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March 31, 2010

Mr. Thomas Mason, General Manager  
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We have reviewed your letter of March 19, 2010 in light of the provisions of Chapter 391 of the Texas Local Government Code, the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA) and regulations implementing both Federal Acts. This response is designed to assure that the record regarding the proposed route through Mason County is clear should it be necessary to proceed to litigation.

With regard to Chapter 391, section 391.009 (c ) requires that you “coordinate” “to the greatest extent feasible” with this Commission “in carrying out your planning and program development responsibilities.” As we have previously pointed out, the Legislature has assigned planning and program development duties to your agency quite apart from the regulatory route-setting process. Prior to your applying for a certificate of convenience you engaged in planning activities to plot out the potential routes for CREZ transmission lines. Implementation of those planning activities should now be coordinated with the Commission.

We will continue to emphasize your statutory duty to “coordinate” so that failure to comply with the statute is knowingly at your own risk.

With regard to the NEPA and ESA requirements, the Commission now has an accurate account of the facts regarding your transmission line proposed for Mason County. Fish and Wildlife has officially published the Notice of Intent to prepare an Environmental Impact Statement. The Notice sets straight the conflict between Mr. Napier’s factual statements and Mr. Wenmohs misleading representations to this Commission and the public. The legal impact of the Notice formally corrects the statements which misled the Commission and, no doubt, the public.

A full environmental impact study is underway to evaluate your Habitat Conservation Plan, which is a necessary part of your application to secure an incidental take permit pursuant to section 10 of the Endangered Species Act. NEPA requires coordination with this Commission and full public review and evaluation of all reasonable alternative routes prior to issuance of a Section 10 (ESA) permit. We take

the following position with regard to your letter of March 19 in order to assure that we have a clear record should litigation become necessary:

1. In our letter of March 5, 2010, we pointed out that your agency was obligated to coordinate with this Commission because you had been delegated to prepare the Environmental Impact Statement (EIS). Our statement was based on the assertion by Mr. Napier of Fish and Wildlife that the job of preparing the EIS had been delegated to your agency. On February 17, 2010, Mr. Napier told the Commission that the Service had assigned to you the task of conducting a complete and rigorous Environmental Impact Statement at least four to five months prior to that meeting. He advised the Commission that the Notice of Intent was in Washington, D.C. for final approval. He told us that he had seen the Notice that included the delegation of authority to your agency.

It is apparent that the Notice was changed in Washington, D.C. in order to relieve you of the legal obligation to prepare the EIS. But, it does not relieve you of the legal obligation to prepare a Habitat Conservation Plan that is subject to NEPA review and evaluation—the full NEPA process.

2. On November 24, 2009, Mr. Wenmohs told this Commission that NEPA did not apply to this project because “There’s no major federal action” involved. He did not mention the application for an incidental take permit; he simply attempted to misdirect this Commission by saying “there’s no major federal action” involved.

After our meeting with Fish and Wildlife on February 17, 2010, your agency conducted a public meeting in Mason, Texas. At that meeting, Mr. Wenmohs advised the public that only an “environmental assessment” would be prepared in order to acquire an incidental take permit.

Both of those statements were incorrect: the application for incidental take permit does involve a “major federal action” that requires an environmental impact statement, not an environmental assessment. In performing its legal duty, Fish and Wildlife has now initiated the process for development of an EIS. The Commission will do everything in its power to assure that the law is obeyed by all parties involved.

3. Your March 19 letter states that compliance with NEPA does not require “prior review and approval from FWS for any or all routes submitted to the PUC in a transmission line CCN application.” You refer to another line that was subjected to a PUC hearing without being submitted to FWS for review.

But, simply put, you cannot construct the proposed transmission line through Mason County without securing an incidental take permit. Fish and Wildlife cannot issue such permit until a complete NEPA review and evaluation demonstrates to the agency that your application and Habitat Conservation Plan complies with the Endangered Species Act and implementing regulations. This Commission will do what is necessary to assure that there is compliance with section 10 of the Endangered Species Act, with NEPA, and with the federal implementation regulations.

What your company persuaded the PUC to do regarding some other line is of no concern or importance to this Commission. We will do what it takes to assure that the McCamey D-to Kendall to Gillespie 345 kilowatt CREZ Transmission line project is considered and handled in accordance with federal law made paramount in this instance by Article VI of the United States Constitution.

4. Your March 19 letter discusses a limited Environmental Impact Statement to include only evaluation of "potential impacts to listed species associated with the CREZ Priority Transmission projects." Of course the Environmental Impact Statement will not be limited to impact on species. There is no statutory or regulatory provision that allows such limited study once NEPA is triggered by a request for an incidental take permit.

