

TEXAS COURT MAKES PROVING COMMON-CARRIER STATUS MORE DIFFICULT

Attorneys Warn, "You'd Better Do More Than Check The Box"

By Patrick R. Byrd and Lara D. Pringle, Jones, Walker, Waechter, Poitevent, Carrère & Denègre L.L.P., Houston | [January 2012, Vol. 239 No. 1](#) ([/january-2012-vol-239-no-1](#))



On Aug. 26, 2011, the Supreme Court of Texas issued its opinion in *Texas Rice Land Partners Ltd. v. Denbury Green Pipeline-Texas LLC* (No. 09-0901), which provides landowners yet another avenue by which to frustrate and delay common carriers' acquisition of pipeline easements. Simply put, this decision makes life a little more difficult for companies trying to exercise the power of eminent domain.

In the Denbury case, the central issue was whether Denbury Green Pipeline-Texas LLC ("Denbury Green") had established itself as a "common carrier" of carbon dioxide. "Common carrier" is a specific term used in the Texas Natural Resources Code (the "Code"). Sections 111.019(a) and 111.002(6) of the Code provide, respectively, that "[c]ommon carriers have the right and power of eminent domain," and, further, a company qualifies as a common carrier for carbon dioxide if it "owns, operates, or manages, wholly or partially, pipelines for the transportation of carbon dioxide . . . to or for the public for hire...."

Ultimately, the Texas Supreme Court ruled that Denbury Green failed to establish its common-carrier status and, in the process, gave a future landowner fighting eminent domain another arrow in his or her quiver.

In March 2008, Denbury Green sent to the Texas Railroad Commission its one-page "Form T-4" application to construct and operate a carbon dioxide pipeline running from the Texas-Louisiana border to Brazos and Galveston counties. As part of the Form T-4, Denbury Green checked the box indicating that the pipeline would be operated as "a common carrier." Denbury Green further checked the common-carrier box indicating that the gas was to be "[o]wned by others, but transported for a fee."

Denbury Green also, pursuant to the Code, submitted its application letter to the Commission stating that it agreed to be subject to the duties and obligations placed on common carriers by the Code. About a week later, the Commission granted Denbury Green's T-4 application confirming Denbury Green's common-carrier status. Denbury Green also filed a tariff with the Commission setting out the terms for its transportation of carbon dioxide in the proposed pipeline. It appeared that Denbury Green had complied with all regulations in the Texas Natural Resources Code to establish itself as a common carrier.

After this initial application process, Denbury Green began surveying the land along the anticipated route. During its surveying efforts, a landowner, Texas Rice Land Partners, and its lessee, Mike Latta (collectively "Texas Rice"), repeatedly refused to allow Denbury Green entry onto their land. Denbury Green then brought an injunction action requesting access to the land. Both parties moved for summary judgment on a number of issues, the central one being whether Denbury Green qualified as a common carrier under the Code.

The district court found that Denbury Green qualified for common-carrier status and enjoined Texas Rice from interfering in Denbury Green's surveying efforts. The Court of Appeals in Beaumont agreed. The Texas Supreme Court, however, reversed the decisions of the lower courts. The Supreme Court concluded that there was some question as to whether Denbury Green's pipeline was for public use, and, in turn, whether Denbury Green qualified as a common carrier with the ability to exercise eminent domain. The Supreme Court sent the case back to the district court for further proceedings.

Before looking at the Supreme Court's opinion, it's important to identify the facts which led the lower courts to initially conclude that Denbury Green qualified as a common carrier. First, Denbury Green had applied for a common-carrier permit and the Commission had issued such permit. Second, Denbury Green had published a tariff stating the rates others would be charged for using the pipeline—suggesting that the pipeline would be for "public use."

Third, Denbury Green's Vice President of Land signed an affidavit and testified during a deposition that Denbury Green was currently negotiating with other entities to transport carbon dioxide. The lower courts relied on these facts and rejected Texas Rice's argument that, because Denbury Green intended to use the pipeline exclusively, the pipeline was private and not public. The lower courts reasoned that it was enough that Denbury Green had opened up the pipeline to the public, regardless of whether the public would - or could - utilize the pipeline in reality.

