

CAUSE NO. 2016-52516

TEXAS CENTRAL RAILROAD & INFRASTRUCTURE, INC.,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
vs.	§	333rd JUDICIAL DISTRICT
	§	
CALVIN V. HOUSE,	§	
	§	
Defendant.	§	HARRIS COUNTY, TEXAS

**DEFENDANT’S RESPONSE IN OPPOSITION TO
PLAINTIFF’S APPLICATION FOR INJUNCTIVE RELIEF**

Defendant Calvin House files this Response in Opposition to Plaintiff’s Application for Injunctive Relief as follows:

INTRODUCTION AND SUMMARY OF RESPONSE

Plaintiff Texas Central Railroad & Infrastructure Inc. (“TCRI”) is a private entity that contends it will construct a high-speed rail line between Dallas and Houston (the “Proposed Project”). TCRI has filed at least 35 lawsuits against landowners like Defendant Calvin House (“Landowner”), but has not yet obtained injunctive relief in the State of Texas. In these lawsuits, TCRI seeks an injunction to allow entry onto private property to take surveys in connection with selecting a route for the Proposed Project. Like thousands of landowners along the affected corridor, Landowner opposes the Proposed Project, denies that TCRI has eminent domain authority, and has lawfully refused entry onto his property.

In order to obtain an injunction to survey, TCRI must plead and prove its statutory eminent domain authority. TCRI claims it is “vested” with this statutory right under Sections 112.053 and 131.012 of the Texas Transportation Code as either a “Railroad Company” or an “Interurban

Electric Railway.”¹ TCRI has the burden to prove that it qualifies under Section 112.053 or 131.012. TCRI’s proof falls short.

Under Section 112.053, TCRI cannot be a Railroad Company because it is not a “railroad incorporated before September 1, 2007,” nor is it “any other legal entity operating a railroad.”²

Under Section 131.012, assuming *arguendo* that TCRI had eminent domain authority as an Interurban Electric Railway, that authority expired under controlling statutes as a result of TCRI’s failure to follow eminent domain registration laws. That being said, TCRI is not an Interurban Electric Railway because Chapter 131 of the Texas Transportation Code does not apply to TCRI’s Proposed Project, and was never intended to apply to such a Proposed Project. In either event, TCRI does not have eminent domain authority, and its Application for Injunctive Relief should be denied.

For purposes of this Court’s analysis, it is critically important to note that the Texas Supreme Court has held that the legislative grant of eminent domain power is strictly construed in two regards. First, the condemnor is required to strictly comply with all statutory requirements. *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 198 (Tex. 2012). Second, in instances of doubt as to the scope of eminent domain power, the statute granting such power is “strictly construed in favor of the landowner and against those corporations and arms of the State vested therewith.” *Id.*, citing *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 831 (1958). While Landowner believes it is abundantly clear TCRI has failed to meet its burden of proof, any close calls *must* be decided against TCRI, and in his favor.

¹ TCRI’s Application for Injunctive Relief at 6, n.6.

² See definition of Railroad Company -- TEX. TRANSP. CODE § 81.002.

Even if the Court determines TCRI does have eminent domain power, its request for an injunction should be denied for two additional reasons. First, TCRI has failed to comply with the quintessential landowner protection statute, Texas Property Code § 21.0112, which requires an entity with eminent domain authority to provide a copy of the Landowner’s Bill of Rights to a landowner “*before or at the same time* as the entity first represents in any manner to the landowner that the entity possesses eminent domain authority.” (emphasis added). To date, TCRI still has not provided Landowner with a copy of the Bill of Rights. Thus, TCRI is seeking equity against a landowner where it has directly violated a landowner protection statute -- classic unclean hands. Second, TCRI’s Application should be denied because it has not proven a probable, imminent, and irreparable injury.

Alternatively: If the Court determines that TCRI has eminent domain authority and the right to survey, TCRI is entitled to a lineal survey only. TCRI’s requested survey activities far exceed the scope of the relevant statutes and are contrary to long-standing Texas precedent.

BACKGROUND FACTS

A. Status of TCRI’s Proposed Project.

1. Testimony of TCRI’s corporate representative.

In a Leon County case, where TCRI is seeking the identical injunctive relief, Plaintiff/Counter-Defendant Jim Miles claims—much like Landowner here—that TCRI does not have eminent domain power or the right to survey his private property.³ In that suit, TCRI’s corporate representative Shaun McCabe (who will be TCRI’s corporate witness at the instant hearing) gave a deposition in which he made several startling admissions regarding the bleak status of TCRI’s proposed project. Mr. McCabe admitted the following:

³ James Frederick Miles v. TCRI, No. 16-0137CV, in the 87th Judicial District Court of Leon County, Texas.

- TCRI does not own any train tracks;
- TCRI does not own any trains;
- TCRI does not have the money to buy any trains;
- TCRI does not even have a contract in place to buy any trains; and
- TCRI does not have the financing in place to build the railroad.⁴

Despite these admissions, TCRI continues to threaten⁵ and sue landowners along the affected corridor, including 23 cases in Harris County alone.

2. TCRI does not have approval to construct its Proposed Project.

a. Proceedings before the Surface Transportation Board.

The Surface Transportation Board (“STB”) is a federal agency with broad economic regulatory oversight of railroads, including the construction, acquisition and abandonment of federally-regulated rail lines. On April 19, 2016, TCRI and its affiliate filed two petitions with the STB: (1) a Petition for Exemption, which sought to insulate their project from Texas regulation, seeking federal jurisdiction, and thus federal preemption over state regulations, and (2) a Petition for Clarification, an end run around Texas law calculated to speed up the process of acquiring private property from Texas landowners through the use of eminent domain.⁶ In its Petition for Exemption, TCRI requested exemption from 49 U.S.C § 10901, which governs the authority to construct and operate a railroad in the United States. In the Petition, TCRI admitted, “[t]he

⁴ Exhibit 1, Deposition of Shaun McCabe (taken June 23, 2016) at p. 139, l. 13-20, p. 69, l. 15 – p. 70, l. 13, p. 61, l. 7-10.

⁵ On July 1, the Friday before the July 4 holiday weekend, TCRI sent out hundreds, if not thousands, of letters to landowners threatening suit if they denied survey permission. *See, e.g.*, Exhibit 2.

⁶ Exhibits 3 and 4, respectively.

construction and operation of a new rail line requires prior Board approval pursuant to 49 U.S.C. § 10901.”⁷

On July 18, 2016, the STB determined that it lacked jurisdiction over TCRI’s Proposed Project, dismissed the exemption proceeding, and denied as moot the Petition for Clarification.⁸

b. TCRI claims it does not need approval from the State of Texas to begin construction.

