Kellie Martinec

From: Ashley <[redacted]>
Sent: Monday, August 25, 2014 11:06 AM
To: rulescoordinator
Cc: 'David Holland'; 'Laura Cullinan'
Subject: 16 TAC 3.70 rule change proposal - Comments for Submission
Attachments: DGPT00603 DNR Ltr to TRRC, Common Carrier Status 06.25.2008.pdf; 2011.10.21 Texas Railroad Commision Amicus Letter.pdf; DGPT00601 DNR Letter to TRRC 2012.04.24.pdf

Mr. Lindil Fowler
1701 N. Congress
Austin, Texas 78701

Re: Railroad Commission Proposed Rule Change

Dear Mr. Fowler:

We have never met or talked. I suspect, though, that you may recognize my name. My brother, my children, and I are the defendants in the now famous "Denbury Case."

I learned of the 16 TAC 3.70 rule proposal regarding common carriers and the request for comments when a reporter called me to ask for my opinion. He was under the impression that the rule proposal was perhaps connected in some way with our Denbury and TransCanada cases.

As you surely know they have now been awaiting trial on the merits for a number of years. During that time, they have received a large amount of comment regarding the perceived "problem" and what to do about it. However the problem is not, as has been suggested, the need to create a safe haven for abusers so landowners can still be abused in the judicial system. The abuse will continue and the problem will fester.

Oddly, the real underlying abuse has not yet received any significant attention in public or any branch of government, including the Railroad Commission. If the underlying abuse is not addressed in a meaningful fashion, the rule as I see it will simply exacerbate the problem—that has been the effect of every other effort to rein it in. This seems to be the consensus of the public while the oil and gas industry remains strangely silent.

The abuse cannot be addressed so long as all government treats it like the emperor's new clothes. After all, unlike the legend, this "emperor" knows he is naked. With the exception of the 9 justices sitting on the Texas Supreme Court in 2011, all branches of government seem to be straining their necks to look the other way.

One might suppose, quite accurately, that no one knows better than I do why my family took issue with Onshore in the first place—now seven years ago. When an oil company with no power of eminent domain offered us one third (take it or leave it on their terms) of what two real pipeline companies were paying us for easements in the same time frame, why didn't we simply donate the other two thirds to their shareholders?

The reason was simple: since the Producers' Transportation case in the 1920s, now almost 100 years ago (and as reaffirmed in the Kelo case), the 5th and 14th Amendments to the US Constitution clearly proscribe the exercise of eminent domain authority to build private pipelines of any kind. As I am sure you know, the Texas Constitution contains very similar rules and the denial of eminent domain authority for private pipelines is specifically codified into the Texas statutory definition of common carriers.

But if Onshore could get away with a common carrier alter ego to use as a pretext—no hearing, no necessity, no evidence, things even governmental entities cannot do—they could take us to court with the threat to make us give them the easement they wanted—for all practical purposes free—and leave us to repair the damage at our expense. Wouldn't we be insane not to take one-third of the going value rather that risk getting nothing and being left with a huge loss to eat? So that's what the Commission helped them do and that's exactly where we are 6 years later.

You need to have the benefit not just of my comments; your records should also document that you have knowledge of and access to the facts of our three still pending cases. After all, the facts are now in the public domain so wouldn't it make sense for the Commission to consider those facts when advancing opinions and promulgating rules?

Everything alleged in this letter is by now a matter of public record. If this really is news and you don't know where to find the facts, or if you want any one or more specific items, please just let me know.

When Denbury Onshore's Green Pipeline project began its focus on Texas, Onshore discovered that unlike Mississippi and Louisiana, common carrier status was a predicate to threatening landowners with expensive condemnation litigation if they didn't accept Onshore's prices and terms. But they learned that they didn't need a real common carrier—only a few pieces of paper. The cost would be nominal and the only inconvenience would be spreading the word to start using the new name on government documents and deeds.

It was news to Onshore but I suspect that the Commission has known all along that alter ego pretexts were routinely used by the oil and gas industry to force discounts on landowners—everyone else did. This letter therefore is to make absolutely certain that at least now, any rule that goes into effect will do so with the facts laid bare for all to see.

The actual facts of the "Denbury Case," even when viewed in more detail, are quite simple: In 2007, Denbury Onshore, an oil company, was soliciting survey permits for the "Green Pipeline" it intended to build, own, and operate. As you must surely know by now, Onshore went on to build the Green Pipeline and begin operating it before the "Denbury Case" went to the Supreme Court. Onshore still owns and operates the Green Pipeline according to Onshore's allegations in a case filed in a Harris County court several months ago

The "Plaintiff" in the "Denbury Case" has never had any funds that didn't come from Onshore: for two years its bank balance was a constant $12,000. The "Plaintiff" has never had an employee and has never had any existence except in government filings. Its balance sheet shows as assets only the Green Pipeline, its easements, and some cash, which are offset by an approximately equal liability to Onshore. That leaves it with no significant net worth (i.e., no ability to respond in damages). With possibly a very minor exception, its only revenues come from the "tariffs" that Onshore is "paying" to the "Plaintiff." The exception is that a portion of the money that a long time Onshore customer—Air Gas—pays to Onshore is lodged in the "Plaintiffs" account. Onshore's transactions with the "Plaintiff" are offset and disappear in the consolidation of Denbury Resources's accounts for filing its income tax returns and SEC filings. As I recall, in the last 10K that Denbury Resources filed, the "Plaintiff's" name only appears once near the end where it is included in the list of subsidiaries.

Up to recently, the Green Pipeline has only carried CO2 from Onshore's Jackson Dome source to Onshore's Oyster Bayou and Hastings fields. More recently Onshore started buying CO2 from Air Products for Onshore's own use. We all now know that Air Products is a supplier, not a "customer." Neither Onshore nor Air Products is a "customer" of the "Plaintiff" according to the Supreme Court's opinion.

