

**HOW MUCH IS FAIR?: WILL SENATE BILL 18  
ENSURE CONDEMNORS PAY JUST  
COMPENSATION FOR LAND TAKEN DUE TO THE  
CREZ TRANSMISSION LINES?**

Comment

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#### I. WHAT IS WIND ENERGY & WHERE IS IT GOING?

Flat, arid, oil, cotton—all words that adequately describe what most people believe represents a great portion of western Texas. Although this description is not far from the truth, something new is sprouting up across great expanses of western Texas and is spreading rapidly across other portions of the United States.<sup>1</sup> What is growing, although associated with farms, has little resemblance to cotton or any other crop. Rather, West Texans are cultivating wind farms with each farm consisting of hundreds of 300 to 400 foot tall wind turbines.<sup>2</sup> The Roscoe Wind Farm, between Sweetwater and Snyder, Texas, provides a glimpse of what the future may look like if wind energy continues to develop roots in the energy portfolio of the United States.<sup>3</sup> With over 600 wind turbines, each equipped with three blades over 100 feet in length, the Roscoe Wind Farm is the largest in the United States.<sup>4</sup> In fact, the Roscoe Wind Farm encompasses approximately 100,000 acres of land comprising portions of four counties.<sup>5</sup>

1. See, e.g., Ted Apodaca, *New Mexico's Renewable Energy Transmission Authority*, 2009 WIND ENERGY INST., at 7 (Jan. 21-22, 2009).

2. Eric Rosenbloom, *Size Specifications of Common Industrial Wind Turbines*, AWEQ.ORG, <http://www.aweo.org/windmodels.html> (last visited Jan. 16, 2011).

3. See, e.g., Eileen O'Grady, *E.ON Completes World's Largest Wind Farm in Texas*, REUTERS (Oct. 1, 2009, 6:00 AM), <http://www.reuters.com/article/2009/10/01/wind-texas-idUSN3023624320091001>.

4. See *id.*

5. See *id.* When at full capacity, the Roscoe Wind Farm can generate 781.5 megawatts (MW) of power and occupies approximately 100,000 acres, which is nearly 1/8 the size of the entire state of Rhode Island. See *id.* Sweetwater, Texas, is located approximately 230 miles west of Dallas, Texas,

Driving through the wind farm could take hours and provides the feeling of navigating an obstacle course with the blades of the wind turbines at times appearing as if they stretch across the road. At night, hundreds of red lights flash in synchronized fashion from the tops of the wind turbines, illuminating the night sky from miles away. The future of West Texas is no longer tied solely to the oil and cotton of years past but is now on the cutting edge of the new wind industry sector.<sup>6</sup>

The Roscoe Wind Farm is just one specific example of the growing wind industry in western Texas. Texas, however, is not the only state expanding its wind energy capability.<sup>7</sup> Studies show that while wind could supply 25% of the electricity Texas consumes, it could supply over 100% of the electricity consumed in Montana, New Mexico, North Dakota, South Dakota, or Wyoming.<sup>8</sup> New Mexico, specifically, through the New Mexico Renewable Energy Transmission Authority (RETA), is embarking on projects similar to those ongoing in Texas.<sup>9</sup> For example, RETA is currently financing a clean energy transmission line that stretches 900 miles from New Mexico to California.<sup>10</sup> This project, along with numerous others, demonstrates the commitment states are making to encourage the development of wind energy.<sup>11</sup>

Although the growing wind industry has the potential to play a key role in creating an energy-independent United States, it is also exposing a critical problem: an inadequate transmission infrastructure that plagues the entire country.<sup>12</sup> Texas is leading the way in upgrading its transmission infrastructure through the comprehensive Competitive Renewable Energy Zones (CREZ) transmission project.<sup>13</sup> The CREZ transmission project involves a collection of utility companies selected to build over 2,000 miles of high voltage transmission lines from West Texas to higher populated

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along Interstate 20. Snyder, Texas, is located approximately 35 miles northwest of Sweetwater, Texas. *Driving Directions from Dallas, TX to Snyder, TX*, GOOGLE MAPS, <http://maps.google.com/> (follow "Get Directions" hyperlink; then search "A" for "Dallas, TX" and search "B" for "Snyder, TX"; then follow "Get Directions" hyperlink).

6. John Burnett, *Winds of Change Blow into Roscoe, Texas*, NPR (Nov. 27, 2007), <http://www.npr.org/templates/story/story.php?storyId=16658695>.

7. See Jimmy Giotfelty & Carl Huslig, *The Challenges and Promise of the Transmission Super Highway*, 2009 WIND ENERGY INST., at 4 (Jan. 21-22, 2009).

8. See *id.* Other states where wind has the potential to supply amounts of electricity in excess of that of Texas include Minnesota, Oregon, Arizona, Oklahoma, Colorado, Iowa, Idaho, Kansas, Utah, Nevada, and Nebraska. *Id.*

9. See Apodaca, *supra* note 1.

10. *Centennial West Clean Line*, N.M. RENEWABLE ENERGY TRANSMISSION AUTH., [http://nmreta.com/index.php?option=com\\_content&view=simplecon&page=curprojects](http://nmreta.com/index.php?option=com_content&view=simplecon&page=curprojects) (last visited Jan. 17, 2012).

