



Public Utility Easements and Eminent Domain:

We All Want Power, But We Don't All Want Power Lines

Stephanie S. Potter

September 17, 2014

Disclaimer

- This is a summary. There are details omitted that could be important in any particular case.
- This is not legal advice or the rendition of legal services.
- The statements contained herein are not to be deemed the position of law firm or clients.



Public Utility Easements and Eminent Domain Outline

I. Avoiding Power Lines

A. Open House Prevention vs. PUC Cure

B. Route Selection at the PUC

II. Negotiating Easement Terms and Price

III. Condemnation with Public Utilities

IV. Living with Power Lines

V. Abandonment and Termination

VI. Questions

Avoiding Power Lines – Not in *My* Backyard

Open House Prevention vs. PUC Cure

- An ounce of open house prevention can be better than a pound of Public Utility Commission (“PUC”) cure
 - The first opportunity to impact routing decisions is during the utility’s public outreach phase. Outreach usually includes:
 - Property Owners
 - Local Officials
 - Government Agencies – USFWS, TPWD, TCEQ, THC, TRC, USACOE, FAA, TXDOT
 - Utilities host open houses to seek public feedback before presenting route options to the PUC of Texas in a Certificate of Convenience and Necessity (“CCN”) proceeding.



Public Utility Easements and Eminent Domain Outline

I. Avoiding Power Lines

A. Open House Prevention vs. PUC Cure

B. Route Selection at the PUC

II. Negotiating Easement Terms and Price

III. Condemnation with Public Utilities

IV. Living with Power Lines

V. Abandonment and Termination

VI. Questions



Avoiding Power Lines – Not in *My* Backyard

Route Selection at the PUC

- Impacted land owners will be noticed of the CCN filing and can participate.
 - Strict timelines! Intervention due 30-45 days after filing.
 - CCNs often involve voluminous filings. Landowners need not be represented by counsel, but the process can be difficult to navigate ex parte. Similarly situated landowners sometimes join together to hire counsel / share costs.
 - Parties can settle on a route that crosses the property of non-parties, so decline to participate at your own risk.
- If you wait until a CCN is secured, the route is set, and the utility approaches you to obtain easement rights, you have probably already lost your opportunity to avoid having a line cross your land.



Avoiding Power Lines – Not in *My* Backyard

Route Selection at the PUC

- Sometimes, it's wise to negotiate during route selection to get the line.
 - Worst case scenario: the line impacts your view but you don't get any money through condemnation.
 - So savvy lawyers know that if you're going to have to look at the line, you probably want it on your land.
 - However, keep in mind that one line can become an infrastructure “magnet.”

Avoiding Power Lines – Not in *My* Backyard

Route Selection at the PUC

- PUC contact information:
 - www.puc.texas.gov
 - Click on Filings / Filings Search / Filings Search and enter docket number in the blank after Control Number.
 - Don't know the docket number? Call Central Records at 512-936-7180 or the PUC's Assistance Hotline at 1-888-782-8477.
- PUC legal staff assigned to a CCN case may help point landowners or their counsel to templates and forms.
- The State Office of Administrative Hearings (“SOAH”) typically handles the hearings, but all filings are still made available at PUC website.



Public Utility Easements and Eminent Domain Outline

I. Avoiding Power Lines

II. Negotiating Easement Terms and Price

III. Condemnation with Public Utilities

IV. Living with Power Lines

V. Abandonment and Termination

VI. Questions

Negotiating Easement Terms and Price

Getting the Best Deal

- The power of eminent domain isn't used unless negotiations fail; landowners will first have the option of selling the easement if parties can agree on a price.
- Utilities are not typical litigants.
 - Generally speaking, a utility's reasonable and prudent costs are recoverable in rates. Daunting litigation costs are unlikely to inspire settlement.
 - Prudence is crucial to utilities-- comparative cost per acre is important and may cause inflexibility.



