

# *Public Utility Commission of Texas*

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## **Memorandum**

TO: Chairman Donna L. Nelson  
Commissioner Brandy D. Marty

FROM: Commissioner Kenneth W. Anderson, Jr.

DATE: May 29, 2014

RE: **Open Meeting of May 30, 2014, Agenda Item No. 11, Docket No. 40953 – Complaint of Johnny H. and Eloise Vinson Against Oncor Electric Delivery Company, LLC**

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This is a case of first impression that raises significant legal and policy questions about the scope of a utility's authority to modify unilaterally the route of a transmission line after the Commission has approved a certificate of convenience and necessity that incorporates a settlement agreement between the utility and landowners that specifies a definitive route. Because I am troubled by some of the conclusions the Administrative Law Judge (ALJ) reached in the Proposal for Decision (PFD)<sup>1</sup> in this docket, I wish to state my position as to some of the recommendations included in the PFD.

As a starting point, both parties in the matter before us seem to agree that disputes between utilities and landowners involving transmission routing settlement agreements are by necessity fact intensive exercises and that the results in any particular contested case will be driven by, and limited to, the specific facts.<sup>2</sup> I agree and our ultimate decision should make that point clear. The parties also seem to agree that utilities have some leeway to make minor route adjustments even when the settlement route can be determined with precision.<sup>3</sup> Again, I agree, although we do not need to decide in this case a general rule as to where the limit should reside. As a further preliminary issue, I should also make the obvious point that factually this is not a dispute involving a Commission selected link that does not involve a settlement. How that factual distinction may affect a utility's authority to make minor adjustments in the route remains to be decided in a future case.

Accordingly, I agree with and would adopt the PFD regarding (1) the determination that the location of the settlement route can be determined with specificity;<sup>4</sup> (2) the determination that the settlement route is coincident with the existing Brazos Newark-Rhome 69-kV transmission

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<sup>1</sup> *Complaint of Johnny H. and Eloise Vinson Against Oncor Electric Delivery Company, LLC*, Docket No. 40953, Proposal for Decision (March 25, 2014) (PFD).

<sup>2</sup> See Tr. at 343-44, 661-62, 713.

<sup>3</sup> Tr. at 205-07 (Vinson witness Andrew Poth stating that a line falling within 20-25 feet of the settlement route is constructed "on or along" the settlement route); Direct Testimony of Oncor Witness Jess Totten at 8-10, 15 (Nov. 8, 2013) (stating that Commission authorized transmission routes incorporate an inherent degree of latitude that allow utilities to make adjustments that may account for the average 160 foot discrepancy between the settled route and the constructed route in this case).

<sup>4</sup> PFD at 23.

line on the Vinsons' property (Brazos Line);<sup>5</sup> and (3) the determination that Oncor Electric Delivery Company, LLC (Oncor) constructed the Willow Creek to Hicks 345-kV transmission line (WC-Hicks Line) approximately 160 feet south, on average, of the settlement route.<sup>6</sup> Where I part company with the ALJ is in the PFD's determination that Oncor has broad (indeed, almost limitless) authority under the order authorizing construction of the WC-Hicks Line (Order)<sup>7</sup> when faced with an "engineering constraint," a term the PFD defines so broadly as to render the settlement with the Vinsons a nullity. Furthermore, I disagree with the PFD's conclusion that this broad grant of authority, which is found the Order's findings of fact, somehow trumps the Order's clear and specific distinction between "minor deviations" and "more than minor deviations," which are found in its ordering paragraphs.<sup>8</sup> Therefore, the PFD concludes that Oncor did not "deviate" from the settlement route by moving the line almost 160 feet from the clearly agreed route, a conclusion with which I cannot agree and decline to adopt.

## I. FACTUAL BACKGROUND

As previously mentioned, in this case the parties agree that disputes such as the one before us must be decided on their particular and peculiar facts. Beyond that, disagreement begins. Even so, several undisputed facts reveal principles that should guide the interpretation of Commission orders authorizing the construction of transmission facilities. First, it is undisputed that the Vinsons and Oncor reached an agreement (Settlement Agreement) regarding where the WC-Hicks Line was to be sited.<sup>9</sup> Second, it is undisputed that the Vinsons and Oncor agreed that the physical location of the WC-Hicks Line would be coincident with the Brazos Line along the northern portion of the Vinsons' property.<sup>10</sup>

The ALJ concluded that the Settlement Agreement was definitive regarding where the parties would locate the line over the Vinsons' property. Based on a review of the settlement map attached to the Settlement Agreement, the ALJ stated "it is undisputable that the Settlement Route is coincident with the Brazos 69-kV transmission line where it crosses the Vinsons' property."<sup>11</sup> Thus, there is no doubt that Oncor and the Vinsons intended to route the line coincident with the existing Brazos Line and their agreement reflected as much. Moreover, no party disputes that the actual location of WC-Hicks Line as constructed on the Vinsons' property is approximately 160 feet south of the Brazos Line.<sup>12</sup>

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<sup>5</sup> *Id.* at 17.

