NATURAL GAS PIPELINE EASEMENT AND RIGHT-OF-WAY AGREEMENTS: A LANDOWNER'S LIST OF TERMS TO NEGOTIATE

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Disclaimers and Acknowledgements

This paper is not intended as legal advice and should not be relied upon as such. If you need legal advice, seek independent legal counsel.

These comments are the author's own and not the official or unofficial position of any bar association. The author is an attorney licensed in Texas, not Louisiana.

The author intends this paper to be a general guide and checklist of points a Landowner should consider when negotiating and preparing pipeline easement and right-of-way agreements. All terms in these agreements are subject to negotiation based on each a specific fact situation.

The author thanks Tim Malone and Bob West, partners in his firm, for their support of this paper and Becca Maddux and Michelle Sutton-Hydinger, legal assistants in his firm, for their editing work.

The following are terms a landowner should consider when negotiating a natural gas pipeline easement or right-of-way agreement (collectively called "Easement Agreement"). This list is not exhaustive; each situation is different. This list is not legal advice. When negotiating an Easement Agreement, a Landowner should seek independent legal advice. A Landowner who chooses to seek legal advice should do so at the outset of negotiations, not just before signing the Easement Agreement or condemnation proceedings.

In this list, the terms "easement" and "right-of-way" are interchangeable. Also, the Grantee is called the "Pipeline Company" and the Grantor is called the "Landowner".

1. The Price Per Linear Foot (or Rod)

Pipeline Companies primarily compensates the Landowner for the easement by a payment per linear foot (or rod). Where an oil and gas lease bonus pays the mineral owner an amount per acre, an Easement Agreement pays the Landowner a price per foot (or rod) of the property the pipeline passes. The Easement's length, not width, determines this payment. Thus, if a Landowner grants an easement fifty feet (50') wide and one hundred feet (100') long and the Pipeline Company pays the Landowner $20 per linear foot, the Landowner gets $2,000 (100' x $20/linear foot). But, if another Landowner grants an easement one hundred feet (100') wide and one hundred feet (100') long and the Pipeline Company pays that Landowner the same $20 per linear foot, that Landowner gets the same $2,000 (100' x $20/linear foot). Even though the second Landowner's easement covered twice as much area, because the payment is by linear feet and not square feet, the Pipeline Company compensated both Landowners equally.

Often in rural areas the price offered is per linear rod, not linear foot. When calculating, note that one (1) linear rod equals sixteen and a half feet (16.5').

The value per linear foot is based on the prevailing rates in the area, the property's zoning and development potential, whether timber covers the proposed easement, and other land valuation issues. An appraiser is often necessary to determine the land's value prior to and after the easement.

2. The Nature, Location, and Number of any Surface Facilities

Like oil and gas wells, pipelines require certain surface facilities. Unless the Easement Agreement provides differently, the Pipeline Company can put whatever it deems necessary on the easement. Landowners should try to restrict all surface facilities. If the Landowner cannot get that, try to agree on what will be on the surface. The more burdensome the surface facilities, the larger the payment the Landowner can demand.

3. Pipeline Depth Below the Surface

Most Easement Agreements make the Pipeline Company bury the pipeline at least thirty-six inches (36") underground. To maximize the Landowner's future development options, a Landowner should ask the Pipeline Company to bury the pipeline at least forty eight inches (48") underground. This will satisfy certain local, state, and federal development regulations.

4. Pipeline Easement's Width & Temporary Construction Easement's Width

Often a Pipeline Company will seek a fifty foot (50') or wider easement. The Pipeline Company usually only needs about twenty feet (20') to thirty feet (30') of width for the pipeline once installed. But during installation, the Pipeline Company needs about fifty feet (50') of width. Therefore, a Landowner should negotiate two easements in the Easement Agreement. The first is a Temporary Construction Easement about fifty feet (50') wide. The Temporary Construction Easement terminates at construction's end or a later specified time. The second is a Pipeline Easement about twenty feet (20') to thirty feet (30') wide. The Pipeline Easement lasts until abandoned by the Pipeline Company.

5. Written Timetable for Construction and Installation

The Landowner should seek a written timetable of the pipeline's construction and installation. This ties into the Temporary Construction Easement discussion above and lets the Landowner know when operations will commence and end. Usually the Pipeline Companies have a schedule in mind so why exclude it from the Easement Agreement?

