the ALJ, generally on two bases. One was  
6 environmental concerns, and the other was community  
7 values.

8 With regard to the environmental concerns,  
9 PBS&J, the contractor who has expertise in performing  
10 environmental assessments, actually ranked the routes as  
11 proposed and ranked the preferred route of LCRA as first  
12 ecologically. They did so after having all the data  
13 available to them and having studied that data under  
14 proper legal theories and using the appropriate  
15 scientific criteria. Yet, the proposal elects to go  
16 with some evidence which was adduced from Parks &  
17 Wildlife folks, which was admittedly contradicted and  
18 conflicted in the record and which was admittedly based  
19 on lack of information for the conclusions given.

20 Community values: The CVA suggests that  
21 they should be the, quote, "decider," as it were, of  
22 community values of the Hill Country, because it had the  
23 greatest number of individual intervenors, albeit every  
24 single one of them with a personal interest, and that  
25 their designation of community values was that this line

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1 should be along I-10. Along I-10, of course, should not  
2 impact anybody with CVA. So based upon their  
3 methodology, it appears that the numbers of people who  
4 assert community values should be the determining  
5 factor.

6 Now, the citizens of Kerrville and Kerr  
7 County selected a more efficient model for this process.  
8 The interest of all the 47,250 citizens of Kerrville and  
9 Kerr County were represented by their elected officials  
10 who intervened on their behalf. And after we  
11 intervened, a public meeting was held, well-attended.  
12 And I can assure you that loud and clear the community  
13 values of those 47,000-plus represented were that the  
14 line should be located not adjacent to or along I-10  
15 but, rather, somewhere else.

16 Now, if we're going by numbers, I think  
17 it's a no-brainer on community values. The population  
18 of Kerrville and Kerr County -- or Kerr County generally  
19 is 47,250. The four other counties involved have a  
20 combined population of only 72 percent of that. The  
21 fact that we chose a different model to represent our  
22 citizens for efficiency should not be held against us.

23 One could come to the conclusion that the  
24 Administrative Law Judge was overwhelmed by the noise  
25 from all of the intervenors to the north who had the

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1 NIMBY intervenors and made a decision to go with the  
2 southern routes because of that noise, and then  
3 proceeded to try and find a way to justify it.

4           The LCRA folks, when they filed their  
5 routes, did so only after extensive study, numerous open  
6 meetings, talking with citizens, evaluation on the  
7 ground, the topography, total knowledge of all of the  
8 criteria and conditions. And most of all, LCRA has no  
9 dog in this fight. It's been designated to do the line.  
10 They are not interested. They don't own any of the  
11 dirt.

12           The LCRA, based upon all these things,  
13 designated its preferred route. Now, you folks have got  
14 a tough decision to make, and I know there's a lot of  
15 emotion involved in it. But I have every confidence  
16 that you will look at the record before you, the  
17 credible evidence in that record. And after considering  
18 and weighing that credible evidence in accordance with  
19 the criteria which you have prescribed, make the right  
20 decision. And I believe that right decision will be and  
21 should be, based upon that, is to trust the judgment of  
22 the only true disinterested party and the one who had  
23 the most complete knowledge and information concerning  
24 all the aspects, and that's LCRA TSC, and designate  
25 their preferred route.

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1 I thank you for your time. Do up have any  
2 questions?

3 CHAIRMAN SMITHERMAN: Judge, I've got a  
4 couple of questions and then a couple of observations.  
5 And thanks again for coming.

6 With regard to the ALJ's -- you know,  
7 there were two of them involved, Wendy Harvel and Travis  
8 Vickery. And I guess I would just say, based upon my  
9 almost seven years here, I've found particularly the two  
10 of them are not easily cowed. We don't always follow  
11 their recommendations. But in my memo, I particularly  
12 reference them, because at least I've found their work  
13 to be good in my opinion.

14 As I went back through the record -- and  
15 we all have spend a lot of time over the holidays and  
16 I'm looking at Volume 1 of the environmental  
17 assessment -- a couple of things struck me as  
18 interesting and one of the reasons that led me in the  
19 directions of the PFD.

