

SUBJECT: Allowing construction of facilities across a railroad right-of-way

COMMITTEE: Energy Resources — committee substitute recommended

VOTE: 5 ayes — West, E. Jones, Canales, Delisi, B. Keffer

1 nay — Crabb

1 absent — Farabee

WITNESSES: For — James Mann, Texas Pipeline Association; Terry Mock, Colonial Pipeline Co.; Ben Sebree, Texas Oil and Gas Association; Cameron Smallwood, Texas Electric Cooperatives; Tommy Weathersbee, Association of Electric Companies of Texas; Alan Wurtz; *(Registered but did not testify:)* Marty Allday, Copano Energy and Enbridge Energy; Jose Camacho, Valor Telecom; Kinnan Golemon, Devon Energy and Shell Oil; Kathy Grant, Texas Cable and Telecommunications Association; Jim Grover, Texas Telephone Association; William Nikolis, TEPPCO; Patrick Nugent, Texas Pipeline Association; Kym Olson, El Paso Corp.; Patrick V. Reinhart, SBC; Bill Stevens, Texas Alliance of Energy Producers; Shayne Woodard, Duke Energy and Sunoco

Against — Steven George, Self and Texas Short Line and Regional Railroad Association; Alan D. Hegi, Burlington Northern and Santa Fe Railway Co.; Hugh L. McCulley, Texas Railroad Association, Port Terminal Railroad Association, and Union Pacific Railroad; Christine M. Smith, Union Pacific Railroad; *(Registered but did not testify:)* Blaine Bilderback and Dennis Kearns, Burlington Northern and Santa Fe Railway Co.; Ron M. Olson, Union Pacific Railroad; Joe Bill Watkins, Kansas City Southern Railroad

BACKGROUND: Property Code, ch. 21 governs eminent domain authority. Sec. 21.012 allows a party with eminent domain authority, such as the U.S. government, the State of Texas, or a corporation to begin a condemnation proceeding if the entity wants to acquire real property for a public use but cannot agree with the property owner on compensation for the property. Sec. 21.042 states that the value of a condemned tract or parcel is the local market value of the property at the time of the assessment hearing.

Natural Resources Code, sec. 111.002 defines a common carrier as the owner, operator, or manager of a pipeline that transports crude petroleum or coal to the public or to any distributing, refining, or reshipping point in the state. Sec. 111.019 gives a common carrier the right of eminent domain. Sections of the Utilities Code also grant eminent domain to public utilities.

DIGEST:

CSHB 2006 would authorize a utility, common carrier, or energy transporter to build and maintain facilities along, over, under, or across a railroad or railroad right-of-way. The bill would define an energy transporter as a pipeline used for gathering or transporting oil or gas that is not subject to the same regulation as a common carrier or a utility. It would define a utility as a gas, water, electric, telecommunications, or municipally owned utility or an electric cooperative.

Eminent domain. In the absence of an agreement to use a railroad right-of-way, CSHB 2006 would grant a utility, common carrier, or energy transporter the right to use that right-of-way by exercising eminent domain. A utility or common carrier would have to notify the railroad of its intent to build, maintain, or operate such facilities and would have to comply with all applicable state and federal safety regulations. The utility or pipeline company could not interfere unreasonably with the railroad's operations.

The right of a utility, common carrier, or pipeline to build along a railroad or railroad right-of-way would apply to facilities that did not run parallel to the railroad for a distance of more than 500 feet within any one-mile section of the railroad.

Compensation. Damages due the railroad would be the market value of the property, determined immediately before and immediately after the taking. The property could not be valued at more than the valuation of real property adjacent to the right-of-way. The railroad also could recover costs for providing flagging services, for interference with railroad operations, and for repairing damages caused by the construction or maintenance. This payment would be the only payment due the railroad by the utility, common carrier, or pipeline for the perpetual use of the property.

Negotiation process. A utility, common carrier, or pipeline could obtain a license to use a railroad right-of-way by paying a one-time fee based on an

agreement between two parties or a mutually acceptable third-party determination of market value.

