

**Kellie Martinec**

---

**From:** rrcwebcontact@gmail.com  
**Sent:** Monday, August 25, 2014 11:58 AM  
**To:** rulescoordinator  
**Subject:** Comment Form for Proposed Rulemakings



## Comments Form for Proposed Rulemakings

### Date Submitted

Monday, August 25, 2014 11:57:52 AM

### Submitted By

**Martha Strawn**

3783 Ingold St  
Houston, TX 77005

Phone:

Fax:

Email: [REDACTED]

I request my e-mail address remain confidential

### §3.70: Amend T-4 pipeline permit procedures

§3.70: Amend T-4 pipeline permit procedures

#### To the Commission:

As a landowner who has experienced the unconstitutional taking of my property by eminent domain by a for-profit pipeline company, I thank you for the opportunity to comment on the Texas Railroad Commission's proposed changes to the permitting process for pipelines in 16 TAC § 3.70. I hope that in reforming the regulation that you will give due consideration to the need to protect the constitutional rights of all Texans, not just the interests of the oil and gas industry.

An administrative agency such as the Railroad Commission must, where possible, interpret its legislative mandate in a constitutional manner. The proposed changes to regulation do not remedy the constitutional flaws under the Texas Constitution identified by the Texas Supreme Court in the Denbury case. Moreover, the proposed change will not protect property rights guaranteed by the Fifth Amendment of the U.S. Constitution. Since these changes will not meet the Commission's goal of creating "more certainty for pipelines and landowners," I urge the Commission to go back to the drawing board to create a constitutional regulatory scheme.

The proposed rule fails to meet constitutional muster for two reasons: first, it fails to require the Commission to make particularized determinations of "public use" to support the exercise of eminent domain for the permitted pipeline. Second, the rule fails to provide for due process in making that determination.

#### I. Public Purpose Determination

One of the stated reasons for the proposed rule change is to create a "more developed inquiry into the issue of a pipeline's public use, thereby providing more credibility to the Commission's process . . . ." In so stating, the Commission recognizes its duty to inquire into "public use" as that term is used in both the US and Texas Constitutions.

The Fifth Amendment requires that property may be taken by the government only for a "public purpose." Under the Fifth Amendment, a taking requires a determination of a "public purpose" by a governmental entity. See, e.g., *Kelo v. City of New London, Conn.*, 545 U.S. 469, 480 (2005). Under the Texas Constitution:

[t]here are two aspects to the "public use" requirement. First, the condemnor must intend a use for the property that constitutes a "public use" under Texas law. Second, the condemnation must actually be necessary to advance or achieve the ostensible public use. A related concept is that a mere legislative declaration that a given use is a public use or is necessary does not control if the true intended use is a private use. This second aspect of public use is commonly termed the "necessity" or "public necessity" requirement.

*Whittington v. City of Austin*, 174 S.W.3d 889, 896-97 (Tex.App.—Austin, 2005)(internal citations omitted).

While the Commission recognized the need for a "more developed inquiry into the issue of a pipeline's public use", the proposed regulation requires no such inquiry. The proposed regulation merely requires pipeline companies to demonstrate that, at some level, they are "common carriers." "Common carrier" means only that the companies must show that they sell capacity on their pipelines to someone other than themselves, i.e., another oil company, or several oil companies. Nothing in the proposed rule requires the pipeline company to show, or more importantly requires the Railroad Commission to find, that a particular pipeline is for a public purpose. Such a finding is a necessary predicate to a taking under the Fifth Amendment and the Texas Constitution.

Substituting a "common carrier" determination for the "public purpose" inquiry violates both state and federal constitutional requirements. First, it appears that the Commission has improperly avoided making the required "public purpose" determination altogether, and has unconstitutionally delegated the decision to the private pipeline companies themselves. When the pipeline company came to take my land last year, I received a letter stating that the company's executive board had "decided that it is in the public interest" to construct a pipeline across my land. Nothing in the letter, however, explained how the company has reached this determination or the basis of its reasoning. In any event, the executive board is not an elected or appointed official, and has no authority to determine what is in the "public interest." Nor is any such determination credible, as its own substantial private interest obviously creates of a conflict of interest with any determination of "public interest." In order to satisfy the Fifth Amendment and the Texas Constitution, a governmental entity must make such a determination prior to allowing eminent domain to be used.

Moreover, simply being a common carrier cannot per se satisfy the public purpose requirement. If this were the law, the requirement of "public purpose" would have no meaning. I can't condemn land to build a toll road just because I believe I would have public users and could turn a profit. A pipeline is no different. As both Texas and federal law make clear, the "public use" determination turns on the individual facts of the case. Whittington, at 897 n.3, citing cases.

At a minimum, therefore, the Commission must consider, in an individualized and particularized way, whether a proposed pipeline serves a public purpose: will it serve a need or is it redundant of other capacity, and therefore serves only a private profit motive? Can the purpose be met by a less coercive state action? What are the countervailing public interests at stake, and do they outweigh the public purpose of the pipeline?

In sum, the balancing of industry interests against the private property interests that are at the very heart of our Constitutional rights is not a task that can be delegated to a private entity, and certainly it cannot be delegated to the self-interested pipeline company itself. Moreover, determining "public purpose" requires a particularized determination and finding, not a per se application of the different legal concept of "common carrier."

## II. Due Process

Both the Texas and the US Constitution also require due process before a taking may occur. In the Denbury case, the Texas Supreme Court required the Commission to establish procedures that would be more than simply "checking the box." As the Court put it, "[our Constitution demands far more." Texas Rice Land Partners, LTD. V. Denbury Green Pipeline-Texas, LLC, 363 S.W. 3rd 192, 199 (2012). The Denbury Court noted that in awarding a permit, the Commission gave no notice to affected parties, held no hearing, and heard no evidence. Id. at 199-200.

The proposed procedures do not remedy the problems found by the Court in the Denbury case. The proposed changes require pipelines to submit certain information, but they are entirely one-sided and provide no procedure at all for the adversely affected parties. Due process, at a minimum, mandates that landowners and others affected by a taking be afforded an "opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (internal citation omitted). Although a landowner may still challenge a taking in the courts, as we have seen with Denbury and other cases in practice the judicial process does not provide an opportunity to be heard at a "meaningful time." When the opportunity to be heard occurs after the permit is awarded, the pipeline is built (and therefore the damage to the land occurs) before the landowner's challenge can be heard in the courts. In my own case, I was forced to waive my constitutional challenges to the pipeline to avoid the pipeline's threat to take a route that would have been ruinous to my entire property. By settling, I was able to negotiate a less damaging route; however, I was denied the ability to challenge the pipeline's right to take my property at all.

In the context of pipeline permitting, as the Denbury Court states, due process would require providing notice to landowners and other affected parties sufficiently in advance of the permit decision to allow such parties to object. The regulation should provide for notice to affected landowners, as well as public notice. The regulation must allow affected parties to present evidence to the Commission on the issue of public purpose, and provide for the right of appeal. The proposed regulation contains none of these procedural safeguards and therefore does not meet the

standard of due process. Since this proposal continues to leave the issue of public use to the courts in the first instance, it does nothing to promote certainty for pipelines or landowners.

Thank you for your consideration of this important issue.

Martha Strawn  
3783 Ingold St.  
Houston, TX 77005

Railroad Commission of Texas | (877) 228-5740 | 1701 N. Congress, Austin, Texas 78701