Kellie Martinec

From:	Jennifer Rogers [redacted]
Sent:	Monday, August 25, 2014 11:36 AM
To:	rulescoordinator
Cc:	John Hays; Alicia Ringuet; Vanessa Buckmaster
Subject:	Comment filing on §3.70: Amend T-4 pipeline permit procedures
Attachments:	CWEI comments on Rule 70 proposal.pdf

Dear Sir/Madam:
Attached are the written comments of Clayton Williams Energy, Inc. related to Proposed Amendments to 16 TAC §3.70 relating to Pipeline Permits Required; Gas Utilities Docket No. 10366.

Should you have any questions, or difficulty with the attachment, please let me know.
Thank you,
Jennifer

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August 25, 2014

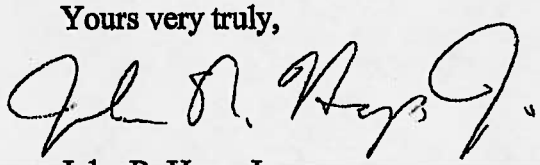
Rules Coordinator
Railroad Commission of Texas
Office of General Counsel
P.O. Drawer 12967
Austin, TX 78711-2967

Re: Proposed Amendments to 16TAC §3.70, relating to Pipeline Permits Required; Gas Utilities Docket No. 10366

Dear Sir/Madam:

Enclosed are four copies of the written comments of **Clayton Williams Energy, Inc.** to the above-referenced proposed rule amendments.

Yours very truly,



John R. Hays, Jr.
Attorney for Clayton Williams Energy, Inc.

JRH:vrb

cc:
Chairman Christie Craddick	***via: Hand Delivery***
Commissioner David Porter	***via: Hand Delivery***
Commissioner Barry Smitherman	***via: Hand Delivery***
Milton Rister, Executive Director	***via: Hand Delivery***
Gil Bujano, Director, Oil & Gas Division	***via: Hand Delivery***
William Geise, Director of Gas Services	***via: Hand Delivery***
Marry Ross (Polly) McDonald, Director of Pipeline Safety	***via: Hand Delivery***

CLAYTON WILLIAMS ENERGY, INC.

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via: Electronic Filing & Hand Delivery

August 25, 2014

Rules Coordinator
Railroad Commission of Texas
Office of General Counsel
P.O. Drawer 12967
Austin, TX 78711-2967

Re: Proposed Amendments to 16TAC §3.70, relating to Pipeline Permits Required; Gas Utilities Docket No. 10366

Clayton Williams Energy, Inc. (Williams) welcomes the opportunity to file these comments. As discussed below, Williams believes that the rule amendments proposed in this docket are not necessary and will cause more delay, cost, and problems without any benefit. For these reasons, Williams urges the Commission to reconsider its proposed amendments.

Williams is an independent oil and gas company, founded by Clayton W. Williams. Mr. Williams and Clayton Williams Energy, Inc. have been in the oil and gas business for over fifty years and have drilled hundreds of wells. Through various related entities, Williams has owned and operated numerous pipelines for oil, gas, and salt water. Williams knows well the critical role pipelines play in the oil and gas industry. Pipelines are necessary for wells to be drilled, produced, and the hydrocarbons moved to market. With new plays developing in areas of the state lacking proper infrastructure, an efficient process to securing take-away capacity is critical. Pipelines, common carriers, and others will play a vital role in solving capacity problems.

Williams is aware of the concerns expressed by some in the industry following the Texas Supreme Court's decision in *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC.*[1] In point of fact, *Denbury* was a unique situation where the

[1]363 S.W.3d 192 (Tex. 2012).

Pipeline-Texas, LLC.[1] In point of fact, *Denbury* was a unique situation where the applicant owned all the CO_2 within the area that the pipeline traversed. Moreover, the applicant had boasted on its website that the pipeline would effectively be a private carrier for its CO_2 product. It was in this context that the court ruled that Denbury would not be serving other parties and flat could not meet the constitutional "public use" test for condemnation. Under the facts of the case, this should not have surprised anyone, and this situation is highly unlikely to occur again, especially in the oil and gas transportation business. The court articulated the criteria that must be met to satisfy the constitutional public use requirement, and made it clear that this was a judicial determination for the courts. It was under these circumstances that the *Denbury* court made it clear that the T-4 permit classification could not be determinative of the public use status.

