

Texas High Wires

A Balancing Act for Private Landowners

article by Lorie Woodward Cantu



Today, because of a confluence of factors, more landowners are finding themselves in the path of electrical transmission lines than ever before. Like most issues affecting private property rights, land use, and the law, it is important to be informed.

Competitive Renewable Energy Zones (CREZ)

Beginning in 1999 with Senate Bill 7, the Texas Legislature made a decision to position Texas as a leader in the production of wind energy. The combination of federal tax incentives and state mandates, including the Renewable Portfolio Standard, caused wind energy production to boom in Texas.

In 2006, Texas surpassed California as the nation's top producer of wind-generated electricity. Currently, the state has the ability to produce 8,000 megawatts annually, but the Electrical Reliability Council of Texas' system can only handle 4,500 megawatts. As a result, the wind energy production companies, which include some of the world's largest corporations, are "curtailed," meaning that they cannot introduce all the energy they produce into the system. The wind production companies can only earn federal production tax credits and sell renewable energy credits for electricity that actually enters the system, so there is a very strong incentive for the utility companies to press for additional transmission infrastructure.

"The renewable energy industry fundamentally changed the American business model, because success in renewable energy is based on government policy, not on profit," said Glen Webb, an attorney in Abilene who specializes in wind energy issues. "Congress is gambling that subsidizing renewable energy, which currently is not competitive with traditional energy sources, will pay off in the long-term. Whether they are right or not remains to be seen, but their bet is leaving a big footprint on the private lands of Texas."

While transmission lines are being constructed throughout the state, the mark of utility transmission lines will soon be very obvious throughout west Texas and the Panhandle. In response to a legislative mandate issued through Senate Bill 20 passed in 2005, the Public Utility Commission (PUC) designated five areas as Competitive Renewable Energy Zones (CREZ).



photo by Russell Graves

When a landowner signs the paperwork granting a transmission company an easement, it gives the utility unlimited access to the property, which could disrupt both wildlife and livestock.

The zones are part of a statutory plan to build single-circuit and double-circuit 345 kV lines to carry electricity from the Panhandle and west Texas to the metroplex and the I-35 corridor. Under the plan, an additional 2,334 miles of 345 kV transmission lines, capable of handling 18,456 megawatts, will be completed by 2013; with a 200 foot-right-of-way, the projects will impact 56,581 acres of potential wildlife habitat. The PUC has determined a maximum cost for the CREZ projects of \$4.93 billion.

“When this law passed, landowners were up in arms about the eminent domain provisions involving the Trans-Texas Corridor,” Webb, who also serves as TWA Treasurer, said. “Despite its huge potential to impact private property and change the face of Texas, Senate Bill 20’s massive transmission plan with large grants of eminent domain authority flew right under the radar. Now, landowners have to deal with it.”

Terry Hadley, PUC spokesman said, “The CREZ process is different, because the commission, under direction from the Legislature, actually chose areas for transmission line development and then allowed transmission service providers to bid on the projects within these areas.”

Traditionally, transmission service providers have owned and operated the power lines in a particular region of the state, suggesting and building lines as they have needed them.

In March 2009, the PUC selected eight transmission service providers to complete projects as part of the overall CREZ initiative.

“Now that the PUC has fulfilled the legislative mandates associated with CREZ, these transmission service providers will follow the same procedure that transmission service providers throughout the state have followed traditionally, but the CREZ projects have been given a priority status to ensure the lines are completed by 2013,” Hadley said.

The providers will lay out the specific routes, negotiate easement agreements with landowners, obtain PUC’s final approval in the form of a Certificate of Convenience and Necessity, and then build the transmission lines.

Certificate of Convenience and Necessity (CCN)

Before a transmission service provider can begin constructing a transmission line, it must be granted a Certificate of Convenience and Necessity (CCN) by the PUC. The CCN is important, because it

brings two things: the power of eminent domain and the power for the transmission service provider to charge back its costs for the project, plus earn a reasonable profit as provided in Section 36.051 of the Texas Utilities Code, part of Senate Bill 20.

