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Attached are CenterPoint Energy's comments on the proposed amendments to 16 TAC §3.70 relating to Pipeline Permits Required.

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GAS UTILITIES DOCKET NO. 10366

PROPOSED AMENDMENTS TO 16 TEX. ADMIN. CODE § 3.70	**§**	**BEFORE THE RAILROAD COMMISSION OF TEXAS**

COMMENTS OF CENTERPOINT ENERGY

CenterPoint Energy Resources Corp., d/b/a CenterPoint Energy Entex and CenterPoint Energy Texas Gas ("CenterPoint" or the "Company") timely submits these comments in response to the proposed amendments to 16 Tex. Admin. Code § 3.70, approved for publication by the Railroad Commission of Texas (the "Commission") on July 8, 2014, and published in the *Texas Register* on July 25, 2014.

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I. INTRODUCTION

CenterPoint supports the Commission's proposed amendments to Commission Substantive Rule § 3.70 (the "Proposed Amendments"), which will enhance public confidence in the Commission's issuance of T-4 permits, particularly for common-carrier pipelines. However, it is important to keep in mind the clear statutory distinction between "common carriers," as defined by the Texas Natural Resources Code,[1] and "gas utilities," as defined by the Texas

[1] TEX. NAT. RES. CODE § 111.002.

Utilities Code.[2] To that extent, the Company urges the Commission to ensure that the regulatory scheme applicable to common-carrier permits does not blend into the distinctly different regulatory scheme applicable to gas utilities. While common-carrier status has become heavily litigated by courts, gas-utility status has largely remained subject to Commission determination. If it were otherwise, the entire regulatory scheme embodied in the Texas Utilities Code could be undermined, as the comments below demonstrate.

II. GENERAL COMMENTS ON PROPOSED RULES

A. The Commission Has Clear and Comprehensive Statutory Authority Over Gas Utilities

The Application for Permit to Operate a Pipeline in Texas (the "Permit Application") encompasses two different pipeline classification schemes. For pipelines transporting a fluid other than natural gas, the Permit Application allows an applicant to operate the pipeline as either a "common carrier" or a "private line."[3] Provisions in the Texas Natural Resources Code govern whether such a pipeline legally qualifies for operation as a common carrier.[4] Alternatively, if a pipeline will transport natural gas, the Permit Application allows for the applicant to determine whether the pipeline will be operated as a "gas utility" or a private line.[5] This determination is governed by provisions in the Texas Utilities Code. If a pipeline is operated as a gas utility or common carrier, it will have the right and power of eminent domain.[6]

Recently, a fair amount of scrutiny has centered on the process for determining the common-carrier status of a pipeline not transporting natural gas.[7] In determining a landowner's ability to challenge the eminent-domain power of a permit holder, the Texas Supreme Court's

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[2] TEX. UTIL. CODE § 121.001(a).
[3] *Application for Permit to Operate a Pipeline in Texas*, Form T-4 (Tex. R.R. Comm'n, Jan. 28, 2012).
[4] *See* TEX. NAT. RES. CODE §§ 111.002(6), .003(a), .019.
[5] *Application for Permit to Operate a Pipeline in Texas*, Form T-4 (Tex. R.R. Comm'n, Jan. 28, 2012).
[6] TEX. UTIL. CODE § 181.004; TEX. NAT. RES. CODE § 111.019.
[7] *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 198, *reh'g denied*, 381 S.W.3d 465 (Tex. 2012).

Denbury Green decision recently focused on the "minimal requirements" imposed on a common-carrier applicant.[8] The Court lamented that the current statutory and regulatory scheme does not provide for an investigation or adjudication of an applicant's claimed status as a common carrier.[9] The Court noted that the "process for handling T-4 permits appears to be one of registration, not of application."[10] To that extent, the Commission's Proposed Amendments will help address some of the Court's core concerns. Specifically, the proposed amendments to § 3.70(b) require supporting documentation, including a sworn statement regarding the factual basis for the pipeline's proposed classification, when applying for a T-4 permit at the Commission. Additionally, proposed § 3.70(e) contemplates that the Commission will play a more active role in reviewing these applications.