11. See *U.S. Wind Energy Projects*, AM. WIND ENERGY ASS'N (Sept. 30, 2010), <http://archive.awea.org/projects/> (providing a database that lists the projects under construction in each state).

12. See *infra* notes 70-75 and accompanying text.

13. See *infra* Part II.C.2.

areas in the eastern portion of the state.<sup>14</sup> While these transmission lines are critical to ensure that the electricity generated by the wind farms is not wasted, the size and scope of the project requires utility companies to obtain easements on a substantial amount of private property.<sup>15</sup> As a result, landowners are facing condemnation proceedings and are realizing that most of the power lies with the condemning authority.<sup>16</sup> In order to equalize the power, the Texas Legislature spent the past five years focusing on reforming various aspects of the condemnation process to ensure that landowners have a chance to fight back against the abuses of the utility companies that refuse to justly compensate landowners for their losses.<sup>17</sup> Senate Bill 18 (S.B. 18), effective September 1, 2011, takes the first substantial step towards leveling the playing field between landowners and utility companies, but it still leaves landowners vulnerable in critical areas.<sup>18</sup>

This Comment focuses primarily on whether S.B. 18 ensures that landowners receive just compensation for the land utility companies condemn as part of the CREZ project. In order to gain an understanding of how the CREZ project came about, Part II provides the history of wind energy development in Texas.<sup>19</sup> Specifically, Part II will address federal and state legislative incentives enacted to encourage the development of a commercialized wind energy sector.<sup>20</sup> Part III then switches gears and looks at the land appraisal process and how the subjectivity inherent in that process creates problems in the condemnation process.<sup>21</sup> Part IV then provides an overview of how the condemnation process occurred in Texas prior to the enactment of S.B. 18 and how the problems mentioned in Part III could cause confusion in the condemnation process.<sup>22</sup> Part V looks at how S.B. 18 changes the condemnation process in Texas by analyzing the key provisions that focus on creating an equal playing field between the condemning authority and the landowner.<sup>23</sup> In addition, Part V focuses on why S.B. 18 failed to enact an attorney's fees provision, which is critical in helping ensure landowners receive just compensation for the taking of their

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14. See *infra* Part II.C.2.

15. See *infra* Part II.C.2.

16. See *infra* notes 341-44 and accompanying text. The words "condemnation" and "eminent domain" are used in similar contexts throughout this Comment. Technically, eminent domain is the right the various levels of government have to take private property, whereas condemnation is the process the government utilizes to acquire the private property. *Condemnation & Eminent Domain*, STATELAWYERS.COM, [http://www.statelawyers.com/Practice/Practice\\_Detail.cfm/PracticeTypeID:21](http://www.statelawyers.com/Practice/Practice_Detail.cfm/PracticeTypeID:21) (last visited Apr. 5, 2012).

17. See *infra* Part V.A-B.

18. See *infra* Part V.B-C.

19. See *infra* Part II.

20. See *infra* Part II.A.

21. See *infra* Part III.

22. See *infra* Part IV.

23. See *infra* Part V.A-B.

lands.<sup>24</sup> Part VI expands upon the concept of an attorney's fees provision by looking at how other states incorporated attorney's fees provisions into their condemnation processes.<sup>25</sup> Part VII concludes that Texas needs to adopt an attorney's fees provision in order to ensure that condemning authorities do not continue to have an unfair advantage over landowners.<sup>26</sup> Specifically, Texas should adopt a provision that adopts elements of both the Wisconsin and Florida approaches in order to create a unique provision that achieves the goal more efficiently than either approach does independently. This proposed approach encourages meaningful negotiations between the landowner and the condemning authority and provides the best chance to reach a successful resolution for both sides.

## II. DEVELOPMENT OF WIND ENERGY IN TEXAS

Wind energy provided an essential source of power for many Texans on a local scale for well over half a century.<sup>27</sup> Wind energy on a large-scale commercial production, however, is still a relatively new technology.<sup>28</sup> Prior to the commercialization of wind energy, rural Texans harnessed the wind through small windmills.<sup>29</sup> These small windmills allowed Texans to draw groundwater from wells in order to provide water for domestic and irrigation purposes.<sup>30</sup> Although the electrification of rural Texas decreased the need for small, independent windmills, the recent push for clean, renewable energy has ushered in an era of commercial wind energy production.<sup>31</sup> With the help of federal incentives and aggressive Texan legislative mandates calling for more wind-generated electricity, Texans are rediscovering the bountiful amounts of wind that blow across the state.<sup>32</sup>

### *A. Federal & State Incentives to Develop Renewable Wind Energy*

Fossil fuels have dominated the American energy arena since the Industrial Revolution.<sup>33</sup> Because this aspect is unlikely to change in the near future, agencies and public officials are beginning to realize the

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24. *See infra* Part V.C.

25. *See infra* Part VI.

26. *See infra* Part VII.

27. *See Wind Energy*, WINDOW ON STATE GOV'T, <http://www.window.state.tx.us/specialrpt/energy/renewable/wind.php> (last visited May 22, 2012).