After the STB denied jurisdiction and dismissed TCRI’s exemption proceeding, TCRI, in an exercise in spin control, issued a press release claiming the “STB’s decision makes clear that the board’s approval is not required. By removing a regulatory uncertainty, the construction of high-speed rail in Texas is even closer.”⁹ TCRI claimed further, “[l]ook for construction to begin as soon as the federal environmental study is completed by the Federal Railroad Administration.”¹⁰ In other words, TCRI has now taken the *absurd* position that it can proceed with its Proposed Project without any route approval or regulation by the State of Texas, despite clear statutory precedent to the contrary.

c. The former Texas High-Speed Rail Authority.

In the late 1980’s, the French company which operates the TGV (*Train à Grande Vitesse*, the high-speed rail in France) expressed interest in constructing a high-speed rail wholly within Texas. In addition, other competing entities also showed interest. As the project was wholly within Texas borders, of course there was no federal regulatory jurisdiction. Consequently, the Texas Legislature moved forward to create a Texas regulatory authority to approve the route, grant a franchise, regulate environmental and conservation issues, and oversee the project from the

⁷ Exhibit 3 at 20.

⁸ Exhibit 5.

⁹ Exhibit 6.

¹⁰ *Id.*

perspective of public convenience and necessity. If the project was federal in scope, the Federal Railroad Administration would regulate the aforementioned items. The 71st Legislature enacted the Texas High-Speed Rail Act in 1989 and later substantially amended it in 1991. Vernon’s Ann. Civ. St. art. 6674v.2 [repealed]. The Texas High-Speed Rail Authority (“Authority”) was created to be “an agency of the state with statewide jurisdiction.” *Id.* The Authority was charged with the statutory duty of awarding a franchise “to the private sector” for the construction and maintenance of a high-speed rail facility if it was determined that it would serve “public convenience and necessity.” Vernon’s Ann. Civ. St. art. 6674v.2, § 2(b). The Authority was governed by an eleven-member board of directors, some of whom were members of other state agencies (including the Railroad Commission, Texas Turnpike Authority, and the Texas Department of Transportation). *Id.* After the project failed, the 74th Legislature abolished the Authority and repealed the legislation, as there were no future high-speed rail projects on the horizon.

Former Executive Director of the Authority, Marc H. Burns, wrote a *post-mortem* titled “High-Speed Rail in the Rear-View Mirror: A Final Report of the Texas High-Speed Rail Authority.”¹¹ Burns states that by 1994, it had become clear that the proposed high-speed rail project “could not be built without public funds.”¹² As for the private franchisee, there were certain milestones it was required to meet in order to measure its progress. These milestones were also intended to “protect the State and people of Texas from a financial boondoggle.”¹³ According to Burns, the most important milestone was “the Equity Financing Commitment (EFC),” which

¹¹ Exhibit 7.

¹² *Id.* at 8.

¹³ *Id.* at 10.

required the franchise to supply proof of equity financing by a date certain.¹⁴ The franchisee blew the deadline on multiple occasions.¹⁵

Burns made several important observations and conclusions regarding the former Authority. He observed that “[i]n implementing transportation infrastructure, safeguards should be included to prevent foisting on the public sector unfinished projects and unwarranted financial burdens.”¹⁶ He noted further, “HSR is a mass transportation project and the role and power of safeguarding the public must be reserved to the State. Only after we have articulated how the project may be accomplished without denigrating the lives of Texans, can we seek a private partner to implement a plan designed to better Texas.”¹⁷ As a result of the abolishment of the Authority, there is no authority presently in place to approve and oversee TCRI’s Proposed Project, ensure adequate financing, and safeguard the public interest.

In a calculated jurisdictional gamble, TCRI went to the federal government to avoid Texas regulatory scrutiny. TCRI believed that federal regulation would diminish the input of Texas citizens. TCRI’s gambit to avoid Texas regulation failed, and the Surface Transportation Board sent TCRI empty away.¹⁸ As stated on its letterhead, TCRI commits to landowners to act fairly, in good faith, and at all times in compliance with Texas law.¹⁹ TCRI is undoubtedly aware of the conclusion reached by Burns, the executive director of the Authority. It is worth repeating here:

HSR is a mass transportation project and the role and power of safeguarding the public must be reserved to the State. Only after we have articulated how the project might be accomplished without denigrating the lives of Texans, can we seek a private partner to implement a plan designed to better Texas.

¹⁴ *Id.*

¹⁵ *Id.* at 29-31.

¹⁶ *Id.* at 11.

¹⁷ *Id.*

¹⁸ For some reason, perhaps hope against hope, TCRI still contends that the Federal Railroad Authority (“FRA”) has regulatory authority over aspects of the project. Of course, the FRA has not acted since the STB denied federal jurisdiction, and jurisdictional challenges to the FRA’s authority are forthcoming.

¹⁹ Exhibit 2.

Rather than follow this clear dictate, and work cooperatively with the Texas Legislature to safeguard the public by reenacting the Texas High-Speed Rail Authority, TCRI has unleashed a blitzkrieg of threatening letters and over 30 injunction suits.

TCRI has argued that Landowner's arguments fall short, suggesting that Landowner's interpretation of "operating" under TEX. TRANSP. CODE § 81.002 would result in a legislative prohibition against future railroads. Nothing could be further than the truth; TCRI is distorting Landowner's argument. The above language from the *post-mortem*, and the Legislature's prior enactment of the Texas High-Speed Rail Authority, establish that the legislators intended that when a new potential high-speed rail project arose, eminent domain authority would have to be granted by the legislature, and the State of Texas would regulate.

B. Landowner and his Property.

Landowner Calvin V. House's family has owned approximately 440 acres along House Road (the "Property") for four generations, dating back to the 1800's. In 1890, Landowner's great-grandfather built House Plantation on the Property, where he raised seven sons and three daughters. The Property was passed down to Landowner's grandfather, then to Landowner's father, then to Landowner. It is Landowner's intention to pass the Property along to his five-year-old grandson and nine-year-old granddaughter.

In 2006, Landowner began renting out the House Plantation for weddings - <http://houseplantation.com/>. Each year, Landowner hosts approximately 55 weddings at House Plantation, and grows hay as a crop on the Property.