20 When you look at the comments from the  
21 various open houses -- and in particular I'm going to  
22 reference you to the Kerrville open house -- the use of  
23 parallel or other existing compatible right-of-way was  
24 the highest ranked item. So at least those folks --  
25 admittedly it's not all your constituents -- but those

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1 folks who showed up seemed to express that that was the  
2 most important.

3           And it's not a numbers game, but I think  
4 that's one indication of where the community is. And  
5 you know them better than me -- you live and work there,  
6 and they elected you -- but that's in the record. The  
7 other thing that's in the record -- and this is in  
8 Section 6 -- and I don't know how this was expressed,  
9 but some of the state representatives and elected  
10 officials expressed that we should go down IH-10, that  
11 we should use existing right-of-way and state highway  
12 right-of-way and a number of other -- so given those,  
13 what would your response be to that?

14           JUDGE TINLEY: Mr. Chairman, my response  
15 would be that there's a considerable difference between  
16 rights-of-way for aerial structures and rights-of-way  
17 for highways. Your highway and roadway rights-of-way  
18 are essentially two-dimensional rights-of-way. And when  
19 you add that third dimension, I don't think you can say  
20 there's not significant additional scarring that takes  
21 place.

22           And, in fact, if you look at some of the  
23 I-10 corridor, TxDOT has done a wonderful job of  
24 beautifying a lot of those areas along I-10. They've  
25 done so in many areas of the state, not just out where

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1 we are. So, actually, I-10 is a beautiful drive. But  
2 when you add that third dimension, I think it does  
3 something much, much more significant. And it's for  
4 that reason -- in our resolution, for example, by the  
5 Commissioners Court, which is on file in the record, we  
6 specifically said particularly to follow particularly  
7 those rights-of-way upon which there are existing aerial  
8 structures, because of that very reason.

9 CHAIRMAN SMITHERMAN: You may not want to  
10 answer this, but as between the preferred route that  
11 loops north of I-10 and Kerrville following, for a  
12 portion of it, the Lone Star Genco line, the private  
13 line, or the line that continues down I-10 all the way  
14 to Comfort, which of those do you prefer?

15 JUDGE TINLEY: Are you talking about the  
16 preferred route?

17 CHAIRMAN SMITHERMAN: I'm talking about  
18 just for this southeastern segment around Kerrville --  
19 not the preferred route, the PFD route, the one the  
20 Judge supported --

21 JUDGE TINLEY: Well, obviously, the --

22 CHAIRMAN SMITHERMAN: -- versus the I-10  
23 route which was the one that at least in part of their  
24 Parks & Wildlife talked about, and the Judge talked  
25 about as well.

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1 JUDGE TINLEY: Well, as between those two,  
2 I think my testimony is already in the record. And the  
3 route which parallels the private line through there  
4 north of Kerrville that goes on down to Comfort would be  
5 much preferable than the one which comes through  
6 Kerrville, as it were, the most southern route.

7 CHAIRMAN SMITHERMAN: Any other questions  
8 of the Judge?

9 Ken?

10 COMM. ANDERSON: If we were, for whatever  
11 reason, to ultimately pick the I-10 route -- I-10 route  
12 through Kerrville -- I hesitate to call it a proposal --  
13 an idea that LCRA made in their replies was that one  
14 could span I-10, go south for a brief distance that went  
15 through Lowe's parking lot, or over a Lowe's parking lot  
16 and -- I don't want to call it a motel, but a -- like  
17 a --

18 JUDGE TINLEY: There is a Holiday Inn  
19 there.

20 COMM. ANDERSON: A Holiday Inn -- Holiday  
21 Inn at a parking lot, and then after passing the parts  
22 of the north side that are a problem for a lot of the  
23 folks, then would cross back over and proceed on. And,  
24 of course, the Judges recommended I believe monopolies  
25 through there, and LCRA also mentioned it again in their

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1 reply to the exceptions, that they had various ways to  
2 in that area perhaps reduce the height, make other  
3 adjustments. Is that something that -- understanding  
4 that you object to it going through -- that would in  
5 your opinion mitigate I think some of your concerns?