28. *See id.*

29. *See id.*

30. *Id.*

31. *See Wind Energy*, STATE ENERGY CONSERVATION OFFICE, <http://www.seco.cpa.state.tx.us/publications/renewenergy/windenergy.php> (last visited May 22, 2012).

32. *See id.*

33. *See SUSTAINABLE ENERGY AND THE STATES: ESSAYS ON POLITICS, MARKETS AND LEADERSHIP 5* (Dianne Rahm ed., 2006). Studies show that approximately 70% of the electricity generated in the United States comes from fossil fuels. *See id.*

importance of obtaining energy independence.<sup>34</sup> Because fossil fuels by their nature are limited in quantity, new sources of sustainable, renewable energy are critical to achieving energy independence.<sup>35</sup> Both federal and state legislatures, therefore, are passing legislation to incentivize renewable energy production.<sup>36</sup> The two most important pieces of legislation with regard to increasing wind energy production in Texas were the federal Energy Policy Act of 1992 (Energy Act) and Texas Senate Bill 7 (S.B. 7).<sup>37</sup>

### 1. Federal Production Tax Credit

In 1992, Congress enacted the Energy Act, a comprehensive energy bill intended to encourage investment in all forms of renewable energy.<sup>38</sup> Specifically, the Energy Act included a provision for the Production Tax Credit (PTC) for renewable energy.<sup>39</sup> The PTC was technically an income tax credit, but it provided what amounted to an annual federal subsidy for the first ten years a renewable energy source was operational.<sup>40</sup> To counteract inflation and ensure the long-term usefulness of the credit, Congress adjusted the amount of the subsidy each year.<sup>41</sup> Because of the PTC, wind energy took substantial steps towards providing a competitively priced, renewable energy alternative compared to traditional forms of electrical production.<sup>42</sup> For example, in 1984, wind-generated electricity across the country, including Texas, cost approximately \$.30 per kilowatt-hour.<sup>43</sup> Through the aid, in part, of the PTC, however, the cost of wind-generated electricity rapidly decreased to approximately \$.03 to \$.06 per kilowatt-hour.<sup>44</sup> Investors took advantage of the benefits provided by the PTC and invested in the construction of wind farms.<sup>45</sup> The impact of the PTC was especially profound in Texas, which increased its production from less than 200 megawatts (MW) of wind-generated electricity annually in the early 1990s to approximately 4,296 MW by 2007.<sup>46</sup>

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34. *See id.* at 5-6, 8-9.

35. *See id.* at 5-6.

36. *See id.* at 8-9, 54-58.

37. *See id.* at 5-6. *See generally* Tex. S.B. 7, 76th Leg., R.S. (1999), available at <http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=76R&Bill=SB7> (enrolled version) (comprehensively addressing various utility and renewable energy concerns).

38. SUSTAINABLE ENERGY AND THE STATES, *supra* note 33, at 59-60.

39. *Id.*

40. *See* 42 U.S.C. § 13317(d) (2006).

41. *See id.* In 1992, Congress allowed for a 1.5 cents per kilowatt-hour credit but by 2011, Congress increased the credit to 2.2 cents per kilowatt-hour. *What is the Production Tax Credit?*, AM. WIND ENERGY ASS'N, [http://www.awea.org/issues/federal\\_policy/upload/PTC\\_April-2011.pdf](http://www.awea.org/issues/federal_policy/upload/PTC_April-2011.pdf) (last visited Apr. 11, 2012).

42. *See Wind Energy*, *supra* note 27.

43. *See id.*

44. *See id.*

45. *See* SUSTAINABLE ENERGY AND THE STATES, *supra* note 33, at 59.

46. *See Wind Energy*, *supra* note 27.

The impacts of the PTC, however, could have been far greater were it not for the PTC's multiple lapses in reauthorization.<sup>47</sup> Under the Energy Act, the PTC originally contained a sunset provision that took effect in 1999.<sup>48</sup> In order for investors to take full advantage of the PTC, therefore, they needed to have the wind farm operational by no later than 1999.<sup>49</sup> With the improved wind turbine technology and the increasing costs of traditional sources of electricity, many supported a long-term extension of the PTC.<sup>50</sup> Despite the support, Congress continually chose only to reauthorize the PTC for short-term windows and even allowed the PTC to expire three times between 1999 and 2004.<sup>51</sup> Consequently, wind energy went through what are termed "boom or bust cycles" depending on the status of the PTC.<sup>52</sup> When the PTC was reauthorized, there was a frenzied increase in wind-generated electricity spurred on by an increased amount of investments.<sup>53</sup> When the PTC neared expiration, however, investors decreased their investments in wind energy facilities because history showed that Congress would allow the PTC to expire.<sup>54</sup>

Texas provides a good example of the detriment that can occur due to delays in reauthorizing the PTC.<sup>55</sup> During the lapses in reauthorization of the PTC in portions of 2002 and 2004, Texas failed to increase the amount of wind power generated beyond what was achieved during the prior year.<sup>56</sup> In contrast, following the extension of the PTC in 2004, Texas doubled the amount of wind power generated by 2006.<sup>57</sup> Realizing the importance of the PTC to the long-term success of wind energy, Congress extended the PTC until 2012 as part of the American Reinvestment and Recovery Act (ARRA).<sup>58</sup>

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47. See *Renewable Electricity Production Tax Credit*, DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY (June 3, 2011), [http://dsireusa.org/incentives/incentive.cfm?Incentive\\_Code=US13F](http://dsireusa.org/incentives/incentive.cfm?Incentive_Code=US13F).