<sup>6</sup> *Id.* at 24. The PFD states that the distance between the WC-Hicks Line and the settlement route is approximately 150 feet, however, evidence in this case indicates that the average distance is 160 feet. Direct Testimony of Andrew D. Poth at 13 (Oct. 25, 2013).

<sup>7</sup> *Application of Oncor Electric Delivery Company, LLC to Amend a Certificate of Convenience and Necessity for the Willow Creek-Hicks 345-kV CREZ Transmission Line in Denton, Parker, Tarrant and Wise Counties*, Docket No. 38324, Order (Dec. 13, 2010).

<sup>8</sup> Order at 17-18.

<sup>9</sup> *Application of Oncor Electric Delivery Company, LLC to Amend a Certificate of Convenience and Necessity for the Willow Creek-Hicks 345-kV CREZ Transmission Line in Denton, Parker, Tarrant and Wise Counties*, Docket No. 38324, Settlement Agreement (Oct. 14, 2010).

<sup>10</sup> PFD at 17.

<sup>11</sup> *Id.*

<sup>12</sup> PFD at 24.

It is the policy of this Commission to encourage settlements between landowners and utilities planning transmission facilities over landowner property. In recognition that landowners bear a burden when transmission lines cross their property, Commission rules defer to agreements between affected landowners and utilities when siting transmission lines.<sup>13</sup> This policy allows affected landowners to have a meaningful voice in determining how transmission facilities will affect their land. Judicial economy weighs in favor of upholding these agreements because they ease the Commission's difficult task of ordering the location of transmission lines based on factors in the Public Utility Regulatory Act<sup>14</sup> and our rules. However, the policy of encouraging landowner and utility siting agreements is sensible only to the extent that those agreements match the expectations of the parties to them.

This is not a case in which the Commission determined and ordered the routing path of the WC-Hicks Line over the Vinsons' property. Arguably, when the Commission designates a transmission route without the agreement of an affected landowner the utility may have greater leeway to make routing adjustments because the landowner has not agreed on how he prefers the facilities to affect his property.<sup>15</sup> However, a utility should be held to a more precise standard when it reaches a voluntary agreement with the landowner regarding the location of transmission facilities. I am mindful that the Commission placed a heavy emphasis on the swift completion of the Competitive Renewable Energy Zone (CREZ) transmission projects, but our guidance was not intended to disrupt the expectations of landowners who agreed on where CREZ facilities would sit on their property.<sup>16</sup>

In this case, the Vinsons and Oncor knew precisely where it was intended for Oncor to construct the WC-Hicks Line. In effect, the parties looked at the Brazos Line and said to each other "let's put the new line where that old one is." As soon as Oncor determined that this agreement was unfeasible it should have cooperated with the Vinsons to determine an agreeable alternate route or sought guidance from this Commission on how to proceed. Instead, Oncor moved the WC-Hicks Line on its own accord, disrupting the Vinsons' expectations as reflected in the Settlement Agreement.<sup>17</sup> Accordingly, the Commission's determination that such action was permissible because Oncor encountered an "engineering constraint,-----" which is defined in the PDF very broadly, would frustrate the expectations expressed in the Settlement Agreement. In addition, such a determination would disrupt the principles that underlie

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<sup>13</sup> P.U.C. SUBST. R. 25.101(b) (the Commission shall consider several enumerated factors in the selection of transmission line routes "unless a route is agreed to by the utility, the landowners whose property is crossed by the proposed line, and [other owners of land supporting habitable structures in the vicinity]").

<sup>14</sup> TEX. UTIL. CODE ANN. §§ 11.001 – 66.017 (Vernon 2007 & Supp. 2012).

<sup>15</sup> This is an issue that need not be decided in this case.

<sup>16</sup> See, e.g., *Application of Oncor Electric Delivery Company, LLC to Amend a Certificate of Convenience and Necessity for the Riley-Krum West 345-kV CREZ Transmission Line (Formerly Oklaunion to West Krum) in Archer, Clay, Cooke, Denton, Jack, Montague, Wichita, Wilbarger, and Wise Counties, Texas*, Docket No. 38140, Remarks of Commissioner Kenneth W. Anderson, Jr., Open Meeting Tr. at 38 (Jul. 1, 2010) ("[J]ust because we're on an abbreviated timeline, I don't feel like we run roughshod over the landowners in these cases.").

<sup>17</sup> I express no opinion regarding the pending contract lawsuit filed by Oncor against the Vinsons in the 271<sup>st</sup> District Court in Wise County, if for no other reason we do not have jurisdiction to decide such matters. See *Oncor Electric Delivery Company, LLC v. Johnny Vinson*, No. CV12-10-657 (271st Dist. Ct., Wise County, Oct. 8, 2012).

Commission recognition of routing settlements for transmission lines because it would undermine the landowner input that supports recognition of these agreements in the first place.