Negotiating Easement Terms and Price

Getting the Best Deal

- Utilities may appreciate agreed easements because they can show the PUC their low condemnation rates as evidence of how well they're working with landowners.
 - But, they are concerned with precedent and they have to justify all future payments in rate cases, so they will not be able to agree to outlier land values.
 - Consider other requests to mitigate landowner impact: moving expenses, installation of fences or gates, consideration for impacts to crops or livestock, certain notice before entry, abandonment clauses, etc.
 - If you want any special easement terms, you better agree to them. The utility will probably get its standard easement through condemnation.



Public Utility Easements and Eminent Domain Outline

I. Avoiding Power Lines

- I. Open house prevention vs. PUC cure
- II. Route Selection at the PUC

II. Negotiating Easement Terms and Price

III. Condemnation with Public Utilities

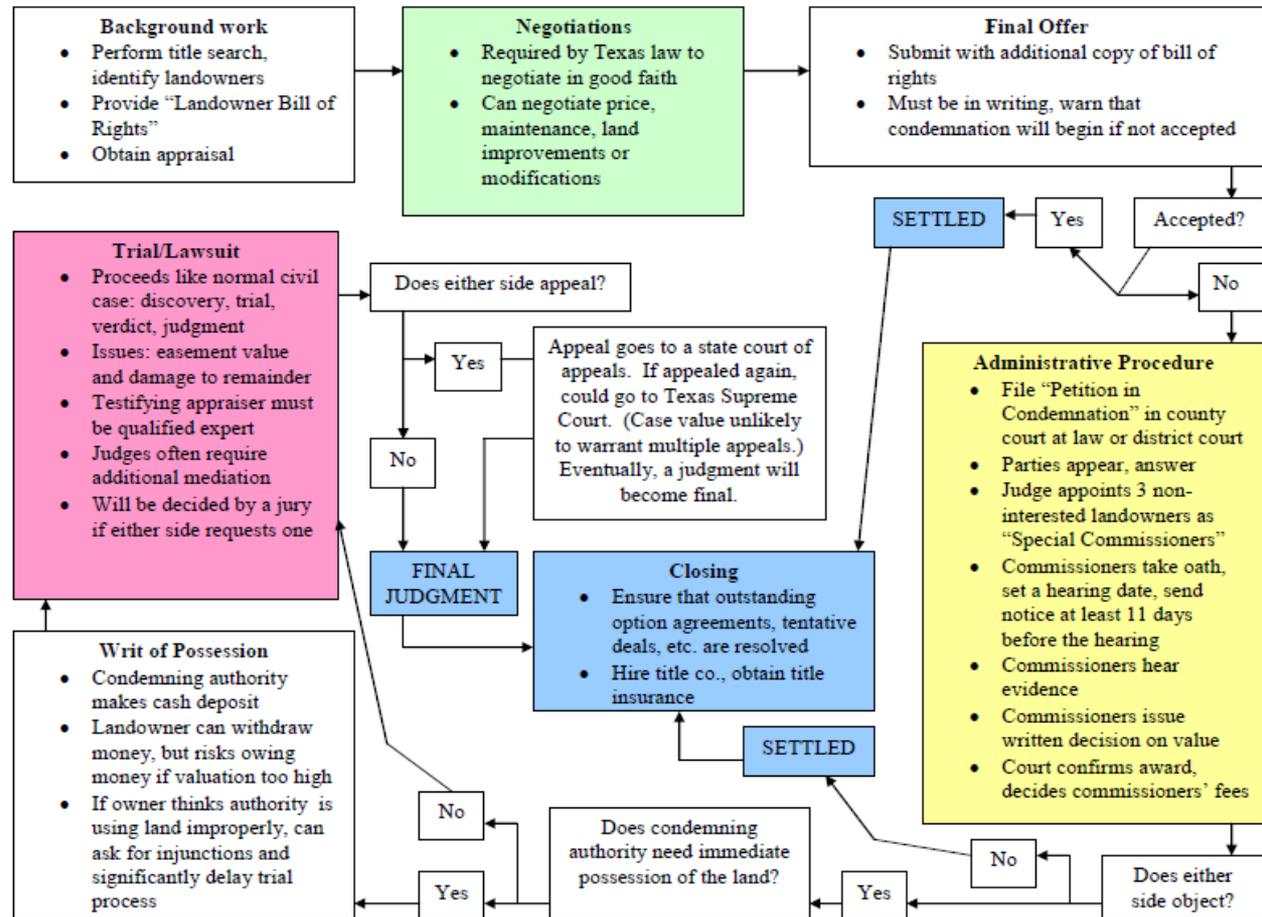
IV. Living with Power Lines

V. Abandonment and Termination

VI. Questions

Condemnation with Public Utilities

The Condemnation Process



A condemnation hearing (the yellow box) typically takes about 120 days from filing to award.

