

INSIGHTS

Prove It Up: Texas Railroad Commission Revises Rule for Pipeline Common Carrier Permits

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The Texas Railroad Commission has recently promulgated certain rule [amendments](#) designed to clarify how much information a pipeline operator must file to be classified, for TRRC regulation purposes, as a common carrier or a private pipeline. The revisions require pipeline operators to substantiate their claim to be a common carrier or private pipeline when applying for a permit. Currently, the permit application, known as a T-4, requires the pipeline applicant only to "mark [the] appropriate block" to establish its classification as a common carrier or private pipeline. The revised rule, however, will add new informational requirements and certifications that a pipeline operator must submit. Specifically, for a new application the applicant must provide a sworn statement providing the operator's factual basis supporting the classification and purpose being sought for the pipeline, including an attestation to the applicant's knowledge of the eminent domain provisions in the Texas code. In addition, the applicant must provide documentation supporting the classification and purpose being sought. The revised rule also provides that a pipeline must renew an existing permit annually by filing an application for a pipeline permit accompanied by (1) contact information for an individual who can respond to questions; (2) a statement confirming the current classification and purpose of the pipeline as a common carrier, gas utility, or private pipeline, and (3) any other information requested by the TRRC. The proposed rule garnered numerous comments, several of which the TRRC included in the final rule, but many were rejected as raising issues outside the scope of the TRRC's jurisdiction or as otherwise unnecessary. Specifically, the TRRC *declined* to: - Expand its application process to encompass an investigation and an adversarial testing of the common carrier assertions made by the pipeline; - Establish standards of proof of common carrier status, including (a) documentation of third-party shippers, and (b) whether "common carrier" should be defined to address affiliate issues; - Establish standards for revoking common carrier status; - Include a public notice and hearing requirement for an application; - Assess a fee to support TRRC staffing and review of applications; and - Extend the timeline allowed for TRRC review of an application. Notably, the revised rule does not provide an administrative mechanism by which third-parties can challenge the classification of a pipeline as a common carrier. The TRRC stated that such action should be brought in court as the TRRC does not have the authority to render such a decision. Further, the TRRC clarified that the issuance of a T-4 permit classifying a pipeline as a common carrier does not preempt a challenge to that pipeline's status in court. The TRRC also provided

commentary on the nature of a T-4 permit. The TRRC stated that a T-4 permit is only a permit to operate an intrastate pipeline, and it is not a permit for construction, nor is it authorization to exercise eminent domain authority in the acquisition of a right-of-way. The TRRC explained that it uses the T-4 permit process to classify a pipeline so it can exercise the specific statutory authority application to each pipeline within its jurisdiction. An example of such application might be ensuring that common carriers pipelines have filed a tariff with the TRRC. The TRRC's revised rule follows a 2012 Texas Supreme Court decision in which the court found that a carbon dioxide pipeline, owned by Denbury Green Pipeline-Texas, LLC, did not qualify as a common carrier. In *Denbury*, the court found that the issuance of a T-4 permit to a pipeline, with the "common carrier" box checked, does not necessarily grant the pipeline common carrier status. To qualify for common carrier status, the pipeline had to show a "reasonable probability" that the pipeline at some point would serve the public and that this burden fell on the pipeline. The Texas Supreme Court sent the issue back to the lower court for further review, and in March 2014, a state district court judge agreed that Denbury had submitted adequate support for its common carrier status. The case remains on appeal. The new rule will take effect on March 1, 2015.