

**NO. 05-09-01500-CV**

IN THE COURT OF APPEALS  
FIFTH DISTRICT OF TEXAS  
DALLAS, TEXAS

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DALLAS AREA RAPID TRANSIT AND  
FORT WORTH TRANSPORTATION AUTHORITY,  
APPELLANTS

VS.

ONCOR ELECTRIC DELIVERY COMPANY LLC,  
APPELLEE

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APPEAL FROM COUNTY COURT AT LAW NO. 4  
DALLAS COUNTY, TEXAS

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BRIEF OF AMICUS CURIAE  
CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC

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## **IDENTITY OF AMICUS CURIAE<sup>1</sup>**

Amicus Curiae is CenterPoint Energy Houston Electric, LLC ("CenterPoint"). CenterPoint engages in the electric transmission and distribution business in a 5,000-square mile area of the Texas Gulf Coast that includes the city of Houston, serving more than 2.2 million customers. As of December 31, 2009, CenterPoint had 47,806 miles of distribution lines and 3,755 miles of transmission lines operating in nearly 100 municipalities, including the fourth largest city in the country. The Court's opinion in this case drastically impacts CenterPoint's ability to install such lines. It is CenterPoint's position that the trial court correctly denied the plea to the jurisdiction. CenterPoint is paying the fees associated with the preparation of this Amicus Brief.

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## **STATEMENT OF THE CASE**

- Nature of the Case: This is a condemnation case filed by an electric utility for an aerial easement for an electric transmission line over a rail line owned by a governmental unit. The fundamental issue in this case is whether a governmental unit can stop the construction of a large public work that will benefit many citizens by asserting governmental immunity.
- Trial Court: The trial court was County Court at Law No. 4, Dallas County, Texas, the Honorable Kenneth Tapscott presiding. The Plaintiff was Oncor Electric Delivery Company LLC ("Oncor"). The Defendants were Dallas Area Rapid Transit ("DART") and Fort Worth Transportation Authority ("The T"). DART and The T filed a plea to the jurisdiction asserting that the trial court did not have jurisdiction over Oncor's condemnation suit due to governmental immunity (C.R. at 29-38).
- Trial Court's Disposition: The trial court denied the plea finding that governmental immunity did not bar Oncor's condemnation suit, and DART and The T filed this appeal (C.R. 3, 156). This Court reversed the trial court's order on July 29, 2010. Oncor filed a motion for rehearing on August 12, 2010.

## **ISSUE PRESENTED (RESTATED)**

**ISSUE I** Texas has encouraged the development of reliable electric transmission and distribution systems by enacting broad statutes that give electric utilities the right to condemn property, specifically including "public property," by creating an agency with broad powers and jurisdiction to regulate the construction of a reliable transmission and distribution system, and by creating precedent that supports utilities' right to construct reliable systems. The trial court correctly denied DART's and The T's plea to the jurisdiction and governmental immunity defense because: 1) the Texas Utility Code grants Oncor the right to condemn any person's property; 2) courts have historically allowed utilities to condemn public property; 3) the term "person" includes governmental units; and 4) the opposite decision would end in an absurd result that has significant consequences for the citizens of Texas and the electric industry.

## **STATEMENT OF FACTS**

The Amicus Curiae adopts the statement of facts in the Appellee's Brief.

## **SUMMARY OF THE ARGUMENT**

This Court's opinion sets dangerous precedent that, unless corrected, will adversely impact the Texas electric transmission grid. The trial court correctly held that DART and The T were not entitled to stop progress on Oncor's construction of a high-voltage electric transmission line in Dallas County and/or hold Oncor hostage to ridiculous and arbitrary monetary demands, which would have to be paid by utility ratepayers. Rather, consistent with over 80 years of precedent, the trial court correctly determined that when a governmental entity stops being reasonable, another publicly-related entity – here, an electric utility – can condemn an easement and exercise the right to cross the governmental entity's property to construct an electric transmission line. That is also consistent with the fact that another governmental entity, the Public Utility Commission of Texas (the "PUC" or the "Commission"), has already found that North Texans need this new electric transmission line and that the route over DART's and The T's line is the best location for the needed facilities. The decision in this case has allowed DART and The T to create their own process for approving the construction of transmission lines in contravention of the PUC's exclusive, original authority. If this Court's precedent stands, DART and The T hold a "King's X" despite the PUC's decision that a particular route serves the public interest. This Court should reevaluate the important public policy issues concerned in this case and affirm the trial court's order.

## ARGUMENT

### **A. This Court's Opinion Violates The Rules Of Statutory Construction: An Electric Utility Has The Right To Condemn Public Land.**

The Court's determination that governmental immunity defeats an electric utility's condemnation right violates the rules of statutory construction. After taking into effect legislative history, the rules of statutory construction require a reasonable result and will not support an absurd one. The rules of statutory construction provide:

In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the:

- (1) object sought to be attained;
- (2) circumstances under which the statute was enacted;
- (3) legislative history;
- (4) common law or former statutory provisions, including laws on the same or similar subjects;
- (5) consequences of a particular construction;
- (6) administrative construction of the statute; and
- (7) title (Caption), preamble, and emergency provision.

TEX. GOV'T CODE ANN. § 311.023 (Vernon 2005). Courts presume that the Legislature intended a reasonable result when it enacted a statute. *See, e.g., Cardinal Health Staffing Network, Inc. v. Bowen*, 106 S.W.3d 230, 237-38 (Tex. App.—Houston [1st Dist.] 2003, no pet.). In fact, "where the application of the statute's plain language would lead to absurd consequences that the Legislature could not have possibly intended," courts will not apply the statutory language literally. *Korndorffer v. Baker*, 976 S.W.2d 696, 700 (Tex. App.—Houston [1st Dist.] 1997, pet. dism'd w.o.j.).