During a negotiation on condemnation or purchase of a right-of-way, a utility, common carrier, or pipeline could not be required to remove existing facilities if those facilities initially were located in the right-of-way with agreement of the railroad.

Notification and relocation rights. A railroad could require a utility, common carrier, or pipeline to provide notice of any construction that would interfere with its operations. The railroad also could require the utility, common carrier, or pipeline to relocate any portion of the planned facility not in the public right-of-way that would interfere with railroad operations if an alternate route was available, if a reasonable amount of time was provided, and if the railroad reimbursed the operator for the cost of relocation, unless otherwise provided in an existing agreement.

Proof of ownership. If a railroad required a utility, common carrier, or pipeline to obtain its permission to use a right-of-way, the railroad would have to produce its title to the property in question. If the railroad could not produce such documentation, the utility, common carrier, or pipeline would owe the railroad no compensation for using the property but would have to reimburse the railroad up to \$250 for the cost of producing the title.

Indemnity agreements. Any indemnity agreement between an operator and a railroad would be void if the agreement claimed to indemnify a railroad or agent against loss, liability, or damage resulting from gross negligence on the railroad's or agent's part or required the utility, common carrier, or pipeline to buy insurance for the railroad or agent against any loss, liability, or damage resulting from the railroad or agent's gross negligence.

Prohibitions. A railroad could not interfere with the right of a utility to cross a railroad right-of-way that was not restricted or require a utility to pay a fee to cross a railroad right-of-way that was on a public right-of-way.

Exemptions. Inclusion of an energy transporter in the bill's provisions would not subject the entity to regulation as a utility or common carrier. Inclusion of a common carrier would not subject it to regulation as a utility.

The bill would take effect September 1, 2003.

**SUPPORTERS
SAY:**

CSHB 2006 would provide utilities, common carriers, and energy transporters relief from unreasonable fees demanded by railroads for a pipeline to cross a railroad right-of-way. To transport products to market, utilities and pipelines often cannot avoid the rail lines that crisscross Texas. An operator often has no choice but to pay a fee to cross a rail line, even if the railroad charges an excessive fee. This bill would level the playing field and ensure that utilities and pipeline companies were not held hostage and forced to pay exorbitant prices to transport fuel and energy to the people of Texas.

Utilities and pipelines are subject to costly, abusive practices by railroads, and they pass on these costs to Texas consumers in the form of higher prices for energy. In recent years, fees for construction in railroad rights-of-way have skyrocketed as the industry has exploited this unchecked revenue source. Fees have increased by a factor of 20 or more in a few years, and administrative delays have slowed infrastructure expansion. CSHB 2006 would force railroads to stop these unfair actions, benefiting citizens and businesses across the state.

While a utility or pipeline could redirect a line away from the land of an individual who demanded an unreasonable fee, they often have no choice but to cross a railroad line. For this reason, railroads inherently enjoy an unfair advantage in negotiations. CSHB 2006 would correct this disadvantage by clarifying when utilities and pipelines could condemn the land of railroads that did not negotiate in good faith.

CSHB 2006 would create a healthier atmosphere for negotiating right-of-way fees and would lead to fewer property condemnations. It would establish a clear process requiring a utility or pipeline to notify a railroad about its intent to build facilities in a railroad's right-of-way. If the construction were to cause disruption of service, the railroad could require the project to relocate. The bill would encourage the two parties to sit down together and determine a mutually acceptable fee for the pipeline's use of the right-of-way.

The valuation of acquired property under this bill would follow accepted and established eminent-domain procedures. A utility or pipeline acquiring property would have to pay the market value on land directly adjacent to the

land it was acquiring, and this value would be determined by measuring the market value before and after the acquisition. The valuation process laid out in CSHB 2006 is significantly more lenient than in other states that have capped the amount that an entity would have to pay for a right-of-way.