48. See SUSTAINABLE ENERGY AND THE STATES, *supra* note 33, at 59.

49. See *Renewable Electricity Production Tax Credit*, *supra* note 47.

50. *What is the Production Tax Credit?*, *supra* note 41.

51. See SUSTAINABLE ENERGY AND THE STATES, *supra* note 33, at 59-60. Congress typically includes sunset provisions when creating a tax credit because tax credits necessarily decrease revenue streaming into the government. See *id.*

52. *Wind Power and the Production Tax Credit: An Overview of Research Results: Hearing on Clean Energy Before the S. Comm. on Fin.*, 110th Cong. 100-03 (2007) (statement of Dr. Ryan Wiser), available at <http://permanent.access.gpo.gov/lps102185/43872%5b1%5d.pdf>.

53. See *id.* at 103.

54. See *id.*

55. See *Wind Energy*, *supra* note 27.

56. See *id.*

57. See *id.*

58. See *Renewable Electricity Production Tax Credit*, *supra* note 47.

## 2. Texas Increases Incentives to Invest in Wind Energy Development

Renewable wind energy production also received incentives from state legislative initiatives. In 1999, the Texas Legislature passed S.B. 7, which was the first in a series of renewable energy bills aimed at increasing Texas's reliance on renewable energy technologies.<sup>59</sup> The main feature of S.B. 7 focused on the creation of the state's first Renewable Energy Portfolio.<sup>60</sup> A Renewable Energy Portfolio requires that utility companies obtain a specified statutory amount of their electricity from renewable energy sources.<sup>61</sup> Under S.B. 7, Texas utility companies had to collectively increase their use of renewable energy sources by 2,000 MW before the end of 2015.<sup>62</sup> S.B. 7 divided the 2,000 MW based on the market share of electricity that each utility provided throughout the state.<sup>63</sup> This proportional division of the 2,000 MW ensured that large utility companies bore the burden of finding additional sources of renewable energy because they had more financial capital available.<sup>64</sup>

In order to assist utility companies in obtaining more of their electricity from renewable energy sources, the legislature created Renewable Energy Credits (RECs).<sup>65</sup> Essentially, utility companies that could not produce enough renewable energy on their own now had the ability to satisfy the requirements in S.B. 7 by purchasing RECs on the open market.<sup>66</sup> Although this provided more options for smaller utility companies, it gave large utility companies an incentive to acquire as many RECs as economically feasible.<sup>67</sup> With control of large amounts of RECs, large utilities made substantial profits by selling their excess RECs to other utility companies in need.<sup>68</sup> Accordingly, S.B. 7 not only helped increase the amount of wind-generated electricity in Texas, but it also provided a new method for large utility companies to increase their profit margins.<sup>69</sup>

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59. See *Texas Renewable Portfolio Standard*, STATE ENERGY CONSERVATION OFFICE [http://www.seco.cpa.state.tx.us/re\\_rps-portfolio.htm](http://www.seco.cpa.state.tx.us/re_rps-portfolio.htm) (last visited May 23, 2012).

60. See *id.*

61. See *id.*

62. Act of June 18, 1999, 76th Leg., R.S., ch. 405, § 39.904 (amended 2005) (current version at TEX. UTIL. CODE ANN. § 39.904(a) (West 2007)). In 2005, the Texas Legislature increased the amount of electricity that must come from renewable energy sources. See § 39.904(a).

63. See *Texas Renewable Portfolio Standard*, *supra* note 59.

64. See *id.*

65. See § 39.904(b).

66. See *id.*

67. See *Texas Renewable Portfolio Standard*, *supra* note 59.

68. See *id.*

69. See *id.*

*B. How Texas's Infrastructure Became Outdated*

Transmission line infrastructure in Texas, and all across the country, is outdated and in need of modification.<sup>70</sup> As of 2009, only 30% of transmission lines in the United States were installed within the past twenty-five years.<sup>71</sup> Nevertheless, energy consumption and demand continues to increase.<sup>72</sup> According to experts, the demand for electricity will increase 30% by 2030.<sup>73</sup> The two major factors driving the increase in energy consumption are the increase in total population and society's increasing reliance on modern technology.<sup>74</sup> Thus, without even considering the impact that renewable energy will have on transmission lines, the United States continues to push the limits of the current transmission line infrastructure to the brink of capacity.<sup>75</sup>

Utility companies originally designed transmission grids as independent and isolated systems designed only to carry and distribute power to the local community.<sup>76</sup> This design developed from the clustering of populations in cities that were generally isolated in distance from other cities.<sup>77</sup> Utility companies, therefore, only designed transmission grids to distribute electricity at low voltage levels to consumers immediately surrounding the city.<sup>78</sup> Utility companies, content to distribute electricity only locally, failed to design transmission lines with the capability of becoming interconnected in the future.<sup>79</sup> As the population increased, however, utility companies began to connect their local power grids with other neighboring power grids in order to share power and reduce the need to build more power plants.<sup>80</sup> In order to interconnect these local grids, power companies built higher voltage transmission lines that patched in to the local grids through transmission conversion stations.<sup>81</sup> These transmission stations reduced the voltage and diverted the power onto the local distribution lines.<sup>82</sup> Thus, a patchwork of different sized grid systems

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70. See Giotfelty & Huslig, *supra* note 7, at 4.

