

Eminent Domain Reform in Texas: A Guide for Going With the Flow

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On June 16, 2021, Texas Governor Greg Abbott signed into law House Bill 2730, which goes into effect on January 1, 2022. Texas H.B. 2730, 87th Legislature (2021). HB 2730 marks the culmination of more than six years of negotiations between the Texas Civil Justice League, the Coalition for Critical Infrastructure, the Texas Farm Bureau, and several other landowner organizations to reach consensus on eminent domain reform.

Intended to “make the process more transparent, accountable and fair for landowners,” the bi-partisan bill could have major ramifications for some pipeline and electric transmission owners and operators. New negotiation tactics and detail-oriented drafting of offer language for land acquisition agreements are required—creating unprecedented expectations for entities with eminent domain authority. This will impact both the ways pipeline and electric transmission entities should prepare to revamp their negotiation and drafting approach, and the steps right-of-way agents should take to protect their certificates of registration moving forward.

Who is subject to HB 2730’s offer and negotiation requirements? The offer and negotiations provisions expressly do not apply to certain entities. Electric power lines that operate below 60 kilovolts are excluded. Certain pipelines or appurtenances are also excluded if they are (i) downstream of the point where natural gas is measured and the chain of custody goes from transmission pipeline to local distribution company to end-use consumers or (ii) at a location where a gas utility taps a transmission pipeline into a city gate if the pipeline does not exceed 100 feet. Tex. H.B. 2730 § 7.

How do these entities come into compliance? A revamp of energy entities’ contract negotiation and drafting approach is required. It starts with a bona fide offer. The new bill changes the requirements set forth in the Texas Property Code for determining whether a bona fide offer was made. Previously, an offer was considered bona fide if, in part, it was in writing, included a written appraisal, was for an amount equal to or greater than the appraisal, and included a copy of the then-existing landowner bill of rights.

Now, and in addition to those requirements, HB 2730’s updated landowner bill of rights must be included in every offer. The updated bill of rights, which will be evaluated by the State Attorney General at least once every two years, must inform landowners of their right to file a complaint with the Texas Real Estate Commission (TREC) regarding alleged misconduct by a registered right-of-way agent. The updated bill must also provide a list of terms that *could* be in the negotiated instrument of conveyance as well as additional information about the parties’ rights and obligations in an eminent domain proceeding. The hope is that the landowner will become a more-informed negotiator.

Under HB 2730, an entity’s initial offer must also include, in plain writing, certain proposed terms related to damages and compensation. Notably, the offer must include in bold type whether the offer includes damages to the remainder. This is often a critical issue in landowner-

versus-pipeline-company litigation—especially in Texas, where the damages could cost companies millions. *See e.g., Peregrine Pipeline Co., L.P. v. Eagle Ford Land Partners, L.P.*, No. 10-14-00162-CV, 2018 WL 543026, at *1 (Tex. App. Jan. 24, 2018) (Landowners awarded \$2.1 million judgment); *Crosstex DC Gathering Co. v. Button*, No. 02-11-00067-CV (Tex. App. Jan. 24, 2013); *LaSalle Pipeline v. Donnell Lands, LP*, No. 04-10-00272-CV (Tex. App. Dec. 15, 2010) (Landowners awarded \$650,000 judgment).

When forming this initial offer, pipeline and electric transmission companies should have a checklist in hand. Required terms for the instrument of conveyance include the critical who, what, when, where, and why of the easement or right-of-way. The entity, through its offers, must inform landowners of their rights to negotiate terms relating to where the pipelines will sit, how many there will be, what will pass through them, who will restore any damages and how it will be restored, when access to a pipeline is permitted, who will hold insurance, and more. All existing forms for easement acquisition offers should be carefully reviewed and rewritten or, at the very least, updated to include the laundry list of terms set forth by HB 2730.

Pipeline and electric transmission companies need to get the bona fide offer *right*. After the entity has made a HB 2730-compliant offer, the bill allows the private entity or the property owner to negotiate for and agree to an instrument that differs from or omits the general term requirements in the offer. In addition, any amendments moving forward will be deemed to have satisfied the bona fide offer requirement if the initial offer was compliant. However, if a court later determines that the offer was not bona fide, the eminent domain proceeding can be abated until the offer can be corrected, with the entity exercising eminent domain held liable for related costs and the landowner's reasonable fees. This means that "getting it right the first time" can save significant time and expense.

What does HB 2730 mean for Right-of-Way Agents? Electric transmission and pipeline entities are not the only ones impacted by HB 2730. Right-of-way agents should expect to undergo increased education and certification requirements beginning in March of 2023. *See* HB 2730 § 11 (providing that a person who submitted an application for issuance or renewal before January 1, 2023 is not subject to the education requirements until their first renewal that occurring after March 1, 2023). Agents will need to complete a required course of study to be eligible for issuance or renewal of their certificates of registration and will need to complete sixteen hours of TREC-approved coursework during future renewal periods. The bill also gives TREC the ability to suspend or revoke a right-of-way agent's certificate if they accept financial incentives for making an offer they know is inadequate under the Texas Constitution. *Id.* at § 4.

What happens next? Pipeline and electric transmission entities should review their instrument drafting process and implement training procedures on offer initiation and negotiation. As the TREC finalizes its rules for implementing HB 2730's new education requirements, right-of-way agents should prepare to submit a timely application before January 1, 2023 to defer the onset of coursework requirements. Moving forward, these entities and right-of-way agents should be prepared to see high expectations for compliance stemming from this bi-partisan effort to protect landowner rights.