**1. Plain Language Of The Texas Utilities Code Provides For The Right Of Electric Utilities To Condemn Public Lands.**

The result in this case, that every governmental unit can stall or potentially stop an electric transmission line, is an absurd result that will have a significant impact on the transmission of electricity in Texas. Importantly, the result of this Court's opinion is not mandated by the language of relevant statutes.

**a. "In Rem" Condemnation Suits Do Not Implicate Governmental Immunity Concerns.**

Electric utilities have "the right and power to enter on, condemn, and appropriate the land, right-of-way, easement or other property of any person or corporation." *See* TEX. UTIL. CODE ANN. § 181.004. "An electric utility has the right to construct, maintain, and operate lines over, under, across, on, or along a state highway, a county road, a municipal street or alley, or other public property in a municipality." *Id.* at § 181.042. The Code Construction Act defines a "person" to include a "corporation, organization, government or governmental subdivision or agency...or any other legal entity." *See* TEX. GOV'T CODE ANN. § 311.005(2). The definition of a "person" applies "unless the statute or context in which the word or phrase is used requires a different definition." *Id.* at § 311.005.

DART and The T argue that they cannot be considered a "person" or "corporation" under the terms of section 181.004 of the Texas Utilities Code. In attempting to rely on these provisions, DART and The T exhibit a fundamental misunderstanding of governmental immunity and the nature of a condemnation proceeding. This condemnation suit is not the type of proceeding that triggers governmental immunity.

The Legislature views sovereign immunity as necessary to "preserve the legislature's interest in managing state fiscal matters through the appropriations process." *See* TEX. GOV'T CODE ANN. § 311.034 (Vernon 2009). Courts view sovereign immunity as necessary to "shield the public from the costs and consequences of improvident actions of their governments." *See Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006). These policies behind sovereign immunity are irrelevant in this case because this proceeding is not a suit for monetary damages.

Oncor filed this lawsuit to acquire an electric utility easement in accordance with the Texas eminent domain statutes. *See* TEX. PROP. CODE ANN. § 21.012. This is not a lawsuit against a governmental body where Oncor is seeking money damages. Rather, Oncor is trying to pay governmental bodies for the use of their property. This relief will not interfere with the management of the fiscal matters of DART or The T or any appropriations process and will certainly not require them to pay unforeseen costs or monetary liabilities. For this reason the authorities cited by DART and The T are inapposite because those cases all concern suits for monetary damages and do not discuss the issue of whether immunity applies to a condemnation proceeding.

Rather, a condemnation suit is not a suit for monetary damages or even one of *in personam* liability. "A condemnation proceeding is an *in rem* matter and is not a taking of rights of persons in an ordinary sense but is an appropriation of physical properties..." *State v. Rogers*, 772 S.W.2d 559 (Tex. App.—Amarillo 1989, writ denied) (citing *Reeves v. City of Dallas*, 195 S.W.2d 575, 581 (Tex. Civ. App.—Dallas 1946, writ ref'd n.r.e.)). Procedurally, Section 21.012 of the Texas Property Code requires a petition in

condemnation to name the "owner of the property." *See* TEX. PROP. CODE ANN. § 21.012. In such petitions, municipalities, counties, and other governmental entities are routinely named by condemning authorities as the holders of liens for property taxes and countless other matters. In other words, these governmental entities are only named because of their interest in the land. The *in personam* interests of these entities are not invoked by a condemnation proceeding. Under Appellants' theory, an absurd interpretation results whereby governmental entities can never be joined as parties to any condemnation proceeding.

This proceeding is not a suit to establish liability against DART and The T. Oncor named DART and The T as parties because the condemnation statute required the joinder of each of them as an "owner" of the subject property. *See* TEX. PROP. CODE ANN. § 21.012(b). Because this proceeding does not implicate governmental immunity, governmental immunity is not a bar to the trial court's jurisdiction over Oncor's claims.

**b. Texas Utilities Code Chapter 181 Waives Governmental Immunity.**

Although section 181 of the Texas Utilities Code and Chapter 21 of the Texas Property Code do not expressly state that "sovereign immunity to suit is waived," the statutes nevertheless plainly demonstrate legislative intent to waive immunity to suit. Courts may discern legislative intent to waive sovereign immunity from the words and context of the statute. *See* TEX. GOV'T CODE ANN. § 311.034; *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697-98 (Tex. 2003). Factors to consider are: (1) whether the relevant statute(s) waive immunity beyond doubt, such as when the provision in question

would be "meaningless unless immunity were waived," but resolving any ambiguities against a finding of waiver; (2) whether the Legislature requires the joinder of a governmental entity in a suit for which immunity would otherwise attach, and (3) whether the Legislature simultaneously enacted legislation limiting the governmental entity's potential liability. *See Taylor*, 106 S.W.3d at 697-98. Here, these considerations strongly favor a waiver of governmental immunity.

The first *Taylor* factor is met because the various statutes authorizing Oncor's eminent domain power plainly demonstrate Oncor's right and power to condemn the subject property. Oncor has the right and power to condemn the "property of any person or corporation." *See* TEX. UTIL. CODE ANN. § 181.004. "Person" includes "corporation, organization, government or governmental subdivision [...]." *See* TEX. GOV'T CODE ANN. § 311.005(2); *Fort Worth & W. R.R. Co. v. Enbridge Gathering*, 298 S.W.3d 392, 395 (Tex. App.—Fort Worth, 2009, no pet.) (governmental unit was considered "person"); *Crosstex N. Tex. Gathering, L.P. v. Fort Worth & W. R.R.*, No. 10-08-00204-CV, 2009 Tex. App. LEXIS 8733 (Tex. App.—Waco November 10, 2009, no pet.) (same). "Government" or "governmental subdivision" plainly includes DART and The T; in fact, they do not dispute they each are a "person" as defined in section 311.005(2) of the Texas Government Code.