It appears that the proposed rules reflect issues widely discussed post-*Denbury* and the advocacy by some that either the Legislature or the Commission should do something to address the *Denbury* "problem." Williams does not believe that there is a *Denbury* problem. There is no need to do something. Even more troublesome, Williams believes that the rule proposals would create a number of problems, some of which can now be foreseen and many of which will be unintended consequences, and solves none. A great deal of caution is in order.

The doom and gloom talk about *Denbury* has been misplaced.

It appears that many, including lawyers, have focused on the "common carrier/T-4 permit" discussion in *Denbury* to the exclusion of what we believe is the more important "public use" point. That point was stated by the Court multiple times, beginning at the opening of the first paragraph:

> The Texas Constitution safeguards private property by declaring that eminent domain can only be exercised for "public use." Even when the Legislature grants certain private entities "the right and power of eminent domain," *the overarching constitutional rule controls*: no taking of property for private use. [citations omitted]

It was in this context that the Court observed that the common carrier provisions found in the Texas Natural Resources Code require that the pipeline be used for transportation "to or for the public for hire," i.e., for a public purpose, and that merely

[1] 363 S.W.3d 192 (Tex. 2012).

obtaining a T-4 permit that stated that the pipeline would be a common carrier was not conclusive as to the constitutional public use requirement.

Based on the very unique facts in *Denbury*, facts which are not likely to reappear, the court simply found that Denbury was not entitled to summary judgment on the common carrier/public use issue. This certainly has not spelled doom for the pipeline industry.

Changing the T-4 pipeline permit procedures will not prevent the constitutional issues from being raised in the courts.

The *Denbury* court clearly stated that the public use determination was a judicial matter for the courts to decide, making it clear that the Railroad Commission's administrative process could not be determinative. The court made it clear that because of the impact on property rights and the constitutional requirement for a showing of public use, the courts could not be foreclosed from such a review.

All of this means that changing the T-4 process at the Commission will *not* deprive private litigants in condemnation cases of the right to raise public use issues. But the proposed changes will, if adopted, add *needless additional layers of bureaucracy, delay, and regulatory burdens to the pipeline permit process.* This would result in a dramatic increase in the flaring of gas or shut-in wells together with a reduction in the number of wells drilled. The darker side of the current proposal is that without flaring, producers would not be able to drill wells unless the pipeline that would take the gas had already navigated the bureaucratic process and obtained the permit for the pipeline(s) to the wells.

The concern about the "representation" of status on the T-4 can be answered without creating a new uncertain and discretionary regulatory system.

On the third page of the preamble to the proposed rule changes, the writer refers to "the credibility of the Commission's process with respect to the ultimate classification of the pipeline" and suggests that the proposed changes would lead to an "increased certainty for both pipelines and landowners."

For several reasons, it is doubtful that the suggested filings and review would accomplish such a goal. The proposed administrative review, which would be done without notice to landowners and opportunity for hearing, and without clearly articulated

standards for determining whether the classification criteria are met, would certainly not do so.

Williams does not believe that "credibility of the Commission's process" has been a significant issue. *And to the extent that the Commission is concerned that the T-4 permit may be taken to suggest a level of review that does not occur, that can be remedied by simply including a statement on the permit that the classification is based on the operator's representation.*

The proposed rule changes would create unnecessary costs, delays, needless uncertainty, and cause more flaring of gas.

To date, the T-4 permitting process has been relatively straightforward and direct – if the form is completed, the requisite map(s) submitted, and the financial security is in order, the T-4 permit to operate the pipeline is granted in short order. This provides operators with the flexibility they and the industry need, so that they may move quickly to build and operate pipelines to hook up new wells quickly and provide transportation avenues to market to decrease the flaring of gas.