71. *Id.*

72. *Id.* at 3.

73. *Id.*

74. *See id.*

75. *See id.* at 5.

76. STAN MARK KAPLAN, CONG. RESEARCH SERV., ELECTRIC POWER TRANSMISSION: BACKGROUND AND POLICY ISSUES 2-3 (2009), available at <http://fpc.state.gov/documents/organization/122949.pdf>. Rural areas had to generate their own sources of electricity if needed. *See Wind Energy*, *supra* note 27.

77. *See* KAPLAN, *supra* note 76, at 2-3. For example, over 200 miles separate many large cities in Texas, such as Dallas and Houston; therefore, both developed independent electrical grids without the intention of ever connecting the two grids. *See id.*

78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.* at 2.

82. *See id.*

developed across the country.<sup>83</sup> Over time, these interconnected power grids began to reach their capacities because they were not designed to handle large amounts of electricity.<sup>84</sup>

The development of wind energy presents a unique challenge to the transmission infrastructure problem.<sup>85</sup> In Texas, the winds necessary to generate electrical power are generally located in sparsely populated regions.<sup>86</sup> Specifically, the most wind-rich areas of the state are located in the Panhandle and the Trans-Pecos Mountain regions.<sup>87</sup> Because these regions were, and remain, sparsely populated, local power infrastructure never adequately developed even though the potential existed to do so.<sup>88</sup> As time passed, the growing population necessitated that transmission line infrastructure go to areas with high electrical consumption demands in the short-term, rather than to areas where it could be utilized best long-term.<sup>89</sup> Currently, with the power grid at full capacity, utility companies cannot adequately patch new sources of wind-generated electricity onto the transmission grids.<sup>90</sup> Consequently, large amounts of wind-generated electricity are wasted because the transmission infrastructure cannot carry it to potential consumers across the state.<sup>91</sup>

Even though Texas is aware of the problems that plague the transmission grids, the problems continue to worsen because the time it takes to construct transmission lines greatly exceeds the time required to construct wind farms.<sup>92</sup> Unlike wind farms, which can be constructed and operational in less than two years, a transmission line project takes five to ten years to become operational.<sup>93</sup> Further, transmission line projects require an extensive amount of capital, especially when those lines need to travel long distances.<sup>94</sup> With the amount of wind-generated electricity projected to increase, officials must carefully design the new transmission infrastructure with long-term growth in mind or else they will suffer the

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83. *See id.*

84. *See id.* at 9.

85. *See Wind Energy, supra* note 27.

86. *See id.*

87. *See id.* The Panhandle encompasses the northern portion of the state and includes cities such as Lubbock and Amarillo; the Trans-Pecos Mountains are located just east of El Paso. *See id.*

88. *See* Matthew L. Wald, *The Energy Challenge: Wind Energy Bumps into Power Grid's Limits*, N.Y. TIMES (Aug. 26, 2008), <http://www.nytimes.com/2008/08/27/business/27grid.html?pagewanted=all>.

89. *See id.*

90. *See* Paul Davidson, *Lines Lacking to Transmit Wind Energy*, USA TODAY (Feb. 26, 2008), [http://www.usatoday.com/printedition/money/20080226/1b\\_wind26.art.htm](http://www.usatoday.com/printedition/money/20080226/1b_wind26.art.htm).

91. *See id.*

92. *See id.*

93. *See id.*

94. *See id.*

continuous problem of constantly trying to catch up with the rapidly expanding wind energy industry.<sup>95</sup>

### *C. Texas Takes the Lead on Modernizing Transmission Infrastructure*

With wind power production booming and the electrical grid at maximum capacity, Texas public officials realized that the current transmission grid was inadequate to handle both future demand for electricity as well as increases in renewable energy production.<sup>96</sup> In 2005, the Texas Legislature responded to the crisis by passing Senate Bill 20 (S.B. 20): a comprehensive energy bill providing solutions for the various problems facing the energy and utility industries.<sup>97</sup>

#### *1. The Impacts of Senate Bill 20*

The majority of the legislation centered on the accomplishment of three goals.<sup>98</sup> First, the legislature increased the percentage of electricity that S.B. 7 originally mandated come from a renewable energy source.<sup>99</sup> Second, the legislature instructed the Public Utility Commission of Texas (PUCT) to research which areas of the state were favorable for renewable energy development.<sup>100</sup> Finally, the legislature required the PUCT to conduct studies into improving the electrical transmission grid in order to maximize the renewable energy potential of the state.<sup>101</sup>

With regards to the first goal, S.B. 20 focused on increasing the renewable generated electricity quota by 5,000 MW rather than just 2,000 MW as initially specified by S.B. 7.<sup>102</sup> In other words, instead of a target of 2,880 MW (the old 2,000 MW quota plus the 880 MW already operational) of electricity coming from renewable energy sources by 2015, the legislature set a new target of 5,880 MW (the new 5000 MW quota plus the 880 MW already operational).<sup>103</sup> In order to maximize the potential of achieving the 5,880 MW final goal, the legislature divided the additional

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95. See Tex. Pub. Util. Comm'n, Commission Staff's Petition for Designation of Competitive Renewable-Energy Zones at 20-21, No. 33672 (Oct. 7, 2008) (order on rehearing) [hereinafter Commission Staff's Petition].