These amendments will provide for a more comprehensive determination of common-carrier status. However, a "gas utility," as defined by the Texas Utilities Code, is subject to a different statutory and regulatory scheme than a common carrier. The distinction between these statutory schemes is important. Under the broad authority of the gas-utility regulatory scheme, a pipeline's gas-utility status is routinely determined by the Commission and not the courts. To that extent, a separate division within the Gas Services Division determines the gas-utility status of a pipeline. In fact, the Permit Application, when discussing gas-utility status, states that "[a] natural gas pipeline permit will not specify whether the pipeline is a gas utility or a private line. The Gas Services Division Gas Utility Audit Section will make that determination and notify the operator of its status."[11] With this in mind, it is important to emphasize the Commission's clear

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[8] *Id.* at 199.
[9] *Id.*
[10] *Id.*
[11] *Application for Permit to Operate a Pipeline in Texas*, Form T-4 (Tex. R.R. Comm'n, Jan. 28, 2012); *see also* Railroad Commission of Texas, *Gas Services Division: Gas Services Focuses on the Increasing Importance of Natural Gas in Texas*, http://www.rrc.state.tx.us/about-us/organization-activities/divisions-of-the-rrc/gas-services-division/ (last visited Aug. 21, 2014) ("The division's Audit Section . . . determines gas utility status.").

statutory and regulatory authority over natural gas companies and pipelines. The Company is concerned that, if the determination of gas-utility status were to be determined by the courts and not by the Commission, then portions of the regulatory scheme embodied in the Texas Utilities Code would be rendered meaningless.

The gas-utility regulatory scheme "imposes a full range of regulatory requirements"[12] and delegates clear jurisdictional authority to the Commission over gas utilities and their facilities, including pipeline equipment. Specifically, the Commission "is vested with all the authority and power of this state to ensure compliance with the obligations of gas utilities [in the Gas Utility Regulatory Act ("GURA")]."[13] Under GURA, the Commission is provided with "exclusive original jurisdiction over the rates *and services* of a gas utility" that distributes natural or synthetic gas in certain areas, or that "transmits, transports, delivers, or sells natural gas or synthetic natural gas to a gas utility that distributes the gas to the public."[14] This exclusive original jurisdiction over "services" includes jurisdiction over "*any facilities* used or supplied by a gas utility in the performance of the utility's duties under this subtitle to its patrons, employees, other gas utilities, and the public."[15] These facilities include "all of the plant and equipment of a gas utility."[16] Thus, unlike the common-carrier regulatory scheme, the gas-utility regulatory scheme is comprehensive and provides the Commission clear statutory authority to regulate the affairs of gas utilities and their respective pipelines.

B. The Texas Legislature Has Legislatively Declared that A Gas Utility Has the Power of Eminent Domain

The distinction between the statutory schemes covering common-carrier status and gas-utility status is also noticeable when discussing a pipeline's "public use" in regard to eminent

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[12] *See Loesch v. Oasis Pipe Line Co.*, 665 S.W.2d 595, 598 (Tex. App.—Austin 1984, writ ref'd n.r.e.).
[13] TEX. UTIL. CODE § 104.001(a).
[14] *Id.* § 102.001 (emphasis added).
[15] *Id.* § 101.003(14) (emphasis added).
[16] *Id.* § 101.003(6).

domain. The power of eminent domain is found in Article I, Section 17 of the Texas Constitution.[17] For an entity to exercise the power of eminent domain, the Texas Legislature must confer the power either expressly or by necessary implication.[18] This power is circumscribed by the constitutional requirement that eminent domain power is lawfully exercised only when a person's property is taken for "public use."[19] While this authority is "subject to special scrutiny by the courts,"[20] a legislative declaration that a specific taking qualifies as a public use is "entitled to great weight,"[21] though it would "not be entitled to insurmountable deference."[22]

Unlike pipelines with a potential common-carrier status, the Texas Legislature has made a legislative declaration that certain pipelines with gas-utility status have eminent domain power, irrespective of whether the pipeline is actually available for public use.[23] The Texas Utilities Code states that a "gas or electric corporation has the right and power to enter on, condemn, and appropriate the land, right-of-way, easement, or other property of any person or corporation."[24] While the statutory scheme provides no definition of the term "gas corporation,"[25] the term does expressly include a "gas utility . . . regardless of form or organization, but not including a