C. Landowner's communications with TCRI and its representatives.

On November 7, 2015, TCRI and its land agent Contract Land Staffing (“CLS”) sent Landowner a letter and packet of information regarding TCRI’s Proposed Project.²⁰ The packet contained general information about the Proposed Project, a survey permission form, and “an outline of the survey process.”²¹

Subsequently, on behalf of TCRI, Mark Mahaffey personally visited Landowner’s Property and asked to speak to him regarding TCRI’s requested survey. Landowner explained to Mr. Mahaffey that he did not want the Proposed Project cutting through his Property because it would destroy his wedding event business and greatly devalue his Property. Landowner asked Mr. Mahaffey specifically if TCRI had eminent domain authority. Mr. Mahaffey told Landowner yes, and, further, that TCRI was a “bona fide railroad.” Despite this representation, which Mr. Mahaffey repeated on subsequent visits, and in clear violation of Texas law, TCRI never provided Landowner with a Landowner’s Bill of Rights. Landowner asked Mr. Mahaffey if he had any papers or proof showing TCRI’s eminent domain authority. Mr. Mahaffey told him yes and that he could get them. Landowner refused to sign the survey permission form.

Mr. Mahaffey returned to Landowner’s Property five more times. Each visit was cordial. On two occasions, Landowner invited Mr. Mahaffey into his home. Despite Mr. Mahaffey’s repeated assurances that TCRI had eminent domain power, he never produced any documents or proof. Mr. Mahaffey did, however, provide Landowner with a revised survey permission form.²²

At the final meeting, Mr. Mahaffey brought his supervisor, Rene Richards, to see if Landowner and TCRI “could work out a deal.” But Ms. Richards was similarly unable to produce

²⁰ Exhibit 8.

²¹ *Id.*

²² Exhibit 9.

any proof of TCRI's claimed eminent domain authority. As a result, Landowner again refused to sign the survey permission form.

ARGUMENTS AND AUTHORITIES

An applicant for a temporary injunction seeks extraordinary equitable relief. *In re Tex. Natural Res. Conservation Comm'n*, 85 S.W.3d 201, 204 (Tex. 2002). An applicant must plead and prove three elements to obtain a temporary injunction: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

A. TCRI has not proven a probable right to the relief sought because TCRI does not have eminent domain authority.

An entity seeking to force a landowner to allow a preliminary survey prior to a condemnation proceeding must first have the power of eminent domain. “[T]he authority to enter upon the land to make a preliminary survey’ is considered ‘[a]ncillary’ to the power of eminent domain.” *Occidental Chem. Corp. v. ETC NGL Transp., LLC*, 425 S.W.3d 354, 361 (Tex.App.—Houston [1st Dist.] 2011, pet. dism'd). Simply put, if TCRI does not have the power of eminent domain, it does not have the right to a preliminary survey.

In order for TCRI to have the power of eminent domain, there must be a clear legislative grant of that power. The Legislature's power to do so “***must be explicit and undoubted***, and those, and only those, persons, corporations, and municipalities upon whom the requisite authority has been conferred by the Legislature can put in motion the statutes furnishing the procedure for the condemnation of property.” *Benat v. Dallas County et al.*, 266 S.W. 539, 540 (Tex. Civ. App.—Dallas 1924, writ ref'd) (emphasis added). “It is well settled by the decisions in this state that the only authority for condemnation of private property for public use is derived from the statutes

enacted within the powers granted to the Legislature by the Constitution.” *Coleman v. Archer County*, 16 S.W.2d 942, 945 (Tex. Civ. App. 1929).

In construing the statutes upon which a condemning authority relies for its power, rules of statutory construction for eminent domain statutes must be observed. “The substance of those rules seems to be that such a right may not be exercised except where the plain letter of the law permits it, and that acts conferring the right are to be strictly construed in favor of the landowner.” *Wood v. Bird*, 32 S.W.2d 271, 273 (Tex. Civ. App.—El Paso 1930, no writ.). To reiterate, strict compliance with all statutory requirements is required. *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline–Texas, LLC*, 363 S.W.3d 192, 198 (Tex. 2012). And, in instances of doubt, the statute granting such power must be strictly construed in favor of the landowner. *Id.*

1. According to TCRI’s filings with the Texas Comptroller, it claims to have somehow acquired eminent domain authority in just six days.

TCRI’s predecessor, TXHS Railroad, Inc., incorporated on December 20, 2012.²³ Just six days later, on December 26, 2012, TXHS sent a reporting letter to the Comptroller “in order to comply with Section 2206.101 of the Texas Government Code.”²⁴ Section 2206.101(b) states:

Not later than December 31, 2012, an entity, including a private entity, authorized by the state by a general or special law to exercise the power of eminent domain shall submit to the comptroller a letter stating that the entity is authorized by the state to exercise the power of eminent domain and identifying each provision of law that grants the entity that authority.

In its letter, TXHS misled the State by falsely claiming that it was “operating a railroad in the State of Texas” and “authorized by the State of Texas to exercise the power of eminent domain.”²⁵ None

²³ Exhibit 10.

²⁴ Exhibit 11.

²⁵ *Id.* When TCRI later reported to the Comptroller for its online database, TCRI submitted December 2012 as the date on which it acquired eminent domain authority, confirming its belief that it somehow obtained that authority just six days after incorporation. Exhibit 12.

of this was true, as TXHS had been in existence less than a week, and there was certainly no railroad to operate.

On January 21, 2015, TXHS filed a Certificate of Amendment changing its name to Texas Central Railroad & Infrastructure, Inc. (TCRI).²⁶ TXHS also amended its corporate purpose as follows: “[t]he purpose for which the corporation is organized is to plan, build, maintain and operate an interurban electric railroad, and to conduct or promote any other lawful business or purposes that a corporation is legally allowed to conduct or promote, within this state or any other jurisdiction.”²⁷ Based solely on this Certificate of Amendment, which is the only purported evidence attached to its Application, TCRI claims it is “a railroad company” and “an electric railway” vested with the statutory right of eminent domain power.²⁸

2. TCRI is not a Railroad Company.

Texas Transportation Code § 112.002 states that a “Railroad Company” may exercise the power of eminent domain for the purposes prescribed by this subtitle, which according to TEX. TRANSP. CODE § 112.051(a) would include the right to survey to select the most advantageous route. A Railroad Company is defined by TEX. TRANSP. CODE § 81.002 as follows:

- (1) a railroad incorporated before September 1, 2007, under former Title 112, Revised Statutes; or
- (2) any other legal entity operating a railroad, including an entity organized under the Texas Business Corporation Act or the Texas Corporation Law provisions of the Business Organizations Code.