Furthermore, section 311.034's provision that including governmental units into the term "person" does not, by itself, waive governmental immunity, does not mean that Oncor had no right to condemn DART's and The T's property. *See* TEX. GOV'T CODE ANN. § 311.034. That same section conditions itself on the fact that immunity is present

due to a concern about the expenditure of public monies, which as stated above is not present in this case. *See id.* Moreover, as explained below, this provision was intended to maintain prior law on immunity and was not intended to effectuate new law. The prior law in Texas was that utilities were entitled to condemn public lands. *See Humble Pipe Line Co. v. State*, 2 S.W.2d 1018 (Tex. Civ. App.—Austin 1928, writ ref'd).

Additionally, the Legislature granted Oncor the right and power to condemn public property. "An electric utility has the right to construct, maintain, and operate lines over, under, across, on, or along a state highway, a county road, a municipal street or alley, or other public property in a municipality." TEX. UTIL. CODE ANN. § 181.042.

The express references to various types of public property in the eminent domain statutes further indicate the Legislature's intent to waive immunity from suit. For example, in *State v. Montgomery County*, Montgomery County brought a condemnation suit against the State of Texas and the Texas A&M University System ("TAMUS") for title to a strip of land for a highway expansion project. 262 S.W.3d 439, 442-43 (Tex. App.—Beaumont 2008, no pet.). The State and TAMUS filed a plea to the jurisdiction, asserting, among other things, immunity from suit based on sovereign immunity. *Id.* at 441. The trial court denied the plea to the jurisdiction, and the court of appeals affirmed. The eminent domain statute in that case granted authority to condemn "public or private land, but not land used for cemetery purposes." *Id.* at 442. The court of appeals held that the express reference to "public" land clearly and unambiguously indicated legislative intent to waive immunity from suit as to governmental entities. *Id.*

Similarly, the specific grants of authority to Oncor to use public lands, coupled with the broad grants of power and the important public functions of electric transmission lines and utilities, support an implied legislative intent to waive a governmental entity's immunity from suit. Oncor has the right to build a power line on public property. Because DART and The T derive their rights over public land, as well as its immunity from suit, from the State of Texas, Oncor's implied power to condemn public property extends to lands belonging to DART and The T. *See Tooke*, 197 S.W.3d at 345 ("All governmental immunity derives from the State[.]"). Accordingly, the specific grants of authority to Oncor in section 181.001 *et seq.* of the Texas Utilities Code to use public lands necessarily imply Oncor's authority to use public lands belonging to DART and The T in order for Oncor to carry out its statutory authority and public service purpose.

Further, Oncor's broad grants of authority, including its express right to use "public property," would be meaningless if "public" lands in these statutes exclude lands belonging to transit authorities. Immunizing transit authorities from suit in condemnation proceedings would accomplish the same result as narrowly interpreting the eminent domain statutes. If governmental units can refuse an easement to an electric utility, and there is no right to condemn an easement, then utilities will not be able to fully exercise their statutory rights and powers or carry out their important public service functions. *See Humble Pipe Line Co.*, 2 S.W.2d at 1020; *Taylor*, 106 S.W.3d at 697-98. In fact, the entire industry—and the citizens it serves—would suffer.

The second and third *Taylor* factors also favor waiver of immunity. Section 21.012 of the Texas Property Code requires Oncor to join DART and The T each as an

"owner of the property," to a suit after they have refused to accept an offer for the purchase of its property by Oncor. See TEX. PROP. CODE ANN. § 21.012(b). See also *Elliott v. Joseph*, 351 S.W.2d 879, 884 (Tex. 1961) (all persons with an interest must be made a party for the condemning authority to have complete title); *Lo-Vaca Gathering Co. v. Earp*, 487 S.W.2d 789, 790 (Tex. Civ. App.—El Paso 1972, no writ) ("The failure of a condemnor to join an owner of an interest in the land renders ineffectual the proceedings as to interest of the party not joined."). Because DART and The T are required to be parties to this proceeding, the Legislature intentionally waived governmental immunity. See *Taylor*, 106 S.W.3d at 698. Finally, as noted earlier, the liability of DART and The T is not only objectively, but also absolutely, limited in this proceeding. Like any other landowner in a condemnation proceeding, DART and The T have absolutely no liability in the proceeding.

The *Taylor* factors demonstrate that the Legislature, via the Texas Utilities Code and the Texas Property Code, intentionally and unambiguously intended to waive a governmental unit's immunity in a condemnation proceeding. Based on these factors, which this Court did not analyze in its opinion, this Court should withdraw its opinion and affirm the trial court's denial of the plea to the jurisdiction.

**2. The Object Of The Texas Utilities Code Was To Encourage The Development Of Critical Infrastructure Such As Electricity.**

The Texas Utilities Code sought the objective of allowing electric utilities to construct electric transmission lines to serve the citizens of Texas. Since 1911, the Legislature has granted electric utilities like CenterPoint and Oncor the statutory power

of eminent domain. *See* TEX. UTIL. CODE ANN. §§ 181.001, *et seq.* The Legislature considers electric utility transmission and distribution systems to be "critical infrastructure." *See* TEX. PROP. CODE ANN. § 21.024 (Vernon 2007) (citing TEX. GOV'T CODE ANN. § 421.001).<sup>2</sup>

Courts have routinely upheld statutes giving rights to such companies over lands necessary for the public purposes for which they are organized. *See Cotulla v. La Salle Water Storage Co.*, 153 S.W. 711, 713 (Tex. Civ. App.—San Antonio 1913, writ ref'd). "The history of the many laws enacted by the legislature of this state relating to the exercise of the right of eminent domain clearly shows that it is the policy of the legislature to liberalize the exercise of the right, rather than restrict it." *See Brazos River Conservation & Reclamation Dist. v. Costello*, 143 S.W.2d 577, 578 (Tex. 1940); *Houston v. Adams*, 279 S.W.2d 308, 313 (Tex. 1955). The power of eminent domain "in effect constitutes a grant from the state to the property reasonably necessary for the particular purpose ..." for which the right was granted. *See Galveston H. & S.A. Ry. Co. v. City of Eagle Pass*, 260 S.W. 841, 844 (Tex. Comm'n App. 1924).