6 Because at least I've been in areas where  
7 power lines go right over large parking lots and it --  
8 you know, my folks live in an area that's full of high  
9 power transmission lines that cross over, you know,  
10 strip malls and parking, and it doesn't seem to --  
11 that's not evidence, but it doesn't seem to adversely  
12 affect economic growth in that usage. Residential is  
13 one thing, but some of the commercial, it doesn't seem  
14 to be as adversely affected.

15 JUDGE TINLEY: Commissioner, I'm not sure  
16 you can limit that concept solely to crossing a couple  
17 of parking lots. You've got to get back across 16 and  
18 then go north to get on the north side of I-10.

19 COMM. ANDERSON: It would require a  
20 crossing south and crossing back north. You're right.

21 JUDGE TINLEY: And in doing so -- and I  
22 suspect our Kerrville mayor, David Wampler, will  
23 possibly speak to that -- that's one of the most prime  
24 development areas. And, in addition, we've got a number  
25 of assisted living facilities in that particular area or



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1 just adjacent to this very prime development area, and I  
2 would have serious concerns about that aspect. If it  
3 were all parking lots, yes, that's another issue. But,  
4 unfortunately, it's not on the ground.

5 CHAIRMAN SMITHERMAN: Well, thank you,  
6 Judge.

7 JUDGE TINLEY: Thank you.

8 CHAIRMAN SMITHERMAN: Whose next? Let's  
9 stay with the judges for now.

10 Yes, sir.

11 MR. LLOYD: Commissioners, while the Judge  
12 is coming up, Rep. Hilderbran -- I was passed a note --  
13 he expresses his disappointment that he couldn't be here  
14 today. He's occupied with other stuff at the Capitol,  
15 and he wanted everyone to know and you-all to know that  
16 Isaac Alvarado from his staff is here and will be  
17 listening. He doesn't wish to speak but will be here  
18 listening to the proceedings.

19 CHAIRMAN SMITHERMAN: Okay. Thank you.

20 Yes, sir.

21 JUDGE STROEHER: Thank you, Mr. Chairman.  
22 Commissioners. My name is Mark Stroehler, and I'm the  
23 Gillespie County Judge. I appreciate the opportunity to  
24 make a few comments to you this morning. Before I do  
25 that, I would like to introduce -- we also have two of

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1 our county commissioners with me this morning,  
2 Commissioner Donnie Schuch and Commissioner Billy  
3 Roeder. Also, as you're aware, Gillespie County has  
4 participated jointly in this proceeding with the City of  
5 Fredericksburg. And representing the City of  
6 Fredericksburg, we have with us Councilman Graham  
7 Pearson. And I don't -- well, they are back there.

8               Since this case has generated a little bit  
9 of interest, I didn't know whether they would be able to  
10 get in the room or not, but we do appreciate them being  
11 here with us today as well. Unless you have any  
12 questions after a while -- I will be the only one  
13 speaking for our group this morning, in the interest of  
14 time. We very much appreciate your efforts in this  
15 matter.

16               Gillespie County and the City of  
17 Fredericksburg have been actively involved throughout  
18 this process since it began almost two years ago. Last  
19 summer both of our entities passed resolutions  
20 supporting use of the I-10 corridor through Gillespie  
21 County. We have fully participated in the process and  
22 have advocated positions consistent with those  
23 resolutions.

24               Additionally, I presented testimony on  
25 behalf of the county and city, urging protection of the

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1 Hill Country, not just for our residents but for the  
2 many people who visit the area. Many of our  
3 constituents have also intervened and are parties in  
4 this docket. We've have been respectful of the process  
5 and have tried very hard to play by the rules that were  
6 set out for this process.

7 We retained experienced PUC counsel in  
8 this matter to help us navigate through this case. Our  
9 positions have been briefed, and we rely on that  
10 participation in the process here. We fully recognize  
11 and appreciate that you have some difficult decisions to  
12 make.