Webb said, “Essentially, when the PUC grants a CCN, it makes a transmission service provider a representative of the state, granting the provider the state’s power of eminent domain to condemn private land *plus* the ability to charge all of their costs back to Texas electric consumers. Think about this: Senate Bill 20 grants the transmission service providers the power to take your property through eminent domain. But, if you as a landowner choose to fight them, you as an electric consumer will be subsidizing the cost of the very same transmission service provider that is taking your land through eminent domain.”

During the CCN application process, the provider must outline its route and provide a cost estimate. It is during this phase that landowners and interested parties have the opportunity to intervene by commenting on the routes, negotiating alternatives and possibly affecting the outcome of the process.



photos by D.K. Langford

Towers have to be big to support 345kV lines. Some are made of concrete, others are made of galvanized metal. The six-foot, 200-pound man and ATV next to the tower in the right photo give a sense of scale.

The Texas Parks and Wildlife Department (TPWD) also reviews the proposals to ensure providers are complying with all state and federal environmental laws. The PUC requires the consultants who conduct the environmental assessments for each project to submit a signed affidavit verifying that they have submitted their reports to TPWD for review. In a traditional CCN case, the deadline for issuing the final order is up to one year. By law, the CCN process for the CREZ cases must be completed within six months.

The transmission service providers usually hold town hall meetings to discuss the potential routes, but they are only required to directly notify parties who are potentially “affected” by the proposed lines, not those who are just “interested.” Interested parties must keep themselves up-to-date using filings posted on the PUC website or through required public notices in local newspapers.

Milton Greeson, a rancher near Victoria who unsuccessfully opposed the building of transmission line on his family’s property, said, “The best advice I can give anyone is to get involved in the process early, stay informed because the situation can change quickly, and develop suitable alternative routes that will pro-

vide the utilities a feasible option for relocation.”

Easements

An easement is the right to use another person’s real estate for a specific purpose, which in this case is the placement of electrical transmission lines. In legal terms, the property owners who are subject to easements are said to be “burdened” with the easement, because they are not allowed to interfere with the easements’ use.

Derry Gardner, president of the Gardner Appraisal Group in San Antonio, said, “Every property comes with a bundle of rights that belongs to its owner. When you grant an easement to a transmission service provider, you give them about 90 percent of the rights in your bundle for the land covered by the easement.”

In a perfect world, the transmission service providers will stick with already established corridors and, in fact, that is the government’s — including the PUC and the Texas Parks and Wildlife Department — preferred option. In reality, though, utilities and other transmission service providers constantly need new corridors to expand their service and increase their options for siting future

projects, Greeson said.

Gardner, who is a former TWA president, said, “If the government put a highway through the middle of your ranch, the land clearly would not be the same as before. You would ask: ‘What am I left with? What has been damaged?’ You need to ask the same sort of questions about power lines.”

Greeson added, “Once the proposed routes have been established, take time to consider how each one could affect your ranch operationally, visually, environmentally and economically. Whether you’re opposing the line or negotiating an acceptable agreement, you need to know exactly what you have and what its value is — economically and for the greater good.”

If landowners are trying to get the line relocated, it is important that the reasons offered for relocation are broader than “My family doesn’t want this line on our land,” Greeson said. The PUC and the utilities are hard to sway, so the reasons have to be compelling and, if possible, recognized as public benefits in their own right, he said. Examples include endangered species, unique habitat, significant archeological or historical sites, identified flyways or migratory corridors.



photo by D.K. Langford

Power transmission lines cut a 200-foot-wide swath through the land. By 2013, some 2,300 miles of new lines will affect more than 56,000 acres of potential wildlife habitat.