This Court previously recognized the importance of electric systems to the citizens of this district. In *Lewis v. Texas Power & Light Co.*, the trial court issued a temporary injunction to allow the company's engineers and surveyors to go on the property to create field notes for an easement right-of-way later to be condemned. 276 S.W.2d 950 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.). In a case of first impression, this Court held

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<sup>2</sup> "'Critical infrastructure' includes all public or private assets, systems, and functions vital to the security, governance, public health and safety, economy, or morale of the state or the nation." TEX. GOV'T CODE ANN. § 421.001 (Vernon 2003).

that the statute giving power companies the right to enter on, condemn, and appropriate lands also granted authority to enter to make preliminary surveys:

[T]he trial court no doubt weighed the relative convenience and inconvenience and the comparative injuries to the parties and to the public which would arise from the granting or refusal of this temporary injunction, and found the equities to lie with Appellee (Power Company). There can be little if any doubt that Appellee under the facts shown in this record is entitled to acquire easement rights over the Appellant's land, either by voluntary conveyance or by condemnation. That being so, the injuries suffered by Appellant from the survey will be small compared with the injuries suffered by the Appellee and the public if Appellee were denied the right to proceed with its preliminary survey . . . . The continuing growth and development in recent years of the area it will serve through the contemplated transmission line are matters of common knowledge. It is the duty of the Appellee as a supplier of light and power to the public to make timely preparation to meet such increased demands on its facilities. It would be reprehensible of Appellee to wait until "brown-outs" occur due to inadequate facilities before bestirring itself to expand and increase its plant and equipment to serve the public needs. In our opinion the trial court, after weighing the equities did not abuse its discretion in granting the temporary injunction.

*Id.* The Court held that due to the public need for reliable energy, a utility had the right via an interlocutory, temporary injunction to enter and survey another's land. Many other courts have similarly followed this precedent. The objective of Chapter 181 of the Texas Utilities Code is to allow an electric utility to construct a reliable electric transmission system, and this Court's opinion seriously undercuts that objective.

**3. The Circumstances Of The Enactment Of The Texas Utilities Code And Its Predecessor Statutes Confirm Broad Support For The Development Of Reliable Electric Systems.**

The statute's predecessors were enacted at a time when many areas of Texas did not have electric service and state government encouraged the development of electric utility systems to bring light and power to citizens of the State. In fact, there can be no

argument that the single most significant factor in changing, for the better, the lives of urban and rural Texans is the electrification of homes and businesses. This Court's opinion weakens the ability of electric utilities to construct transmission facilities where such facilities would cross any public property.

**4. Former Statute Confirms That Electric Utilities May Condemn Public Land.**

Historically, electric and gas utilities have had the right to condemn public lands, and there is no reason to interpret the current statute any differently. In *Humble Pipe Line Co. v. State*, a pipeline company sought to lay pipes across and upon State-owned tidal lands and waters. 2 S.W.2d 1018, 1019 (Tex. Civ. App.—Austin 1928, writ ref'd). The State of Texas sued for trespass to try title and to temporarily enjoin the company, contending that the pipeline company's eminent domain statute only authorized the company to lay pipes "under any public road or highway, street, railroad, canal or stream[...]," and that the company could only appropriate use of public lands outside those specifically enumerated by obtaining special permission from the Legislature. *Id.* at 1018, 1020. The trial court found that the company was trespassing and granted a temporary injunction against the company.

The court of appeals dissolved the temporary injunction and reversed and rendered judgment for the company. The court of appeals held that even though the pertinent eminent domain statutes did not specifically include the affected state lands, the broad and general language of the statutes granting the company the right to operate its pipelines "between different points in this state" and to "any distributing, refining, or

marketing center or reshipping point thereof, within this State," clearly indicated a legislative intent to grant to the pipeline company by necessary implication the use of any lands belonging to the state in order for the common carrier to carry out its statutory powers and purposes. *See id.* at 1021. The court noted that historically courts liberally construe express statutory grants of power to public service corporations to effectuate the purposes of the powers, including implying all powers necessary and proper for the execution of the express powers. *See id.* at 1019. The court reasoned that narrowly interpreting the statutes would not only frustrate the express, broad grants of authority to the pipe line company, but would frustrate the company from carrying out its important public functions and would unnecessarily limit and curtail the industry. *Id.* at 1020.

The *Humble Pipe Line* opinion applies with particular force in this proceeding. Oncor is an electric utility. The statutes at issue in the *Humble Pipe Line* case are substantially similar to the pertinent eminent domain statutes in this proceeding. *Compare* TEX. REV. CIV. STAT. ANN. art. 1497, 6018, 6020, 6022 (Vernon 1925) with TEX. UTIL. CODE ANN. § 181.004. Moreover, this Court must presume that the Texas Legislature knew of the precedent, and intended to continue it when it codified a utility's right to condemn in Texas Utilities Code Chapter 181 with virtually the same language that was in effect when *Humble Pipe Line* was decided. Indeed, if the Legislature had wanted to clarify that electric utilities did not have the right to condemn public land, then it certainly would have so stated, or at the very least have omitted references to electric utilities' right to condemn various types of public property. *See, e.g.,* TEX. UTIL. CODE ANN. § 181.042.