13 We want to thank you for your thoughtful  
14 consideration of all the material that is in the record  
15 of this docket. Thank you for your time this morning.  
16 And that concludes my comments, if you have any  
17 questions.

18 COMM. NELSON: Well, I just want to say  
19 that I found that the analysis that y'all did on the  
20 habitable structures in the area on I-10 that runs north  
21 of Kerrville, I thought that was very helpful, because  
22 you did an analysis of what they were, whether they were  
23 single-family residents, mobile homes, commercial  
24 properties.

25 So I don't know that this is the time to

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1 discuss it, Mr. Chairman, but at some point I would like  
2 to have a discussion about -- because whether you look  
3 at the number of habitable structures that is in the  
4 record, I think it's higher -- you know, we typically  
5 care more about residential structures, and mobile homes  
6 are still residential structures, but they can be moved  
7 easier than a house with a foundation, and they may not  
8 need to be condemned.

9                   So I just wanted to commend you for that.  
10 It was helpful.

11                   JUDGE STROEHER: Thank you. I believe the  
12 commendation goes to our attorney, Ms. Webking, on that.

13                   COMM. NELSON: Yes.

14                   CHAIRMAN SMITHERMAN: Yes, we've heard of  
15 her.

16                   COMM. NELSON: Yes.

17                   (Laughter)

18                   JUDGE STROEHER: I thought you might be  
19 familiar with her.

20                   CHAIRMAN SMITHERMAN: You know, just to be  
21 consistent with my questions of the former judge, I also  
22 looked at the comments from the Fredericksburg open  
23 house, and it was a well-attended open house. And  
24 again, this is not a numbers game. But running the line  
25 down I-10 was the preferred route, and it was mentioned

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1 113 times, so is was sort of overwhelmingly favored.

2 Now, that's understandable, because if you  
3 live up in that neck of the woods, you prefer it to be  
4 down along I-10 rather than along what I call the P  
5 routes, which I don't think is the right way to go, and  
6 I've said that in my memo that I filed yesterday  
7 afternoon.

8 Do you have an opinion as between the  
9 route recommended by the Judge, the PFD route, which  
10 follows through Tierra Linda and then more or less the  
11 private Genco, or the I-10 route, the route that goes  
12 all the way down I-10 to Comfort?

13 JUDGE STROEHER: Well, the Commissioners  
14 Court position, along with the City of Fredericksburg  
15 position, has been all along, we were advocating the  
16 I-10 route, even though part of it does go through  
17 Gillespie County. We were advocating that over any of  
18 the other routes. We feel like the PFD route through  
19 Tierra Linda would not be at all helpful for those -- we  
20 just can't imagine going through that large residential  
21 subdivision as opposed to I-10 corridor. People driving  
22 along the I-10 route are used to seeing commercial or  
23 industrial uses, along with utility uses, and I think  
24 priority should be given to the residential subdivision  
25 of Tierra Linda as opposed to the I-10. So definitely

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1 our position would be going straight down I-10.

2 COMM. NELSON: And at some point I'm going  
3 to have questions of LCRA, too --

4 CHAIRMAN SMITHERMAN: Okay.

5 COMM. NELSON: -- when we start discussing  
6 this.

7 CHAIRMAN SMITHERMAN: Okay. Great.

8 COMM. NELSON: I guess since you know that  
9 area, would you expect that as the area north of I-10  
10 continues to evolve from an economic development  
11 standpoint, that some of those residential structures  
12 would be replaced with commercial structures as the land  
13 become more valuable?

14 JUDGE STROEHER: I'm not sure which area  
15 you're speaking of. But in the Tierra Linda  
16 subdivision, I would not expect any of that to turn  
17 commercial. I would expect --

18 COMM. NELSON: I'm talking about the area  
19 just north of I-10, the route that you prefer.

20 JUDGE STROEHER: I really can't answer  
21 that for you.

22 COMM. NELSON: Okay. That's okay. Thank  
23 you.

24 JUDGE STROEHER: I don't have any evidence  
25 to speak to.

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1 CHAIRMAN SMITHERMAN: Questions?