To its credit, Fish and Wildlife recognizes that aspect of the law. The officially published Notice states the agency's intent to conduct the environmental review in accordance with the following terms stated in the Notice:

"The Service will conduct an environmental review to analyze the proposed action, as well as other alternatives evaluated and the associated impacts of each. The draft EIS will be the basis for the impact evaluation for each species covered and the range of alternatives to be addressed. The draft EIS is expected to provide biological descriptions of the affected species and habitats, as well as the effects of the alternatives on other resources such as vegetation, wetlands, wildlife, geology and soils, air quality, water resources, water quality, cultural resources, land use, recreation, water use, local economy, climate change, and environmental justice."

The legal parameters described by the Notice correctly include a complete and rigorous Environmental Impact Statement as required by NEPA and the Endangered Species Act. Mr. Napier committed to such a complete study at our February 17, 2010 meeting.

We will be diligent in our efforts to assure that such an EIS is prepared, properly reviewed, properly coordinated with this Commission, and properly submitted to full public review and comment prior to a decision as to whether to grant your company an incidental take permit for the McCamey D to Kendall to Gillespie line.

5. Section 10 of the Endangered Species Act requires completion of an approved Habitat Conservation Plan before an incidental take permit can be issued. Fish and Wildlife regulations and Council on Environmental Quality regulations governing implementation of Section 10 require that such HCP be a part of the application for an incidental take permit. The official Notice published by Fish and Wildlife states quite clearly that "following completion of the environmental review, the Service will publish a notice of availability and a request for comments on the draft EIS **and the Applicant's permit application which will include the draft HCP.** The draft EIS and draft HCP are expected to be completed and available to the public in early mid-2010."

After the EIS and HCP drafts are released to the public, the full public review and comment process must be conducted prior to consideration of issuance of the Final EIS, placement of conditions on the HCP and issuance of the incidental take permit. This Commission will do what it takes to assure that this entire review process is followed in strict accord with the law. According to the Notice of Intent, the lengthy public review and evaluation will not even begin until mid-2010.

In the meantime, the Commission will insist on continuing coordination with the Fish and Wildlife Service as to the complete NEPA process including review of the on-going EIS and HCP. We will call on Fish and Wildlife, the Environmental Protection Agency, the Council on Environmental Quality, and the Department of Justice, if necessary, to comply with the NEPA coordination requirements and the full and detailed NEPA process.

6. Your March 19 letter states that the “federal regulatory process” does not contemplate a “planning and coordination” track “separate and apart from the administrative process described in PURA, the Administrative Procedure Act, or the ESA.” Of course, that is an incorrect assessment of the law. The “administrative process described in PURA” or in “the Administrative Procedure Act” is not superior to NEPA and the NEPA process tied intimately to Section 10 of the Endangered Species Act. Your request to prepare an HCP in order to receive an incidental take permit excusing you from destroying listed species and their habitat invokes the NEPA process. That request and application chains your company to federal laws which represent the supreme law of the land regarding listed species, the environment and the process for protecting both.

Without an incidental take permit, even a certificate of convenience issued by the PUC will not allow you to legally construct the line through Mason County where you will destroy several species, their habitat and the entire ecosystem that supports them. Placement of the line without such permit will result in a taking prohibited by the Endangered Species Act, punishable criminally and civilly.

The federal statutes and regulations to which you have tied your company by your application for an incidental take permit do in fact require coordination between the agency preparing the EIS and this Commission as a unit of local government in the state of Texas. We will insist on the continuation of that process that has already commenced with Fish and Wildlife.

7. Your March 19 letter gratuitously offers information that Fish and Wildlife plans “to hold scoping meetings,” and “will accept suggestions and information from the public on the scope of issues and alternatives to consider.” Of course the Service will hold such public meetings. The law requires it to do so. But, this Commission will be involved with the Service in far more intensive discussions through coordination as required by federal law. The Service and this Commission will engage in government-to-government coordination to resolve inconsistencies between the alternatives being studied and local policy.
8. Your March 19 letter states that the NEPA process related to issuance of an incidental take permit “does not require the submittal to FWS of any or all routes in any CREZ transmission line project for review prior to the filing of certificate of convenience and necessity (CCN) application

with the PUC.” As far as it goes, this is a correct statement. You probably can file an application for a CCN with the PUC before the NEPA process is completed. But, you cannot lawfully commence construction of a line prior to completion of the NEPA process and issuance of an incidental take permit. To do so would constitute a knowing and intentional violation of federal law.

It appears to the Commission that you intend to convey a message that you need not submit for review alternative routes that would not destroy the ecosystem, listed species and other natural resources in Mason County. Such position is incorrect.

16 USC Section 1539 provides that the Secretary of Interior cannot issue your agency an incidental take permit until you have submitted an HCP that specifies:

- a. The impact likely to result from a taking
- b. Steps for minimization and mitigation of the impact
- c. **“what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized”**

We will be carefully reviewing your explanation for not utilizing alternatives which will not destroy species and the ecosystem, as well as “cultural resources,” “geology and soils,” “land use,” “local economy,” “vegetation,” “wetlands,” “wildlife,” and other elements of the environment within Mason County. There are obvious alternate routes for your line that will not destroy unique and finite characteristics of the ecosystem in Mason County. We will be watching carefully to assure that you are not allowed to justify the necessity of constructing the Mason County line purely on the basis of money. As you know, the Mason County line was a late add-on to your proposed routes. It appears to this Commission that the eleventh hour addition was motivated by money coupled with politics. The proposed route will result in such serious adverse impact to the natural and human environment in Mason County that it cannot be justified by an objective NEPA study.

