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From: Rita Beving [redacted]
Sent: Monday, August 25, 2014 11:30 AM
To: rulescoordinator
Subject: Comments re: Amendment to 16 TAC 3.70 Gas Utility Docket 10366

Gas Utility Docket 10366
Amendment to 16 TAC 3.70

Rules Coordinator
Office of the General Counsel
Railroad Commission of Texas

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Proposed Amendments to Rule 3.70

To: Staff at the Railroad Commission of Texas,

As someone who has worked with landowners regarding their dismay at the eminent domain process and the simple T-4 form by which a company can simply declare they are a common carrier without any review by the RRC whatsoever, I welcome the ability to comment on this 3.70 amendment.

However, I find the proposed amendment *woefully inadequate* of clarifying how this new rule indeed clarifies, nor indicates, a verifiable review of an applicant with actual criteria listed in how the agency will determine that indeed an applicant is a company "for hire." Indeed, it seems to be a dressed up version of the existing process.

The amendment does not clarify criteria for what entity is a common carrier, what information is sought to prove there are SHIPPERS that justify the company is a common carrier. A mechanism needs to be established by which shippers for a pipeline can be proven. Or a company needs to waive their proprietary right and declare who those shippers may be in some form or fashion to the RRC. This is the heart of the matter which qualifies or disqualifies a company to be a common carrier.

In the Denbury Green ruling, a subsidiary essentially signed a T-4 form and in actuality was shipping for its parent company.

The amendment needs to also avoid allowing third party carriers to simply continue declaring themselves as common carriers when in fact they are a subsidiary under a new name by which to carry private product. A fair process with clarificiation on how to prevent a private pipeline carrier to declare themselves as a "common carrier" with real investigative review needs to be implemented.

That being said, while we support the Commission in looking at the issues, I am very concerned there is a) no adequate criteria indicated to prove up common carrier status, and b) no mechanism of real investigative initial review by staff and no "independent" review process provided for by SOAH if challenged and c) no notice and hearing mechanism in this rule to give nearby pipeline owners, municipalities or counties along a pipeline route the ability to to dispute the common carrier designation.

Due to the above comments, there may be additional issues outside the scope of this rulemaking that the Legislature may want to address, or the Railroad Commission should consider through a separate rulemaking.

Along with the Lone Star Chapter of the Sierra Club, a public meeting and interim hearing should be held to receive additional comments from the public on this significant issue for the public and the Legislature.

Comments on Proposed Rule

PROPOSED AMENDMENT TOO VAGUE – The proposed amendment to Rule 3.70 is inadequate and vague. Please see the following lines within the rule that illustrate what the lack of clarification:

p. 1, Line 20
Indicates that the RRC will ask for **"certain additional information"**
There is no delineation of what that "certain additional information" required would be within this amendment.

p. 1, Line 23 refers to **"any other information"** the Commission may also request. There is no indication within the text of what that additional info is that the RRC may ask for.

p. 2, Line 8 indicates the RRC will conduct **"its own review"** of the applicant. There is no indication of what the RRC means by **"its own review"** of the applicant. Is the RRC staff simply reading the application without verifying its accuracy? There is no indication staff will actually investigate if in fact the applicant is a "pipeline for hire," or "for the public good" as required by law to be a common carrier. Since the agency says it should need no monies for additional staff to review applications, there is no indication that staff will indeed verify the voracity of the applicant by spending staff time talking to FERC, shippers, etc.

There is no specificity whatsoever about what changes may be to the T-4 form for "what additional information" will be asked for. Currently an applicant can just check a few boxes and sign off on a one-page vague application form.

The amendment does not appear to meet the spirit of the law that the Denbury case has put forward where deference needs to be given by the constitution to that of Texas landowners. Nor does this amendment establish any public input process for the public to provide information or contest an assertion by the applicant. Thus, there is no specific notice provision, no public input or comment period, and no apparent chance to oppose a proposed permit, be it new or an annual renewal.

We think the following changes should occur:

Among the changes we would request in the present rulemaking include:

1. Assess a permit fee for T-4 applicants, upon initiation of their application and every year it reapplies or amends its application to ensure the agencies staff time is compensated.
2. Establish standards for proof that the applicant is really a common carrier and that it has future customer(s) for the line. While we recognize the Commission is requiring information and a sworn statement, much greater clarity is needed in this rulemaking about the type of information required. There do exist actual standards of what a common carrier is, and that specific information should accompany the statement. We have provided some suggested language.
3. The additional information required by this rulemaking should require additional staff time to verify the shippers with verifiable information. The company should provide its shippers to the agency if the carrier wants to do business within the state of Texas. Deference must be made to Texas landowners as indicated by Denbury.
4. A methodology needs to be established so third party carriers can we verified as now wholly-owned or entities essentially wholly-owned by a parent company shipping product as to not violate the spirit of common carrier qualifications .
5. Similarly, the rules should lay out the standards for revocation of common carrier status and the penalty for those falsely claiming to have common carrier status.
6. The rules must provide municipalities, counties, and landowners notice of the application and the pipeline route, as well as an opportunity for the general public to make comments. There should be a public hearing for those landowners in various cities along the route.
7. The RRC should assure that public comments are considered by the Commission and that the Commission respond to these comments prior to the issuance of the permit;
8. The RRC needs to provide for timely notice of final approval of permits and provide a process for landowners. The Commission should perhaps look at the PUC process on not and hearing—or the TCEQ process as long as ample time is given for 1st notice of common carrier application with a process for a hearing with 30-45 days for landowners to gain standing like in a contested case hearing. Allow a process for hearings at the RRC or SOAH as appropriate.