Condemnation with Public Utilities

Tilting at Windmills

- Condemnation / eminent domain occur when the government “takes” land for a public use, such as building utility infrastructure.
- Private companies obtain condemnation authority for a utility easement once a route is approved by the PUC (once the company has an approved CCN).
- Of course, land is not “taken” without compensation—fair market value must be paid.
- Companies typically purchase land outright for substations and take only an easement for transmission lines. This means the landowner retains fee simple to the land under the line.



Condemnation with Public Utilities

Tilting at Windmills

- Right to condemn/public use is rarely a viable challenge in utility condemnations. Value will probably be the sole issue.
- Utilities generally pay 100% value of land in fee even though they only get an easement.
- Still, small parcels unlikely to get significant amount of money from easement value alone - potentially bigger awards come in valuing damage to the remainder.

Condemnation with Public Utilities

Tilting at Windmills

- Do power lines damage remainder value?
 - “Damages to remainder property are generally calculated by the difference between the market value of the remainder property immediately before and after the condemnation, considering the nature of any improvements and the use of the land taken.” *County of Bexar v. Santikos*, 144 S.W.3d 455, 459 (Tex. 2004).
 - Landowners may claim impacts to planned land uses, fears of EMF, unsightliness, etc.
 - Utilities typically take the position there is little to no remainder damage, especially on large parcels.



Public Utility Easements and Eminent Domain Outline

I. Avoiding Power Lines

- I. Open House Prevention vs. PUC cure
- II. Route Selection at the PUC

II. Negotiating Easement Terms and Price

III. Condemnation with Public Utilities

IV. Living with Power Lines

V. Abandonment and Termination

VI. Questions

Living with Power Lines

Vegetation Management and Access

- Once the dust has settled, you will have a power line on your land *for the rest of time* (probably).
- How can you live with the power company?
 - Keep in mind overriding safety concerns. The utility must comply with national safety standards
 - doesn't want to be called in front of the PUC for extended outages after a storm because it failed to manage vegetation.
 - Utility will also enter property occasionally for inspections.
 - Traditionally, this work was done by truck or on foot and periodically on some lines by helicopter.
 - Technology advances may permit less intrusive inspections. Drones prevent inspectors from needing to climb pylons and don't require power lines to be disconnected.



Public Utility Easements and Eminent Domain Outline

I. Avoiding Power Lines

II. Negotiating Easement Terms and
Price

III. Condemnation with Public Utilities

IV. Living with Power Lines

V. Abandonment and Termination

VI. Questions

Abandonment and Termination

Can you ever get rid of a power line easement?

- At law, it can be hard to terminate a public easement.
 - Only two means are abandonment and the statutory vacating of a dedicated plat.
 - Abandonment is shown only by evidence that (1) relinquishment has transpired, and (2) there is present intent to permanently relinquish. Mere disuse is insufficient.
- Many utilities are willing to add abandonment clauses at the negotiations stage. These may include an obligation to remove unused facilities, a potentially valuable concession to the landowner.



Public Utility Easements and Eminent Domain Outline

I. Avoiding Power Lines

II. Negotiating Easement Terms and
Price

III. Condemnation with Public Utilities

IV. Vegetation Management and
Access

V. Abandonment and Termination

VI. Questions

Questions?

Stephanie S. Potter

Naman, Howell, Smith & Lee, PLLC
8310 North Capital of Texas Highway
Suite 490
Austin, Texas 78731
Phone: 512.479.0300
Fax: 512.474.1901

spotter@namanhowell.com

www.namanhowell.com