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Comments Form for Proposed Rulemakings

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§3.70: Amend T-4 pipeline permit procedures

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Gas Utilities Docket # 10366

PROPOSED AMENDMENTS TO 16 TAC SECTION 3.70 RELATING TO COMMON CARRIER PERMITS §

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RAIL ROAD COMMISSION

OF TEXAS

COMMENTS OF PIPELINE ROUTE NEIGHBORS AND ALLIED GROUPS

COMES NOW, Pipeline Route Neighbors and Allied Groups to respond to Proposed Amendments to 16 TAC section 3.70 Relating to Common Carrier Permits, and respectfully submits the following comments.

Introduction:

We appreciate the Commission's attempts to develop rules for granting common carrier status that results in the granting of the right of eminent domain to pipeline companies, but we the undersigned individuals and groups don't think these rules go far enough and need to be strengthened. These rules need to assure real notice is given in an effective and timely manner to those affected by the proposed pipeline and the toxicity of its contents. These rules also need to be modified to provide for a fair process for a landowner and others to challenge the company's assertions.

We do not believe that the process outlined in these rules meets the tests established by the Texas Supreme Court in Denbury Green. In that decision the Court noted:

Unadorned assertions of public use are constitutionally insufficient. Merely registering as a common carrier does not conclusively convey the extraordinary power of eminent domain or bar landowners from contesting in court whether a planned pipeline meets statutory common carrier requirement. Nothing in Texas law leaves landowners so vulnerable to unconstitutional private takings (Pg 1)

A private enterprise cannot acquire unchallengeable condemnation power under Section 111.002(6) merely by checking boxes on a one-page form and self-declaring its common-carrier status. Merely holding oneself out is insufficient under Texas law to thwart judicial review. (pg 17)

We accordingly hold that for a person intending to build a CO2 pipeline to qualify as a common carrier under Section 111.002(6), a reasonable probability must exist that the pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier.

Consistent with judicial review of Commission determinations generally, a permit granting common-carrier status is prima facie valid. But once a landowner challenges that status, the burden (pg 14) falls upon the pipeline company to establish its common-carrier bona fides if it wishes to exercise the power of eminent domain (pg 15)

If a landowner challenges an entity's common carrier designation, the company must present reasonable proof of a future customer, thus demonstrating that the pipeline will indeed transport "to or for the public for hire" (pg 18)

These rules should be clarified to:

1. Establish standards for proof that the applicant is really a common carrier and that it has future customer(s) for the line.
2. Applicants should be assessed a fee to assure that enough staff resources are available to review the applications
3. Develop standards for revocation of common carrier status
4. Provide landowners and neighbors notice of application in a timely manner so that they may contest it thus allowing for the right to challenge as outlined in the Supreme Court's decision.
5. Provide notice to neighbors since most of the parties affected by pipeline construction and threatened by leaks of toxic materials are tenants or neighbors and not just landowners
6. Assure public comments are considered and responded to prior to the issuance of the permit
7. Provide for timely affective notice and a process for landowners and others to challenge that status

Assure that the hearings on the pipelines are held by the State Office of Administrative Hearings (SOAH) In addition, Public Citizen, Inc is an association with more than 25 members in Texas and as such we would like to request a public hearing on these proposed rules as provided in section 2001.029 (3) Texas Administrative Code
Specific Comments

Section 3.70 Pipeline Permit Requirements

In the RRC proposal page 2 lines 23, 24 and page 3 line 1 Mary (Polly) Ross McDonald says " that for the first five years the amendment will be in effect, there are no anticipated significant fiscal implications to state or local

governments as a result of enforcing or administrating the proposed amendments". If a review is to be more than the perfunctory filing of a document the process of checking all the requested documentation will entail substantially more clerical time , effort, and expertise than the former method of "just checking the T-4 box". Nowhere in the RRC proposal is there any request for or admission of a need for additional funding and there needs to be.

On page 3, lines 2-8, Ms McDonald says "the public benefit expected.....will be greater confidence in the Commission's classification of pipelines as common carrier.....and the assurance that there is a review of the pipeline operator's assertion of a particular classification. The permitting process will include a more developed inquiry into the issue of a pipeline's public use, thereby providing more credibility to the Commission's process with respect to the ultimate classification of the pipeline, as well as increased certainty for both pipelines and landowners". (Italics added).

The Public Utility Commission has a process for granting of eminent domain and for the siting of transmission lines that gives landowners and neighbors notice and rights to hearings that should be reviewed and emulated in these rules.

Without more resources funding and explicit standards for these reviews the "confidence" and "credibility" of the process will not materialize. These rules should require applicants to pay a fee that covers the cost to have this review process.

More specific comments:

Without public notice and actual notice to landowners and neighbors prior to the processing of an application for common carrier status there will be no real opportunity for the challenge to an application envisioned by the Supreme Court.

- Amend Section 3.70 (b) by adding the following after the word "permit" on pg 6 line 12 "the proposed route or routes. The applicant shall give notice of the application for the permit to landowners and any resident or business within 2 miles of the proposed route as well as the first responders along the route. The applicant shall publish a similar notice in the largest paper in each of the counties through which the pipeline may run"
- and a new subsection (3) be added to read "(5) a sworn statement by the pipeline operator about the type and toxicity of the materials being transported using the classification system and community notifications requirements contained in Emergency Planning and Community Right-To-Know Act of all or all of the materials that the pipeline is designed to carry"
- Amend section (b) (3). On page 6 at line 15 by adding The penalty for making a false statement shall be loss of operating permit. The individual making the false statement be shall be referred to the Attorney General for civil or criminal perjury.
- amend section (b)(4) pg 7 line 2 to read The applicant shall document that the pipeline will, in fact, be used by third-party customers through evidence such as contracts with third-parties; and a demonstration that pipeline has excess or uncommitted capacity to carry materials for third parties. And renumber the subsequent section accordingly.
- Amend section (e) on page 7 at line 16 after the word "shall" hold a public hearing if requested by 5 or more neighbors in each county or region to allow affected neighbors , landowners and first responders to make public comment prior to the final decision by the Commission.
- Amend section (e) on page 8 line 4 by adding The Commission may, after its own review [investigation] and considering the public comments, ...
- Amend section (e) on page 8 line 4 by adding after the words if granted may be appealed to a district court by interested parties.

On renewals:

- Amend section (c) (renewals) (3) on page 7 at line 11 as follows:

Any other information requested by the commission including change in the types and toxicity of materials being transported. The applicant shall document that the pipeline has in fact, been used by third-party customers through evidence such as contracts;

- Add a new section (4) Notify affected landowners and first responders of any change in the type or toxicity of material transported with specific cautions as to hazards. And renumber the subsequent section accordingly.

- Amend subsection (e) on page 8 at line 12 as follows by adding the following "Any neighbor, landowner or business within 2 miles of the proposed route may request a hearing before the State office of Administrative Hearings to review the Commission's decision on whether the permit should be granted . The hearing shall be held and a decision rendered prior to granting a final permit. The decision by the Commission or the decision of the State Office of Administrative Hearings may be appealed to the district court.

- Amend section (g) of the rule on page 8, Line 16: "The Commission may delegate the authority to administratively issue pipeline permits to the State Office of Administrative Hearings

Versions of these comments have been submitted in various forms by two hundred and twenty nine citizens from the State of Texas.

Respectfully submitted August 25, 2014 on behalf of
Public Citizen.

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