I agree with the Lone Star Chapter of the Sierra Club on the following with some minor adjustments of timeline modifications:

Permit Fees

The proposed rulemaking –or if needed through a guidance document – should establish a reasonable fee for applying for a T-4 for the first time, as well as for annual renewals. Recently, the Legislature authorized surcharges on a variety of permit fees at the RRC, but pipelines were not covered. We would suggest a reasonable fee in the $500 to $1,000 range, which is consistent with other fees charged by the agency

Additional information along with sworn statement

In 3.70 (b) (4), the Commission proposes requiring additional information for the classification being sought by the applicant, but that information is not detailed. We would suggest adopting some specific requirements on the information related to seeking common carrier status including a definition of affiliated entity, such as that laid out in Texas Utilities Code, § 101.003. Thus, under (4), or as a possible (5), the rules might state:

(5) If Common Carrier status is sought, the documentation required by the Commission shall include the operator's sworn statement that third-party shippers have executed transportation service and throughput agreements for a specified aggregate volume/day and that neither the shipper nor the purchaser, if different, is an affiliated entity of the operator. For purposes of this rule, affiliated entity is defined by Texas Utilities Code, § 101.003

Similarly, under C (3), similar language should be added such as: "If continued "common carrier" status is sought, the documentation required by paragraph (4) and (5) of subsec. (b) of this section is also required under this subsection. "

Revocation of Common Carrier Standard

The Rules should establish a standard and process for revocation of common carrier status, including penalties. While the rules do state that a permit is revocable under (h), there is no specific provision other than revocation for those who would falsely claim common carrier status, and abuse this privilege. We would suggest language such as: (h) The pipeline permit, if granted, shall be revocable at any time after a hearing held after 10 days' notice, if the Commission [~~commission~~] finds that the pipeline is not being operated in accordance with the laws of the state and the rule and regulations of the Commission. If the Commission finds the permit holder is operating the pipeline in a manner different from that authorized under the permit, ***the operating permit may be revoked. An individual making or filing a sworn statement about the classification of a pipeline that is considered to be false by the Commission shall be referred to the Attorney General for civil or criminal perjury.***

Notice and public comment

The Rules should require notice for those seeking a permit and an opportunity for public comment, and for a public hearing. Thus, when a permit is sought, notice to nearby landowners should be required in the largest newspaper in the county or counties in which the route is proposed and sent to those within two miles of the proposed route. The rules should allow for the public to request a public meeting to discuss the route.

Once a permit is determined to be administratively complete, it should be posted on the RRC's website, a notice in the largest newspaper of the county or counties in which the pipeline is located should be published and notice provided to landowners within two miles of the proposed pipeline. The Commission should be required to consider any comments from the public related to the pipeline, including its proposed category, that are timely filed with the Commission, such as within 30 days after notice is provided and the application for the permit is posted on the website.

Thus, we would suggest that once the permit is found to be administratively complete under (d), the Commission should post it on its website for a 30-day comment period, and the applicant should post a notice in the largest local newspaper while also providing notice to landowners. Only after this 30-day comment period, and after considering any timely filed comments, should the Commission deny, amend or issue the permit. We would also suggest allowing a public official, or commentators that might be impacted by the proposed route to request a public meeting.

Similarly, we would add language making it clear that the Commission must consider timely filed comments. Thus, we would amend section e) on page 8 line 4 by adding The Commission may, after its own review [investigation] ***and considering the public comments,*** ...

The additional public comment period would require more time for the Commission to act upon the application, and we would suggest extending the maximum time from 45 to 75 days for the Commission to act upon an application.

Notice of Final Approval and Process to Contest Permits

Once the Commission determines that it has enough evidence to grant a permit, there should be a process to provide notice to the public, and a process to challenge the permit. Thus, the final permit should also be posted to the RRC's website, and notice provided to the local county, as well as nearby landowners. Once a permit is granted, the public should have up to **30-45 days** to request a contested case hearing before an RRC hearing examiner or the State Office of Hearings Examiner.

Thank you, Rita Beving