Denbury's keystone "customer" is Air Gas, the possible exception mentioned above. Air Gas sold the Jackson Dome to Onshore in 2001 on terms under which Air Gas retained the right to buy an allotment of CO2 from the Dome to go to Air Gas's plant nearby. When the "Denbury Case" became public, Air Gas realized that the decision left Onshore desperate for a "customer." Air Gas suggested that some its allocation be delivered at the Hastings Field instead of near the Jackson Dome. To make it look right, Onshore and Air Gas simply needed to agree that title would change to Air Gas at some meaningless point along the way rather than at destination as before. Then voila! The Green Pipeline has a "customer" to carry gas for. Air Gas and Onshore agreed that Onshore would continue carrying the same CO2 in the same pipeline system after the title change, but Onshore would then supposedly be carrying for Air Gas instead of delivering that part of the allocation. When Air Gas's CO2 crossed the Texas/Louisiana border, almost by magic the "Plaintiff" took over to carry the CO2 the rest of the way to the Hastings Field. Air Gas would (and did) build its own pipeline to collect it and take it the rest of the way. Very clever, right?

There is no substance of course but doesn't it look nice? However a careful reading of the Supreme Court's "Denbury Case" opinion clearly rules out that ruse, even overlooking the irregularities of its creation, the insignificant amount of CO2 involved, and the clear evidence that it was totally unforeseen when they commandeered our property, which was long before Onshore started scrambling to come up with a "customer." The "Denbury Case" teaches that carriage from one affiliate's location to another cannot support common carrier status. Carriage of some of Air Gas's allocation from Onshore's Jackson Dome to Onshore's Hastings Field doesn't make Air Gas the "Plaintiffs" "customer" even it weren't a farce.

As a side note, if arguendo the "Plaintiff" in the Denbury Case did actually exist, it would still be an "affiliate" under the Supreme Court's opinion and thus not be able to support common carrier status anyway.

At a deeper level, the Denbury case answered the question "is the Plaintiff a common carrier." The "Denbury Case" can go back and forth to the Supreme Court however many times it takes and finally establish that the "Plaintiff" is a common carrier, but how does that make the Green Pipeline a common carrier pipeline when the "Plaintiff" doesn't own or operate it but rather Onshore is operating it as a private line for its own use?

All that said, a number of questions need answers before any informed comments are possible. Since the "Denbury Case" has not yet been to trial—and such is not on the horizon—the obvious question is why promulgate a rule to deal with undisclosed facts in a case in which the facts have not been before the court? A bit more specifically, whose idea was it to

promulgate such a rule and what investigation did that "whomever" make to get to the bottom of the "Denbury Case" before lifting a pen to draft a rule? And what was their agenda?

The root basis for the "Denbury Case" conflict was the Commission's classification of the "Plaintiff" as a common carrier. As you know, although permits to operate pipelines are not required to construct pipelines, the Commission issues such permits well in advance when such is requested. The information furnished by the applicant is then recorded in a database that contains all of the other permits with some of the key items being identified "classified" as though the commission actually made some kind of review or determination.

The Commission got off on the wrong foot with Denbury at the very beginning. The Green Pipeline T-4 file contains a letter informing the Commission that the "Plaintiff" is in the business of owning and operating pipelines. However at that point in time, the database contained no permits for any such pipelines. Denbury should have gotten a letter requesting clarification as to whether the applicant was really Onshore, who had a half dozen permits recorded in the database or an entity new to the Commission that was operating other pipelines without permits? If the latter, why hadn't permits been obtained for the new entity's other operating pipelines?

The reality of course was that the "Plaintiff" didn't even own the easements it needed to build its first pipeline. As the file was built, that became clear but certainly something fishy was already going on and it wouldn't be long before the fish started to smell. It would come out later that the "Plaintiff" had no money to build or operate a pipeline and no employees either.

Onshore filed a Form T-4 with the Commission that showed that (1) the new entity would own and operate the portion of the pipeline that would be in Texas, (2) that portion would be "intrastate," (3) the "intrastate" portion would carry its content solely for others, and (4) the pipeline would be a common carrier pipeline.

Denbury also filed with the Commission (1) a letter in which Denbury agreed to be regulated by the Commission, (2) a tariff, and (3) a resolution adopted by consent of its managers to the effect that common carrier status was necessary.

In court their position was that the Green Pipeline served the public as a matter of law because, regardless of whether the pipeline actually "carried to or for the public for hire," the regulation agreement letter that was added to their T-4 file satisfied this statutory requirement all by itself:

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...if such person files with the commission a written acceptance of the
provisions of this chapter expressly agreeing that, in consideration of the
rights acquired, it becomes a common carrier subject to the duties and
obligations conferred or imposed by this chapter;
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A letter in the T-4 file dated June 25, 2008, establishes such.

The Commission issued the permit a little over 2 years before it was required. As the Commission had always done, the T-4 and supporting documents were accepted at face value, and accordingly the Green Pipeline was "classified" as an intrastate common carrier line carrying only for others.

In any event, with CO2 pipelines, the statute clearly makes such an agreement a quid pro quo to gain eminent domain power. Clearly Denbury's agreement was voluntary. Had Denbury not unilaterally offered the agreement, they could have carried CO2 "to or for the public for hire" until the cows came home and the Commission would not have attempted to regulate their activity. Clearly that's not what Denbury is alleging in court, but we are in agreement that's what the statute says and how it has been applied, right? Has the Commission attempted to regulate a real intrastate pipeline that has not agreed to be regulated?

A sine qua non for such regulation is intrastate line status. The Commission's website states that the Commission only regulates intrastate pipelines and even then only safety and tariffs. As you know, if the T-4 shows interstate status, the Commission routinely returns a letter to the effect that the pipeline is not subject to the Commission's jurisdiction.

As your T-4 file shows, Denbury indicated intrastate status on Forms T-4 until February, 2011. In that time frame, an accident forced Denbury to come clean: in the words of the PHMSA investigator, "You have possibly claimed that the pipeline in question is jurisdictional to Texas. Did the CO2 come from within Texas and was it transported to a location within Texas through a pipeline not connected outside of Texas or which does not comingle with other CO2 which comes in from La.? I'm just wondering, because from all I know about your system, it is by very definition an interstate pipeline. If you in fact claim that the pipeline is not interstate but intrastate, it will be interesting to see and review your legal justification."

Post haste, Denbury filed an amended T-4 that showed the Green Pipeline to be interstate (although nothing had changed other than the box checked on Form T-4). Accordingly on February 24, the Commission sent Denbury its form letter disavowing Commission regulation, a copy of which as you know is in the T-4 file. You know all this.

The regulation to which Denbury "agreed" in return for the privilege of abusing landowners lasted only from the in-service date, about June, 2010, to February, 2011. During that time, no meaningful "safety regulation" occurred by the Commission—at the first hint of a safety issue PHMSA stepped in and established pre-emption.