TCRI’s predecessor was not incorporated until 2012.²⁹ It is therefore undisputed that TCRI is not a railroad incorporated before September 1, 2007. The question is whether TCRI is a legal

²⁶ Exhibit 13.

²⁷ *Id.*

²⁸ TCRI’s Application for Injunctive Relief at 2.

²⁹ Exhibit 10.

entity *operating a railroad*. The issue this court must decide is simply framed. TCRI claims that it is an "entity operating a railroad" when, by its own admission, no railroad exists. Landowner asserts that long-standing principles of statutory construction apply, and that TCRI cannot operate a railroad which does not exist.

There is no definition of “operating” or “railroad” in the Texas Transportation Code. As a result, other tools must be utilized to construe the meaning of these terms. The Texas Supreme Court has often stated that “the primary objective in construing any statute is to give effect to legislative intent.” *Warner v. Glass*, 135 S.W.3d 681, 683 (Tex. 2004). Statutory interpretation begins with the plain and common meaning of the statute’s words. *Id.*; TEX. GOV’T CODE § 311.011(a). “If the meaning of the statutory language is unambiguous, we adopt ... the interpretation supported by the plain meaning of the provision’s words and terms.” *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999); *see also Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651–52 (Tex. 2006). Statutory language should also be interpreted “according to the rules of grammar and common usage.” TEX. GOV’T CODE § 311.011(a). Finally, commonly used dictionaries are used to assist a court in its task of determining a word’s common use. *Powell v. Stover*, 165 S.W.3d 322, 326 (Tex. 2005); *Tex. Dep’t of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 196 (Tex. 2004).

The U.S. Bankruptcy Code’s definition of a “railroad” is instructive in determining whether TCRI is “operating a railroad.” In 11 U.S.C. § 101 (44), the term “railroad” means a “common carrier by railroad engaged in the transportation of individuals or property or owner of trackage facilities leased by such a common carrier.” It is undisputed TCRI has no facility, and therefore cannot transport individuals or property, nor is TCRI an owner of trackage facilities leased by a common carrier.

The U.S. Transportation Code is also helpful. In the general provisions for interstate rail transportation, 49 USCA § 10102 defines a “railroad” as follows:

(6) “railroad” includes—

- (A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;
- (B) the road used by a rail carrier and owned by it or operated under an agreement; and
- (C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation...

Merriam Webster’s has two simple definitions of a railroad: 1) “a system of tracks on which trains travel,” or 2) “a company that owns and operates trains.”³⁰ Merriam Webster’s full definition of a railroad is “a permanent road having a line of rails fixed to ties and laid on a roadbed and providing a track for cars or equipment drawn by locomotives or propelled by self-contained motors.”³¹

As established by the sworn testimony of TCRI’s corporate representative Shaun McCabe, TCRI does not own any trains, tracks, or rail facilities.³² In fact, he flatly admitted on several occasions that TCRI does not own a railroad.³³

As for the term “operating,” the Fifth Circuit recently looked to Merriam-Webster’s and American Heritage dictionaries when determining whether a party was “operating” two pipelines and “replacing” another, *Angus Chemical Co. v. Glendora Plantation, Inc.*, 782 F.3d 175, 180-84 (5th Cir. 2015). Consistent with the *present tense* common meaning of “operating,” the Fifth Circuit determined that the defendant was *not* operating two pipelines because one was capped

³⁰ <http://www.merriam-webster.com/dictionary/railroad>.

³¹ *Id.*

³² Exhibit 1, p. 139, l. 13-20, p. 61, l. 7-10.

³³ *Id.* at p. 131, l. 21-22, p. 135, l. 14-19, p. 143, l. 22-25.

and not currently being used. *Angus*, 782 F.3d at 184. The court also noted that the district court’s speculation that the capped line *might* be used in the *future* was insufficient to establish it was “operating.” *Id.* Clearly, TCRI cannot substitute a future possible tense (“might be operating”) for the present tense in the statute. In *Angus*, the pipeline existed, but was not operating. In this case, the alleged railroad, according to TCRI’s corporate representative, “doesn’t have physical form.”³⁴

Merriam-Webster’s defines “operating” (an adjective) in the present tense as: (1) “relating to the way a machine, vehicle, device, etc., functions or is used and controlled; and (2) relating to the way a business, department, program, etc., functions or is controlled.”³⁵ Importantly, Webster’s provides several synonyms for operating like “alive, functioning, operational, active, going and working.”³⁶ “Operating” and all its synonyms are in the *present tense*, meaning that the company claiming to be a railroad has to be operating a railroad today. TCRI is not currently operating a railroad. Rather, TCRI is merely promoting a railroad, and currently needs to raise—according to estimates from the Texas Department of Transportation—over \$18 billion before it is in business.³⁷

TCRI does not even allege in its Application that it is currently operating a railroad. Rather, TCRI’s claims are strictly in the future tense. For example, TCRI claims it “was *chartered for the express purpose* of planning, building, maintaining and operating an electric railroad.”³⁸ (emphasis added). As another example, TCRI states that “the Project *will operate* on a dedicated right-of-way that will be similar in width...”³⁹ As a final example, TCRI claims that without a survey, “the

³⁴ Exhibit 1, p. 133, l. 20-21.

³⁵ <http://www.merriam-webster.com/dictionary/operating>.

³⁶ *Id.*

³⁷ Exhibit 14, Statewide Ridership Analysis Report (December 2013) at 71.

³⁸ TCRI’s Application for Injunctive Relief at 2.

³⁹ *Id.* at 4.

planning and other preliminary activities associated with the proposed high-speed rail line...cannot continue.”⁴⁰ Purposing, planning, promoting, researching, hiring, corresponding, and rulemaking are preliminary actions. They do not constitute “operating” a railroad.

Although TCRI does not address this central, dispositive issue in its Application, what TCRI appears to be claiming is that it is currently promoting a Railroad Company, and planning to operate a railroad six or seven years in the future, after somehow raising over \$18,000,000,000.00. This is well short of what the statute requires. The plain language of the statute requires TCRI to be a legal entity “operating” (present tense) “a railroad” (a train on a set of tracks) in order to qualify as a Railroad Company. At best, TCRI is a mere promoter, hoping to operate a currently non-existent railroad in the future.

3. TCRI’s alleged eminent domain authority under Section 131.012 expired.

Texas Government Code Chapter 2206 Subchapter C governs the expiration of certain eminent domain authority. Section 2206.101(b) states:

Not later than December 31, 2012, an entity, including a private entity, authorized by the state by a general or special law to exercise the power of eminent domain shall submit to the comptroller a letter stating that the entity is authorized by the state to exercise the power of eminent domain and ***identifying each provision of law that grants the entity that authority.***⁴¹ (emphasis added).