2 Great. Thank you for coming. Appreciate  
3 you-all coming.

4 Who else do we have? I thought we had at  
5 least one more county judge here.

6 Yes, sir?

7 JUDGE BEARDEN: I think you may have two.

8 CHAIRMAN SMITHERMAN: All right. We can  
9 do two.

10 JUDGE BEARDEN: I'm Jerry Bearden, Mason  
11 County Judge. I believe I've met with you before. I  
12 just have a few short comments to make to you. I want  
13 to thank you for the diligent work that you have  
14 presented to the public on this transmission line. I  
15 realize that the Administrative Law Judges presented to  
16 you what we presented in our intervention process, our  
17 concerns with environmental impacts, our concerns with  
18 the right-of-ways that are incompatible.

19 I do have to digress a little bit from  
20 Judge Tinley, because Mason County, we're the smallest  
21 in population. I realize we don't have 47,000 people.  
22 We only have 3,800, but we're pretty well 100 percent  
23 behind the Administrative Law Judges' selections of the  
24 routes. And the memo that Chairman Smitherman  
25 presented, again we want to thank you for the hard work

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1 that you have done.

2 Do you have any questions?

3 COMM. NELSON: No. Thank you for coming.

4 CHAIRMAN SMITHERMAN: Judge, let me ask,  
5 because it's interesting where your position is. I  
6 mean, obviously, you're not in favor of the P line  
7 segments.

8 JUDGE BEARDEN: That's correct.

9 CHAIRMAN SMITHERMAN: But the LCRA  
10 preferred line would not go through Mason County; it  
11 would go south of Mason County, sort of more or less in  
12 a straight line from the two substations. And, yet,  
13 you-all think that's not the way to go. Could you  
14 expand upon that a little bit?

15 JUDGE BEARDEN: Well, I have to agree with  
16 Judge Stroehler that when we began this process a year or  
17 so ago, our feeling was the I-10 route to begin with.  
18 And again, as Judge Stroehler said, the Mason County  
19 Commissioners Court supported the I-10 route. I also  
20 agree with Judge Stroehler in thinking that there is less  
21 disturbance by following the route through I-10 instead  
22 of going through Tierra Linda, which it does affect  
23 residences like you were talking about, Commissioner.

24 The preferred route that LCRA has selected  
25 as their route, I've not spent as much time studying



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1 this, studying how many residences, how much effect it  
2 would have on this. I think that I will have to agree  
3 with Texas Parks & Wildlife studies, that when you get  
4 out and look at the environmental concerns and the  
5 impact that it would have by taking the P line is the  
6 main reason why our court and our group, our Heritage  
7 Association, our P line association has supported the  
8 I-10 route.

9 I hope that answers your question without  
10 beating around the bush.

11 CHAIRMAN SMITHERMAN: No, it's good and  
12 it's consistent with the open house responses in Mason  
13 with the No. 1 ranked criteria was minimize  
14 environmental impacts, and No. 2 was use or parallel  
15 other existing compatible right-of-way.

16 JUDGE BEARDEN: That's correct. Thank you  
17 again.

18 CHAIRMAN SMITHERMAN: Thank you.

19 Who else?

20 JUDGE MURR: Good morning, Commissioners.  
21 My name is Andrew Murr. I'm the County Judge of Kimble  
22 County in Junction. And I wanted to take only a brief  
23 moment to point out, even shorter than my colleagues,  
24 that our Commissioners Court issued two resolutions, one  
25 during 2009 and 2010, that were provided as part of our

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1 statement of position as an intervenor.

2                   Importantly, I would like to note that  
3 there are proposed routes that run both to the north and  
4 the south of Kimble County airport. And what we have  
5 stated in our resolutions, our statement of position,  
6 and continue to state is that while we have refrained  
7 from expressing a preference of a route through Kimble  
8 County, we ask that any harmful or negative impacts to  
9 the airport caused by proposed segments -- and I think  
10 they are still B, 19C, B21B and Y11 -- please be  
11 mitigated. Or if it is unable to mitigate those  
12 negative consequences, that they not be located next to  
13 the airport.