Although safety regulation did not end—the Commission just no longer had anything to do with it—it appears that tariff regulation terminated completely? I looked without success for evidence that CO2 tariffs of interstate pipelines are regulated by someone. The Commission website indicates that the Commission does not. It appears FERC only regulates oil pipelines. If you know who does regulate CO2 tariffs, please let me know and consider including it on your web site.

My reading of the "tariff" in the T-4 file reveals a formula dependent on future events in order to be applied. Can you please explain how the Commission could regulate such a "tariff" for a pipeline that had yet to be built? And after it was built, how could the Commission regulate a "tariff" that ceased having effect before the formula could be calculated? How would regulation work when the only payments even supposedly occurring under it during the period it was in effect were going from Onshore to the "Plaintiff"? Doesn't the Commission step in to "regulate" when a real common carrier shows a preference of one customer over another? The record shows that Onshore had a complete monopoly during that period and the "Plaintiff" had no customers, certainly not two having a tiff. Who would have complained about what by whom?

Can you suggest anything that would indicate that both the agreement to be regulated and the tariff, 2 of their 4 deliveries to support common carrier classification, had not disappeared before March, 2011? With those 2 gone, weren't the T-4 itself and Denbury's internally generated resolution (that common carrier status was necessary) the only remaining basis from then on for the Commission's current common carrier classification status? If not, please clarify.

I would also like for you to revisit the resolution and the rest of the T-4 file to glean Denbury's reason why common carrier status was necessary. I don't recall seeing any reason in the Commission's file. Could it be that forcing discounts and egregious terms are not a "public use" for which common carrier status is "necessary"? That is what happened in the several Denbury cases I'm familiar with. It would seem that if the situation is that there are instances in which (1) eminent domain should properly be employed to prevent abuse by landowners, (2) eminent domain is necessary but the condemnor goes beyond preventing its abuse to abuse the condemnee, and (3) the cases like ours and the others I know about, we should all be aware of the relative proportions before a rule to somehow affect it is considered.

If the proportions of eminent domain threat or litigation (using the numbers above as labels), are (1) 1%, (2) 5%, and (3) 94%, shouldn't the eminent domain regime be "balanced" differently than if the proportions are (1) 94%, (2) 5%, and (3) 1%? What does the Commission's experience and database reveal about these proportions? Who can and should investigate?

The Green Pipeline T-4 file now contains among the earlier and other documents Denbury's 2011 revised T-4 showing interstate status, which caused the standard Commission response letter to be issued.

The first question raised by the new combination (common carrier status with no regulation) is if the original T-4 showed both interstate and common carrier classification plus the agreement to be regulated at the same time, would the Commission have classified the Green Pipeline as interstate and common carrier in the database and then sent both form letters? That is, you get the common carrier letter because you agreed to everything and you get the regulation denial because you're interstate? Or maybe a new letter especially for applicants gaming the system: "Since you are interstate we will not regulate you but since you filed an agreement to be regulated and you have done everything required for common classification the Commission will classify you as such." Would the notion be that unlike the law of contracts in which a peppercorn can be adequate consideration, no peppercorn is necessary as the quid pro quo for common carrier classification? How does that work? How does it fit in the excerpt above from the statute?

At least by this time the source documents for classification that are in the Green Pipeline T-4 file are internally inconsistent with both interstate and common carrier classifications at the same time. If the response to the above inquiry is that both such classifications are now in the database, to quote the PHMSA investigator, "it will be interesting to see and review your legal justification." Is the Commission continuing to report common carrier classification to public inquiries?

Classification of carriage only for others would also seem to be clearly inconsistent with the record before the Supreme Court. I believe that box on the most recent T-4 filed still reflects such. Does the database as well? What use is the database if it contains a lot of such disconnects?

I am naturally curious how various classification items are treated if the Commission recognizes that they are in conflict? Is there customary way to treat such? If so, what is it and has it been used in the "Denbury Case"?

As you will recall, the events that eliminated Commission regulation occurred right before the April 19, 2011 oral argument in the "Denbury Case." Although much was made there that the agreement to be regulated by the Commission alone established public use as a matter of law, we did not know (and of course it wasn't in the record of the 2008 trial) that all regulation of Denbury—all of the sine qua non—was already gone.

Denbury brought up to a quizzical Supreme Court that the Green Pipeline was somehow already in service but forgot to mention that all Commission regulation terminated when they filed a T-4 with one of the several miss-filled boxes corrected. In your opinion, should Denbury have told the court that the T-4 on which their entire case rested was no longer in effect and they were no longer regulated? And that our motion for summary judgment should have been granted? If they didn't, why didn't the Commission feel a sense of duty to do so?

As everyone knows, the "Denbury Case" was about a summary judgment that ruled that the "Plaintiff" was a common carrier and that we should be permanently enjoined from interfering with their surveyors. At the time of the Supreme Court oral argument, why do you think they still needed an injunction to prevent interference with a survey for a line that had been in service for almost a year? Doesn't it seem to you that the survey case was moot?

Why go to the Supreme Court in a survey case when the proper venue was the condemnation court while that case lay dormant? I would like for you to speculate as to why such was happening then, but I can provide a hint: according to Denbury's attorneys, if they could use the survey case to establish common carrier status, we would not be allowed to introduce in the condemnation court the overwhelming evidence now in the record that the survey case was a farce and the dormant eminent domain case has supported a blatant abuse for years. I realize that you may not have the transcript in which such a comment was made? Let me know if you want me to send you a copy.

When the record reached the Supreme Court, abundant evidence showed that Onshore had told the world a very different story. Onshore would build, own, and operate the entire interstate Green Pipeline to carry its own CO2, including that Onshore had a monopoly on all the CO2 along the way.

The "problem" facing the Supreme Court, alluded to or not in the opinion, was how could the court be looking at such an inexplicable, odd set of facts that clearly indicated nothing more an end run around not just the Texas and US Constitutions but even the plain language of the Texas statutory regime?

Onshore has asserted in judicial proceedings that it created the "Plaintiff" because it had no choice: Onshore was prohibited from engaging in the pipeline business so the "Plaintiff" had to be created for that purpose. The new pipeline business would be inherently public so they were somehow forced to agree to be regulated. In other words, the "Plaintiff" is a common carrier because it agreed to be regulated and it had to agree to be regulated because it was a common carrier. Or do I have that backwards? I don't quite understand the logic, especially because it is so directly contrary to the plain meaning of the statute.