Moreover, the law in Texas has consistently applied the prior use doctrine to allow the taking of public land by condemnation. An authority seeking to condemn property already devoted to public use may do so if it will not destroy its existing use, and even if there is a destruction of current use, condemnation is still appropriate where the condemning authority shows that its intended use is of paramount public importance and that its purpose cannot be otherwise accomplished. *See Sabine & E. Tex. Ry. Co. v. Gulf & I. Ry. Co.*, 92 Tex. 162, 46 S.W. 784, 786 (1894). *See also In re Burlington N. & Santa Fe Ry. Co.*, 12 S.W.3d 891, 894 n.1 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding); *Fort Worth & Denver Ry. Co. v. City of Houston*, 672 S.W.2d 299, 300- 01 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). If a governmental unit has an absolute immunity defense to condemnation, then the prior public use doctrine is meaningless in Texas. This would place Texas out of the mainstream of jurisdictions in the United States, which allow for some version of a prior public use doctrine. *See* 1A-2 NICHOLS ON EMINENT DOMAIN § 2.17 (2010).

The right of a condemning authority to take public land is implicit in the general grant of eminent domain power where such grant is meaningless without such ability:

There are many cases in which land in public use may unquestionably be taken under a general delegation of the power of eminent domain. Express authorization to impair or destroy the prior use is the best authority, but is not required if the nature of the proposed use is such as to confer the power by necessary implication. A public way, whether it be a highway, a railroad, or a canal, cannot in the nature of things be constructed for any considerable distance through an inhabited country without crossing other public ways. Accordingly, general authority to lay out and construct public ways and to take the necessary land justifies the condemnation of crossings over other ways so far as it can be done without destroying the use of the

original way, and subject to the condition that the power is to be exercised so as to interfere as little as possible with the original use.

*Id.* Examples where under the prior public use doctrine a condemning authority may condemn prior public lands include the ability of a highway, railway or pipeline to cross a canal, other highway, turnpike, or railroad. *See id.*

For example, the Texas Supreme Court held that a school district had the implied right to condemn portions of a city park by a general grant of eminent domain authority. *See Austin Indep. Sch. Dist. v. Sierra Club*, 495 S.W.2d 878, 882 (Tex. 1973). The Court held that the lower court had jurisdiction over the condemnation action and could address the prior public use doctrine in exercising its jurisdiction:

By the express terms of Sec. 23.31, V.T.C.A., Education Code, the District is vested with "power by the exercise of the right of eminent domain to acquire the fee simple title to real property." This authorizes the District to condemn land and to invoke the eminent domain jurisdiction of the County Court at Law, but the statute does not expressly empower the District to condemn property already devoted to a public use. In these circumstances and when the condemnation will practically destroy the use to which the property has been devoted, the power will not ordinarily be implied from a general power conferred by statute. The power will be implied, however, where the necessity is so great as to make the new enterprise of paramount importance to the public and it cannot be practically accomplished in any other way. It is clear then that the question of the District's right to condemn the school site under the facts and circumstances of the case does not go to the jurisdiction of the County Court at Law but was a matter to be resolved by that court in the exercise of its jurisdiction.

*Id.* *See also Canyon Reg'l Water Auth. v. Guadalupe-Blanco River Auth.*, 258 S.W.3d 613, 617 (Tex. 2008). Therefore, this Court's precedent effectively overrules this long standing doctrine, which has been endorsed and applied by the Texas Supreme Court.

Under this Court's precedent, condemning authorities never get to argue prior public use because governmental units can simply assert governmental immunity. In that vain, the prior public use doctrine is a judicial doctrine that allows competing public entities (government vs. utility) to come to court, explain the dispute, provide evidence, and explain which side has the best use of the public's property. But that will not happen anymore. Rather, under this Court's precedent, a governmental unit (the executive branch) will be the sole, exclusive decision maker behind which use is paramount. If a governmental unit thinks that it does not want an electric transmission line over its property, even though it has no impact on the use or function of the property, then "King's X" there will be no transmission line built. The issue is done. The utility and the PUC have no ability to go to the third branch of government, the judicial branch, and seek a fair and reasonable outcome. Therefore, this Court's opinion has impaired the judicial branch's jurisdiction and ceded that to any number of governmental units, who do not have the specialization to deal with the complicated issues involved in planning an electric transmission line.

**5. The PUC's Jurisdiction And Oversight Of The Development Of Electric Transmission Systems Supports A Utility's Ability To Condemn Public Land.**

**a. This Court's Decision Disregards The Comprehensive Regulatory System Created By The Public Utility Regulatory Act ("PURA") To Protect The Public Interest And Assure Rates, Operations And Services Are Just And Reasonable To Customers And To Electric Utilities.**

Under PURA, the Texas Legislature granted the PUC authority to make and enforce rules necessary to protect customers of "electric services consistent with the

public interest." TEX. UTIL. CODE ANN. § 11.002(c). The Commission "has the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by [PURA] that is necessary and convenient to the exercise of that power and jurisdiction." *Id.* at § 14.001. Under PURA, the Texas Legislature intended to establish a comprehensive and adequate regulatory system for electric utilities to assure rates, operations and services that are just and reasonable to the consumers and to the electric utilities. *Id.* at § 31.001(a).

The Commission is composed of three commissioners who are appointed by the Governor with the advice and consent of the Texas Senate and serve staggered, six-year terms. *Id.* at § 12.051. Before taking office, each commissioner must complete a training program regarding:

- (1) the enabling legislation that created the Commission and its policymaking body to which the commissioner is appointed to serve;
- (2) the programs operated by the Commission;
- (3) the role and functions of the Commission;
- (4) the rules of the Commission with an emphasis on the rules that relate to disciplinary and investigatory authority;
- (5) the current budget for the Commission;
- (6) the results of the most recent formal audit of the Commission;
- (7) the requirements of Chapters 551, 552, and 2001, Government Code;
- (8) the requirements of the conflict of interest laws and other laws relating to public officials; and
- (9) any applicable ethics policies adopted by the Commission or the Texas Ethics Commission.

