

A Reprint from *Tierra Grande*

Shock Treatment

Negotiating Transmission Line Easements

By Judon Fambrough

Condemnation constantly threatens private landowners. Every year pipelines and power lines weave a tighter and tighter web across the landscape.

The Trans-Texas Corridor threatened to take massive amounts of land for transportation purposes before the project was scrapped. Now, with wind turbines sprouting up across Texas, the need for transmission lines sets the stage for more condemnation of private land.

Texas wind farms can generate about 8,000 megawatts (MW), but existing transmission lines can carry approximately 4,500 MWs. Plans are underway to construct 2,334 miles of lines to transport an additional 18,456 MWs. The project anticipates taking over 56,000 acres.

This article discusses the condemnation process in Texas and highlights issues landowners need to address to protect their property and property rights.

Three-Stage Process

Texas law divides condemnation into three stages. The first stage is devoid of court involvement. Past judicial interpretation of Chapter 21 of the Texas Property Code indicated that the condemnor must attempt to purchase the needed land in lieu of condemnation. This required condemnors to make a bona fide effort to purchase the land based on its fair market value.

The Texas Supreme Court modified this requirement in 2004 (*Hubenak v. San Jacinto Gas Transmission Co.*).

The court ruled that, "The dollar amount of the condemnor's offer should not be scrutinized nor compared with other indications of value. A single offer by the condemnor satisfies the requirement regardless of the amount."

Thus, until Sept. 1, 2011, condemnors are not obliged to offer fair market value in the first stage. Whether they must negotiate in good faith is questionable.

Starting Sept. 1, 2011, SB 18 becomes effective in Texas. The new statute applies to all proceedings that have not reached Stage 2. The condemnor does not have to offer fair market value for the property, but they must make a bona fide attempt to purchase the property. To do so, they must comply with the following statutory requirements.

The initial offer to purchase must be in writing and sent by certified mail, return receipt requested. It must include copies of all relevant appraisals produced or acquired by the condemnor during the prior ten years regarding the value of the property. The final written offer must follow no sooner than 30 days later.

Before making the final offer, the condemnor must obtain an appraisal, rendered by a certified appraiser, to assess the value of the property being acquired along with the damages to the remainder, if any. The final offer must equal or exceed the amount of this appraisal.

The final offer must include a copy of the appraisal, a copy of the deed or easement sought by the condemnor to take the property and a copy of the required Landowner's Bill of Rights Statement. The landowner has 14 days to

respond. Stage 1 ends when the landowner does not respond or responds unfavorably to the final offer.

Stage 2 begins with the condemnor petitioning the court for the appointment of three disinterested landowners, better known as special commissioners, to conduct a hearing to determine damages from the proposed taking.

Starting Sept. 1, 2011, the law requires the appointment of three disinterested real property owners who reside in the county, giving preference to the ones chosen by the parties. Thereafter,

the judge must provide each party a reasonable period to strike one of the three commissioners appointed by the judge. If an appointee fails to serve as a commissioner or is struck, the judge must appoint a replacement. The statute does not address the pool from which the replacements are chosen.

Starting Sept. 1, 2011, a new element item of damages is added to the list. Prior to that date, the special commissioners assessed the value of the strip taken and any special damages incurred to the remaining property as well as any special benefits added to the remaining property. Now, the special commissioners must consider the "material impairment of direct access on or off the remaining property" caused by the taking. This is sometimes referred to as the loss of access.

There are some qualifications. Direct access means "ingress or egress on or off a public road, street or highway at a location where the remaining property adjoins that road, street or, highway." It does not include an injury experienced in common with the general community, such as indirect travel routes or traffic diversion. The loss of access must be specific to the property condemned.

