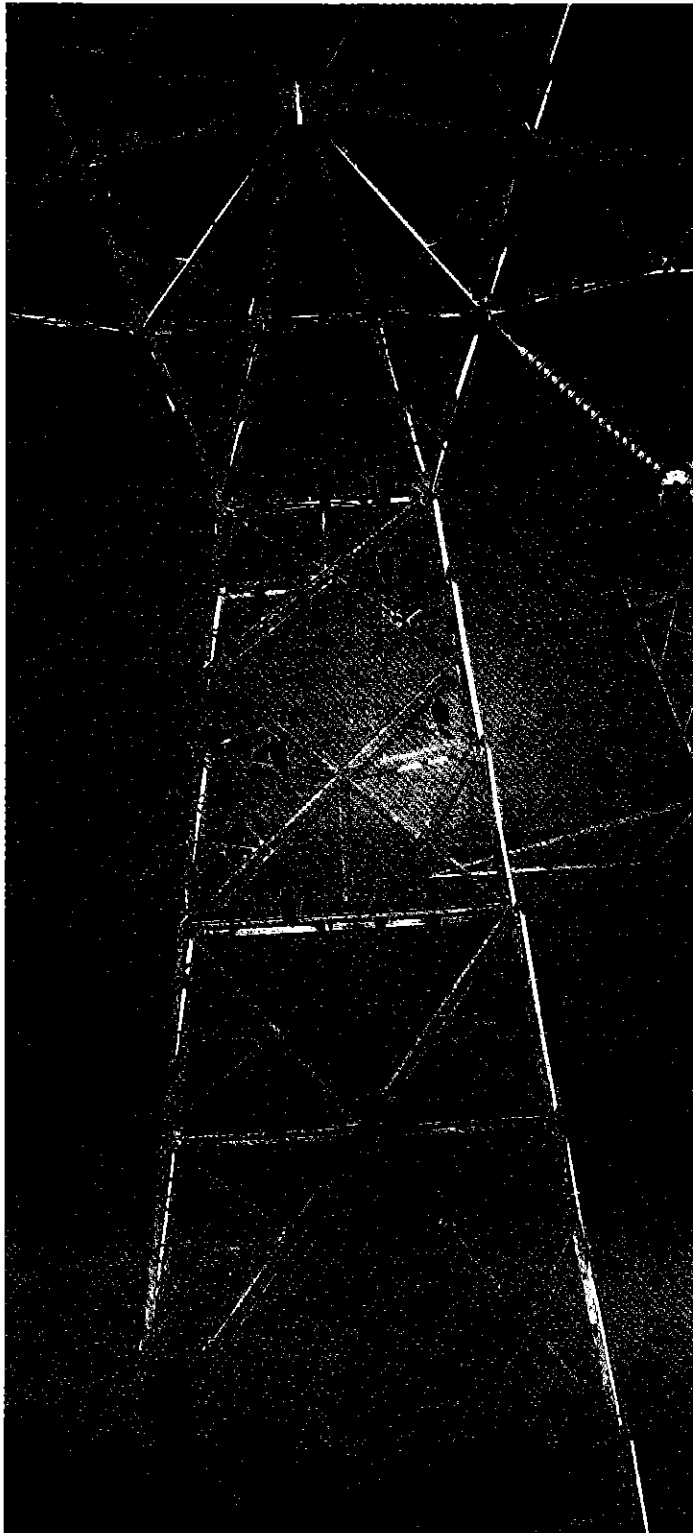


Preparing Landowners for Transmission Lines Process

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In one of the largest eminent domain actions since the Eisenhower era initiated the interstate highway system in the 1950s and 60s, the Texas Legislature mandated 2,300 miles of 345 KV transmission lines to carry wind energy from West Texas and the Panhandle to the I-35 corridor. This infrastructure will require 56,000 acres of private lands.

TWA has taken a reasonable position towards the development of renewable energy methods that would reduce our dependence on foreign oil; however, TWA has serious concerns about the equitable treatment of private landowners involved at the Texas Public Utility Commission, the easement negotiations, and the condemnation process. Furthermore, TWA remains concerned about the overall CREZ legislation due to its compressed time frames and process that have resulted in harsh treatment of private landowners and impacts on wildlife habitat.

For instance, CREZ provides a mechanism for Transmission Service Providers and Condemnors to be reimbursed for their capital costs (including legal fees). Private landowners, on the other hand, must pay all legal fees associated with CREZ out of pocket. Moreover, the CREZ legislation did not address the concerns brought about by the Texas Supreme Court Case, Hubenak. Therefore, landowners subject to condemnation as a result of CREZ do not have to receive fair market value offers for their land prior to condemnation proceedings. TWA's main objective in this debate is to provide our membership and other private landowners credible informa-

tion so that they may find themselves in a more knowledgeable position to protect their property rights, increase their damage awards, mitigate damages to sensitive wildlife habitat, and reduce the stress landowners face when dealing with condemnation.