Am I correct that the Commission's database shows the particulars of a T-4 file for a common carrier pipeline that Onshore is operating? I am wondering if you will sense the same hint of irony I do when the full record makes clear that Onshore is operating a common carrier line and the "common carrier" "Plaintiff" isn't?

In my opinion, the only purpose for the "Plaintiff" was to use the Commission's early permit and classification as prima fascia evidence of common carrier status in order to use the threat of litigation disaster to force discounts on landowners. Hindsight reveals that such is precisely what began years ago, has happened, and isn't over yet. Although hindsight is supposedly twenty-twenty, it isn't if you're blind. I would be interested in your speculation, both as of 2008 and now, as to what other purpose might have attended the early filing of a permit application that would have to be refiled after construction anyway? You've weighed in supporting their cause, so please help me understand how all that works.

In my recollection, your database shows that, notwithstanding the assertion that no more pipelines will ever be built if the "Denbury Case" isn't reversed, private pipelines outnumber common carrier lines by a quite significant portion. Can we explore that a bit deeper? Is there really a significant number of pipelines classified as "private"? If so, wouldn't that mean that private pipelines are often built without the threat of eminent domain? Or maybe they are built with common carrier T-4s, then switched to private on the one filed right before the line goes into service? Another possibility is that the threat of eminent domain is often used to build private (and thus unregulated) pipelines when threat is enough. It seems that's what the so-called Landowner's Bill of Rights has brought to the game? The T-4 fraud doesn't even have to be used to get the Texas Condemnation Discount. Can the Commission please share its knowledge and experience on this subject?

The record in our case will show that we have fifty or so pipelines on our property, some dating back to the Spindletop era. Two were granted in the time frame that Denbury approached us and three more have been granted since the "Denbury Case." In our 100 years of granting easements without ever being sued by a supposed "pipeline company," do you not think it curious that we would single out Denbury to refuse an easement?

Of course the explanation is that we didn't—they sued us. It doesn't seem obvious by the discourse, but landowners don't sue supposed pipeline companies as an indoor sport. The supposed pipeline companies that are asserting eminent domain authority will be or are the plaintiffs. How is it then that the defendants "take" the plaintiffs to court? From a technical standpoint, aren't the plaintiffs "taking to court" defendants who are resisting"? Or are those defendants being just plain "taken"?

I can speak for our case: we were taken to court (actually 3 courts) because we refused ridiculous "bona fide" offers. How can an offer that bears no relationship to real world values and terms be called "bona fide"? TransCanada's in our case on its face is "bona fide threat"—which they carried out—not a "bona fide offer."

Inquiring a bit deeper, why did Denbury (and TransCanada shortly after Denbury) take us to court but the other seven didn't? I can answer that. It's actually simple: the other seven didn't attempt to game the system, much less abuse it. A little abuse is one thing; gross abuse is another.

With Denbury and TransCanada as models, can you please put the Commission's opinion on the record: to what extent should imposter "pipeline companies" be allowed to use eminent domain to force sellers who are willing to convey easements on commercially reasonable terms to instead convey easements at discounted prices and more egregious terms solely if the effect is only to enhance shareholder returns? Was the traditional 20% enough or should the ante be upped Denbury and TransCanada fashion to well over 50%? What about the way that the terms of the easement affect the landowner and tenant? Typically easements are restricted to a single line with a designated content only for as long as the easement is so used. TransCanada's "bona fide" offer would have allowed as many as 5 pipelines to come and go for any use in perpetuity.

I would also like to understand why such companies should be permitted simply for the taking to obtain an advantage over their competitors? That is, why should a company that "games" or abuses the system have a competitive advantage over one that doesn't? Won't that force the honest, ethical ones to abuse landowners in order to remain competitive? Do not think for a moment that widespread landowner abuse is necessary. Remember, please, with us as an example, that Denbury and TransCanada are outnumbered 25 to 1 in our pipeline relationships by ethical, honorable pipeline companies that go out of their way to treat landowners with respect and fairness.

Since the Commission is proposing a rule that supposedly affects eminent domain authority in some way, I am assuming that at least some kind of minimal background has been collected as a predicate. You are therefore aware, I trust, that the "Denbury Case" is not a condemnation case? I alluded to that above but not with any details. The condemnation case that supposedly justified possession of our property was filed in parallel in a different court—the court where condemnation cases and their constitutionally protected "takings" are supposed to be filed. That case was abated pending completion of the effort to use the "Denbury Case," a survey injunction (not a "taking") to deprive us of the right to be heard in the condemnation court (where "takings" are supposed to be heard). Denbury has used the survey case to keep the condemnation case in limbo while my family and I hope as the months and years go by that someday there might be a day in court—at least in my children's lives if not my brother's and mine.

With (1) Denbury having turned down the price and terms contemporaries accepted seven years ago, (2) my family having lost possession under a condemnation case that has now laid dormant for 5 years (with no end in sight), and (3) no evidence appearing as yet that satisfies the Supreme Court's reasonable probability test, the next question would appear to be how many years does the Commission feel is appropriate for oil and gas companies, with no power of eminent domain, to use private property without either any evidence of common carrier status or any payment, even for the damages they caused when they commandeered property years ago?

Since no branch of government has stepped forward with any effort to limit the prospect that we will get to condemnation court in less than a decade, decades seems a reasonable unit of measure for response. In the Commission's view, how many decades should an oil company be allowed to possess private property without payment, all the while punishing landowners with excruciating legal fees, before hindsight finally conclusively proves, not by a preponderance of the evidence but beyond a reasonable doubt that there was never a legitimate common carrier around in the first place?

As you may be aware, Onshore has been using our property as part of a project that earns, as I recall according to Denbury, over $250 million a year on an investment of $850 million. I think that the budget for landowner payments was about $25 million. Suppose hypothetically eminent domain power reduced maybe $50 million down to the budget—i.e. by $25 million. Should the one time $25 million be compared to the $250 million a year to perhaps put some limit of the landowner subsidy that the Texas Condemnation Discount creates?