96. See *Wind Energy Transmission*, STATE ENERGY CONSERVATION OFFICE, [http://www.seco.cpa.state.tx.us/re\\_wind-transmission.htm](http://www.seco.cpa.state.tx.us/re_wind-transmission.htm) (last visited May 23, 2012).

97. See generally House Comm. on Regulated Indus., Bill Analysis, Tex. S.B. 20, 79th Leg., 1st C.S. (2005), available at <http://www.hro.house.state.tx.us/pdf/ba791/sb0020.pdf#navpanes=0> (detailing how S.B. 20 affects the renewable energy sector).

98. See *id.* at 1-3.

99. See *id.* at 1-2.

100. See *id.* at 2-3.

101. See *id.* at 3.

102. See TEX. UTIL. CODE ANN. § 39.904(a) (West 2007).

103. See *id.*

5,000 MW into intermediate biennial targets.<sup>104</sup> In addition, the legislature set a long-term goal of reaching 10,000 MW of renewable capacity by January 1, 2025.<sup>105</sup>

The two other goals set out in S.B. 20 are interconnected and will significantly affect whether the first goal is eventually successful. With the goal of expanding renewable energy development, the Texas Legislature realized that certain geographic regions of the state were better suited to generating wind power than others.<sup>106</sup> The legislature, therefore, instructed the PUCT to locate which areas of the state had the highest average wind speeds and then designate those areas as CREZs.<sup>107</sup> After the PUCT finalized the locations of the CREZs, they focused on developing a plan to build transmission lines that would transport the renewable energy from the CREZs to the major population zones in the eastern portion of the state.<sup>108</sup> In order to accomplish both of these objectives, the legislature mandated that the PUCT consider specific factors including financial commitment, suitable land quantities, and sufficient renewable energy resources.<sup>109</sup>

## 2. *Developing the CREZ Project*

Following the passage of S.B. 20, the PUCT, as part of a comprehensive rule, directed the Energy Reliability Council of Texas (ERCOT) officials to conduct a study to determine which geographic regions of Texas were best suited for cost-efficient renewable energy development.<sup>110</sup> As part of this study, ERCOT had to factor in transmission constraints when selecting the most favorable sites.<sup>111</sup> The following year, the PUCT held a hearing to finalize the location and number of CREZs it would create.<sup>112</sup> Through the evidence of wind industry officials and the

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104. *Id.* The provision specifically mandates that “cumulative installed renewable capacity in this state shall total 2,280 megawatts by January 1, 2007; 3,272 megawatts by January 1, 2009; 4,264 megawatts by January 1, 2011; 5,256 megawatts by January 1, 2013; and 5,880 megawatts by January 1, 2015.” *Id.*

105. *Id.* The Texas Legislature, realizing that wind energy was beginning to monopolize the renewable energy sector of the state, specifically required that at least 500 MW of the total 10,000 MW must come from a renewable energy other than wind. *See id.*

106. *See* § 39.904(g)(1).

107. *See id.*

108. *See* § 39.904(g)(2).

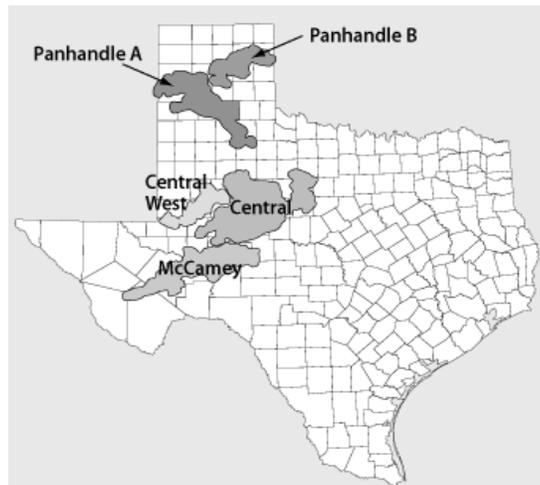
109. *See* § 39.904(g)(2)-(3).

110. *See* Steven Baron, *Texas Competitive Renewable Energy Zones: Progress Report*, 2009 WIND ENERGY INST., at 3 (Jan. 21-22, 2009). ERCOT is a non-profit intrastate organization responsible for managing 75% of Texas’s transmission grid. *About ERCOT*, ELECTRIC RELIABILITY COUNCIL OF TEX. (2005), <http://www.ercot.com/about/>. ERCOT is the smallest of three grid-managers across the country and falls under the jurisdiction of the PUCT. *Id.*

111. *See About ERCOT*, ELECTRIC RELIABILITY COUNCIL OF TEX. (2005), <http://www.ercot.com/about/>; *see also* 16 TEX. ADMIN. CODE § 25.174(a)(2) (2011) (determining deadlines for decisions regarding transmission improvements, determining the financial commitment that transmission line companies would need to demonstrate, and instructing ERCOT to perform a comprehensive study).