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[17] TEX. CONST. art. I, § 17.
[18] *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 831 (Tex. 1958).
[19] TEX. CONST. art. I, § 17; *see Denbury*, 363 S.W.3d at 195.
[20] *Denbury*, 363 S.W.3d at 197.
[21] *Housing Auth. of City of Dallas v. Higginbotham*, 143 S.W.2d 79, 85 (Tex. 1940); *see also Denbury*, 363 S.W.3d at 200 (finding that, "in the absence of compelling legislative findings and declaration of public purpose, we can see no purpose [for the Denbury Green pipeline] other than a purely private one."); *Vardeman v. Mustang Pipeline Co.*, 51 S.W.3d 308, 314 (Tex. App.—Tyler 2001, pet. denied) ("This constitutional requirement is satisfied when a company uses its pipeline in a manner declared by our legislature to be a public use.").
[22] *Denbury*, 363 S.W.3d at 200 n.23 (noting that, "even if the Legislature included findings and an explicit declaration of public purpose, such material, while undeniably instructive, would not be entitled to insurmountable deference.").
[23] *See Loesch*, 665 S.W.2d at 598.
[24] TEX. UTIL. CODE § 181.004.
[25] *See Anderson v. Teco Pipeline Co.*, 985 S.W.2d 559, 564 (Tex. App.—San Antonio 1998, pet. denied) ("It has been noted that while these statutes grant the power of eminent domain to gas corporations, they offer no definition of the term 'gas corporations.'").

municipally owned utility."[26] Because there is a lack of a clear definition of "gas corporation," courts have often "turned to [Texas Utilities Code § 121.001] to determine whether a corporation asserting the power of eminent domain under [§§ 181.001 and 181.004] actually has such power."[27] Section 121.001 provides a specific definition of a "gas utility," and includes a business that "owns, operates, or manages a pipeline that is transporting or carrying natural gas, whether for public hire or not . . . ." When reading these statutes together, Courts have held the entire regulatory scheme to mean that:

> [I]f a corporation, acting within its corporate powers, acquires land for a pipeline to be owned by it for the transport of natural gas, through an exercise of the power of eminent domain given in [§ 181.001], it thereby submits to the regulatory provisions . . . *so that its ownership of the pipeline, under such regulations, is a "public use" by legislative declaration, irrespective of whether the pipeline is available for public use.*[28]

This is unlike the factual determination that is often made for common-carrier status, for which the Texas Natural Resources Code largely requires that the person owns, operates, or manages a pipeline for the transportation of a fluid "to or for the public hire." In fact, the *Denbury Green* decision was based in part on the fact that, absent an express legislative declaration of public purpose, the common-carrier statutory scheme specifically required this "public hire" characteristic of the proposed common-carrier pipeline.[29] Accordingly, public-use considerations are decidedly different when making a common-carrier status determination than when making a gas-utility status determination. Therefore, CenterPoint again urges the

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[26] TEX. UTIL. CODE § 181.001(1)(D).
[27] *See, e.g., Teco Pipeline*, 985 S.W.2d at 564.
[28] *Loesch*, 665 S.W.2d at 598 (emphasis added); *see also Arcola Sugar Mills Co. v. Hous. Lighting & Power Co.*, 153 S.W.2d 628, 633 (Tex. Civ. App.—Galveston 1941, writ ref'd w.o.m.) (stating that the gas-utility regulatory scheme "amount[s] to a legislative declaration that appellee's business is to be regarded as being affected with a public use, in consequence of which it is delegated that small portion of the public authority denominated 'the power of eminent domain'; so that, the resulting question, if any, is whether the legislature might reasonably have considered that use a public one, not whether the use itself is actually a public one.").
[29] *Denbury Green*, 363. S.W.3d at 200.

Commission to ensure that the regulatory scheme surrounding common-carrier permits does not blend into the clear, established statutory and regulatory scheme surrounding gas utilities.

CenterPoint looks forward to working with the Commission and interested stakeholders regarding this rulemaking.

Respectfully submitted,

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