What TWA is doing:

First and foremost – pushing for eminent domain reform so eminent domain authorities treat landowners equitably and with respect. Moreover, all eminent domain statutes should require condemnors offer fair market value for the private lands subject to condemnation. Governor Perry, Lt. Governor Dewhurst, and Speaker Straus have agreed that eminent domain reform will be proposed as emergency legislation to allow lawmakers to consider the topics ahead of normal legislative schedules. TWA members must promote the legislation with their House and Senate members, and TWA will ask that the legislation go into effect after passage and immediately upon signing by the Governor.

TWA teamed with the Texas and Southwestern Cattle Raisers Association in providing Transmission Line/ CREZ Workshops around the state, this year in San Angelo, Wichita Falls, Ker-ville, Cleburne and Lubbock.



The workshops featured TWA Secretary Glen Webb (also an attorney who is providing pro bono services for TWA in regards to renewable energy and eminent domain), Texas A&M Real Estate Center legal expert Judon Fambrough, and TWA Vice President of Public Policy Kirby Brown in providing expertise in renewable energy – in the CREZ process before and at the PUC – and in contract negotiations if the line selected would affect an individual property owner.

TWA continues to provide expertise on what a landowner should do if or when they receive a letter from the transmission provider.

➤ CREZ is a legal proceeding, treat it as such. It starts a timeline, and landowners must meet certain deadlines or their rights may be waived;

➤ The transmission line is a legislatively-directed line and legislatively-created process that has been expedited to quickly provide transmission of energy, and transmission providers have been provided eminent domain authority.

➤ This will likely be a lengthy and potentially expensive process, but it is critical that you participate whether you are on a “preferred” route or on an “alternative” route! Any of the routes can be selected during the PUC process. Engage at the beginning of the process, stay engaged, and learn as much as you can about the process and your rights as a landowner.

➤ You have the option to file as “protestor” or as an “intervenor” in the very first letter you receive. We strongly recommend you select “intervenor,” as this allows you to actively engage in the process, present evidence, and, later, even participate directly in hearings at the PUC.

➤ TWA notes you do not have to select an attorney, BUT we highly recommend that you consider hiring an

experienced, administrative law attorney who has practiced before the PUC and has both experience and wins before the PUC. We also recommend you actively recruit neighbors along the route to join together and share expenses in attorneys and experts like biologists, appraisers, engineers, etc.

➤ With your neighbors, develop a unified position, and generate data that supports your case. Pool your efforts, and provide diverse logical testimony why the line should not be on that route, including community values, effect on wildlife or habitat, endangered species, water and springs, historical and cultural issues, etc. Remember, landowners are pitted against landowners on other routes, and someone is going to end up with the transmission line. Not In My Backyard (NIMBY) arguments carry little weight.

➤ We have found the PUC staff, the PUC Administrative Law Judges that conduct the hearings, and the PUC, itself, to be reasonable, willing to listen, and sympathetic to landowner concerns, especially larger groups of property owners working together with reasonable information.

➤ Remember, if your land is selected for a transmission line, there will be a Certificate of Convenience and Necessity issued by the PUC. If this is the case, during contract negotiations, concentrate less on the dollar award in the contract offer and more on the rights you are giving up in the condemnation. This must be done in the very beginning in stage one, so ask for those rights required in the CCN with those values listed on one side of a ledger sheet and those rights not required by the CCN with values listed on the other side. We have found eminent domain providers will generally ask for more rights than what is actually provided in the CCN, which specifically designates what can be taken.

Therefore, it is essential that landowners seek wise counsel at the initial stages of condemnation in order to protect their private property rights. A landowner should never be required to give more property rights than is reasonably necessary for the public use.

➤ See Judon Fambrough’s attached sidebar. We also recommend you go to the TWA website to view PowerPoint presentations developed by Glen Webb and Judon Fambrough for information on the process and negotiations. There is much more that you should consider, and those points are enumerated in the presentations.

TWA is developing legislative recommendations to enhance the process and reduce overall impacts on the landscape and on private landowners. We are looking for your input and specific suggestions based on your experiences to provide to legislators. Early suggestions include:

- First and foremost, fix eminent domain and condemnation legislation;

- During the PUC process, provide a longer time period to react; allow amendments to early documents, such as providing an opportunity to change status to “intervenor,” if desired; incorporate EIS requirements for wildlife and endangered species habitat, water, groundwater and springs impacts, etc., and require the Texas Parks and Wildlife Department input to be taken into consideration in ruling;

- In the negotiation process, TWA is advocating that landowners receive equal treatment as condemnors when it comes to compensating landowners for their out-of-pocket legal fees;

- Keep lines on major existing right-of-ways, even if that is not a straight line from point A to point B, so as to reduce easement purchase

costs and impacts to landowners, wildlife, habitat and viewsheds;

- Reduce impacts to landscape, and minimize impacts within rights of ways to native vegetation, trees and habitat, and revegetate to enhance the landscape, avoid placement in areas with springs and seeps, and impacts to trees in creeks and bottomlands;

- Determine how to best implement transmission on the Texas landscape, high-lighting reduced impacts to land values and viewsheds by requiring providers to bury the transmission lines; require the use of monopoles in other areas, move away from lattice towers immediately, implement community-based processes outlining methods to reduce unsightliness and enhance overall aesthetics of transmission (If we can do highway beautification, why not transmission line beautification?).