*Id.* at § 12.059. The commissioners may not engage in certain prohibited relationships and activities that are set forth in detail in sections 12.053(b), 12.054, 12.055 and 12.151 to 12.156 of PURA. Commissioners may not seek nomination or election to another civil office of this state or of the United States and must avoid certain proscribed conflicts of interest. *See id.* at §§ 12.055, 12.152.

The Commission has exclusive, original jurisdiction over the rates, operations and services of an electric utility. *See, e.g.,* TEX. UTIL. CODE ANN. § 32.001. Those terms have broad and most-inclusive meanings, and include the location and placement of electric facilities. *See id.* § 11.003(16), (19). *See also City of Allen v. Public Util. Comm'n. of Tex.*, 161 S.W.3d 195, 207-08 (Tex. App.—Austin 2005, no pet.) (holding city's ordinances directing, *inter alia*, electric utility's line placement and location of electric facility installation were attempts to regulate the utility's "service" and "operations" to its customers under definitions of PURA). Courts have observed that "the jurisdiction of the commission extends not only to rates ... but to every aspect of an electric utility's operation." *City of Allen*, 161 S.W.3d at 207-08 (citing Robert A. Webb, *The 1975 Texas Public Utility Regulatory Act: Revolution or Reaffirmation?*, 13 HOUS. L.REV. 1, 14 (1975)).

The Legislature has expressly charged the Commission to determine whether a certificate for a transmission line should be issued. TEX. UTIL. CODE ANN. §§ 37.051, .053, 0.56. The Legislature has also set forth the standards the Commission must consider in making that determination. *Id.* § 37.056. These factors are stated in the broadest possible terms and are intended as legislative standards to guide the Commission

in its administration of the certification process. *See Pub. Util Comm'n v. Texland Elec. Co.*, 701 S.W.2d 261, 266 (Tex. App.—Austin 1985, writ ref'd n.r.e.). The general purpose behind the certification requirement is "to provide for a rational distribution of public utility service within defined geographical areas" so that, within a specific area, the provider of utility service is "unhampered by competitive forces." *Id.* (citing Toben, *Certificates of Convenience and Necessity under the Texas Public Utility Regulatory Act*, 28 BAYLOR L.REV. 1115, 1116 (1976); *Amtel Commc'ns, Inc. v. Public. Util. Comm'n of Tex.*, 687 S.W.2d 95 (Tex. App.—Austin 1985, no writ)).

As a general rule, administrative agencies possess by implication such powers as may be necessary to effectuate the legislative objectives which underlie the administrative powers expressly conferred upon them. *Texland Elec.*, 701 S.W.2d at 269. Because administrative agencies are given their statutory powers with a view to achieving legislative purposes more fully and effectively through the agency's specialized judgment, knowledge, and experience, the methods chosen by the agency, and its interpretation of the statute it is required to administer, are entitled to judicial respect. *Id.* Moreover, courts have noted that the Commission has been given more control than some other agencies over the ultimate disposition of its cases. *See Hammack v. Public Util. Comm'n*, 131 S.W.3d 713, 723-24 (Tex. App.—Austin 2004, pet. denied) (citing TEX. UTIL. CODE ANN. § 14.051); *S.W. Pub. Serv. Co. v. Public Util. Comm'n*, 962 S.W.2d 207, 214 (Tex. App.—Austin 1998, pet. denied). This especially makes sense in the public-utility arena, because public-utility matters are frequently complex, often involving objective evidence more conducive to review on a written record than evidence

such as live-witness testimony and its attendant credibility concerns. *See Hammack*, 131 S.W.3d at 724; *S.W. Pub. Serv.*, 962 S.W.2d at 214.

It is the Commission's task to assess competing policies and determine what is in the public interest. *See Amtel Commc'ns*, 687 S.W.2d at 99. The Legislature intended the Commission to make whatever accommodations and adjustments necessary when determining what is in the public interest. *See id.* at 101. In balancing these considerations, the Commission is required to exercise its expertise to further the overall public interest. *Texland Elec.*, 701 S.W.2d at 266. The Commission has wide discretion in determining what factors to consider when deciding whether something serves the public interest. *See El Paso Elec. Co. v. Public Util. Comm'n*, 917 S.W.2d 846, 856 (Tex. App.—Austin 1995), *judgm't withdrawn and cause dismiss'd by agr.*, 917 S.W.2d 872 (Tex. App.—Austin 1996, no pet.).

The Commission considers the public interest when deciding whether to grant a certificate to an electric utility to install, operate, or extend a transmission line. *See* TEX. UTIL. CODE ANN. §§ 37.051-.061. An electric utility must apply to the Commission for a certificate. *See id.* at § 37.053. The Commission will approve the application and grant a certificate only if it finds that the certificate is necessary for the service, accommodation, convenience, or safety of the public. *See id.* at § 37.056(a). In reviewing the application, the Commission must consider:

- (1) the adequacy of existing service;
- (2) the need for additional service;

- (3) the effect of granting the certificate on the recipient of the certificate and any electric utility serving the proximate area; and
- (4) other factors, such as:
  - (a) community values;
  - (b) recreational and park areas;
  - (c) historical and aesthetic values;
  - (d) environmental integrity;
- (e) the probable improvement of service or lowering of cost to consumers in the area if the certificate is granted; and
- (f) to the extent applicable, the effect of granting the certificate on the ability of this state to meet certain renewable energy goals under section 39.904(a) of this title.