14                   Since 1997, our county, in relationship  
15 with both federal and state agencies, has spent almost  
16 \$4.6 million on our airport, and we're actually slated  
17 to spend close to another \$900,000 this year on  
18 improvements and maintenance. And so it is something  
19 that is a public asset to our community, and we're doing  
20 the best we can to ensure that it is there for the  
21 future.

22                   And with that, I have no further comments,  
23 unless you have questions.

24                   COMM. ANDERSON: Judge, do you have any  
25 view as to if a route is picked, either the route

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1 recommended by the Administrative Law Judges or for some  
2 modification to it, that does go around Junction, either  
3 the north or south, as to which one is likely to have  
4 the least impact on the airport?

5 LCRA has, in their evidence and as well as  
6 in their exceptions and replies, made the point that by  
7 going north around the airport, they can actually site  
8 the line lower than an intervening hill, which  
9 apparently is to the north of -- just north of the  
10 runway. Do you have -- I mean, do you have any view one  
11 way or the other on this? And that, obviously, is hotly  
12 contested by one group of intervenors.

13 JUDGE MURR: To answer that question, we  
14 didn't go and hire any experts. And I myself don't know  
15 a lot about aviation. I have a fear of heights anyway.  
16 So turning from 290 to Mopac was enough for me this  
17 morning.

18 (Laughter)

19 JUDGE MURR: What I will tell you is that  
20 we do understand that the FAA will be involved through  
21 the process at a later date. And since we consider them  
22 to also be experts, we're going to defer to the FAA. If  
23 the FAA has problems with it, then, you know, most  
24 likely we feel that we'll have problems with the  
25 attractiveness and future use of our airport facilities

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1 to those that use it locally and those that use it as a  
2 stopover.

3 So that's why we identified both the  
4 northern routes and the I-10 route, because -- and I  
5 really want to clarify. The Commissioners Court didn't  
6 rule out any of those routes. We just asked that they  
7 be mitigated so they don't harm it. If that process is  
8 available to LCRA, then we are happy with that.

9 Initially I would think we advocated it  
10 not be in our back yard. But beyond that, we're just  
11 focusing on the airport.

12 CHAIRMAN SMITHERMAN: Well, the proposed  
13 mitigation, if it runs along I-10, is an awfully  
14 expensive proposal. I'm still not sure how you can  
15 spend that much money on such a short amount of  
16 infrastructure. And I'm going to ask Ferdie some  
17 questions about that at some point in time.

18 COMM. NELSON: Yes. I have questions,  
19 too, about the flooding stuff, and I also have questions  
20 about -- because I've always heard that if flooding is  
21 an issue, underground lines are not good. So I've got  
22 questions about that when we get to LCRA.

23 JUDGE MURR: And I look forward to  
24 listening in on that as well.

25 COMM. NELSON: Thank you.

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1 JUDGE MURR: Anything further?

2 CHAIRMAN SMITHERMAN: Great. Thank you,  
3 Judge.

4 JUDGE MURR: Thank you, Commissioners.

5 CHAIRMAN SMITHERMAN: All right. Any  
6 other elected officials who have not spoken, wish to  
7 speak?

8 Great.

9 MAYOR WAMPLER: Commissioner Smitherman?

10 CHAIRMAN SMITHERMAN: Yes?

11 MAYOR WAMPLER: David Wampler, Mayor of  
12 the City of Kerrville.

13 CHAIRMAN SMITHERMAN: Sure. Come on down,  
14 Mayor. Didn't mean to exclude you.

15 MAYOR WAMPLER: I wasn't aware if we were  
16 finished with the judges and getting down to us lowly --

17 CHAIRMAN SMITHERMAN: We're working our  
18 way down, yes, sir.

19 MAYOR WAMPLER: I want to take a moment to  
20 thank you-all for your time and for the opportunity for  
21 me to be here today in my role as mayor of the City of  
22 Kerrville and representing our voters and taxpayers  
23 there.