The consequences of failing to comply with Subsection (b) are contained in Subsection (c), which states, “[t]he authority of an entity to exercise the power of eminent domain expires on September 1, 2013, unless the entity submits a letter in accordance with Subsection (b).” Simply put, if TCRI did not claim authority under a particular statute, TCRI’s statutory authority, if any, expired.

⁴⁰ *Id.* at 11.

⁴¹ This reporting was in preparation for the 84th Legislature which would consider revisions to various eminent domain statutes.

To reiterate, TCRI's predecessor, TXHS Railroad, submitted its reporting letter on December 26, 2012 to comply with Section 2206.101.⁴² TCRI falsely claimed—six days after incorporation—to be a Texas corporation “operating a railroad in the State of Texas, as defined under Section 81.002 of the Texas Transportation Code.”⁴³ Regarding its “Sources of Eminent Domain Authority,” TCRI identified only TEX. TRANSP. CODE §§112.002, 112.052, and 112.053,⁴⁴ all which relate exclusively to Railroad Companies. TCRI did not claim to be an Interurban Electric Railway, nor did it identify Chapter 131 or any of its subsections as a source of eminent domain authority. As a result, even if the Court were to find that TCRI qualifies under Chapter 131, TCRI's eminent domain authority *expired as a matter of law* on September 1, 2013, due to TCRI's failure to timely register.

4. Expiration of eminent domain authority.

December 31, 2012, was the statutory deadline for TCRI to submit a letter by certified mail, return receipt requested, to Texas State Comptroller of Public Accounts stating that TCRI is authorized by the State of Texas to exercise the power of eminent domain and identifying each provision of law that granted TRCI such power.⁴⁵ If the letter was not timely sent, any authority of TRCI to exercise the power of eminent domain expired on September 1, 2013.⁴⁶

Despite being on notice of this statutory defect since at least June of 2016 (during Mr. McCabe's deposition), TCRI has not indicated in its Application for Injunctive Relief or its Brief in Support filed today, September 22, how it claims to reacquire its expired putative eminent

⁴² Exhibit 11.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ TEX. GOV'T CODE § 2206.101(b).

⁴⁶ *Id.* at § 2206.101(c).

domain authority under Section 131.012. Case law provides no guidance, but the legislature certainly does.

5. Legislative cure for expired eminent domain.

In 2015, 27 municipal utility districts in Texas,⁴⁷ including ten districts from Harris County, sought to address their expiration of eminent domain authority resulting from failing to register in accordance with TEX. GOV'T CODE § 2206.101. Each district was required to obtain legislative passage of a bill to reacquire its expired eminent domain authority.

At the Regular Session of the 84th Legislature, a bill relating to reacquisition of eminent domain powers of the 27 municipal utility districts was introduced.⁴⁸ H.B. 4175, passed on June 19, 2015, effective September 1, 2015, provides that, with respect to each of the 27 municipal utility districts enumerated in the bill, the district may, “notwithstanding the expiration of a district’s authority to exercise the power of eminent domain under Section 2206.101(c), Government Code,” each designated district may exercise the power of eminent domain by following the requirements of H.B. 4175. This is the precise quandary that TCRI is facing with respect to its putative authority under TEX. TRANSP. CODE 131.102. This Court cannot confer Section 131.102 eminent domain authority on TCRI. Rather, TRCI must obtain legislative relief.

6. TCRI is not an Interurban Electric Railway.

The “interurban electric railway company” envisioned and intended by the legislature in 1907 when the substantive provisions of what is now Chapter 131 of the Texas Transportation Code were written bears absolutely no resemblance to TCRI or its Proposed Project. Interurban railways, and the rights granted in Chapter 131, were intended to provide rail service between a

⁴⁷ The 27 districts were from Harris, Montgomery, and Liberty Counties.

⁴⁸ H.B. No. 4175, 84th Leg., 2015.

large city and its surrounding towns and rural areas as an alternative to horse-drawn buggies prior to widespread use of automobiles. This alternative mode of travel was meant to provide rural populations the ability to more easily avail themselves of the amenities of urban centers. Interurban railways were not intended—in 1907—to provide high-speed rail service at over 200 miles per hour between the two largest metropolitan areas on opposite ends of the State. Any fair reading of the provisions of Chapter 131 reveals that the legislature was contemplating short localized electric railway projects that could, for instance, produce, supply, and sell electricity. TEX. TRANSP. CODE § 131.061. The legislature was not contemplating TCRI’s 240-mile-long, multi-billion-dollar Proposed Project, consisting of technology that would not come into existence for many decades. For these reasons, Chapter 131 does not provide TCRI with the power of eminent domain.

7. Section 111.103 makes clear that Chapter 131 does not apply to high-speed rail.

Section 111.103 of the Texas Transportation Code is the only place “high speed rail” is mentioned, discussed or defined in Title 5 of the Transportation Code dealing with railroads. “[H]igh-speed rail means passenger rail service capable of operating at speeds greater than 185 miles per hour.” TEX. TRANS. CODE § 111.103(a). “On application by a **railroad company**, the department by rule may adopt safety standards for high-speed rail systems, including rolling stock, for that **railroad company**.” TEX. TRANS. CODE § 111.103(b). (emphasis added). “A **railroad company** is not required to submit an application to the department under subsection (b) if the **railroad company** is operating under safety standards approved by the Federal Railroad Administration or another federal agency.” TEX. TRANS. CODE § 111.103(d). (emphasis added).

When Chapters 111 and 131 are read together, the legislature’s intent is clear: “Interurban Electric Railways” and “high speed rail” *are not synonyms*. “High-speed rail” is not even

mentioned in Chapter 131. Likewise, there is no mention of Interurban Electric Railways in Chapter 111. Had the legislature intended Interurban Electric Railways to have the right to construct and operate high-speed rail systems, it would have enacted amendments to Chapter 131 reflecting that intent in 2011, when it defined “high-speed rail” in Chapter 111. Or, the Legislature would have included Interurban Electric Railways within the subsections of Chapter 111. It did neither.

8. In *Denbury Green*, the Texas Supreme Court disposed of TCRI’s argument that a private entity can obtain the extraordinary power of eminent domain by merely “checking the box.”