Up to the present we've heard over and over that without universal pipeline eminent domain, pipelines will cease being built. Of course the US and Texas Constitutions don't permit universal pipeline eminent domain. I couldn't even tell you which of the pipelines on our place are common carriers and which are private. It doesn't come up if it isn't being abused. The question is not whether the hypothetical is reality (not that it isn't). The question is whether should someone investigate what the reality is? The obvious answer is "yes." And if someone should investigate what's really going on, I think the Commission should support any effort to improve getting to the bottom of things.

Of course you would not propose a rule without knowing all of this? I do wonder though if you should take a closer look at the evidence? I've almost finished a package with documents in the public domain. At least in my opinion you should mull it

over with an eye to its content's relationship with the proposed rule. I'm going to be circulating it widely. I'll make sure the Commission is on the list.

Let us now look at the Commission's response so far to the "Denbury Case":

Your first response of which I am aware is the amicus letter that you filed in the "Denbury Case" on October 21, 2011. As revealed above, by then (and before the events below) the Denbury T-4 file showed manifest irregularities in all of the checked boxes that had been their famous gateway to common carrier status. The "Plaintiff" no longer even arguably satisfied the statutory common carrier definition. The Commission had not then contacted me about the case (and still has not). However, your letter, read as a whole, reiterates the assertions of the pipeline industry. You do not mention that the Commission's records and database make the industry comments misleading at best and at worst belie the industry's assertions. Should an impartial amicus have described the changes that had occurred and suggest their effects? Why wasn't our side of the story essential to an impartial amicus?

On April 24, 2012, Denbury wrote you a letter confirming an oral demand to which you had acceded: specifically, the Commission would stop telling landowners that Denbury's "Plaintiff" is not a common carrier. The reason was that the Supreme Court ruling did not make final disposition of the case. The letter references your accord with their prior demand. Curiously that letter does not appear in the Commission's T-4 file with all of the other correspondence specifically referencing the Green Pipeline permit number?

By then, the Supreme Court decision had eliminated the last key common carrier element: the "Plaintiff" could not be carrying *only* for others if the only CO2 in the line was Onshore's. The T-4 was not amended to reflect such and I doubt that the classification has. Although as noted by the Supreme Court no summary judgment proof existed to establish the "Plaintiff's" common carrier status as a matter of law, the Commission—for whatever reason—simply bowed down rather than make its own investigation of the manifest anomaly of the "agreement's" effect. If there was an investigation, I was not part of it. Whatever it was that I might say was not something the Commission wanted to hear. And as noted above, the Commission at that point no longer even had a dog in the fight—the subject was an interstate pipeline.

On July 23, 2012, Rep. Rene Oliveira held a Public Hearing of the Land & Resource Management Committee. One of the subjects was the "Denbury Case." Presentations were by invitation. Denbury Resources' "governmental affairs officer" (i.e. lobbyist), Greg Schnacke, clearly very well acquainted with Oliveira, was an invitee. The "Plaintiff" in the "Denbury Case" couldn't send a representative since it didn't have one—after all, it doesn't exist. The Resources representative gave their position but refrained from answering any meaningful questions—an example would be are you aware of any real evidence that Denbury—"Plaintiff" or otherwise—will ever carry CO2 for anyone else? That is the same Mr. Schnacke who told the Mississippi legislature that it would be a disaster for Mississippi if Denbury were forced to be a common carrier. By the way, are you on top of the big picture—not just Texas but in the other states in which they seem consistently embroiled in controversy? If not, you should be. Let me know and I'll send you some links. TransCanada too.

You were also invited to Rep. Oliveira's hearing. When asked what justification existed for classifying entities as common carriers without investigation, you responded that the Commission relied on the applicants' T-4 classifications because filing false information on a T-4 is a felony. In case you need to refresh, this is a link to the hearing: Oliveira Hearing. At that point, all of the relevant T-4 "boxes" were suspect, the tariff was irrelevant, and the "agreement" was meaningless. Only the "necessity" resolution was left. One might suppose that with far more access and understanding of the T-4 file and its role in the case, when testifying before a legislative committee supposedly attempting to get to the bottom of things, you might have started out with a current status report on the deplorable state of the T-4 file that caused the hearing in the first place. Another option given that the Commission doesn't investigate, you might have suggested to an appropriate office that perhaps an investigation might be in order? For example, did the Attorney General's office have any interest in seeing for itself what all the ruckus was about?

In any event, I was not invited by Rep. Oliveira to testify. I'll leave why I wasn't to Mr. Oliveira to explain if he wishes. My sense though is that the lobbyists who have confided to me are dead on: the last person a legislator wants to hear from is a constituent—or maybe worse, as in Oliveira's case, someone else's constituent. Whatever I might blurt out about reality was not wanted. I have to wonder though if in the demographic of his jurisdiction the "ox" that is getting gored by unscrupulous oil and gas companies is the person who puts food on the table and that cannot afford to fight back? Let us do keep in mind that the minnows, not the great white sharks, are the bottom of the food chain.

As you know, prior to the "Denbury Case," the Commission dealt with eminent domain summarily in a website Frequently Asked Questions format that denied any involvement. And the website still does. However the FAQs have been expanded to indicate the role of Form T-4, including a brief description of the "Denbury Case." However the FAQs still do not treat common carrier qualification—I do not see where the private pipeline exception appears? As a whole, they leave the impression that all oil and gas pipelines are common carriers?

In December, 2012, the Sunset Commission held a hearing in which the continuation of the Commission was on the agenda. The "Denbury Case" and eminent domain was a significant topic. The Sunset Commission seemed surprised both at the amount of eminent domain abuse and the opposition it was creating. I left a package for each committee member that described the abuse in some detail, including supporting documentation. I have never heard back.

Also in December, 2012, Rep. Oliveira filed a report for his committee. It included a section on eminent domain—about seven pages. It describes the background, our case, the testimony at the hearing, some conclusions, and some recommendations. It is noteworthy that he had bought into unsupported oil and gas industry notions as to the need to "balance" easy common carrier status with landowner interests. Ending overreaching abuse by rich oil companies over subsistence farmers and ranchers is never addressed.

The recommendations, if followed, would do nothing to roll back the abuse regime at any level or create any sort of "balance." It is also noteworthy that he quotes the Railroad Commission's opposition to losing control of common carrier status. Could you please comment on how that is proposed to work at this time since the Commission has always left eminent domain issues entirely to the judicial system?

I will now move to the bigger picture:

Surely you must have heard that TransCanada Pipelines Limited, of Calgary, Canada, applied for a presidential permit to cross the US/Canadian border—a permit that remains in limbo because of huge opposition? If you read the first several pages of the application, you saw that the operator applicant was bringing $49 billion and 60 years of experience to the table.