By the terms of 40 CFR Section 1502.14, the Council on Environmental Quality requires that “agencies shall rigorously explore and objectively evaluate all reasonable alternatives..., devote substantial treatment to each alternative considered in detail including the proposed action so that the reviewers may evaluate their comparative merits, include reasonable alternatives not within the jurisdiction of the lead agency [this provision expands the scope of the EIS beyond just the jurisdiction of Fish and Wildlife to that of other federal and state agencies, e.g. including jurisdiction of the Department of Agriculture, Corps of Engineers, Environmental Protection Agency, state Department of Environmental Quality, Parks and Wildlife], include the alternative of no action, [and] identify the agency’s preferred alternative or alternatives, if one or more exists.”

The terms of 50 CFR Section 17.22 (b) (1) require that the application for an incidental take permit include the HCP so that the Secretary can review its contents to determine that it satisfies the requirements of the law. The requirement of early filing of the HCP is consistent with NEPA’s goal to evaluate potential environmental harm before it occurs, not after. The requirement of early filing makes sense because the EIS may reveal a reason to delay, modify or cancel a project. It is not logical to delay

protection of our environment—its fragile ecosystems and endangered species—until after harm has occurred. Such delay would allow industry and agencies to cause any manner of environmental destruction with no more than a promise to implement an HCP. The law is clear. The NEPA process must be completed prior to commitment to a particular transmission route.

We presume that you included a draft of your HCP with your application for incidental take permit. We presume that your draft HCP explains why you prefer the Mason County route that will destroy the world famous ecosystem and natural resources of Mason County. We base that presumption on a probability that you would not want to be found in violation of the Endangered Species Act or any other federal law.

We will request that at our next coordination meeting Fish and Wildlife produce your application for incidental take permit and the draft HCP as it was filed with the Service.

9. We will continue coordination meetings with Fish and Wildlife, and will now include EPA in our coordination requests because of its overriding concern with environmental damage above and beyond species takings. We will review with Fish and Wildlife and with EPA the conflicts between your proposed Mason County route and the Commission's policy of protecting the unique ecosystem and environmental characteristics of Mason County.

40 CFR Section 1502.16(c) requires that the EIS include discussions of "possible conflicts between the proposed action and the objectives of Federal, regional, state and local...land use plans, policies and controls for the area concerned." 40 CFR Section 1506.2(d) requires that the EIS "discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law."

In an official Memorandum, the Council on Environmental Quality described what the agency preparing an EIS must do with regard to possible conflicts with local government:

"How should an agency handle potential conflicts between a proposal and the objectives of Federal, state or local land use plans, policies and controls, for the area concerned? See Sec. 1502.16 (c).

- A. The agency should first inquire of other agencies whether there are any potential conflicts. If there would be immediate conflicts, or if conflicts could arise in the future, when the plans are finished...the EIS must acknowledge and describe the extent of those conflicts. If there are any possibilities of resolving the conflicts, these should be explained as well. The EIS should also evaluate the seriousness of the impact of the proposal on the land use plans and policies, and whether, or how much, the proposal will impair the effectiveness of land use control mechanisms for the area. Comments from officials of the affected area should be solicited early and should be carefully acknowledged and answered in the EIS."

"What constitutes a 'land use plan or policy' for purposes of this discussion?"

- A. The term 'policies' includes formally adopted statements of land use policy as embodied in laws or regulations. It also includes proposals for action such as the initiation of a planning process, or a formally adopted policy statement of the local, regional or state executive branch, even if it has not been formally adopted by the local, regional, or state legislative body."

As to the conflicts which do exist between your proposed Mason County route and the Commission's local policy of protecting the unique cultural and natural resources within the County, Fish and Wildlife will be required to explain in its final EIS "whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not."

We are requesting that Fish and Wildlife schedule another coordination meeting with the Commission so that we can again emphasize the existing conflicts. We are also requesting that the Environmental Protection Agency schedule a coordination meeting with the Commission for the same purpose.

Your March 19 letter concludes with the statement that you would like to continue discussion of the issues. If you decide to comply with your statutory duty to coordinate, and you request a meeting to pursue compliance, the Commission will of course meet with you.

In the meantime we will continue our coordination with the federal agencies responsible for making sure that your application for an incidental take permit is processed in complete accord with the law.

Sincerely,



Jerry Bearden, Chairman, MSRPC

Cc: Clayton Napier, USFWS  
Dr. Tuggle, USFWS  
Dr. Alfredo "Al" Armendariz, Region 6 EPA Director  
Barry Thomas Smitherman, PUC of Texas  
Representative Harvey Hilderbran  
Senator Troy Fraser