In its Application, TCRI claims, “[u]nder the law, TCRI is not required to provide notice to landowners or to seek permission for surveying.”⁴⁹ Thus, according to TCRI, immediately upon the filing of its corporate registration papers, it acquired the unfettered right to enter onto private property—without notice—for survey purposes. If this unfounded and, frankly, astonishing claim were true, and TCRI is granted injunctive relief here, Landowner and others in his position will be subject to losing a constitutionally-protected property right when there is, at the very least, a serious question regarding the private entity’s statutory right to take it. The Texas Supreme Court’s ruling in *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192 (Tex. 2012) demonstrates why the relevant eminent domain statutes in this case cannot and should not be interpreted in that fashion.

Denbury was a private company wanting to build a continuation of a pipeline to transport CO₂. Denbury filled out a 1-page permit application called a Form T-4 and checked the box that it would be operated as a common carrier, which was essential to Denbury’s contention of eminent domain authority. *Denbury*, 363 S.W.3d at 195.

⁴⁹ Plaintiff’s Application for Injunctive Relief at 1.

Texas Rice owned two tracts along Denbury's pipeline route. *Id.* at 196. When Denbury requested a survey, Texas Rice refused. The trial court granted injunctive relief, permanently enjoining Texas Rice from interfering with Denbury's survey. *Id.* The court of appeals affirmed, concluding that Denbury had established itself to be a common carrier as a matter of law. *Id.* The court held that a pipeline owner could conclusively acquire the right to condemn private property by registering its status with the State of Texas.

The Texas Supreme court reversed and remanded. In doing so, it first stated:

Unadorned assertions of public use are constitutionally insufficient. Merely registering as a common carrier does not conclusively convey the extraordinary power of eminent domain or bar landowners from contesting in court whether a planned pipeline meets statutory common-carrier requirements. Nothing in Texas law leaves landowners so vulnerable to unconstitutional private takings. *Id.* at 195.

Here, TCRI is attempting to do the exact same thing; obtain the extraordinary power of eminent domain merely by incorporating itself and, six days later, registering with the Comptroller and falsely self-declaring that it was operating a railroad. If this were the law, landowners would be vulnerable to unconstitutional private takings because anyone who formed a corporation with the expressed purpose of operating a railroad would acquire the power of eminent domain immediately upon the filing of registration papers.

With respect to this statutory framework, the court held, "[h]ad the Legislature intended a T-4 permit to render a company's common-carrier status and eminent-domain power unchallengeable, it would have said so explicitly. '[W]hen an action is inherently judicial in nature, the courts retain jurisdiction to determine the controversy unless the legislature by valid statute has expressly granted exclusive jurisdiction to the administrative body.'" *Denbury*, 363 S.W.3d at 199. In this case, Landowner is challenging TCRI's claim of eminent domain authority on multiple grounds.

As was the case with respect to Denbury's claim, TCRI's self-serving reporting of eminent domain authority to the Comptroller has endured no investigation, and certainly no adversarial testing. Such an investigation is warranted here, where there are numerous questions regarding TCRI's claim of eminent domain authority. These questions must be investigated and answered before an injunction can issue. As the court put it, "Private property cannot be imperiled with such nonchalance, via an irrefutable presumption created by checking a certain box on a one-page government form. Our Constitution demands far more." *Id.*

Moreover, the handling of T-4 permits is similar to the handling of corporate registration filings in that the issue is one of registration, not application. No notice is given to affected parties. No hearing is held, evidence presented, or investigation conducted. How can this be sufficient to grant a private entity the extraordinary power of eminent domain? The Texas Supreme Court has held that "checking a box," which TCRI claims to have done by reporting to the Comptroller, will never suffice.

In its conclusion, the Texas Supreme Court held, "Locke deemed the preservation of property rights '[t]he great and chief end' of government, a view this Court echoed almost 300 years later, calling it 'one of the most important purposes of government.' Indeed, our Constitution and laws enshrine land ownership as a keystone right, rather than one 'relegated to the status of a poor relation.'" *Id.* at 204. The court continued, "[a] private enterprise cannot acquire unchallengeable condemnation power under Section 111.002(6) merely by checking boxes on a one-page form and self-declaring its common-carrier status. Merely holding oneself out is insufficient under Texas law to thwart judicial review." *Id.* For these same reasons, this Court must not endorse TCRI's claim that its mere incorporation followed by its Comptroller filing six days later immediately vested TCRI with eminent domain authority.

B. TCRI failed to comply with Texas Property Code § 21.0112.

In order to exercise eminent domain power, TCRI must be in strict compliance with all statutory requirements. *Denbury Green*, 363 S.W.3d at 198. One such statute is Texas Property Code § 21.0112, which states, “an entity with eminent domain authority shall provide a copy of the landowner’s bill of rights statement to a landowner *before or at the same time as the entity first represents in any manner to the landowner that the entity possesses eminent domain authority.*”⁵⁰ (emphasis added). TCRI failed to provide Calvin House, the Landowner in this case, a copy of the Landowner’s Bill of Rights before or at the same time it represented that it had eminent domain authority. In fact, TCRI *still* has not provided Landowner a copy of the Landowner’s Bill of Rights. As a result, TCRI is not in strict compliance with all statutory requirements. On this basis alone, its Application must be denied.

1. TCRI has unclean hands.

In *Riley v. Davidson*, 196 S.W.2d 557 (Tex. Civ. App.—Galveston 1946, writ ref’d n.r.e.), unclean hands served to deny injunctive relief. Plaintiff, Davidson, laid water lines for the public water supply in violation of certain safety and pollution laws and sought an injunction to keep Riley, under whose land the lines ran, from cutting them out.⁵¹ Davidson was apparently ignorant

⁵⁰ The text of the Landowner’s Bill of Rights contains this same requirement. In the very first section of the landowner bill of rights – “How the taking process begins” – it states, “The taking of your private property by eminent domain must follow certain procedures. First, the entity that wants to condemn your property must provide you with a copy of this landowner bill of rights before – or at the same time – the entity first represents to you that it possesses eminent domain authority.”