112. *See* Baron, *supra* note 110, at 4.

recommendations contained within the ERCOT study, the PUCT established five CREZ regions that incorporated the majority of the high-wind regions found within the state.<sup>113</sup>



**Figure 1**<sup>114</sup>

With the five CREZs established, the PUCT shifted its attention to determining the number of transmission lines the state would need to construct in order to maximize the wind generating capacity of each CREZ.<sup>115</sup>

To determine the extent of transmission infrastructure needed to maximize the potential of each CREZ, ERCOT performed an “optimization study.”<sup>116</sup> The study required ERCOT to create a secure master power grid that would provide the foundation for long-term increases in both power usage and production.<sup>117</sup> ERCOT focused on four distinct scenarios—each of which would transmit a different level of electrical current—and then analyzed the financial commitment each scenario would require.<sup>118</sup> The increased transmission capability of each of the four scenarios ranged from a low of 5,150 MW to a high of 17,956 MW.<sup>119</sup> Following a six-month evaluation, ERCOT recommended, and subsequently the PUCT adopted, “Scenario 2” as the official CREZ transmission development plan.<sup>120</sup>

113. *See id.*

114. *Overview: Renewable Energy*, WINDOW ON STATE GOV'T, <http://www.window.state.tx.us/specialrpt/energy/renewable/> (last visited May 23, 2012).

115. *See Baron, supra* note 110, at 5-4 to -5.

116. *Id.* at 5.

117. *Id.*

118. *See Commission Staff's Petition, supra* note 95, at 9-11.

119. *Id.* at 11.

120. *Baron, supra* note 110, at 5.

The PUCT selected Scenario 2 in large part because it provided the highest benefit for the lowest overall cost.<sup>121</sup> Scenario 2 would increase the transmission capability of the state by 11,553 MW through new construction and upgrades to the existing transmission infrastructure in place throughout the state.<sup>122</sup>

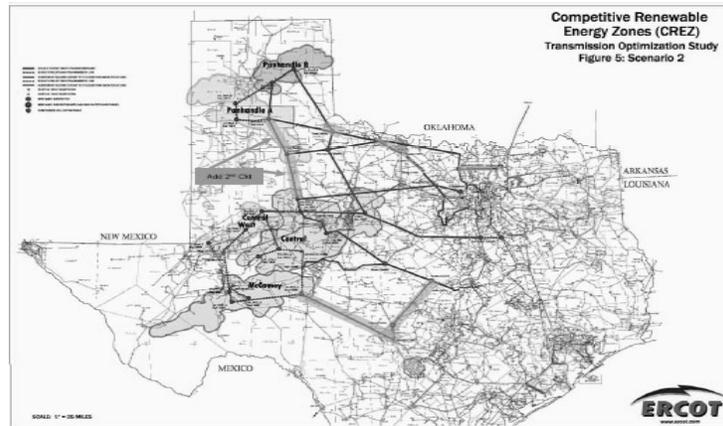


Figure 2<sup>123</sup>

Specifically, the scenario provided for the construction of “2,334 miles of new 345-kV right-of-way [transmission lines], and 42 miles of new 138-kV right of way [transmission lines].”<sup>124</sup> Through the addition of new lines and upgrades to existing infrastructure, the plan would satisfy current and future levels of wind-generated electricity.<sup>125</sup> Even though the new transmission lines and other upgrades in infrastructure carried an estimated overall price of approximately \$4.93 billion—higher than the overall cost of Scenario 1—Scenario 2 is the most cost-effective plan over the long-term because the cost per unit of power is lower.<sup>126</sup> The reason for the lower cost per unit of power directly relates to the increased carrying capacity of the improved transmission infrastructure.<sup>127</sup> The increased carrying capacity of the improved transmission infrastructure will then allow wind farms to generate more power and better utilize the wind resources located within each

121. See Commission Staff’s Petition, *supra* note 95, at 16-17.

122. See *id.* at 11.

123. Dan Woodfin, *CREZ Transmission Optimization Study Summary*, ERCOT, 7 fig.5: scenario 2 (Apr. 15, 2008), [http://www.ercot.com/content/meetings/board/keydocs/2008/B0415/Item\\_6\\_-\\_CREZ\\_Transmission\\_Report\\_to\\_PUC\\_-\\_Woodfin\\_Bojorquez.pdf](http://www.ercot.com/content/meetings/board/keydocs/2008/B0415/Item_6_-_CREZ_Transmission_Report_to_PUC_-_Woodfin_Bojorquez.pdf).