6. The Materials / Substances Allowed and Excluded from the Pipeline

A Landowner should try to limit the substances the Pipeline Company can transport to only natural gas and associated hydrocarbons and exclude undesirable substances like sewage, crude oil, or salt water.

7. The Easement Agreement is for a Single Line

In a standard Easement Agreement, the Pipeline Company can lay an unlimited number of pipelines under the easement – without paying the Landowner additional compensation. The Easement Agreement should be for a single pipeline. This way, if the Pipeline Company wants to lay another pipeline later, it must get another easement from the Landowner.

8. The Rights and Restrictions on the Landowner's to Use Easement Area

The Landowner should try to retain rights to use and enjoy the easement area as much as possible. This gives the Landowner flexibility about what it can do on the easement's surface. Some common future uses Landowners expressly reserve in the Easement Agreement are the right to build parking lots, driveways, seasonal landscaping, etc.

9. The Extent to Which the Pipeline Company or Landowner will Maintain the Easement Area

The Landowner should establish that maintaining the easement area is the Pipeline Company's responsibility.

10. Whether and How the Surface will we Restored upon the Pipeline's Completion

To ensure proper easement area restoration, the Landowner should ask the Pipeline Company to re-seed the area annually with the Landowner's desired grasses until permanent. The Landowner should also require double-ditching so topsoil is returned to the surface. Ideally, these remediating measures would also apply when the Pipeline Company disturbs the surface in the future.

11. Easement Area Access

In a standard Easement Agreement, the Pipelines Company's Employees can enter the property at any time to conduct operations. Many Landowners want to limit when the Pipeline Company's representatives, employees, or contractors (collectively "Employees") can enter their property. For example, Landowners should try to limit access times to Monday through Friday from 8 a.m. to 6 p.m. Landowners can also ask for notice of upcoming accesses.

Unless the Easement Agreement states the permitted routes, the Employees can access the easement from anywhere. Landowners also often want to limit the specific routes of ingress and egress the Pipeline Company's Employees may access. The Landowner should clearly identify these routs in the drawing attached to the Easement Agreement.

12. Damages Caused by Contractors

The Landowner should make the Pipeline Company strictly liable for all damages caused to and on all the property caused by the Pipeline Company's operations and Employees.

13. Restrictions on Contractors' Activities

The Landowner should restrict the Employees' activities to only those necessary. Common limits include no guns, fishing poles, trash, pictures, etc.

14. Restrict or Specify Activities Outside the Easement Area

To prevent Employees from trespassing, the Landowner should restrict all activities to the easement area and require express written condition before Employees can go outside that area.

15. List Special Issues

Every property is different and has special issues - a favorite tree, boring or not boring under a specific area, etc. The Easement Agreement should address such issues.

16. Explain Environmental Responsibilities

Natural gas pipelines involve many environmental issues. The Easement Agreement should require the Pipeline Company to comply with all local, state, and federal environmental laws. The Pipeline Company should indemnify and hold harmless the Landowner from any and all environmental damages caused by the pipeline or its operation. And the Landowner should also ask the Pipeline Company to pay the costs of all environmental remediation.

17. List the Types of Roads that Can Cross the Easement Without Permission

To maximize the Landowner's future uses, the Easement Agreement should specify the types of roads that can cross the easement without the Pipeline Company's permission.

18. State Whether Future Ponds, Lakes, or Tanks May Intrude on the Easement Without Permission

This provision is relevant to rural property owners with future plans to build a pond, lake, or tank. In these cases, the Landowner should try to reserve those rights in the Easement Agreement.

19. List the Other Types of Easements the Landowner May Grant Across this Easement

Another company may want an easement across this pipeline easement in the future (power lines, water lines, etc.). The Landowner should include a provision stating that it can grant all other easements across the property and easement area that do not unreasonably interfere with the Pipeline Company's use and enjoyment of its easement.

20. Restrict the Pipeline Company's Ability to Grant Other Easements Within the Easement Area

The Landowner should restrict the Pipeline Company's ability to grant other easements within the easement area. Thus, if another company or utility wants to use the easement, it has to deal with and compensate the Landowner, not the Pipeline Company.

21. State the Right to Recover Damages for Disruption Due to Maintenance, Repair, Replacement, and Other Activities in the Easement Area in the Future

Without such a provision, it is unlikely the Landowner will recover damages caused by future disruptions to the property. The Easement Agreement should provide that the Pipeline Company will compensate the Landowner for future damages caused by maintenance, repair, replacement, and other activities related to the pipeline.