⁵¹ *Id.*

of his statutory violations, but *since the laws served the public interest*, he did not have clean hands for purposes of requesting injunctive relief.⁵²

Riley is directly instructive here, as it is uncontroverted that the Texas Landowner’s Bill of Right is a law which serves the public interest. Every citizen of this State has a constitutionally vested right not to be deprived of his property except by the due course of law.⁵³ As noted, the Texas Supreme Court held, “Locke deemed the preservation of property rights ‘[t]he great and chief end’ of government, a view this Court echoed almost 300 years later, calling it ‘one of the most important purposes of government.’” *Denbury Green*, 363 S.W.3d at 204. This purpose is codified in the Texas Property Code, whose protections the Supreme Court has repeatedly reaffirmed must be “liberally construed for the landowner’s benefit.”⁵⁴ The *John* Court noted that the “statutory scheme authorizing eminent domain actions ... is designed to protect the landowner.”⁵⁵ On the other hand, there is no equivalent public policy reason to construe the statute liberally in favor of the condemnor.⁵⁶ The unequivocal and unambiguous requirement that TCRI provide a Bill of Rights statement to a landowner at the time it first represents that it has eminent domain authority—must be strictly followed and construed in favor of the landowner.

Under the *Riley* rationale, since the relevant laws serve the public interest, TCRI’s statutory violation is fatal, and TCRI does not have clean hands for purposes of requesting injunctive relief. Furthermore, Landowner will be seriously harmed by TCRI’s proposed actions. Entry onto Landowner’s property will constitute a trespass and a violation of Landowner’s constitutional rights. And, Landowner will have to endure the harm flowing from these violations for years, while

⁵² *Id.* at 559.

⁵³ TEX. CONST. art 1, §§ 17, 19; U.S. CONST. AMEND. 14.

⁵⁴ *State v. Bristol Hotel Asset Co.*, 65 S.W.3d 638, 647 (Tex. 2001); *John v. State*, 826 S.W.2d 138, 140 (Tex. 1992).

⁵⁵ *John*, 826 S.W.2d at 140.

⁵⁶ *Id.*

this case goes through the appellate court system. As such, monetary damages are insufficient to restore Landowner's rights once they have been infringed.

2. TCRI knowingly violated a landowner protection statute.

As an entity claiming to have eminent domain authority, TCRI is aware of Texas' statutory requirement to provide the Landowner's Bill of Rights to a landowner as soon as TCRI represents that it has that authority. Attached as Exhibit 2 are examples of letters sent by TCRI to hundreds, if not thousands, of landowners over the July 4th holiday weekend, threatening legal action if survey access was not granted. At the bottom, pre-printed on TCRI's letterhead is the following footer:

Texas Central's Commitment to Landowners:
■ Respect ■ Good Faith Negotiations ■ Fair and Transparent Land Purchase Process ■
■ 100% Compliant with Texas Law and "Texas Landowner Bill of Rights" ■

Clearly, TCRI has repudiated its commitment to be "100% Compliant" with Texas law and the Landowner's Bill of Rights. In fact, the evidence shows that TCRI has fallen short on every commitment made on its letterhead, and TCRI cannot claim ignorance as a defense.

In *Regional Properties, Inc. v. Fin. & Real Estate Consulting Co.*, 752 F.2d 178, 182 (5th Cir. 1985), a litigant with unclean hands was deprived of equity. The party with unclean hands, Financial, knew of its duty to register with the SEC in order to sell limited partnership interests, and violated the law.⁵⁷ The *Regional* court, citing *Riley*, underscored the significance of a knowing statutory violation:

We do not intimate, as did the court in *Riley*, that a violation of law might result in a *per se* finding of unclean hands. *Riley* was a case dealing with injunctive relief and different policy considerations were at issue because of the public interests of health and safety that were involved. But unlike the plaintiff in *Riley*, Financial

⁵⁷ *Id.*

was not ignorant of the fact that its conduct was in violation of the law. Financial knew of its duty to register with the SEC in order to sell limited partnership interests, but chose instead to conceal this fact and misrepresent itself as one authorized to handle securities offerings. These facts establish that under Texas law, Financial came to court with unclean hands. Financial intentionally violated the law and misrepresented its qualifications. Texas courts would not permit it to then go on and successfully assert equitable defenses.⁵⁸

Upon information and belief, TCRI has failed to distribute the Landowner's Bill of Rights to thousands of landowners who have been told by TCRI that it has eminent domain power. In doing so, TCRI has knowingly and flagrantly violated TEX. PROP. CODE § 21.0112, which is designed to promote the public policy of this State. Accordingly, TCRI has no right to injunctive relief due to its unclean hands.

C. TCRI has not proven a probable, imminent, and irreparable injury.

TCRI claims that without access to Landowner's Property, "the planning and other preliminary activities associated with the proposed high-speed rail line...cannot continue."⁵⁹ TCRI claims further that without the requested examinations and surveys, its Proposed Project "will be indefinitely suspended—causing monetary damages that cannot be adequately measured or easily calculated, as well as damages to TCRI's operations, goodwill, and reputation that cannot be monetarily measured at all."⁶⁰ In essence, TCRI is claiming that Landowner's refusal to allow a survey will kill the Proposed Project. For a number of reasons, this is false.

First, TCRI's Proposed Project is already indefinitely suspended because it does not yet have approval to construct. TCRI chose poorly and sought that approval from the Surface Transportation Board, but it lacked jurisdiction and dismissed TCRI's request. Had TCRI applied for and obtained approval from the Texas Legislature back in 2013, TCRI might be home

⁵⁸ *Id.*

⁵⁹ Plaintiff's Application for Injunctive Relief at 11.

⁶⁰ *Id.*

and dry. As it stands, the Texas Legislature will need to reenact the Texas High-Speed Rail Authority to oversee the project and protect the public's interest, and to determine the convenience and necessity of the project.

Second, TCRI has not proven that it has sufficient financing to complete its Proposed Project. The former Texas High-Speed Rail Authority required the potential franchise to meet financial milestones, which included proof of an Equity Financing Commitment. The project ultimately died, and the Authority was subsequently abolished, when the franchise failed to meet those milestones, and it was determined that the project could not be built without public money and that it was not in the public's interest. TCRI has admitted that it has no adequate financing. How can an injury exist when TCRI cannot establish over 99% of its financing needs?

Third, TCRI's claim that the Proposed Project will be "indefinitely suspended" is nothing more than a bald, conclusory allegation it has repeated in all 35 of the cases it has filed. In two Harris County cases, TCRI sued landowners on .1-acre subdivision lots.⁶¹ TCRI could have taken those surveys from the sidewalks.

Leon County case – the Miles Case

The Miles Case was filed by a landowner in Leon County on April 18, 2016. This was the first case in the state relating to TCRI's demand for surveys. On June 3, 2016, TCRI filed a counterclaim seeking an injunction identical to this case.⁶² Subsequently, State Senator Byron Cook asked Attorney General Paxton to opine as to whether or not TCRI had eminent domain

⁶¹ Exhibit 15, exhibits showing the property TCRI sought to survey in TCRI v. Frances Warren, Cause No. 2016-50091 and TCRI v. Johnetta L. Cyrus, Cause No. 2016-50126.