*Id.* at § 37.056(c). The Commission's review and consideration of these factors nearly always involves fully contested proceedings, involving a number of public and private interested parties, in which the full panoply of statutory mandated issues are vetted and considered before a utility's certificate request is granted. DART, The T, and other interested governmental bodies have the opportunity to participate in such proceedings and express their opinions regarding the need and appropriate routing of requested utility transmission facilities. For example, during the proceedings at the Commission regarding the transmission line that is the subject of this dispute, the City of Dallas was significantly involved and provided testimony regarding the location and manner of construction of the requested transmission line (C.R. at 106-107, 112, 114-15). In fact, the Mayor of Dallas personally appeared before the Commission in this CCN on at least two occasions. If DART and The T chose not to participate in the Commission

proceeding regarding the route of the transmission line at issue in this case, that was their choice.

It is not contested by DART or The T that the Commission considered all of the factors set forth in PURA § 37.056(c) and properly determined that the certificate requested by Oncor was necessary for the service, accommodation, convenience, or safety of the public. As discussed below, this Court's decision allows the governing bodies of DART and The T to substitute their arbitrary decision in place of the well-considered determination of the Commission that Oncor was entitled to a certificate consistent with the public interest. This Court's precedent grants to DART, The T, and other governmental units unilateral veto power to stop the construction of electric transmission lines and directly interferes with the PUC's determination on routing.

**b. If Governmental Units Have Governmental Immunity From Condemnation, Electric Utilities May Have To File Multiple And Possibly Endless Applications With The Commission And Will Incur Exorbitant Costs That Will Ultimately Be Paid By The Consumers Whose Interests The Texas Legislature And The Commission Sought To Protect In The First Place.**

DART and The T claim that they do not seek to alter the route of Oncor's transmission lines or to challenge the Commission's order. However, according to Appellants, Oncor only has two choices: (1) make an agreement with DART and The T by paying them whatever monetary consideration is demanded for the crossing; or (2) obtain legislative consent to bring suit to condemn the subject aerial easement. The record is unclear as to whether Oncor will ever be able to reach an agreement with DART and The T, and the Texas Legislature, which is only in session for 140 calendar days

every two years, is certainly not obligated to grant Oncor consent to sue simply upon request. In effect, following a decision by the PUC granting Oncor an amendment to its certificate to construct and operate transmission facilities that are needed for the reliable operation of the North Texas transmission grid, Oncor would then be subject to the mercy of DART and The T as to whether such facilities can actually be constructed. Thus, this Court's decision places CenterPoint and all other electric utilities at the mercy of entities like DART and The T in order to construct and operate transmission facilities that are needed for the reliable operation of the State's electric system. Electric utilities such as Oncor or CenterPoint will have no certainty or predictability when they acquire a certificate from the PUC that they will actually be able to build or extend transmission facilities which the Commission has already determined are needed, especially in heavily congested metropolitan areas such as Dallas and Houston.

DART is governed by a 15-member board appointed by member-city councils based on population. Eight members are appointed by the City of Dallas, and seven are appointed by the remaining cities. Board members serve two-year terms with no limits.<sup>3</sup> The T, on the other hand, is governed by a nine-member board of directors with eight appointed by the Fort Worth City Council and one by the Tarrant County Commissioners Court.<sup>4</sup>

The board members of DART or The T are not required to participate in the same training program and are not subject to the strict provisions in Chapter 12 of PURA

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<sup>3</sup> See DART Agency Overview December 2009, <http://www.dart.org/about/dartoverviewdec09.pdf> (last visited Sept. 5, 2010).

regarding conflicts of interest or prohibited relationships and activities that govern the qualifications and conduct of the three PUC commissioners. Further, neither DART nor The T board members have any specific training or background regarding the need or routing of electric transmission facilities. The Court's decision allows local governmental bodies like DART and The T to regulate if, when, and where electric utilities construct transmission lines. The preference for state-wide regulation by the PUC over local regulation motivated the Texas Legislature to enact PURA in 1975. "Local regulation was said to be inconsistent, inadequate, and insensitive to ratepayers." Jack Hopper, *A Legislative History of the Public Utility Regulatory Act of 1975*, 28 BAYLOR L. REV. 777, 781 (Fall 1976). "The solution to the problems and proposal for change most often advocated was the creation of a state utility commission." *Id.*

An examination of DART's website reveals that it operates 48 miles of light rail transit in Dallas and surrounding cities and jointly operates the Trinity Railway Express—a 35-mile commuter rail transit linking downtown Dallas and Fort Worth—with The T. Further, DART is currently working to double its rail system to 90 miles and will have as many as eleven rail lines coming into downtown Dallas.<sup>5</sup> According to DART's own maps, it will be physically impossible to cross through Downtown Dallas without crossing multiple rail lines belonging to DART. *See id.* Of course, DART's maps do not show the multitude of other governmental bodies that may own public property that would need to be crossed by an electric utility in order to build a

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<sup>4</sup> See The T's Fact Sheet, <http://www.the-t.com/LinkClick.aspx?fileticket=AHEnaBTQU2o%3d&tabid=218> (last visited on Sept. 5, 2010).

<sup>5</sup> See <http://www.dart.org/about/dartoverviewdec09.pdf> (last visited on Sept. 5, 2010).

transmission line in accordance with a certificate granted by the Commission. Regardless, this Court's decision allows the 24 combined board members of the DART and The T to substitute their decision about the public interest in lieu of the well-considered decision of the Commission.

The same scenario exists in the heart of the City of Houston where existing and planned light rail lines belonging to METRO, Houston's transit authority, and other public property are situated. One METRO rail line currently runs from downtown Houston south to Reliant Center for about 7.5 miles and five more rail lines are planned, which will completely encircle the downtown area and make it virtually impossible to construct or extend a transmission line without crossing METRO property.<sup>6</sup> Thus, if this Court's decision is upheld, CenterPoint potentially will be at the mercy of METRO's board in order to construct and operate needed transmission facilities, even though the Commission will have decided, after carefully considering an application in light of the statutory factors, that CenterPoint's line serves the public interest and should be routed across METRO property.<sup>7</sup>

Whether it is Oncor in Dallas or CenterPoint in Houston, an electric utility will face the danger of having to apply for a certificate at the Commission, incur the expense of that proceeding, obtain the certificate and commence right-of-way acquisition and

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<sup>6</sup> See METRORail Transmit Map, <http://www.gometrorail.org/external/content/document/2491/468583/1/METRORail%20SystemMap1%2027%202010.pdf> (last visited Sept. 5, 2010).