22. State What Constitutes Abandonment

To avoid later arguments between the Pipeline Company and Landowner about whether the Pipeline Company abandoned the easement, the Easement Agreement should define "abandonment." Such provisions usually provide that if the Pipeline Company lays no pipeline a specific number of years, usually two years, after the easement's grant, then it abandoned the easement and the easement terminates. Such provisions also usually provide that where a pipeline exists, if no natural gas has flowed through that pipeline for a specific number of years, usually two years, then the Pipeline Company abandoned the easement and the easement terminates.

23. Whether the Pipeline Company Must Remove its Structures if it Abandons the Pipeline

Unless the Easement Agreement provides otherwise, the Pipeline Company can leave its structures in place if it abandons the pipeline. A Landowner should ask that when abandoned, the Pipeline Company remove its structures – both pipeline and above ground facilities. The Landowner should also include a provision requiring the Pipeline Company to properly remediate the property after removal and compensate the Landowner for damages caused during the removal.

24. Where the Pipeline Company Will Place Warning Signs

The law requires the Pipeline Company to post certain signs along the pipeline route. A Landowner should work with the Pipeline Company in the Easement Agreement to determine where to place the signs. Otherwise, the Pipeline Company can post the signs anywhere.

25. The Pipeline's Size

The Landowner wants the pipeline's size it to be as small as possible and the Pipeline Company wants maximum flexibility. The standard Easement Agreement does not specify the pipeline's maximum size so the Pipeline Company can lay as large a pipeline as it desires. A Landowner should try to limit the pipeline's size in the Easement Agreement. Usually the Pipeline Company knows what size pipeline it plans to use so it is agreeable to limiting it to that size.

26. Is There a Secrecy Agreement?

When negotiating an oil and gas lease, there is power in numbers. When negotiating an Easement Agreement, it is every Landowner for itself. Why? Because unlike oil and gas exploration operations, the pipeline is coming through the Landowner's property whether the Landowner likes it or not through the Pipeline Companies power of eminent domain. Given pipelines' nature and design, certain above-ground facilities have to be built on either the Landowner's or the Landowner's neighbors' land. As the Landowner, you probably prefer such facilities on your neighbor's land.

A Secrecy Agreement benefits the Landowner because the Pipeline Company can pay a higher price per linear foot (or rod) and make other concessions without worrying about neighboring Landowners seeking the same terms.

27. Include the Easement's Proper Legal Description and Drawings

Often the only legal property description in the Easement Agreement is of the entire property (a "blanket easement"). Frequently the right-of-way agent has told the Landowner the pipeline would go in one place. Then, however, the Pipeline Company puts the pipeline somewhere else. How did this happen? It happened because the Easement Agreement granted the Pipeline Company a blanket easement and the right to put its pipeline anywhere on the property.

To prevent this, a Landowner should include the easement location's proper legal description in the Easement Agreement. A Landowner should also include drawings of the easement's location as exhibits to the Easement Agreement. These two things assure the Landowner that the pipeline is going where agreed.

28. Landowner Should Not Warrant Title

The Pipeline Company has its own professionals to research title and is in a better position than a Landowner to find potential title issues. If the Pipeline Company makes a mistake in its title research, the Landowner should not suffer. The standard Easement Agreement has the Landowner warranting title and promising to defend the Pipeline Company

should a title issue arise. This is a large potential burden for a Landowner considering the amount of compensation it receives for the easement. The Pipeline Company is in a better financial position to bear this burden and will often do so if asked by the Landowner.

29. Right to Move the Pipeline at Landowner's Expense

This provision helps Landowners with plans to develop their property. In some cases, it makes financial sense for the Landowner to pay to move the pipeline so the Landowner can go forward with its development plans. If the Landowner wants this right, it must include it in the Easement Agreement.

30. Whether the Pipeline Company will Repair Roads to Their Former Condition or Improve the Roads After Construction and Installation

The Pipeline Company will use many vehicles that can damage the Landowner's roads. The Landowner should request that the Pipeline Company fix such damages. Otherwise, the Pipeline Company could argue it included such compensation in the consideration for the Easement.

31. Whether the Landowner Will Require Temporary Crossings Across Open Trenches or Ditches

Including a provision requiring the Pipeline Company to build temporary crossings across open trenches and ditches is another way to ensure it conducts its operations respecting the property. Such a provision is not in the standard Easement Agreement.