When you compare the permit application with the T-4 application in your file, you will see that TransCanada Pipelines Limited also filed that application. However TransCanada Pipelines Limited is not the named operator. TransCanada Pipelines Limited named another, different entity. The TransCanada organization chart that is in the record in our TransCanada case shows that the "operator" appears to be the same kind of alter ego pretext as in our Denbury cases. If you have not seen that, please let me know. I'll be glad to send it to you.

A huge public outcry has expressed grave concerns about the damage TransCanada's legendary shoddy workmanship is likely to cause. In our circumstances, such a spill could permanently destroy our entire irrigation system, ending over 130 years of rice farming and cattle ranching on our 4,000 acres.

If it looks like the TransCanada entities named in the T-4 may be broke, as the evidence clearly shows that the Denbury "Plaintiff" is, would it warrant an investigation by somebody? I would like to know why it wouldn't be appropriate for the Commission to confer with the State Department to synchronize their records? I would also be interested in the Commission's policy on granting permits to entities that may have no ability whatsoever to respond in damages for the spills that seem a likely possibility? It would seem that safety should include remediation as well as prevention.

In the same fashion as Denbury, TransCanada Pipelines Limited obtained possession of our property and built a piece of the Keystone Pipeline on our property. As I write this, it remains a 1 ¾ mile unusable gash. Their possession was based on untested sworn statements—statements that remain untested as I write this. The discovery in our case now shows at least one of those statements is clearly debatable if not patently false: specifically, that we turned down their offer of "twenty times fair market value."

The record will show that their "twenty times fair market value" when the terms were taken into consideration was far less than other pipeline companies were paying us for easements in the same time frame. None of the approximately 50 easements would allow more than one pipeline—TransCanada's had room for 5.

The records clearly show that that we accepted their monetary offer. Our motivation to accept the discount if we could get commercially reasonable terms: we did not want to be in litigation with both Denbury and TransCanada the same time. But then the choice wasn't ours to make. They filed eminent domain proceedings anyway.

I have to admit that at that point they hadn't singled us out—it was "necessary" for some as yet undisclosed reason to sue over 100 other landowners. Do you think you could find out why it was "necessary" to file such an unheard of number of eminent domain cases?

You probably need to address this "20 times fair market value" notion. The last easement we conveyed, which was earlier this year, was to a willing buyer by a willing seller (us) with both having knowledge of the facts and being under no duress. The going price was closer to 50 times "fair market value." As previously indicated, when TransCanada's "20 times" is adjusted to reflect the terms we had to accept to get that price, it was more like 5 or 10 times "fair market value."

No easements are ever conveyed in negotiated transactions for TransCanada's "fair market value." In litigation taken to the end, landowners often obtain awards more like 50 times TransCanada's "fair market value." The TransCanada affiant who swore that they offered and we turned down 20 times fair market value testified that he had no idea whatsoever as to what "fair market value" was. I suppose that you cannot enlighten either us or condemnees in general what the relationship is

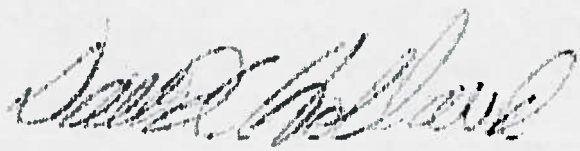
between reality and this "fair market value" concept. TransCanada's man-in-charge of rights—of—way testified that he has no idea what fair market value is.

Our three cases remain on their tedious, tortured journey for all to see and conclusively establish—a step at a time—that any landowner who opposes big oil should expect to spend the rest of his earthly existence incurring massive legal fees in the attempt to disprove probably perjured testimony by the sole possessors of the facts—with no branch of the government willing to help until the Supreme Court reads the Constitutions out loud to them.

In the opinion of the Commission, how many such trips to the Supreme Court should be required before somebody in the government steps in to help? Can you also please help sort out this confusion: since the Commission shouldn't interfere with eminent domain exercise but you've told the Sunset Commission that it shouldn't be taken from you, what exactly is it that the Commission is proposing? How does that relate to the proposed rule?

Hopefully the justification for the rampant landowner abuse by the oil and gas industry will not turn out to be that it is the only possible alternative in the critical need to prevent the hundreds of billion dollar landowners from litigating the thousands of poor starving fledging oil companies into the dirt and thus (as the industry has clearly, really clearly, asserted) stop all future pipeline construction? I may be prejudiced, but I really don't know of any billion dollar landowners abusing poor oil companies into the dirt.

Yours very truly,



David C. Holland

Submitted by:

Ashley Barnard
Holland & Associates
2121 Sage Road, Suite 280
Houston, Texas 77056
713.629.0700

Denbury Resources Inc.

Corporate Headquarters
5100 Tennyson Pkwy, Suite 1200
Plano, Texas 75024
Telephone: 972/673-2272
Fax: 972/673-2299

June 25, 2008

COPY

Robert L. Alexander
5117 Oak Court
Dickinson, TX 77539

Re: Your Railroad Commission Inquiry of May 31, 2008, Regarding a CO_2 Common Carrier

Dear Mr. Alexander:

Denbury Green Pipeline-Texas, LLC has been forwarded Mr. Howard's copy of your letter to Mr. Stephen Pitner, Director of the Gas Services Division of the Railroad Commission for a response from Denbury Green Pipeline, LLC. We appreciate your concern and interest regarding our CO_2 pipeline because there are currently no such pipelines in South Texas. Most of these pipelines have been located in North and West Texas to date and have operated there for many, many years, transporting CO_2 to various oil fields in those regions of Texas.

Denbury Onshore, LLC is planning to ship CO_2 in the Green Pipeline from various sources for use not only in the Hastings Field but also other oil and gas projects in South Texas. The Railroad Commission, in its regulation of the oil and gas industry and its approval of such projects is required under the law to declare, and does declare, such enhanced recovery projects to be in the "interest of the public welfare" as being necessary to prevent waste and to promote the conservation of oil or gas or both. These projects improve recoveries of oil and gas over what might occur without the use of CO_2. This enhanced oil recovery benefits both the state and the public.