The commissioners hear evidence from both parties before posting an award. Landowners do not need an attorney for the hearing, but the

bona-fide-attempt-to-purchase rule discussed earlier. Basically, the court must order the condemnor to pay certain costs and expenses when the matter is appealed to Stage 3, and the court determines that the condemnor failed to make a bona fide attempt to purchase as required by the statute in Stage 1. In such instances, the court must (not may) abate (stop) the suit and order the condemnor to (1) comply with the bona fide attempt to purchase, (2) pay all court costs and (3) reimburse landowners their reasonable attorney's fees and other professional fees incurred directly related to the violation.

Stage 3 ends when no further judicial appeals occur. The appeals cannot go beyond the Texas Supreme Court. (For more details on the condemnation process, see "Understanding the Condemnation Process in Texas," recenter.tamu.edu/pdf/394.pdf.)

Four Condemnation Limitations

Texas law imposes four restraints on the condemnation process.

First, the taking must support some public purpose or bestow some public benefit. Land cannot be condemned for private purposes. However, the U.S. Supreme Court recently approved condemnation solely for economic development in the Kelo decision. In 2009, Texas voters limited this ruling, to some degree, with the passage of a constitutional amendment.

Second, the condemnor cannot take more land or property rights than are reasonably needed for the project. This is known as the public necessity limitation. For example,

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a pipeline company cannot condemn a 50-foot easement when a 30-foot easement is needed. However, the Hubenak case mentioned earlier modifies this limitation.

While the condemnor cannot condemn more than is reasonably needed, the high court permits the condemnor to attempt to purchase more than this in Stage 1 as long as it is generally related to the project. For example, the condemnor may attempt to purchase the 50-foot easement to transport both natural gas and crude oil when only a 30-foot easement is needed to transport natural gas. According to Hubenak, it is up to the landowners to narrow the offer to what is reasonably needed during Stage 1.

Third, the condemnor is supposed to pay the landowner "just compensation" or fair market value for the property. As discussed earlier, this may no longer be the case.

After Sept. 1, 2011, landowners can demand that the condemnor comply with the bona-fide-attempt-to-purchase rule. Otherwise, the condemnor risks the possibility of paying the landowners' attorney and expert witness' fees.

Fourth, the condemnor must adhere strictly to the three-stage condemnation process described in the previous section. This is better known as the due-process limitation.

Rules of Engagement

Hubenak severely limited landowners' rights in condemnation. Consequently, landowners must remember the following rules.

First, the condemnor is not required to offer fair market

value, but they must make a bona fide attempt to purchase as described in the statute. Second, the condemnor may attempt to purchase more land and property rights in Stage 1 than can later be condemned in Stage 3. Finally, landowners cannot recover attorney fees or expert witness fees if they contest the matter beyond Stage 1 except when the condemnor fails to make a bona fide attempt to purchase. (For more information about the Hubenak decision, see "This Property Condemned: What Land-

The rights the condemnor attempts to purchase in lieu of condemnation are outlined in the initial written proposal presented to landowners entitled "Right-of-Way Easement" or simply "Transmission Line Easement." Read it carefully. Limit the proposal to the property and property rights reasonably needed for the transmission line project.

Hubenak represents a mixed bag for landowners. While it removes certain rights, it impliedly guarantees others. Basically, the high court directs condemnors to

- List and value the rights that cannot be condemned and offer to accept the condemnor's proposal if these rights are dropped or purchased separately.

But how do landowners discern between what property and property rights are reasonably needed for a project? These facts appear to be within the domain of the condemnor, not the landowner. To some degree, the answer lies in the public domain if landowners know where to look.

Before a company can condemn property for transmission lines, it must first secure a permit from the Public Utility Commission of Texas. This permit, better known as a Certificate of Convenience and Necessity (CCN), contains among other things the height, width, voltage, number of wires (conductors), and the type of supports (poles) needed for the project.

So, initially, landowners should ask for a copy of the condemnor's CCN or find it online. The dimensions just described should then be inserted into the proposed easement agreement. The agreement should state these specifications are the maximums allowed.

For example, "This easement cannot exceed ___ feet in width, ___ feet in height, contain more than ___ conductors to transport ___ kV of electricity. Only ___ type of poles or supports may be used."