## II. FINDINGS OF FACT DO NOT GRANT AUTHORITY AND DO NOT TRUMP ORDERING PARAGRAPHS

The Texas Administrative Procedure Act requires that administrative agencies include separately stated findings of fact and conclusions of law in final decisions of contested cases.<sup>18</sup> Texas courts explain that the requirement that an agency make findings of fact to support a decision serves several objectives: “[1] to restrain an agency from making a decision without the full consideration of the evidence, [2] to inform parties of the facts so that they may intelligently prepare and present an appeal, and [3] to assist the courts in properly exercising their reviewing function.”<sup>19</sup> Simply put, findings of fact are judicial determinations that support an agency’s ultimate decisions in a contested case, and as factual determinations they do not authorize or direct parties to engage in a particular course of action.

Oncor rests its authority to move the line off the path of the Brazos Line on Finding of Fact No. 78 in the Order, which states “[t]he settlement route does not present any engineering constraints that cannot be resolved with additional consideration during the design and construction phase of the proposed transmission-line project.”<sup>20</sup> Although Oncor goes to great lengths to construe Finding of Fact No. 78 as a source of authority to route the WC-Hicks Line around an engineering constraint, a plain reading of Finding of Fact No. 78 confers no such authority; it simply declares a state of affairs applicable to the construction of the WC-Hicks Line. Upon issuance of the Order, Finding of Fact No. 78 established this Commission’s determination that no engineering constraint would impede construction of the WC-Hicks Line. However, no portion of Finding of Fact No. 78 included authorizing language allowing Oncor to move the WC-Hicks Line off the path of the Brazos Line upon discovery of an engineering constraint.

The sources of authority allowing Oncor to construct the WC-Hicks Line in accordance with the Commission’s directives appear in the ordering paragraphs or, if applicable, conclusions of law of the Order. In particular, Ordering Paragraphs Nos. 9 and 17 allow Oncor to undertake action that would move the WC-Hicks Line off the Brazos Line route, but only if Oncor meets certain conditions. In the case of a minor deviation under Ordering Paragraph No. 9, Oncor must obtain the approval from the affected landowners and cooperate with the landowners to implement deviations in the settlement route. In the case of a non-minor deviation under Ordering Paragraph No. 17, Oncor must obtain landowner consent and pursue a reasonably direct path towards the terminus of the line.<sup>21</sup>

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<sup>18</sup> TEXAS GOV. CODE § 2001.141(b) (Vernon 2007 & Supp. 2012).

<sup>19</sup> *West Texas Utilities Co. v. Office of Public Utility Counsel*, 896 S.W.2d. 261, 270 (Tex.App.-Austin 1995, no pet.).

<sup>20</sup> Order at 11.

<sup>21</sup> *Id.* at 17-18.

Unlike Finding of Fact No. 78, Ordering Paragraphs Nos. 9 and 17 include the word “shall,” indicating specific mandatory action to implement construction of the WC-Hicks Line in a manner that deviates from the Brazos Line. Finding of Fact No. 78 includes no such authorizing directive and, accordingly, cannot be a source of authority for construction of the WC-Hicks Line in any manner. Indeed, construing Finding of Fact No. 78 as a source of authority to divert from the Brazos Line necessarily conflicts with Ordering Paragraphs Nos. 9 and 17 because such construction would allow for a deviation from the Brazos Line without cooperation or consent from affected landowners as required by Paragraph Nos. 9 and 17. For these reasons, I do not find any grant of authority to move the WC-Hicks Line in Finding of Fact No. 78.<sup>22</sup>

### III. DEFINITION OF ENGINEERING CONSTRAINT

Finding of Fact No. 47 of the PFD offers the following definition of engineering constraint:

In the context of the electric utility industry, an “engineering constraint” is an impediment to the safe, reliable, and efficient construction, maintenance, and operation of a transmission line. Engineering constraints could consist of almost any physical constraint, including pipelines, property lines, wells, transmission lines, and tombstones.

Regardless of how we ultimately decide this case, this definition strikes me as far too broad and could allow transmission utilities in future cases to argue that relatively minor physical constraints require transmission routing adjustments. In my view, the definition should be narrowed to something along the following lines:

As used in the context of electric transmission, an “engineering constraint” is any physical condition or physical obstacle to construction along the Commission-approved route that would be impossible, unsafe, or unreasonably cost-prohibitive to overcome with design and construction solutions alone.

### IV. CONCLUSION

This is a case where a landowner and a utility agreed to a transmission line route and the location of that route was identifiable with specificity. Given these facts, it is unnecessary to decide where to draw the line distinguishing minor adjustments from deviations.<sup>23</sup> In this case, it is sufficient to conclude that where a landowner and a utility agree on the specific settlement route of a transmission line an average distance of nearly 160 feet is too far from the settled route to be considered a minor adjustment. At the very least, the width of a football field constitutes a

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<sup>22</sup> Going forward, the Commission should continue to be mindful of the wording included in our orders to ensure that parties do not infer authority from the judicial determinations stated in findings of fact.

<sup>23</sup> I express no opinion about the leeway left to utilities to implement minor adjustments to settled routes.

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minor deviation that required Oncor to cooperate with the Vinsons and obtain their approval pursuant to the terms applicable to minor deviations in the Order.

I look forward to discussing these issues with you at the open meeting.