24 CHAIRMAN SMITHERMAN: Just state your name  
25 again so the court reporter --

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1                   MAYOR WAMPLER: My name is David Wampler,  
2 and I'm here representing the City of Kerrville as Mayor  
3 of the City of Kerrville.

4                   It's clear to all of us involved here  
5 today that this process and the proposed line is going  
6 to have a perpetual impact and negative impact on parts  
7 of the Hill Country. And to my knowledge, no one wants  
8 to see the line pass either close to their property or  
9 certainly across their property, and we certainly  
10 understand that.

11                   However, since petitioning the Public  
12 Utility Commission a few months ago to reexamine ERCOT's  
13 analysis and finding supporting the need for this line  
14 and receiving word from the Public Utility Commission  
15 that this line is indeed needed and will be constructed,  
16 the City of Kerrville's position has been and continues  
17 to be to support the LCRA's preferred route.

18                   I'm here today on behalf of all of the  
19 citizens of Kerrville who, as taxpayers, will suffer  
20 permanent irreparable harm as a result of the loss of  
21 future ad valorem value estimated to be equivalent to  
22 32 percent of our total ad valorem tax base as it stands  
23 today if this line is constructed across our gateway and  
24 through our natural and really only major growth  
25 corridors.

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1           The line, if placed along I-10 through  
2 Kerrville, will do irrevocable harm to the city's  
3 finances, it will impact our future financial growth and  
4 the flexibility needed to provide basic service and,  
5 again, will ruin our only natural growth corridor.

6           I represent those homeowners and property  
7 owners and business owners who lack the resources to  
8 intervene or to be here today. They will be adversely  
9 affected by the placement of this line along I-10  
10 through our city. The LCRA preferred route impacts 18  
11 habitable structures that lie within 500 feet of the  
12 line; whereas, the I-10 route affects nearly seven times  
13 that many -- 123 habitable structures. Among those 123,  
14 we believe 17 lie along that northern line through  
15 Kerrville, two of which are permanent homes. We believe  
16 that eight families will lose their homes.

17           And I reject the assertion or the  
18 implication made by other intervenors in this case that  
19 the type, style or quality or construction of your home  
20 should have any bearing whatsoever in deciding where the  
21 line should go relative to any other type, style or  
22 quality of home. The fact is, is that we believe eight  
23 people in my community will have to leave their homes  
24 and will be uprooted as a result of the alignment as  
25 proposed down I-10.

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1                   Additionally, one of those habitable  
2 structures is a major employer in our area, employing  
3 over 50 people and contributing greatly to our tax base,  
4 both from a sales tax and ad valorem standpoint.

5                   Our city continues to evaluate  
6 opportunities for expansion along the gateway. We are  
7 currently in the process of a \$4 million infrastructure  
8 project, taking water and wastewater virtually across  
9 one of the areas that the line would impact at the  
10 intersection of Harper Road and I-10. We are also  
11 evaluating a proposal to add additional access along  
12 I-10 that would open up commercial and residential  
13 development that would have a significant economic  
14 impact on our community. And I believe that placement  
15 of this line along that route would have a negative  
16 impact on those discussions and the future of that  
17 developable property.

18                   Nearly 20,000 cars travel I-10 through  
19 Kerrville every day. And for many people, that's their  
20 introduction to the Hill Country. I believe we could  
21 all agree that you would be hard-pressed to find a more  
22 scenic stretch of interstate in this region, and that  
23 just passes from the south of Kerrville to several miles  
24 to the west of Kerrville.

25                   We're a center for trade, tourism,



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1 commerce, and we continue to make investments to  
2 facilitate those industries and those economic  
3 activities for the betterment of our community and our  
4 taxpayers.

5                   So with my brief summary today and by our  
6 positions detailed in our official resolutions and  
7 testimony, I respectfully ask each of you to consider  
8 the lasting negative impact and alignment along I-10 as  
9 proposed would have on our community and taxpayers, and  
10 I ask that you recognize and take into consideration not  
11 only the physical and business impact but the fact  
12 people in my community will lose their homes if the line  
13 is constructed along I-10 through Kerrville.