The Texas Natural Resources Code (Chapter 111) provides that pipelines for the transportation of CO_2 or hydrogen, in whatever form, become common carriers if a company files with the Railroad Commission a "written acceptance of the provisions of Chapter 111, expressly agreeing that in consideration of the rights acquired, the company becomes a common carrier subject to the duties and obligations conferred or imposed by the Chapter." The rights acquired under the statute do include the right of eminent domain. Denbury Green Pipeline-Texas, LLC filed this written acceptance with the Railroad Commission on March 25, 2008, together with an Application for a pipeline operations permit, which application designated the Green Pipeline as a common carrier. The T-4A permit to operate was subsequently issued on April 2, 2008.

Denbury Green Pipeline, LLC has preliminarily mapped a proposed route for the pipeline, but must first survey this proposed route in order to make a physical assessment of the work to be done and to determine any environmental impact of the proposed line. When the surveying is complete, the route will be finalized and the documentation required by the Railroad Commission will be filed together with the Notice to Construct.

Denbury is attaching copies of its Railroad Commission filings and a copy of the relevant Texas Natural Resources Code for your information. We sincerely hope that you now appreciate the public's need for such a pipeline and will be supportive of Denbury's efforts.

Sincerely,

H. Raymond Dubuisson,
Vice President-Land

cc: Mr. Bill Geise, Div. Dir. Gas Services, TRRC (w/o attachments)

RAILROAD COMMISSION OF TEXAS

OFFICE OF GENERAL COUNSEL

October 21, 2011

Mr. Blake A. Hawthorne
Clerk, Supreme Court of Texas
201 W. 14th Street, Room 104
Austin, TX 78701

Re: Case No. 09-0901; *Texas Rice Land Partners, Ltd., et al. v. Denbury Green Pipeline-Texas, LLC*, in the Supreme Court of Texas.

Dear Mr. Hawthorne:

This letter is submitted as *amicus curiae* to address issues discussed in the opinion delivered on August 26, 2011 in the referenced case and to inform the Court of the opinion's potential impact on the Railroad Commission of Texas and the entities and activities it regulates.

The Legislature has charged the Railroad Commission with regulating both common carriers and gas utilities pursuant to the statutory mandates contained in Chapter 111 of the Natural Resources Code and Title 3 of the Utilities Code. Pursuant to those statutes, the Commission is required to ensure that common carriers and gas utilities comply with the obligations the Legislature set forth.

One of the duties the Legislature has directed the Railroad Commission to perform is the classification of pipelines as common carriers, utilities or private lines. That classification is based on the information provided in the pipeline permitting process. While there is no hearing on such applications, the information obtained shows what is being transported and whether the pipeline will be operated as a gas utility or common carrier.

Once a pipeline submits itself to the Commission's jurisdiction, the statutory requirements the Legislature requires the Railroad Commission to follow attach and that pipeline is thereafter subject to the Commission's power to enforce the obligations of that pipeline in accordance with the Natural Resources Code or the Utilities Code. No hearing or other adjudicative act is necessary for the attachment of Commission jurisdiction. In the event of a complaint, or upon its own motion, the Commission can – and has – required both common carriers and gas utilities to comply with their statutory duties.

The Railroad Commission would note that in *Vardeman*, the court cited a letter from the Railroad Commission which said, in part:

> *"First, Mustang has subjected itself to the jurisdiction of the Commission by declaring on its T-4 application for permit to operate a pipeline that it is a common carrier. Second, Mustang has held itself out to the public for hire as evidenced by its Texas Local Tariff No. M-3 on file with the Commission. Therefore, Mustang is a common carrier subject to the jurisdiction of the Commission."*[1]

The statement made in *Vardeman* continues to be true. While the Commission does not determine property rights or the authority to exercise eminent domain since those rights and authorities are dictated by the Legislature in statute, it does enforce regulatory obligations pursuant to the statutes.

The Court in its opinion appears to move the determination of regulatory status to the courts for a case by case determination. By establishing this new standard for common carrier designations, the court's opinion in *Denbury* will likely make it more difficult to obtain pipeline right-of-way easements in Texas and could significantly impact the development of needed pipeline infrastructure within the state. To the extent the opinion has such a limiting effect on new pipeline construction, there will likely be a corresponding limiting effect on new oil and gas development – particularly with regard to the drilling of new gas wells. Operators will be unlikely to drill new wells if there is no economical means of moving production to processing plants, refineries, or markets. Limiting new pipelines serving new and expanding producing fields could require that the Commission prorate gas production from those fields with insufficient pipeline capacity to protect the correlative rights of producers whose production must be limited due to inadequate pipeline capacity. Inadequate pipeline capacity could also lead to the filing at the Commission of a greater number of complaints under Chapter 111 alleging pipeline discrimination.

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[1] *Vardeman v. Mustang Pipeline Co.*, 51S.W.3d 308, 313 (Tex. App.—Tyler 2001, pet. denied).

The Commission urges the Court to carefully consider these issues and the impact of its opinion on oil and gas development throughout Texas.

The Commission urges the Court to carefully consider these issues and the impact of its opinion on oil and gas development throughout Texas.

Respectfully submitted,

Lindil C. Fowler, Jr.
Texas State Bar No. 00795807
General Counsel
Railroad Commission of Texas
1701 N. Congress Avenue
Austin, Texas 78711
Telephone: (512) 463-6715
Facsimile: (512) 463-8824

Attorney for *Amicus Curiae*
Railroad Commission of Texas

Certificate of Service

I certify that a copy of the above Amicus Curiae Letter was delivered via first-class mail on October 21, 2011 to the following:

Counsel for Petitioner, Texas Rice Land Partners, Ltd.