Energy transporters bring vital energy resources to Texas citizens and businesses and should be granted limited authority to exercise eminent domain over railroad rights-of-way. Currently, these providers have no option when confronted with an unreasonable railroad, since they do not have the authority to condemn property in their line of transport. CSHB 2006 would grant these entities reasonable authority to cross a right-of-way and make sure that their product gets to market without being subject to excessive charges.

An expected floor amendment for CSHB 2006 would allow eminent domain authority only for perpendicular crossings, eliminating any concern about excessive authority for energy transporters. This limited scope also would counter the argument that valuation of property adjacent to a railroad right-of-way is somehow improper. Variations in value between a right-of-way and adjacent land likely would apply only to property that runs alongside a railroad for a significant distance.

CSHB 2006 adequately would address all safety concerns by requiring that any pipeline construction be performed in accordance with state and federal laws governing pipeline safety.

The bill would halt the practice by many railroads of charging fees on property and easements over which they have no claim. A railroad would have to produce a title of ownership before charging a fee, or the property would become eminent domain of the pipeline. A utility or pipeline would have to compensate a railroad for any costs associated with producing this title, up to a reasonable limit of \$250.

CSHB 2006 would benefit taxpayers in municipalities that own pipelines or utilities. According to the bill's fiscal note, these local governments could save money in cases where their utilities or pipelines could locate in railroad rights-of-way instead of more costly locations.

OPPONENTS
SAY:

CSHB 2006 would establish new eminent domain procedures that unfairly would apply only to property owned by a railroad company. Railroads, utilities, and common carriers all have access to an established process for exercising eminent domain and condemnation. This bill is unnecessary and would give utilities and pipelines an unfair advantage when conflicts occur.

The bill would establish the unprecedented category of “energy transporter” and would grant these unregulated entities the ability to seize railroads’ land without their consent. Eminent domain is a powerful right and, as such, is granted only to public entities and industries that are subject to state or federal regulation. Texas law already allows these “energy transporters” to exercise eminent domain, provided that they choose to be regulated as common carriers. The Legislature should not expand the scope of this powerful authority to private companies with little or no public accountability.

The valuation provisions in CSHB 2006 are flawed and biased against railroads. Under the bill, compensation for a condemned right of way could not be valued higher than property adjacent to the right-of-way, ignoring the value of the right-of-way itself. A railroad right-of-way could be much more valuable than the farmland through which it runs, but CSHB 2006 would consider the two types of property equivalent.

Although the bill would require pipeline compliance with state and federal regulation, construction through condemned rights-of-way would avoid the stricter pipeline safety measures practiced in the railroad industry. The industry has adopted stricter standards for pipelines built across or near a railroad right-of-way to address the unique physical aspects that must be considered to ensure public safety. The railroad industry has the most complete knowledge of safety hazards associated with the installation and management of pipelines that disrupt a railroad trackbed or of electrical lines that could interfere with railroad signals.

Although CSHB 2006 would allow a railroad to demand relocation of a pipeline if it interfered with railroad operations, the railroad would have to pay the cost of that relocation. If a railroad wanted to expand operations but a pipeline’s presence inhibited that action, a railroad might not be able to justify expansion on these grounds. CSHB 2006 could harm an industry on which the state’s economy depends by deterring the expansion of operations.

CSHB 2006 would pose particular problems for the dozens of small railroad companies for whom a right-of-way is the key to expansion and their primary asset. The bill could cause a small railroad to lose property along its right-of-way and could restrict its ability to work with local communities in developing land along its tracks. Short lines with limited resources would feel the minimal compensation offered by the bill most acutely.

NOTES:

As filed, HB 2006 would have required computation of the fair market value of condemned property as the difference in value of a right-of-way before and after condemnation. It would not have authorized a utility or pipeline company to use a railroad for a one-time fee or specified that this fee was the only payment due to a railroad. It also did not include the section declaring some indemnity agreements void.

The companion bill, SB 914 by Fraser, has been referred to the Senate Infrastructure Development and Security Committee.