“When you’re dealing with the service providers, it’s important to remember that the transmission line has to go somewhere,” Greeson said. “And if it doesn’t cross you, it’s likely to cross your neighbors. You need to be aware of the potential for hostilities, if you don’t handle the negotiations and potential relocation with tact, care and regard for your neighbors.” Utilities prefer to use the least contentious routes, so if landowners and their neighbors can come up with an amenable alternative, the utilities are generally willing to listen, even if it means spending more money to re-route, Greeson said.

Considerations

Regardless of whether landowners are preparing to oppose a proposed power line or to negotiate an easement agreement, it behooves them to create an inventory of assets and potential damages.

“Information is power,” Greeson said. “I suggest creating a team that includes an informed attorney and/or a utility expert, someone who understands the industry and the inner workings of the PUC; environmental experts such as range managers or wildlife biologists and, if applicable, a field archaeologist to help you gather the best information possible.” For the purposes of negotiation, it is important to not

only identify potential resources, but to assign a reasonable monetary value to them, he said.

In Greeson’s opinion, the first thing that landowners need to determine is the likelihood of prevailing in a battle to have the power line relocated.

“We lost our battle with the utility and ended up with the transmission line running right down the middle of our ranch,” he said. “If I’d known that the chances of us prevailing were slim, I would have focused our resources and our energy on having the line sited in a much less obtrusive location.”

Even if landowners are optimistic about the chances of prevailing over the utility company, they should spend time considering the impact of the transmission line from every angle.

“Consider all the ramifications of any potential line,” Gardner said. “From strictly an economic standpoint, I’ve seen the presence of a transmission line lower the market value of a property by 20 percent to 35 percent. From a broader perspective, the lines change your land and the way you use it – forever.”

For instance, he said, during the construction phase, a ranch will be subjected to heavy traffic by heavy equipment,

which can damage ranch roads, cattle guards and low-water crossings. Unlike oil companies, utility companies do not build new roads for their use.

If there is damage to the land or to the infrastructure, the utilities are required to return the property to its original condition, Hadley said. But the damages have to be documented by the landowners if they are going to recover the damages, Gardner said.

Gardner listed other issues that landowners should consider:

Liability: Even though landowners have sold the easement to the transmission service provider, the landowners can be held responsible for injury or death sustained by any people constructing or working on the power line.

Damage outside of easements: During construction, it is likely that heavy equipment will maneuver outside the easement’s boundaries because of the sheer scope of the work, potentially damaging property that doesn’t “belong” to the transmission service provider.

Travel corridors: In south Texas, the utility right-of-ways, with their clear-cut corridors and highly visible towers, serve as “highways” for illegal immigrants and illicit drug trade.



photo by D.K. Langford

Build it and they will come: new transmission lines, new sources of electricity, new subdivisions, and thousands more people making demands on the land.

Wildfires: One of the leading causes of wildfire is sparks from electrical transmission lines. Their presence increases the likelihood of an uncontrolled burn.

Creation of “easement corridors:” The construction of a power line and its attendant easement creates a corridor for other easements. Several contiguous easements through a property can change the land’s character, making it more suitable for industrial or corridor-use. Plus, the service providers can hang additional lines, such as fiber optic cables, from the towers, increasing the company’s revenues, without benefiting the landowners.

Disruption of livestock and wildlife: The landowner has granted the utility unlimited ingress and egress, so it is possible that the traffic can disrupt feeding patterns of both livestock and wildlife.

The overall impact on wildlife is another consideration.

Kathy Boydston, leader of TPWD’s Habitat Assessment Program, said, “Linear projects such as transmission lines tend to fragment habitat more than other types of projects. Of course, the impact on individual species has to be considered on a case-by-case basis. What harms one species might actually help another.”

For example, in the case of clearing

utility rights-of-way, some species benefit from the additional edge created when the lines are cut through the brush, she said. Others are subject to more predation.

Although transmission service providers often prefer the ease of clear-cutting, TPWD offers guidelines that demonstrate how brush can be trimmed to benefit wildlife without interfering with transmission lines, Boydston said. If all of the native plants are removed, TPWD suggests replanting the area with natives to preserve the value of habitat and to help prevent invasive species from establishing themselves.