Douglas W. Alexander
dalexander@adtappellate.com
Alexander DuBose & Townsend, LLP
Bank of America Center, Suite 2350
515 Congress Avenue
Austin Texas 78701
Fax: 512/482-9303

Amy Warr
awarr@adtappellate.com
Alexander DuBose & Townsend, LLP
Bank of America Center, Suite 2350
515 Congress Avenue
Austin Texas 78701
Fax: 512/482-9303

Anthony G. Brocato
Law Offices of Anthony G. Brocato
550 Fannin St, Ste 230
Beaumont TX 77701

Counsel for Petitioner, Mike Latta

H.P. Wright
hpwright@wright-pitre.com
Wright & Pitre
1221 Dallas Street
Port Neches, Texas 77651
Fax: 409/722-7215

Marcus A. Pitre
psipitri@wright-pitre.com
Wright & Pitre
1221 Dallas Street
Port Neches, Texas 77651
Fax: 409/722-7215

Counsel for Respondent, Denbury Green Pipeline-Texas, LLC

Lynne Liberato
Lynne.liberato@haynesboone.com
Haynes and Boone, LLP
1221 McKinney Street, Suite 2100
Houston, Texas 77010-2007
Fax: 713/547-2600

Katherine D. David
Kate.david@haynesboone.com
Haynes and Boone, LLP
1221 McKinney Street, Suite 2100
Houston, Texas 77010-2007
Fax: 713/547-2600

Melanie S. Reyes
msb@tyler.net
Flowers Davis, P.L.L.C.
1021 ESE South Loop 323, Suite 200
Tyler, Texas 75701
Fax: 903/534-1659

Thomas H. Buchanan
Flowers Davis, P.L.L.C.
1021 ESE South Loop 323, Suite 200
Tyler, Texas 75701
Fax: 903/534-1659

J. Mitchell Beard
Flowers Davis, P.L.L.C.
1021 ESE South Loop 323, Suite 200
Tyler, Texas 75701

Jack T. Strother
Denbury Resources, Inc.
5320 Legacy Dr.
Plano, Texas 75024

Kelli H. Strother
2208 Sturgis
Frisco, Texas 75034

Michael L. Baker
mbaker@strongpipkin.com
Strong, Pipkin, Bissell & Ledyard, L.L.P.
1400 San Jacinto Building
595 Orleans Street
Beaumont, Texas 77701
Fax: 409/981-1010

David E. Keltner
Kelly Hart & Hallman, LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102

Andrew Weber
Kelly Hart & Hallman, LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102

Counsel for Amicus Curiae Texas Farm Bureau

Douglas G. Caroom
Eno Peters
Bickerstaff Heath Delgado Acosta, L.L.P.
3711 S. MoPac Expressway
Building One, Suite 300
Austin, Texas 78746

Counsel for Amicus Curiae Texas Pipeline Association, Gas Processors Association, Atmos Energy Corporation, Texas Association of Business, Natural Gas Supply Association, Association of Oil Pipelines, Independent Petroleum Association of America, and Texas Oil & Gas Association

James Mann
jmann@dwmrlaw.com
Duggins Wren Mann & Romero, L.L.P.
300 West Sixth Street, 15th Floor
P O Box 1149
Austin, Texas 78767

Marnie A. McCormick
mmccormick@dwmrlaw.com
Duggins Wren Mann & Romero, L.L.P.
300 West Sixth Street, 15th Floor
P O Box 1149
Austin, Texas 78767

Counsel for Amicus Curiae Texas Oil & Gas Association

Keith Strama
Shannon W. Bangle
Eric Lipman
Beatty Bangle Strama, P.C.
400 West 15th Street, Suite 1450
Austin, Texas 78701

Counsel for Amicus Curiae Air Products and Chemicals, Inc.

T. Christopher Trent
Johnson, Trent, West & Taylor, L.L.P.
919 Milam, Suite 1700
Houston, Texas 77002

Counsel for Amicus Curiae Plains Pipeline, L.P.

J. Lanier Yeats
David V. Bryce
Robert D. Jowers
Gordon, Arata, McCollam, Duplantis & Eagan, L.L.C.
1980 Post Oak Blvd., Ste. 1800
Houston, Texas 77056

Counsel for Amicus Curiae Kinder Morgan CO2 Company, L.P.

Alice R. L. Ginsburgh
Assistant General Counsel
Kinder Morgan CO2 Company, L.P.
500 Dallas Street, Suite 1000
Houston, Texas 77002

Counsel for Amicus Curiae Texas Civil Justice League

George S. Christian
george@thechristianco.com
400 West 15th Street, Suite 400
Austin, Texas 78701

Counsel for Amicus Curiae Energy Transfer Partners, L.P., Enterprise Products Partners L.P., Explorer Pipeline Company, Shell Pipeline Company LP, and TransCanada Keystone Pipeline, L.P.

Stephen K. Carroll
scarroll@fulbright.com
Fulbright & Jaworski L.L.P.
Fulbright Tower
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Fax: 713/651-5246

Counsel for Alexander Family and grandson of Charles H. Alexander

A.G. Crouch
Crouch Law Office
235 West Sealy Street
Alvin, Texas 77511

Pro Se Amicus Filer

Felix H. Jackson
Ocie Jackson Ranch
P O Box 216
Anahuac, Texas 77514

/s/ Lindil C. Fowler, Jr.
Lindil C. Fowler, Jr.

Denbury

April 24, 2012

VIA U.S. MAIL AND EMAIL

Lindil Fowler, General Counsel
Railroad Commission of Texas
1701 N. Congress
Austin, Texas 78701

Re: Denbury Green Pipeline-Texas, LLC (P-5 Operator 215337)

Dear Mr. Fowler:

Denbury Green Pipeline-Texas, LLC ("Denbury") has recently discovered that, in response to inquiries from certain landowners regarding Denbury's common carrier status, Texas Railroad Commission ("Commission") staff members have stated that Denbury is not a common carrier. This letter is to advise and remind the Commission that Denbury has been granted a permit to operate a pipeline (Permit No. 07737) and has made all of the currently necessary filings to be classified as a common carrier pipeline for the transportation of carbon dioxide under the provisions of Texas Natural Resources Code § 111.002 (6), and as otherwise required by the Commission. I have attached copies of Denbury's filings with the Commission for your information and ease of reference.

In the matter styled *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, the Texas Supreme Court did not hold that Denbury was not a common carrier. Rather, the Texas Supreme Court, upon appeal of a summary judgment action, found that the *prima facie* case established by the regulatory filing could be challenged by a landowner in court. Denbury satisfied all the requirements of the Commission to be classified as a common carrier as illustrated in the July 11, 2008 letter also attached hereto. In the event the case is ultimately remanded to the trial court, Denbury will have the opportunity to provide evidence (which was necessarily not presented in the summary judgment proceedings) supporting its common carrier status. It is our understanding that, from discussions with Denbury's attorney, Brian Sullivan, you are in agreement with such status and will provide information to the Commission staff so that landowner inquiries are correctly addressed. We certainly appreciate your efforts with respect to properly informing and educating your staff. Please feel free to contact me with any questions.

Sincerely,

James S. Matthews
Vice President and General Counsel