

June 26, 2012

Resources

[JW Eminent Domain Practice Area](#)

[JW Eminent Domain Attorneys](#)

[Contact JW](#)

www.jw.com

Offices

Austin

100 Congress Avenue
Suite 1100
Austin, TX 78701

Dallas

901 Main Street
Suite 6000
Dallas, TX 75202

Fort Worth

777 Main Street
Suite 2100
Fort Worth, TX 76102

Houston

1401 McKinney Street
Suite 1900
Houston, TX 77010

San Angelo

301 W. Beauregard
Avenue
Suite 200
San Angelo, TX 76903

San Antonio

112 E. Pecan Street
Suite 2400
San Antonio, TX 78205

Texas Supreme Court Holds That an Electric Company Can Condemn Public Property Over Governmental Immunity Objection

By [Brad Anderson](#)

The Texas Supreme Court issued an opinion on Friday, June 22, 2012, in *Oncor Electric Delivery Company, LLC v. Dallas Area Rapid Transit and Fort Worth Transportation Authority* (Cause No. 11-0079)—holding that a recent change to the Texas Utilities Code waived governmental immunity from condemnation suits instituted by electric corporations seeking to acquire land along a route certified by the Public Utilities Commission ("PUC").

The case followed a traditional path in reaching the Texas Supreme Court. Oncor Electric Delivery Company, LLC ("Oncor") applied to the PUC for approval of a transmission line, and, following the lengthy certification process before the PUC, was granted a route that crossed over a public commuter rail line jointly owned by the Dallas Area Rapid Transit authority and Fort Worth Transportation Authority (collectively, "DART"). Oncor and DART attempted to negotiate an aerial easement and right-of-way over approximately 0.37 acres of the commuter rail line. The negotiations were unsuccessful and Oncor sought to acquire the aerial easement through condemnation—invoking the eminent domain power granted to it as an electric corporation under section 181.004 of the Utilities Code. DART, a governmental unit immune from suit under Texas law¹ sought to have the condemnation suit dismissed on immunity grounds. The trial court denied the invitation but the court of appeals accepted—holding that section 181.004 of the Utilities Code did not waive governmental immunity, and that the PUC's authority to approve transmission lines did not preempt immunity. In essence, the court of appeals said that a public utility vested with the power of eminent domain and attempting to condemn land along a route certified by the PUC was without the power to do so if the land being condemned belong to a political subdivision of the state. Oncor petitioned the Texas Supreme Court for review and the court requested briefing on the merits.

Before either party had submitted a brief to the court, the Texas Legislature enacted House Bill 971—adding Section 37.053(d) to the Texas Utilities Code which reads in part:

For transmission facilities ordered or approved by the [PUC] . . . the rights extended to an electric corporation under Section 181.004 included all public land, except land owned by the state, on which the commission has approved the construction of the line.²

With the passage of House Bill 971, Oncor argued that the Texas Supreme Court should vacate the court of appeals opinion and remand the case to the trial court for consideration in light of the new law. DART argued that House Bill 971 (a) did not clearly waive

immunity; (b) could only be applied prospectively; and (c) that DART was a political subdivision of the State and therefore its land was "land owned by the state" and not subject to the new law.

The court disagreed with DART, holding that Section 37.053(d) of the Utilities Code was so specific—in that it only allowed condemnation of certain public lands, only by electric corporations, and only when such corporations were condemning land with PUC approval—that it clearly meant to waive governmental immunity from condemnation suits that met the criteria of Section 37.053(d). The court further held that the retroactive application of the statute did not violate the Constitution because it was jurisdictional in nature and did not alter a vested right. The court summarily dismissed DART's claim that its land qualified for the "state owned land" exception found in the statute.

Based on these holdings, the Texas Supreme Court vacated the court of appeals judgment and remanded the case to the trial court for further proceedings.

We will continue to watch *Oncor Electric Delivery Company, LLC v. Dallas Area Rapid Transit and Fort Worth Transportation Authority* in case a motion for rehearing may be filed, and we will always have an eye on those cases that may affect the rights of both utilities and landowners in the State of Texas.

If you have any questions regarding this e-Alert, please contact **Robert Neblett** at 512.236.2020 or rneblett@jw.com or **Brad Anderson** at 512.236.2043 or banderson@jw.com.

¹ See *Dallas Area Rapid Transit Authority v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659, 661 (Tex. 2008).

² Tex. Util. Code § 37.053(d).

If you wish to be added to this e-Alert listing, please **[SIGN UP HERE](#)**. If you wish to follow JW on Twitter, please **[CLICK HERE](#)**.

Austin

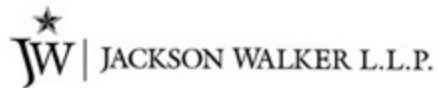
Dallas

Fort Worth

Houston

San Angelo

San Antonio



Eminent Domain e-Alert is published by the law firm of Jackson Walker L.L.P. to inform readers of relevant information in eminent domain law and related areas. It is not intended nor should it be used as a substitute for legal advice or opinion which can be rendered only when related to specific fact situations. For more information, please call 1.866.922.5559 or visit us at www.jw.com.

©2012 Jackson Walker L.L.P.

Click here to unsubscribe your e-mail address
901 Main Street, Suite 6000 | Dallas, Texas 75202