Of course, these are just guidelines but, if desired, landowners can possibly include them as part of an easement negotiation, she said.

Transmission lines seem to have inordinate impact on large birds, including waterfowl and raptors, she said. Raptors tend to perch on line and suffer from electrocution, but there are design guidelines available from TPWD for transmission service providers to help minimize this impact.

“Flying birds cannot differentiate between lines and the line of the horizon, which can lead to deaths by collision,” Boydston said. “If possible, transmission

lines should not be sited across creeks or riparian corridors where birds fly up and down.” If the lines have to cross creeks or riparian corridors TPWD recommends the lines be marked with bird flight diverters to help birds identify the presence of new lines, she said. TPWD provides specific guidelines to help transmission service providers site lines to help buffer wildlife from negative impacts.

In the case of lesser prairie-chickens, which live in the Panhandle, the transmission lines required through the CREZ process may further fragment their already diminished habitat, Boydston said. A Kansas study shows greater prairie-chickens, close relatives of the lesser prairie-chickens, tend to avoid areas with tall structures such as wind turbines and transmission lines, abandoning areas that were previously used for brooding and rearing chicks.

While it may seem that the impacts to wildlife are not significant, they are cumulative, Boydston said. In the case of the CREZ project, it could affect up to 56,000 acres of land. Because of the large footprint that transmission lines can leave across Texas, TPWD is considering creating a process for compensatory mitigation, she said.



photo by D.K. Langford

A bright side to dealing with private companies such as Next Era, which lack power of eminent domain, is their relative generosity to landowners, compared to companies with such power. Money received by this landowner enabled him keep the ranch in the family and make improvements, such as refurbishing this old stock tank.

“The department is charged with protecting the state’s natural resources, and we would be remiss if we didn’t recommend that the utility companies somehow compensate for these wildlife losses,” Boydston said.

In addition to the impact on wildlife, landowners should consider how the transmission line will affect their everyday operations.

“It’s important that landowners anticipate how the presence of the transmission lines and towers will change the way they do business daily,” Greeson said. “Look around and ask: ‘Will I have to move my working pens? My hay barn? My equipment shed? My water troughs? My feeders? My deer blinds? If so, how much will it cost to move them or rebuild them?’ If you want to recover those costs, they need to be documented and presented when you negotiate your easement.”

Gardner noted that landowners have one chance to negotiate an acceptable easement, and once the papers are signed, there is no going back to ask the transmission service provider for additional considerations or damages; therefore, it is important that the initial agreements cover as many eventualities as possible.

“You must position yourself to maximize the value of your property,” Gardner said.

Eminent Domain

Eminent domain is the power of the federal or state government to take private property for a public purpose, even if the property owner objects. Under the Fifth Amendment to the U.S. Constitution, the government can take property if it is for public use and the owners are “justly compensated” for their loss. Experts say that the phrase “justly compensated” is a point of contention in Texas.

David K. Langford, TWA’s Vice President Emeritus, said, “The U.S. Constitution says private land may be taken for public use if the owners are justly compensated. It does not say that private land may be taken for public use, unless it’s too expensive. Excessive expense is the primary justification utility companies give for their cut-rate offers.”

He continued, “In a nutshell – and in an act of ultimate unfairness – individual landowners, because of the misfortune of location, bear the burden of cost for society. Just compensation cannot happen in Texas as the eminent domain laws are written now, so the only way to ensure just compensation is to fix our state’s

eminent domain laws.”

Webb said, “Because the transmission service providers have the power of eminent domain, landowners start with their backs against the wall, and the service providers know it. Why should they pay fair market value when they can just take it from you?”

“The settlement offers are generally based on production value, not market value, and they don’t include damages. As a landowner, you don’t really have a choice — you can take the low-ball offer or you will find yourself in condemnation court.”