14                   Our support of the LCRA's preferred route  
15 has been consistent, and I urge you to rule in favor of  
16 a route that does not bisect the gateway of our city.  
17 And thank you for your consideration and for your time.  
18 And I would be happy to take any questions.

19                   COMM. NELSON: I have a question.

20                   MAYOR WAMPLER: Yes, ma'am.

21                   COMM. NELSON: If the right-of-way is  
22 narrowed to 100 feet because LCRA uses monopoles, then  
23 you end up with eight structures within the  
24 right-of-way. Correct?

25                   MAYOR WAMPLER: I haven't examined that,

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1 but I'll take your word for it if that's --

2 COMM. NELSON: That's my understanding.

3 MAYOR WAMPLER: Okay.

4 MR. JOURNEAY: And then I have one of the  
5 great big blown-up maps behind me. And those structures  
6 are mobile homes, which at least if the parties alleged  
7 that they were entitled to less protection, I'm not  
8 alleging that. I'm simply saying that a mobile home is  
9 easier to move than a home with a foundation, and I just  
10 want clarity on the eight homes from you.

11 MAYOR WAMPLER: Okay. Well, if I may, in  
12 your previous questioning of the Kimble County Judge --  
13 or I believe -- or the Gillespie County Judge -- excuse  
14 me -- the thought that -- first of all, from a  
15 topographical standpoint, that stretch of highway would  
16 not lend itself to commercial development. So, in other  
17 words, the highest and best use of that particular area  
18 in my opinion would not support commercial development,  
19 No. 1. And No. 2 --

20 COMM. NELSON: And why is that?

21 MAYOR WAMPLER: Because of topography --

22 COMM. NELSON: Okay.

23 MAYOR WAMPLER: -- because it's fairly  
24 steep. There are a number of hills there. It does lend  
25 itself better for the use that it's currently being used

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1 for or for future development as permanent type  
2 residential.

3 I would say that the mobile home park in  
4 question has been there for many, many years. I've been  
5 in Kerrville for 17 years, and the park there has been  
6 there far -- before there. There are a couple of  
7 permanent structures there also. And I would say that  
8 while theoretically it's possible to hitch up a mobile  
9 home and move it 100 feet away, I think in this  
10 particular circumstance, that would be unlikely. These  
11 people would have to find new homes and new sites  
12 altogether rather than moving those structures off, to a  
13 large extent.

14 And finally, by running the line along  
15 there, is there a better use of that property? My  
16 opinion is that we would lose the use of the property to  
17 a large extent, even with monopoles and shortening the  
18 right-of-way. So, you know, we would be denied as a  
19 community the use of that property from a development  
20 standpoint.

21 COMM. NELSON: Okay. Thank you.

22 MAYOR WAMPLER: Thank you.

23 CHAIRMAN SMITHERMAN: Mayor, thanks again  
24 for coming.

25 MAYOR WAMPLER: Thank you for having me.

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1                   CHAIRMAN SMITHERMAN: You know, we did the  
2 best we could. We eliminated one complete line from  
3 Kendall to Gillespie to Newton.

4                   MAYOR WAMPLER: Yes.

5                   CHAIRMAN SMITHERMAN: I hope you  
6 appreciate that we've been listening, and we have done  
7 everything that we can to try to mitigate the amount of  
8 infrastructure that has to be built out here. But the  
9 reality is, because of the lack of infrastructure, given  
10 what the Legislature has directed us to do in terms of  
11 building lines for wind energy development, and to a  
12 large degree as well, mitigating existing congestion,  
13 this line has got to be built.

14                   Like you, I've sat here for many years,  
15 and it's only recently that I've had a person say to me,  
16 "Please put the line on my property." We had one in a  
17 previous case. An elderly gentleman said, "You can put  
18 it right here." He just pulled out the map and showed  
19 us where to put it.

20                   But in this case in particular, I find the  
21 position of AC Ranches to be very interesting. I mean,  
22 they've basically said they want the line. I know  
23 that's not in your neck of the woods.

24                   MAYOR WAMPLER: Sure. Right.

25                   CHAIRMAN SMITHERMAN: But I do think it's