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For more information, please contact:

Jim Barkley

Russell Lewis

Ben Sweet

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ENERGY REGULATORY UPDATE - FEBRUARY 24, 2015

New Common Carrier Pipeline Decision

On February 12, the Beaumont Court of Appeals issued an opinion with significant implications for pipeline owners and operators in Texas. The opinion (1) holds that Section 2.105 of the Texas Business Organizations Code does not provide an independent basis for exercising eminent domain, (2) holds that the probability a pipeline will serve the public interest must be judged at the time the owner first intends to build the pipeline, and (3) suggests that juries may have a heightened role in determining whether a pipeline will serve a "substantial" public interest.

The latest opinion involves an attempt by Denbury Green Pipeline to condemn the property of certain Texas landowners. The same Denbury pipeline and the same landowners were parties to the well-known T*exas Rice Land Partners Ltd. v. Denbury Green Pipeline-Texas LLC* decision originally issued on August 26, 2011 and reissued, with revisions, on March 2, 2012. That opinion found that Denbury had not established that the pipeline would be used for a public purpose because Denbury had not shown that it would ship for unaffiliated third parties. On remand, Denbury attempted to prove that it would, in fact, serve unaffiliated third parties. To do so, it presented evidence that it had reserved space in the pipeline for unaffiliated shippers, made the line available to other owners of carbon dioxide for shipping, and shipped on behalf of an unaffiliated third party (who then sold the carbon dioxide to Denbury). The district court once again granted summary judgment in favor of Denbury, but based on these facts, the Beaumont Court of Appeals reversed, holding that reasonable minds could differ regarding whether a reasonable probability existed, *at the time Denbury intended to build it*, that the Green Line would serve the public. The Beaumont Court of Appeals determined that later-signed contracts for transportation were not relevant to Denbury's intent, nor were the company's subjective beliefs about who might use the pipeline competent summary judgment evidence.

With regard to the third party contracts, Denbury had agreed to carry carbon dioxide purchased from Air Products. Air Products retained title throughout the carriage. However, a Denbury affiliate was the ultimate purchaser and majority owner/operator of the destination unit. The evidence indicated that: (i) Denbury owned the majority interest and acted as operator of the unit; (ii) a very small percentage of non-operating interests ratified the transportation agreements; and (iii) the other interest owners didn't take title or possession of the carbon dioxide. Therefore, the Beaumont Court of Appeals held that reasonable jurors could differ as to whether Denbury's contracts were sufficient to establish intent to serve the public.

Also of note, in dicta, the opinion states that the evidence raised a fact issue regarding whether Denbury's proposed taking served "a *substantial* public interest" and noted that the duty of weighing the evidence on that point belonged to the jury. Thus, the Court may be signaling that, in the future, even if a common carrier can establish it seeks to condemn property for public use, the jury may still be asked to determine whether it considers that public use to be in the *substantial* public interest.

The holding that Section 2.105 of the Texas Business Organizations Code is not an independent basis for exercising eminent domain authority is also of note, as it appears to be in direct conflict with the same court's holding in *Crosstex NGL Pipeline, L.P. v. Reins Road Farms*. In that case, the Beaumont Court of Appeals upheld as reasonable a district court ruling that a natural gas liquids (NGL) pipeline did not have eminent domain authority under Chapter 111 of the Natural Resources Code, because NGLs are not "crude petroleum" and therefore do not meet the definition of "common carrier" in Chapter 111. However, the Beaumont Court of Appeals also noted that Section 2.105 of the Business Organizations Code grants common carrier status to entities "engaged as a common carrier" and went on to analyze the question of whether a NGL pipeline was engaged as a common carrier pursuant to Section 2.105.

Also of note, this ruling comes on the heels of amendments to the permitting process adopted by the Railroad Commission in December 2014. Under the new permitting rules, effective March 1, 2015, pipeline operators must classify their proposed project and verify any claim to be a common carrier. The new rules also require that the applicant attest to knowledge of the eminent domain provisions in the Texas Property Code and Texas Landowner's Bill of Rights. Importantly, the Railroad Commission has made clear that these steps do not alter the rights of the property owner or actually grant eminent domain powers. As a result, we expect to see continued adjudication of these issues in state courts across Texas.

Companies wishing to exercise eminent domain should continue to document carefully and retain evidence supporting their common carrier status and, when possible, obtain written findings of fact at each stage of the judicial process.

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