Landowners who choose to oppose the transmission service providers must complete an administrative process before their case ever reaches civil court, Webb said. While it might be tempting to tackle the process without legal counsel, it could be disastrous because one misstep during the administrative process can prevent the landowner’s right to appeal the administrative phase to a civil phase, he said.

Venue for a condemnation proceeding is the county where the land is located. The condemning authority’s (transmission service provider’s) burden is to prove that there is a public necessity for the eminent

domain and obtain a public necessity resolution from the condemning authority's Board of Directors.

"At this point, the condemning authority makes a final offer, and if the landowner refuses to accept it, the case then moves to court, but it's not a trial proceeding," Webb said. The judge, who can be a district judge or a county court-at-law judge, appoints three "special commissioners," who are disinterested parties charged with considering and assessing damages to the property being condemned. After hearing the evidence and assessing damages, the special commissioners must make a written statement of the damages and file the statement with the court on the day the decision is made.

If the landowner disagrees with the assessment of the special commissioners, the landowner may object and appeal the commissioners' decision. Upon filing objections, the commissioners' award is vacated and the judicial phase begins. But, at this point, the condemning authority clearly has the upper hand, because it can deposit an amount equal to the special commissioners' award with the court and take possession of the property, before the judicial phase ever begins.

"Right now, the process is stacked against landowners, but you are not helpless," Webb said. "Get informed and be prepared. The law of eminent domain is full of pitfalls for landowners. Without information and preparation, landowners will lose their property rights and lose just compensation for the loss of those rights."

Epilogue: A Private Alternative

While most transmission service providers in Texas apply for a CCN to obtain its attendant powers, there is one notable exception. Recently, Next Era Energy (formerly Florida Power and Light), the nation's largest domestic supplier of electricity, built a private transmission line from its Horse Hollow Wind Energy Center located near Abilene to Comfort.

The entire project was completed with private money – and without the power of eminent domain.

"I've always said that I'd rather do business with a company that didn't have eminent domain than one that did," Webb said. "And the experiences of landowners along this line bear out my opinion. Because Next Era did not have the power of eminent domain, landowners could say 'No' to the project. Landowners could walk away from the table until the com-

pany brought an offer that was acceptable." In many cases, the company was paying above market value for these lines *plus* damages, he said.

Next Era took this route, not because of a philosophical shift, but because, under the circumstances, it made good business sense, Webb said.

The production of the Horse Hollow Wind Energy Center, the world's largest wind farm, was curtailed because its production capacity exceeded the local transmission capacity, Webb said. As a result, Next Era was not receiving all of its benefits from state and federal policy: federal production tax credits and revenue from the sale of state renewable energy credits.

The company made a business decision that it would be better off compressing the traditional three-year time span for building a transmission line into an 18-month period, Webb said. Why? Because the faster the line was built, the faster the company would receive its benefits under state and federal law.

To expedite the process, the company negotiated exceptional easement agreements to avoid conflict along the route,

knowing that the additional tax credits would help the company recoup its investment in the long-term, he said. Plus, the company, not the state of Texas, would own the line and be able to count it among its assets.

"In this case, it made good business sense for Next Era to reach into its own deep pockets and construct the line," Webb said. "This one example doesn't signal a shift for the entire industry."

Notwithstanding the private line, Next Era created a subsidiary, Lone Star Transmission LLC, which has been awarded one of the CREZ priority projects. The company will be applying for a CCN to complete that line.

Gardner said, "The fact that Florida Power and Light through Next Era Energy was willing to include damages in their easement agreements is a landmark. Prior to this time, utilities refused to admit that the presence of a transmission line could result in damages. Now, the largest utility company in America has not only recognized that there could be damages, but has paid for them. It is a significant shift that could benefit landowners in the long run." 🐾



photo by D.K. Langford

A large pallet covers a freshly dug hole awaiting a tower on a line Next Era Energy is completing. It runs from the world's largest wind farm near Abilene to Comfort in Kendall County.