



Texas Supreme Court Clarifies Common Carrier Test for Pipeline Companies

On January 6, 2017, the Texas Supreme Court clarified the test for common carrier status under the Texas Natural Resources Code and held that Denbury Green Pipeline-Texas, LLC (“Denbury”) conclusively established it was a common carrier with eminent domain authority. *Denbury Green Pipeline-Texas, LLC v. Tex. Rice Land Partners, Ltd.*, 2017 WL 65470 (Tex. January 6, 2017). In its second opinion in the case, the Court held that: (i) the Court of Appeals improperly focused on Denbury’s intent at the time of its plan to construct the pipeline; (ii) the test is that there must be a “reasonable probability” that, “at some point after construction,” the pipeline will serve the public, which Denbury conclusively established through, among other evidence, its post-construction contracts with unaffiliated entities; and (iii) the reasonably probable future use of the pipeline does not have to serve a “substantial public interest.”

While the opinion arguably eases the burden placed on pipeline companies by not requiring them to prove such a “reasonable probability” at the time the company intends to build the pipeline, pipeline companies still must do much more than the prior “check the box”

test on a Texas Railroad Commission T-4 form. How much more will be left to the lower courts in interpreting and applying this decision.

Background and *Denbury I*

Denbury was formed to build, own, and operate a carbon dioxide pipeline known as the “Green Line.” The pipeline’s route through Texas was designed to be close to various refineries, plants, and other facilities that could use the Green Line to transport carbon dioxide.

The *Denbury* case began when Texas Rice Land Partners, Ltd. (“Texas Rice”) refused to allow Denbury to survey two tracts of land it owned in Jefferson County. Denbury filed a T-4 permit with the Texas Railroad Commission to obtain common carrier status, which would give it the power of eminent domain. After obtaining the permit, Denbury filed suit against Texas Rice to obtain access to the land. While the suit was pending, Denbury took possession of Texas Rice’s property pursuant to the Texas Property Code, which permits possession even while the property owner challenges the eminent domain authority.

The trial court granted Denbury's motion for summary judgment and held that Denbury was a common carrier with eminent domain authority. The Court of Appeals affirmed, but the Texas Supreme Court reversed and remanded, holding that "the pipeline must serve the public; it cannot be built only for the builder's exclusive use." *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 200 (Tex. 2012). Accordingly, the Court held that the pipeline must demonstrate a "reasonable probability" that, "at some point after construction," the pipeline will "serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier." *Id.* at 202. The Court remanded the case to the trial court and afforded Denbury the opportunity to produce "reasonable proof of a future customer, thus demonstrating that [the Green Line] will indeed transport to or for the public for hire..." *Id.* at 204.

On remand, Denbury set forth various pieces of evidence, including: (i) transportation agreements with two unaffiliated entities; and (ii) a transportation agreement between Denbury and Denbury Onshore, which was acting on behalf of itself and other working-interest owners that are unaffiliated with Denbury.

Nevertheless, the Ninth District Court of Appeals held that there were fact issues as to whether, "at the time Denbury Green intended to build the Green Line, a reasonable probability existed that the Green Line would serve the public." *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 457 S.W.3d 115, 121-122 (Tex. App.—Beaumont 2015, pet. granted) (emphasis added). Focusing on Denbury's intent at the time of its plan to construct the pipeline, the Court of Appeals rejected Denbury's evidence of post-construction transportation contracts. Denbury appealed, and the Texas Supreme Court was again called upon to apply the test articulated in *Denbury I* to the facts of the case.

Denbury II—The Texas Supreme Court's January 6, 2017 Decision

The Court first held that the Court of Appeals incorrectly focused on the intent of Denbury at the time of its plan to construct the Green Line. The Court pointed out that the phrase "for a person intending to build" that was set forth in

the *Denbury I* opinion was merely a reference to who must prove common carrier status. *Denbury*, 2017 WL 65470, at *4.