The proposed changes would alter the permit process dramatically by requiring, for new permits, the submission of:

- the requested classification and purpose of the pipeline or pipeline system as a common carrier, a gas utility, or a private line;
- a sworn statement from the pipeline applicant providing the operator's factual basis supporting the classification and purpose being sought for the pipeline;
- documentation to provide support for the classification and purpose being sought for the pipeline, if applicable, *and any other information requested by the Commission.*

Proposed Rule 70, subsection (b).

These requirements provide *no guidance* for operators as to just what should be submitted or how they are to know whether they are meeting the requirements. The requirements are open-ended as to "any other information requested by the Commission."

Once the information is submitted, the Commission staff will let the applicant know "if the application is complete within 15 days," and, if complete, decide whether to issue the permit within another 45 days. This is a minimum 60 day delay for the granting of a permit – if everything is in order and is deemed to meet the (largely unknown) criteria.[2]

In reality, it is likely that the delay may well be more than 60 days and extend the time during which gas must be flared. If the staff determines that the application is not "complete" – again, based on discretion without articulated criteria – then the applicant is to be provided a "notice of incomplete application" and given a chance to submit additional information, and then the process begins again. In other areas, such as environmental permitting, this type of process often leads to delays of a year or more.

And it is not appreciably different for the annual renewal process, since the operator would have to "confirm the current classification and purpose of the pipeline" and provide "*any other information requested by the Commission.*" We don't know what may be required for such confirmation, whether operational, market, customer, and contract information, or otherwise relative to ongoing operations. And we don't know the standards by which any such information would be evaluated. But the permit could be terminated nevertheless if the permit holder does not meet the unknown criteria.

This highly discretionary process, with few if any guidelines, violates the most fundamental tenets of sound regulation and the rule of law. It lacks significant guidance for operators and others to know how to comply, builds in regulatory discretion and uncertainty, and increases costs for both operators and the Commission without demonstrable benefit. That may be good for lawyers and consultants, but for no one else.

Moreover, the rule proposal provides no guidance as to what will happen if someone who opposes the pipeline files a complaint or protest regarding the application. Would a hearing then be held? If so, how long will the process take, considering the rights to discovery and the requirements of due process? Will pipelines be delayed for years, as with the Keystone XL pipeline? What will be the cost, both directly and indirectly, to the Commission, to operators, to producers who cannot move oil and gas

[2]For good reason, pipeline and gas plant operators do not file for pipeline permits before the wells to be connected are completed. There are too many uncertainties, including the size of pipe needed, the type of pipe needed based on the quality of the gas, the prospective purchaser, and the specific configuration and location of the pipeline to be laid.

and must flare more gas while waiting, and to the people of Texas?

We do not need this regulatory "solution" that is in search of an illusory problem. The T-4 system has functioned well for dozens and dozens of years. *Denbury* has not changed this fact.

The best answer: don't do it.

By being administratively straight-forward, clear, and expeditious, the T-4 process has served everyone well. It does not need the dramatic changes proposed in this rulemaking.

Williams appreciates the Commission's interest in solving problems. But the only problem here is the proposed solution, for there is no "problem" to solve. Whatever "problem," if any, created by *Denbury*, cannot be solved by the Commission, as the Texas Supreme Court made it clear that the public use determination is a judicial matter for the courts. This is one of those times when doing nothing is the best solution.

Sincerely,

Robert C. Lyon

Robert C. Lyon
Vice President of Gas Gathering and Marketing

cc: Chairman Christie Craddick — ***via: Hand Delivery***
Commissioner David Porter — ***via: Hand Delivery***
Commissioner Barry Smitherman — ***via: Hand Delivery***
Milton Rister, Executive Director — ***via: Hand Delivery***
Gil Bujano, Director, Oil & Gas Division — ***via: Hand Delivery***
William Geise, Director of Gas Services — ***via: Hand Delivery***
Marry Ross (Polly) McDonald, Director of Pipeline Safety — ***via: Hand Delivery***