Please note: *If you are not presently involved in a transmission line process, you had better prepare for the future. The U.S. House of Representatives has previously approved legislation proposing almost 15 times more wind energy in Texas and the U.S., so this initial transmission process is only the beginning. While the House-passed bill was not approved by the U.S. Senate before the 2009-2010 Congress adjourned, it is clear there is significant bipartisan support in Washington, D.C. for increased wind and other renewable energy, requiring transmission. This is only the beginning of an extensive system of transmission across Texas.* 🌐

Comments on the Condemnation Process

Judon Fambrough, Texas A&M Real Estate Center

Once PUC selects the route, it issues a Certificate of Convenience and Necessity (CCN) to the company chosen to construct the transmission line along the segment in question. The CCN clothes the company with the power to take the private property for the transmission-line easement. The process cannot commence until the CCN has been issued. For reasons discussed later, landowners should ask the right-of-way agent, when contacted about the easement, for a copy of not only the CCN but also a copy of the company's application for the CCN filed with the PUC before negotiations begin.

The condemnation process is divided into three stages, each involving more and more judicial involvement. The process is outlined in Chapter 21 of the Texas Property Code. Landowners need to be aware of the process and what each stage involves. The first stage is without any judicial involvement. The statute simply indicates that the company must attempt to purchase both the land and the property rights needed for the project from the landowner. If the parties cannot agree on a price (damages), the company asks the court (the judge) having jurisdiction over the condemnation process in that county to appoint three landowners to serve as Special Commissioners to ascertain damages. (This is the second stage.) At the Special Commissioners' Hearing both parties present evidence of the value of the land and property rights being taken for the project. Appraisers are indispensable at this stage. If either party is dissatisfied with the amount ultimately awarded by the Special Commissioners, they have the right to appeal the matter to the court for a full-blown trial. (The trial level is the third stage.) Both an appraiser and attorney are needed.

The condemnation process is not without limitations. According to the case law, the condemnor can take property only for a public purpose. However, this issue becomes moot once the PUC issues the CCN.

Secondly, the company can take only the amount of land and property rights needed for the project. This is known as the Public Necessity Limitation. Landowners must remember this one. Thirdly, the condemnor must pay "just compensation" for the land and property rights it takes. Finally, landowners are entitled to due process during the taking. Basically, they must be allowed an opportunity or forum to voice their rights during the process. This is done by the condemnor complying with the three stages outlined in Chapter 21.

With these rules in mind, landowners need to know the following facts. First, the company does not have to offer fair market value in Stage 1. The Texas Supreme Court ruled that an offer regardless of the amount satisfies the requirement. Landowners may be able to force the condemnor to pay fair market value by going to Stage 2 or possibly 3, but the appraisers' fees and the attorneys' fees incurred in the endeavor cannot be recovered. These come out of the landowners' pocketbook.

While the condemnor cannot condemn more land or property rights than are needed for the project, the Texas Supreme Court has authorized them to attempt to purchase any right reasonably related to the project. This allows the condemnor to offer to purchase a 200-foot easement when only a 150-foot easement is needed. The condemnor need not disclose this fact to the landowners. The condemnor attempts to purchase these "excess rights" by planting them in the proposed easement agreement given to the landowners. According to the high court, it is up to the landowner to remove these rights from the proposal by stating they will agree to the easement if these excess rights are purchased separately or are removed from the proposal.

How can landowners spot these excess rights? For one, by looking at the application for the CCN discussed earlier. It contains the width, height, number of lines, maximum voltage, type of pole structures, etc. needed for the project. Landowners must limit

the easement agreement needs to these dimensions unless the condemnor pays extra for any excess rights. That is what the Texas Supreme Court said to do.

How can other excess rights be spotted? As a general rule, the terms of the proposed easement agreement contain two items that need to be restricted. First, it grants the condemnor the right to come and go wherever it pleases across the landowners' property. This right of ingress and egress should be limited to the easement itself. The company needs to pay extra for the right to enter and leave at any other location outside the parameters of the easement. Second, the agreement stipulates that the amount paid for easement covers all present and future damages. Again, the amount paid to landowners should be limited to the damages incurred during the construction phase and no longer.

Finally, landowners must remember that changes can be made to the proposed easement agreement only during Stage 1. Many landowners tend to focus on the amount of money being offered for the easement and ignore the fact that the proposal encompasses more land and property rights than are needed for the project. Negotiate the terms of the easement agreement and then turn to the amount of the offer. Once Stage 2 is reached, landowners are stuck with the terms of the agreement. A good agreement that limits the condemnor to what is reasonably needed for the project may be worth a few extra dollars in the long run.

More information regarding the condemnation process and the things that landowners should negotiate in the easement agreement can be found in the Texas Real Estate Center's publication entitled "Shock Treatment: Negotiating Transmission Line Easements" <http://recenter.tamu.edu/pdf/1928.pdf>. Also, two PowerPoint presentations on the subject can be found on TWA's website.