

Landowner's Property Rights vs. New Transmission Power Lines

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By Stephen Taylor

You may have noticed the recent boom in energy infrastructure construction (i.e. pipeline and power line construction) across the greater Metroplex. This construction largely involves replacing older or undersized pipelines and installing new transmission power lines to deliver power generated from wind farms in West Texas. Not surprisingly, the surge in infrastructure construction has also led to an increase in landowner unease over possible infringement of property rights. In fact, that is the foremost concern voiced by my landowner clients who have been approached by pipeline and electric line operators to construct a power line, pipeline, or other utility across their property. As you can imagine, this unease is quite often justified. Though, by providing a brief overview of a landowner's property rights, I've found much of the landowner uncertainty can be alleviated.

As a property owner, it is important to first understand that a pipeline and electric line operator is only authorized to construct pipelines or power lines across your land by one of two methods: via the process of eminent domain (a/k/a condemnation) or through obtaining the landowner's permission, which is most often done through an easement. With that framework in mind, what do you do when an operator contacts you to construct or replace a pipeline/power line across your land? That depends. Is there a pre-existing easement covering your property? If there is no easement, the operator will have to either negotiate a new easement with the landowner or take the land by condemnation, assuming the operator has been given the power of eminent domain. (It should also be noted that even where a pre-existing easement exists, sometimes the operator will nonetheless have to take land by condemnation if the new use of the land is not contemplated in the existing easement). Consequently, when contacted by an operator about building a pipeline/power line on your property, it is important to first confirm whether or not your property is already subject to an easement and, if so, whether that easement conveys the right to construct the new pipeline/power line on your property.

If condemnation proceedings are instituted against you, there are legislative safeguards in place to ensure landowners are afforded rights during the different phases of the condemnation process. In fact, in September of 2011, new legislation came into effect which altered the condemnation landscape significantly for entities with the power of eminent domain. For entities with the power of condemnation, including certain pipeline and power line operators, the new law has put in place additional procedures which have slowed the process to condemn private property in Texas. These procedures were intended to provide the landowner with significantly more time to consider any offers from condemning authorities and to allow for more opportunity to negotiate with the condemning authority before the filing of a condemnation lawsuit.

Among its many provisions, the new law now requires a pipeline or electric line operator to provide two written offers during the negotiation process. An initial offer and a final offer made no sooner than thirty

(30) days after the initial offer. The final offers must be based on a written appraisal, from a certified appraiser, of the value of the property being acquired and the damages, if any, to any of the property owner's remaining property. If the parties fail to agree after the final written offer (the landowner must be given a minimum of 14 days to respond), operators are authorized to proceed to condemnation by filing a lawsuit. As apparent, this minimum forty-five day window between the initial offer and the filing of the condemnation lawsuit provides an opportunity for operators and landowners to negotiate for an easement in lieu of condemnation proceedings.

Given the intricacies in the condemnation process, it is essential that you are knowledgeable of the rights afforded to landowners under the new law (found in Chapter 21 of the Texas Property Code), and it is often helpful to engage a knowledgeable condemnation lawyer to guide you through the condemnation/negotiation process. Conversely, if your property is already subject to a pipeline/power line easement, it is important that you are fully aware of the rights that have been conveyed to the owner of that easement.

When your property is already burdened by an easement, there is often no need for the pipeline or electric line operator to initiate the condemnation process. Instead, the pipeline/power line can be constructed under the terms of the easement with little or no additional compensation being paid to the landowner. In that case, it is critical that you review the easement to confirm the scope of the rights granted to the operator in the easement (usually a copy of the easement can be easily obtained from the county real property records). As mentioned, this is where I believe most landowners would be well served to engage a lawyer. Generally speaking though, if the easement was granted within the past 10-20 years, it is more likely that the easement specifically addresses the rights of the operator as it relates to the right to construct a second or third pipeline/power line, or even to replace an existing pipeline/power line. Further, the more recent easements typically contain a metes and bounds description describing the exact location of the easement on your property. In those instances, assuming the easement does grant the right to install additional lines or replace such lines, the location for the new or replacement pipeline/power line would be typically limited to the space described in the metes and bounds description. As a result, the more recently granted easements typically leave less confusion about the rights of the operator to construct or replace pipelines/power lines.

On the other hand, if your easement is from an earlier period, odds are the easement is a single page form easement, containing undefined terms and broadly worded boiler plate provisions. Surprisingly, the majority of the easements I encounter are from this earlier period. It is therefore worth briefly addressing a couple of the more frequently litigated provisions in the older easements. Most notably, these easements commonly contain language granting the operator the right to construct, maintain, and operate pipe lines, and provide for additional consideration in the event the operator wants to construct additional pipelines in the future. This provision often leads to confusion when the operator places a pipeline in the ground shortly after executing the easement, and then thirty years later wants to construct a second, third, or fourth pipeline. When this happens, landowners often want to take the position that the easement does not expressly allow for construction of a second, third, or fourth pipeline, or even if it

did, the operator waived that right by not constructing the additional pipelines within a reasonable time period. Unfortunately, Texas courts have held use of the plural term pipelines' in the granting language of the easement, coupled with a statement setting the consideration for such additional lines, is enough to evidence intent to construct multiple pipelines, and the additional lines can be placed in the ground at any time in the future.

Another commonly litigated issue involves the location for construction of pipelines/power lines under the old form easements. The majority of these dated easements do not designate a specific location on the property for the easement (i.e. a metes and bounds description of the easement location). An easement that is not limited to a specific location on the property is commonly referred to as a blanket easement. The name is appropriately derived from the fact that Texas courts have concluded such easements cover the entire property. In other words, a blanket easement allows the operator to construct its pipeline/power line at the location of its choosing across the property. It should be noted, however, that Texas courts have generally held that once a pipeline/power line is actually constructed under a blanket easement, the easement's location on the property becomes fixed and certain. Therefore, if an operator wants to replace an existing pipeline/power line, it would typically need to be replaced at the same location as the existing line (assuming the blanket easement only permits construction of a single pipeline/power line). However, blanket easements are treated differently if the easement also permits construction of multiple pipelines. In that instance, a blanket easement for multiple pipelines/power lines will typically permit construction of each line in a separate location. Of course, these are general statements of the law in Texas, and in order to understand the rights of an operator or landowner in a given case, the specific facts of that case must be reviewed and analyzed in light of the actual terms of the existing easement.

The foregoing discussion not only underscores why landowners must be aware of their property rights, but also displays how such knowledge can assist when negotiating with an operator for an easement offered during the condemnation process. For example, a landowner can avoid several of the common pitfalls encountered in the form easements discussed above by requiring any easement with an operator to contain well-defined limits to the space and activities allowed in the easement, the number of pipelines/power lines that can be constructed across the property, and the compensation the landowner will receive in the event multiple pipelines/power lines are constructed. As you could imagine, these are but a few of the many issues that could arise in the negotiation and enforcement of easements. Yet, through the simple step of consulting an attorney well-versed in condemnation and interpretation of easements, landowners can easily avoid these common pitfalls and take steps to maximize their property rights.

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