Just because the CCN contains these dimensions does not mean they automatically become a part of the proposed agreement. Remember, the high court allows the condemnor to attempt to purchase much more than it can condemn. It is incumbent on the landowner to



owners Should Know About Changing Property Rights," recenter.tamu.edu/pdf/1710.pdf.)

So, what should landowners do when confronted with condemnation for transmission lines?

First, they must resist the temptation to focus entirely on the amount of money being offered. While money is important, landowners must not overlook the rights the condemnor is attempting to purchase in lieu of condemnation in Stage 1.

negotiate with landowners when attempting to purchase more than it can condemn. When this occurs, the court directs landowners to:

- Point out in Stage 1 that the condemnor is trying to purchase more than it can condemn. This violates the public-necessity limitation discussed earlier. Make a material issue of this fact. If not raised in Stage 1, the issue cannot be addressed in Stage 3 should the process go that far.

narrow the agreement before signing.

Other Limitations

A number of important other considerations should be addressed in the agreement. Landowners may not be able to get the condemner to agree to all the following suggestions, but they should try.

Never grant an exclusive easement. Always retain the right to grant joint use or occupancy of the easement as long as it does not unreasonably interfere with the condemner's usage. Never grant a permanent, perpetual or irrevocable easement. The adverse legal consequences of doing so are beyond the scope of this article.

If the proposal allows the installation of communication equipment or facilities (telecommunication or otherwise), limit them to private, nonpublic use. Otherwise, commercial use is allowed without additional compensation.

Limit the easement to overhead lines only if this is what the landowner desires. The proposal may permit both above-ground and underground lines.

Terminate the easement if not used continuously for a specific number of months. Never rely on abandonment to terminate the easement. The legal definition of the term includes more than just nonuse. Require the condemner to remove all equipment and fixtures and reclaim the land and pay damages, once the easement ends.

Specify what structures the landowner may place within the easement. For example, are fences, livestock pens, deer blinds and feeders permitted? Are there any height limitations to these structures? This is particularly important with

deer-proof fences. Must the fences and blinds be grounded, and if so, who will do it?

Are there any limitations on the activities the landowner may undertake within the easement? This depends in part on whether or not the landowner grants an exclusive or nonexclusive easement.

Are farming and ranching practices permitted?

In addition to payment for the easement, include compensation for each structure placed on

Landowners should not allow the condemner to enter and leave the premises wherever and whenever it pleases.

the property (each pole, guy wire and so on). If not, limit permitted structures to those placed within the easement during the construction phase. After that, require compensation for any structures added.

In all likelihood, the condemner will assign the easement to another entity in the future. Require notification of the assignment as a condition for it to become binding on the landowner.

Miscellaneous Issues

Here are some issues that might be overlooked by those with no experience in negotiating easements.

What must the condemner do with trees and brush removed from the easement? Must they be stacked and burned, shredded or buried? Must larger trees be cut and piled for firewood? Require that rocks exceeding a certain diameter be removed and stacked at locations designated by the land-

owner. Require that berms and terraces be constructed on steep slopes to prevent erosion.

Do not allow the condemner to enter and leave the premises wherever and whenever it pleases. Limit access solely to and through the easement. Temporary access outside the easement may be granted for additional compensation during the construction phase.

After the construction

phase ends, require the condemner to change the locks on all gates and give 24- to 48-hour advance notice of any subsequent entry except during emergencies.

Never warrant title to the land. Specify the condemner takes the title to the easement solely at its risk. If title fails, the landowner will not be required to return any consideration.

Require welding crews to carry firefighting equipment or be accompanied by water trucks with high-pressure sprayers to prevent range fires. Make the condemner liable for any fire damage resulting from its operations.

Get an indemnification agreement for tort and environmental liability caused by the condemner's activities. Require inclusion as an additional insured under the condemner's liability policy.

Insert "Time is of the Essence" in the agreement. Without this language, there are no hard and fast deadlines. (For more information,

consult "Calculating Time in Promulgated Forms," center.tamu.edu/pdf/1333.pdf.)