⁶² Exhibit 18.

authority. TCRI responded to the Attorney General stating that the issue was in litigation in the Miles Case, which by law prevents the Attorney General from opining.⁶³

TCRI has strenuously avoided an injunction hearing in Leon County, where the first case was filed. Despite the fact that TCRI cited the Miles Case to Attorney General Paxton, and despite numerous attempts by Miles' counsel⁶⁴ to have an injunction hearing, TCRI has sought the perceived more-friendly confines of Harris county.

TCRI gave past testimony, in June 2016, on the subject of imminent harm. Mr. McCabe said TCRI needed to survey Mr. Miles' property immediately:

1 What's the deadline for you getting onto Mr. Miles' property to survey, that if you don't get on by that date, then it's going to kill the project because of the reasons you just said?

5 MR. NEBLETT: Objection, form.

6 A. There's an immediate need to get onto his property –

8 Q. (By Mr. McShan) How –

9 A. -- and all the other properties.

10 Q. How immediate?

11 A. I don't understand your question. **Are you asking is it today immediate?**

13 Q. Yes.

14 A. **Yes, it's today immediate.** We have people out in the field this week, last week and a week before doing work.⁶⁵ (emphasis added)

If TCRI's allegations as to the immediacy of the potential harm were true, TCRI would certainly have gone to an injunction hearing shortly after June 3, 2016 in Leon County, instead of

⁶³ Exhibit 17.

⁶⁴ The Beckham Group also represents Mr. Miles.

⁶⁵ Exhibit 1, p. 216, l. 1-16.

waiting 111 days. Since Mr. McCabe's testimony in the Leon County case, TCRI has filed at least 20 new cases in Harris county. Such delay is absolutely contrary to imminent harm. Further, back in June, Mr. McCabe predicted the imminent harm if all of the surveys were not performed in advance of September, so that a draft environmental impact statement could be completed:

Q. I want you to **assume with me for -- for a moment that you're not allowed on any property from now until, let's say, September**, a month before this October deadline, so you can't get any of these things done that you just told me about. At that point, what would happen? **What would happen that would place the project in jeopardy?**

24 MR. NEBLETT: Objection, form.

25 A. **That's real simple. There would be no draft EIS published in October. It would be a failure of us to meet our business objectives. You fail to execute on a plan, it puts at risk the project funding, politics, administration change.**⁶⁶

Based on Mr. McCabe's testimony, and the fact that still no court has ordered a survey in late September, that damage has already been done. This 111-day delay in seeking a hearing, so TCRI could choose its forum, was totally TCRI's choice. TCRI's manipulative forum shopping has engendered the exact doomsday project-ending delay that Mr. McCabe testified to in the Miles Case. TCRI's forum shopping proves unequivocally that there is no new immediate, irreparable harm; the argument is a sham.

There is nothing special about Landowner's Property here, just like there is nothing special about Mr. Miles' Property in Leon County, or the .1-acre Harris County lots. More to the point, TCRI has not carried its burden of proving that it ***must survey Landowner's Property now***, or it will suffer imminent harm and irreparable injury. TCRI does not have funds to construct its Proposed Project, the State of Texas has not authorized its construction, and the proper regulatory authority still needs to be enacted by the Legislature. After all of these milestones have been

⁶⁶ Exhibit 1, p. 218, l. 16 – p. 219, l. 4.

accomplished, then TCRI might have an immediate need to survey Landowner's Property. Until that time, TCRI is not entitled to injunctive relief.

D. Alternatively, TCRI should be limited to a lineal survey.

In its Application, TCRI requests an order allowing it to conduct unidentified "examinations and surveys of the Property in connection with the [Proposed Project]."⁶⁷ With this broad grant of authority requested by TCRI, it could perform any activity it considered an examination or survey, including cutting down trees, clearing brush, performing environmental and cultural resource evaluations, or conducting soil borings. At most, TCRI is entitled to a "lineal survey" only. TEX. TRANSP. CODE § 112.051(c).

In *Hicks v. Texas Mun. Power Agency*, 548 S.W.2d 949 (Tex.App.—Hous. [14th Dist.] 1977, writ ref'd n.r.e), property owners Hicks brought suit against Texas Municipal Power Agency to enjoin it from cutting survey lines, drilling core holes and otherwise invading their property prior to construction of railroad spur and condemnation, in connection with construction and operation of its electric power plant. Texas Municipal counterclaimed to restrain the Hicks from interfering with its operations. The trial court granted a temporary injunction to Texas Municipal.

On appeal, the court reversed and rendered in part, and modified and affirmed in part. The court held that construction of railroad spur was authorized under the power of eminent domain as a necessary and incidental function to the operation of the generating plant; that Texas Municipal's right to build a railroad spur necessarily implied the right to survey before building railway spur and instituting condemnation proceedings. However, the court concluded that Texas Municipal's right to survey was limited to a "lineal" survey and that it did not have the right to conduct core drilling operations.

⁶⁷ Plaintiff's Application for Injunction at 11 – Prayer for Relief.

Notably on appeal, Texas Municipal cited to *Puryear v. Red River Authority of Texas* in support of its argument that the right to survey may include by necessary implication the right to conduct core drilling operations. TCRI has also cited to *Puryear* in support of its requested survey.⁶⁸ But, as the court of appeals recognized, the pertinent statute in *Puryear* authorizing a survey governed water control and improvement districts, and the survey was in preparation for constructing a dam. In contrast, the pertinent statute in *Hicks* governed the construction of railroads, and the court determined that “it was the legislature's intent to limit railroads to a lineal survey.”

The *Hicks* case is still good law. In fact, TCRI cites to *Hicks* in its Application as supporting its right to survey.⁶⁹ For these reasons, TCRI should not be allowed unlimited access onto Landowner's Property to conduct whatever activities it deems to be “examinations and surveys” related to its Proposed Project. Access should be limited to a lineal survey only.

CONCLUSION AND PRAYER

For all the reasons stated above, Defendant Calvin House respectfully requests that the Court deny Plaintiff's Application for Injunctive Relief in its entirety, and enter an order declaring that Plaintiff does not have eminent domain authority in the State of Texas. Defendant requests all other relief to which he is entitled.

Respectfully submitted,

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⁶⁸ Plaintiff's Application for Injunction at 6, n.7.

⁶⁹ *Id.*

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document has been delivered to the following parties as indicated below on September 22, 2016.

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