As a result of this error, the Court of Appeals disregarded Denbury's post-construction transportation agreements. Moreover, according to the Court, the Court of Appeals disregarded evidence that the Green Line's future public use could be supported by its proximity to other carbon dioxide shippers once construction was completed. In sum, by focusing on intent at the time of construction planning, the Court of Appeals ignored relevant evidence that supported Denbury's common carrier status.

The Court proceeded to clarify and contextualize the *Denbury I* test by stating that the test balances the property rights of Texas landowners with the state's "robust public policy interest in pipeline development" while also respecting constitutional limits placed on the oil and gas industry. *Id.* at *5. The Court reiterated its sentiment that pipeline companies' prior ability to simply "check[] a certain box on a one-page government form" and become common carriers was inconsistent with the Texas constitution. *Id.* Rather, to protect the rights of property owners, pipeline companies must adduce "at least some objective evidence that a pipeline will probably serve the public" to gain eminent domain power. *Id.*

The Court then analyzed Denbury's evidence and, in the process, identified categories of evidence that support a finding of common carrier status. The Court noted that, in general, post-construction contracts, combined with "the regulatory atmosphere," "proximity of the pipeline to potential customers," and other evidence can help prove common carrier status under the *Denbury I* test. *Id.* Regarding Denbury, the Court noted that one of the contracts—a 2013 transportation agreement with Airgas Carbonic—proved that the Green Line transports carbon dioxide by a customer who retains ownership of the gas. This contract, combined with another agreement and the proximity of the Green Line to identified potential customers, "conclusively establishe[d] that it was 'more likely than not' that, 'at some point after construction,' the Green Line would serve the public." *Id.*

Finally, the Court held that the Court of Appeals incorrectly required that the reasonably probable future use of the pipeline serve a "substantial public interest." *Id.* at *6. That is not

the test, according to the Court, and the Court of Appeals improperly imposed a heightened standard on Denbury. The case relied on by the Court of Appeals to derive this heightened standard, according to the Court, may have found a “direct, tangible and substantial interest” in the taking in *that particular case*, but it did not impose this standard on all takings. *Id.* (citing *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828 (Tex. 1958)). Rather, “[t]o the extent that the degree of service to the public was woven into our test in [*Denbury I*], we held that for the pipeline to serve the public it must ‘transport [] gas for *one or more* customers who will either retain ownership of the gas or sell it to parties other than the carrier.’” *Id.* (emphasis in original) The Court stated that the test set forth in *Denbury I* that there must be a reasonable probability that the pipeline will, at some point after construction, serve even one customer unaffiliated with the pipeline owner “is substantial enough to satisfy public use.” *Id.*

Potential Implications

While many viewed the *Denbury I* and subsequent Court of Appeals decisions as a potential paradigm shift in favor of the landowner and property rights, the *Denbury II* decision suggests that the potential change in eminent domain rights is perhaps more moderate. The development and application of the test articulated in *Denbury II* will take time as lower courts address this standard, but it appears to be a middle ground between the original “check the box” test and a more comprehensive intent test.

Importantly, the decision highlights that initial planning for pipeline projects may need to include careful consideration of which aspects of a pipeline project may be used by unaffiliated companies and how long it may take to have proof of this fact. And, if this planning is not done carefully, landowners may have an ability to challenge a pipeline company’s status as a common carrier and its right to condemn land. In *Denbury II*, the key pieces of evidence were post-construction agreements that were obtained years after Texas Rice’s initial legal challenge. Nevertheless, there still had to be agreements and evidence at the time the facts were presented to the Court for a decision, and this may have ultimately tipped the scales in their favor.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com/contactus/.

J. Laurens Wilkes

Houston

+1.832.239.3796

jlwilkes@jonesday.com

William R. Taylor

Houston

+1.832.239.3860

wrtaylor@jonesday.com

Erica E. Youngstrom

Houston

+1.832.239.3897

eyoungstrom@jonesday.com