Insert a "Favored Nations Clause" to ensure no other landowner gets a better deal in the area. (This provision is difficult to get.)

Deny any rights to hunt and fish on the property.

Require all fences be braced before cutting. Specify how the braces will be constructed. Require the condemner to install and maintain gates where fences are cut. Landowners may require a specific local contractor to do all fence work, gate installation and other similar work.

Never allow for relocation of power lines within the easement. The lines must remain in the center of the easement as nearly as possible.

Require the landowner's permission to remove deer blinds and feeders from the easement during the construction period. Otherwise, they could be bulldozed or destroyed.

Specify that the condemner takes subject to any and all existing easements, both visible and those of record. Also, it takes subject to all surface, wind, water and mineral leases on the property.

Compensation for Damages

Never agree that the initial, lump-sum payment for the easement covers all damages. Present damages may be covered but not future damages. Many items related to damages need to be addressed.

Make sure compensation includes damages outside the easement. Blasting, use of heavy equipment or both may collapse shallow aquifers, cause springs and wells to go dry and pond and tank dams to leak. For this reason, blasting may be prohibited.

If the condemnor needs a water source, specify where it can be obtained and the cost if the landowner desires to sell. Otherwise, prohibit any water from being taken.

Require compensation whenever the condemnor's activities reduce the landowner's income from activities such as hunting, bike races or even lambing. Likewise, exact compensation if cropland can no longer be sprayed or seeded by plane because of the elevated lines.

Require compensation for all livestock killed or injured as a result of the condemnor's operations. Compensation should include damages for any livestock or trophy game animals that escape when a fence is cut or a gate is left open, especially in cases of properties with high fences. Include the cost of rounding up the livestock and resulting damages from any diseases introduced into the herd. Require

compensation if predators are introduced when fences are cut or gates left open.

Possibly agree to non-binding mediation to settle disputes when damages cannot be mutually agreed upon. Generally, the parties share the mediation costs. Never waive the right to a jury trial or consent to binding arbitration. Provide for the recovery of attorney fees if the landowner prevails at trial.

Easement Maintenance

Require restoration of the land within the easement at the end of the construction phase. Also, specify how frequently the easement must be maintained.

Some landowners may wish to deny the use of all chemicals (or certain chemicals) to control weeds and brush.

Require all trucks to be washed before entering the premises to prevent the spread of noxious weeds,

especially deep-rooted perennials. Failure to do so makes the condemnor liable for their introduction.

In some areas of Texas, especially in the Hill Country, oak wilt poses a serious problem. Landowners may make the condemnor liable for the spread of oak wilt caused by its activities. Require all oak trees to be trimmed by hand or that all chainsaws and axes are disinfected before being used on oak trees. Require all cuts and scrapes on trees be treated immediately.

As wind turbines generate more and more electricity in Texas, the need for transmission lines increases. Landowners must understand the condemnation process and know how and what to negotiate to protect their property and property rights when confronted with the possibility of transmission lines on their land. ♣

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THE TAKEAWAY

Wind energy production is increasing in Texas. Landowners can protect their interests by studying the many complicated issues related to the taking of land for transmission line easements. For example, the Texas Supreme Court in the 2004 Hubenak decision removed the requirement that condemnors make a bona fide effort to purchase the land based on fair market value. Likewise, condemnors can and will attempt to purchase more property and property rights than they can condemn.



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Tierra Grande (ISSN 1070-0234) is published quarterly by the Real Estate Center at Texas A&M University, College Station, Texas 77843-2115. Subscriptions are free to Texas real estate licensees. Other subscribers, \$20 per year. Views expressed are those of the authors and do not imply endorsement by the Real Estate Center, Mays Business School or Texas A&M University. The Texas A&M University System serves people of all ages, regardless of socioeconomic level, race, color, sex, religion, disability or national origin. Photography/Illustrations: Real Estate Center files, p. 1; Judon Fambrough, p. 3.