32. The Maximum Pressure a Line Can Transmit

If a Landowner had to choose between a pipeline that transported gas at high pressure or low pressure, the Landowner would choose low pressure. Why? Because it is safer. The Pipeline Company should know approximately what pressure level will be transmitted through the pipeline. The Landowner should try to limit the maximum pressure amount allowable. If the Pipeline Company plans a high pressure line, the Landowner can use this as a negotiating point for a higher price per linear foot (or rod) or other concessions. Regardless, including a maximum pressure allowable limit better informs the Landowner about the pipeline across its property.

33. Whether There is an Established Maintenance or Inspection Schedule

Landowners wants to know who is going to be on their property and when. As such, a Landowner should get the Pipeline Company to agree to an established routine maintenance and inspection schedule. This lets the Landowner know when the Pipeline Company's Employees will be on the property and why.

34. Whether There is an Indemnity Agreement to Protect the Landowner Against any Future Lawsuits in any Way Related to the Pipeline or Other Facilities

Since the Pipeline Company is putting its equipment on the Landowner's property, should a lawsuit arise related to that equipment, the Pipeline Company should bear the risk. For example, assume a guest is walking across the Landowner's property and trips over a piece of the Pipeline Company's improperly marked surface equipment. The fall injures the guest.

Along with suing the Pipeline Company, the guest might also sue the Landowner because the accident resulted from a dangerous condition on the Landowner's property. Including an indemnity provision will shield the Landowner from liability for suits related to the pipeline and other facilities.

35. State that Assignees of the Easement Must Strictly Comply with the Easement Agreement's Terms

Often the Pipeline Company will assign the easement to a related or unrelated company. This concerns the Landowner because the Landowner thought it was dealing with one company and now has to deal with another one. To lessen this concern, a Landowner should include a provision requiring the Pipeline Company's assignees' strict compliance with the Easement Agreement's terms.

36. The Pipeline Company is Liable for Potential Payment of Damages for up to Three (3) Years After it Completes the Work

The usual statute of limitations for such damages is two (2) years. Including an additional year extends the time in which the Landowner can file a suit for damages.

37. Whether Pipeline Company is Liable for the Payment of Survey, Filing, and Attorneys' Fees Incurred Incidental to the Easement Agreement

Surveyors and attorneys can be expensive. Pipeline Companies best compensate Landowners who negotiate in good faith. During such negotiations, the Landowner can often convince the Pipeline Company to pay for, within reason, the Landowner's survey, filing, and attorneys' fees. This concession is easier to obtain with a Secrecy Agreement in place. Note that if the Landowner is rude and unreasonable, the Landowner is less likely to get this concession.

38. Payments Apportioned for the Actual Easement and Damages for Tax Purposes

When a Landowner grants a pipeline easement, the Landowner is selling an interest in the property and also damaging the property by allowing a pipeline to pass through it. Unless otherwise agreed, the Pipeline Company will send the Landowner one check for the Easement and not state what amounts it allotted to the sale and what amounts to the damages.

The Federal Income Tax Code treats proceeds received for granting the easement (the sale of an interest in the property) as long-term capital gains if the Landowner owned the property for more than one (1) year before granting the easement. These proceeds are subject to Federal income tax in the year received. But, proceeds received as compensation for the damage done by the easement lower the Landowner's basis in the property (the amount the Landowner paid for the property). Federal income taxes are not due on the damages portion of the proceeds until the Landowner sells the property. Thus, by apportioning the payment between the grant and the damages, the Landowner can delay paying Federal income taxes on the damages portion until the Landowner sells the property.

Such an allocation does not require two checks. However, the Easement Agreement or an itemized statement from the Pipeline Company should clearly state how the parties

apportioned the compensation (for example, 50% of compensation was for the grant and the other 50% was for the damages).

Final Comments

A Landowner should remember during these negotiations that the Pipeline Company holds the ultimate trump card – the right to use eminent domain to condemn the land. Pipeline Companies do not like to do this as it is expensive and causes bad publicity, but they will use the power if a Landowner is completely unreasonable or unwilling to sign an Easement Agreement. Generally, Landowners should not want to go through a condemnation proceeding because it is expensive and only determines the amount of compensation due to the Landowner - meaning the Landowner missed its opportunity to negotiate all the special provisions listed above. To ultimately get the best terms in the Easement Agreement, a Landowner should negotiate in good faith maintaining civility – i.e. kill them with kindness.