<sup>7</sup> The METRO Board of Directors has nine members. Five are nominated by the mayor of Houston and confirmed by Houston City Council. Two are appointed by the mayors of METRO's 14 member cities. Two are nominated by the Harris County judge and confirmed by the Harris County Commissioners Court. METRO Board of Directors, <http://www.ridemetro.org/AboutUs/BoardDirectors.aspx> (last visited Sept. 5, 2010).

construction activities only to find out that a governmental entity like DART, The T, or METRO has decided to oppose the project by asserting sovereign immunity after strategically deciding not to intervene in the utility's certification proceedings at the Commission. At best, the electric utility will then have to file another application for a certificate for an alternate route (if such a route can be delineated), involving further utility costs that must be paid for by utility ratepayers, and very likely confusing and angering other parties to the initial PUC certification proceeding in which the initial route was selected. The electric utility will have to start the process all over again possibly with other governmental entities that choose to stay out of the Commission proceeding and simply assert sovereign immunity during subsequent right-of-way acquisition proceedings to stall or possibly kill the project. This outcome is not what the Texas Legislature intended when it established exclusive, original jurisdiction in the Commission over utility rates, operations and services, as well as a "comprehensive and adequate regulatory system for electric utilities to assure rates, operations, and services that are just and reasonable to the consumers and to the electric utilities." TEX. UTIL. CODE ANN. §§ 31.001(a), 32.001.

If governmental units can use the power to block projects to extort a large and unreasonable fee for the use of the property, this tactic will greatly increase the overall cost of projects. That cost will be passed down to ratepayers. Moreover, under this Court's precedent, governmental entities will essentially get to "tax" the utility, who in turn have to pass that "tax" onto customers/citizens outside of the governmental unit's jurisdiction. This Court's opinion allows governmental units to hold utilities hostage so

that the governmental units can effectively levy taxes on citizens outside of their jurisdictions. Governmental units should just increase their taxes outright instead of by ransom.

Finally, case law is clear that governmental units cannot "regulate" the construction of an electric transmission line due to the PUC's jurisdiction. *See City of Allen v. Pub. Util. Comm'n of Tex.*, 161 S.W.3d 195 (Tex. App.—Austin 2005, no pet.). This Court did not disagree. Rather, this Court's precedent essentially stands for the proposition that governmental units cannot exercise their police power to regulate the construction of an electric transmission line but those same units can outright block the line altogether. This dichotomy will certainly allow governmental units to extort "regulation" concessions that violate the PUC's exclusive jurisdiction in exchange for a consent to build. This directly conflicts with PUC authority and jurisdiction.

**6. This Court's Opinion Could Impact The Reliability of the Electric Grid.**

If this Court's opinion is correct, then electric utilities have no real right to eminent domain in Texas. If this Court is correct, electric companies will have to avoid a patch work of municipalities and other governmental units all over Texas who may arbitrarily decide to oppose new transmission lines that have already been determined needed by the PUC. Further, it may be impossible in heavily congested service areas to avoid these types of entities. Companies will not be able to construct new lines without having to face the risk of multiple PUC proceedings and numerous right-of-way acquisition lawsuits. This result is opposite from the public policy in Texas and the statutory grant of

eminent domain to electric companies and would be detrimental to the customers that PURA protects.

If transmission facilities that have been requested and determined by the Commission to be needed for the reliable operation of the transmission grid are not able to be constructed and operated, the precedent in this case could have significant reliability implications for the State's electric grid. Under the prior *Humble Pipe Line* precedent and a plain reading of the Texas Utilities Code, Texas has experienced monumental development and has a very reliable electric transmission and distribution system. The reliability of that system may be in jeopardy in the future if utilities are not able to certificate, construct, and operate transmission facilities across publically owned land—land that encircles many of Texas's metropolitan areas, including, principally, Dallas and Houston. This Court should withdraw its opinion in this case affirm the trial court's denial of DART's and The T's plea to the jurisdiction.

### **CONCLUSION AND PRAYER**

Electric utilities have the right of condemnation: to build and maintain electric lines for our society's well being and our nation's defense. The precedent in this case allows small governmental units, only looking out for their own myopic self-interests, to delay and effectively stop a large, important public work like the electricity transmission line in this case. The result of giving governmental units a "King's X" power is inconsistent with the public policy of this state as set forth in PURA and is not legally correct. For the reasons stated in this brief, Amicus Curiae request this Court to affirm

the trial court's order, and grant Appellee all other relief to which it is entitled in either law or equity.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned certifies that on this 10<sup>th</sup> day of September, 2010, the above document was served via Certified United States Mail, Return Receipt Requested, on all parties or their attorneys of record listed below pursuant to the Texas Rules of Appellate Procedure:

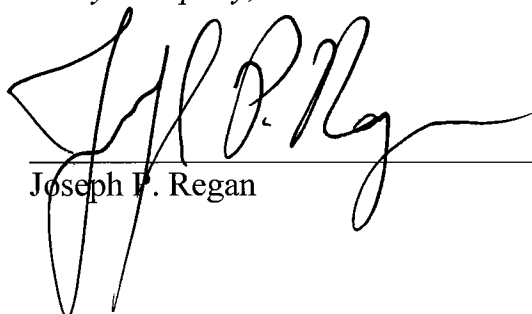
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