The Texas Supreme Court, however, had a different interpretation. It held that summary judgment should not have been granted because a fact issue existed as to whether the proposed pipeline was, in fact, public. At the outset, the Texas Supreme Court, in its unanimous opinion, held that a T-4 permit alone does not conclusively establish a company's status as a common carrier. There must be something more. The Court then articulated the test for common-carrier status and finally concluded that Denbury Green did not prove that it was a common carrier.

The court stated that to be characterized as a common carrier, it is not enough that a pipeline company make its pipeline available for public use; "the professed use [must be] a public one in truth." In other words, "to qualify as a common carrier . . . a reasonable probability must exist, at or before the time common-carrier status is challenged, that the pipeline

will serve the public by transporting gas for customers who will either retain ownership of their gas or sell it to parties other than the carrier."

Although the Commission's approval of a company's T-4 Form is prima facie evidence that a company is a common carrier, when a landowner challenges a company's common-carrier status, the burden is then on the company to prove its "common-carrier bona fides." Furthermore, the court clarified that "customer" as used in the newly articulated test, should not include parties affiliated with the pipeline company seeking common-carrier status.

Turning to Denbury Green's common-carrier status, the court concluded that the affidavit from Denbury Green's Vice President of Land averring that Denbury Green was currently negotiating with other entities to transport carbon dioxide did not indicate whether Denbury Green intended to use all of that carbon dioxide in its operations.

Moreover, the deposition testimony of the same witness suggested the transportation of third-parties' carbon dioxide, but failed to identify any third party unaffiliated with Denbury Green. Lastly, the court found that portions of Denbury Green's own website suggested that the pipeline would be used exclusively for private - not public - use. Accordingly, the court concluded that there was some question as to whether the pipeline was actually for public use and, thus, whether Denbury Green was in fact a common carrier with the power of eminent domain. The court sent the case back to the district court for further proceedings.

Armed with this decision, more and more landowners are challenging pipeline companies' status as common carriers. It is clear that pipeline companies must do more than simply check the common-carrier box on their Form T-4. Because the burden shifts to the pipeline companies to prove their common-carrier bona fides once common-carrier status is challenged, they should ensure that there exists clear documentation establishing an expectation that customers unrelated to the pipeline company will utilize the planned pipeline.

In other words, pipeline companies should make intentional efforts to document that the pipeline will, in fact, be used by third-party customers transporting third-party gas. To accomplish this, companies should first consider drafting non-confidential contracts with third-parties. These contracts can provide clear evidence that parties unrelated to the pipeline company intend to transport gas through the pipeline or purchase gas from the carrier.

Second, companies should consider publishing statements emphasizing the pipeline's availability to carry third-party gas. If the pipeline can show it has capacity to carry customers' gas, then it will be easier to prove that the pipeline will be used for transporting more than only the company's product.

Another simple, but often overlooked, method to prove common-carrier bona fides is by identifying potential third-party customers by company name in publications related to the pipeline - even if no formal contract is in place. This provides obvious proof that third-parties are, in fact, intended to use the pipeline.

Finally, and perhaps most importantly, companies should carefully prepare all documentation regarding the pipeline project - whether on a website, brochure, news release, affidavit, project materials, advertising materials, etc. - with an intent to demonstrate the company's desire that the pipeline carry third-party gas. Companies should be mindful that all statements on their websites, brochures, news releases and the like will be examined by the courts when determining whether there existed any real intent to transport third-party gas through the planned pipeline or purchase.

Four main salient points should be taken from the Denbury case. First, the test for common-carrier status is that a reasonable probability must exist, at or before the time common-carrier status is challenged, that the pipeline will serve the public by transporting gas for third-party customers.

Second, persons or entities who have an affiliation with the pipeline company seeking common-carrier status are not considered third-party customers.

Third, getting a T-4 permit is merely prima facie evidence of common-carrier status, and, once challenged, the pipeline company has the burden to prove it is actually a common carrier.

And fourth, pipeline companies should be careful to clearly articulate in all documents and official statements that unaffiliated third-parties will utilize the planned pipeline.

Authors

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