124. See Commission Staff’s Petition, *supra* note 95, at 16.

125. See *id.* at 20-21.

126. See *id.* at 16-17.

127. See *id.* at 12, 16-18.

CREZ.<sup>128</sup> With the extra supply of power, the demand will subside, thereby allowing the price of the electricity to decrease.<sup>129</sup>

With the transmission routes designated, the PUCT had one final preliminary issue to resolve—the entities ERCOT should select to construct and modify the new transmission lines.<sup>130</sup> The PUCT promulgated § 25.216 to lay out the process for applying to construct CREZ transmission lines.<sup>131</sup> Under the rule, the PUCT held a proceeding to provide a forum for the various transmission providers to submit their construction proposals for building the designated CREZ transmission lines set out in Scenario 2.<sup>132</sup> The PUCT then selected the best proposals based on a comprehensive set of factors including financial capability, maintenance cost, and development schedule.<sup>133</sup> Following the proceedings and time for evaluation, the PUCT selected ten different transmission companies to build different portions of the CREZ transmission lines.<sup>134</sup> The companies selected ranged from large utility companies such as Oncor and the Lower Colorado River Authority (LCRA) to local utility cooperatives such as Bandera Electric Cooperative.<sup>135</sup>

With the companies selected, the commission issued certificates of convenience and necessity (CCNs) to all the companies as required by law.<sup>136</sup> Without a CCN, utility companies would not have the power to construct new lines or utilize the power of eminent domain because condemnation is a power reserved for governmental utilities.<sup>137</sup> Although the application for a CCN filed by a commission is traditionally complex, S.B. 20 provided for an expedited proceeding that removed any potential hurdles that could come about.<sup>138</sup> With the providers determined and the CREZ project finalized, the transmission companies were ready to start seizing the land necessary to construct the designated transmission lines.

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128. *See id.*

129. *See id.* at 17-18.

130. Baron, *supra* note 110, at 6-7.

131. *See* 16 TEX. ADMIN. CODE § 25.216(a) (2011).

132. *See* Baron, *supra* note 110, at 6-7.

133. *See id.*

134. *See Transmission Service Providers*, PUB. UTIL. COMM'N OF TEX., <http://www.texascrezprojects.com/page1132348.aspx> (last visited May 23, 2012).

135. *See id.*

136. *See* TEX. UTIL. CODE ANN. § 39.904(h) (West 2007). The CCN requirement allows potentially impacted parties to voice their concerns about the project through a notice and comment period. *The Need for Transmission Lines: Certificate of Convenience and Necessity*, WETT, <http://www.windenergyoftexas.com/project/process> (last visited Jan. 28, 2012). If a contested case hearing occurs over a CCN application, the State Office of Administrative Hearings (SOAH) conducts the hearing and provides a recommendation for the PUC. *Resources*, TEXASPOWERLINES.COM (2008), <http://www.texaspowerlines.com/Resources.html>.

137. *See* TEX. CONST. art. I, § 17 (amended Nov. 3, 2009).

138. *See* § 39.904(h).

### III. WHY PARTIES CANNOT AGREE: THE SUBJECTIVITY INHERENT IN LAND VALUATIONS

Before analyzing the condemnation procedure prior to Senate Bill 18 (S.B. 18), it is important to understand the challenges of valuing land because they demonstrate why parties resort to the courts for relief. Unfortunately, the challenges will also demonstrate why both administrative and judicial proceedings are in no better of a position to resolve disputes over the value of land. Ultimately, the challenges will demonstrate why there should be more of an incentive to encourage parties to resolve disputes through negotiation rather than through the assistance of administrative or judicial proceedings.

#### *A. Distinguishing Between Entire Takings and Partial Takings*

The first issue that needs resolution is whether the condemning authority plans to take the landowner's entire property or only a portion of it.<sup>139</sup> Regardless of whether the takings is for the entire property or only a portion, the calculation of damages always has a component of subjectivity that can cause significant tension between the two parties.<sup>140</sup> Normally, a condemning authority will hire an appraiser it knows will likely provide a conservative estimate.<sup>141</sup> Even though this may not independently show bias, it is unlikely that a condemning authority would retain an appraiser who was providing financially unbeneficial valuations.<sup>142</sup> Due to this fact, landowners typically hire their own independent appraiser to provide a different opinion because they are skeptical of any appraisal report received from the condemning authority.<sup>143</sup>

When the condemning authority intends to condemn the landowner's entire tract of land, the general approach is to determine the fair market value for the land if the landowner was to sell the property voluntarily.<sup>144</sup> The market value is defined as "the price the property will bring when offered for sale by one who desires to sell, but is not obliged to sell, and is

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139. See generally *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 182 (Tex. 2001) (providing an overview of land valuation and the different approaches utilized by courts depending on the amount of land condemned).

140. See, e.g., *State v. Bristol Hotel Asset Co.*, 293 S.W.3d 170, 173 (Tex. 2009).

141. See Michael Rubinkam, *Landowners Fight Eminent Domain in Pa. Gas Field*, SEATTLE TIMES (Jan. 31, 2012, 11:47 PM), [http://seattletimes.nwsourc.com/html/nationworld/2017380403\\_apusgasdrillingeminentdomain.html](http://seattletimes.nwsourc.com/html/nationworld/2017380403_apusgasdrillingeminentdomain.html).

142. See Wayne B. Baer, *The Scope of Services of an Appraiser in Eminent Domain*, H-6 (Oct. 21, 2004), <http://www.bbrec.com/attachments/articles/52/scope.pdf>.

143. See *Land Condemnation—Eminent Domain*, GILLESPIE, SHIELDS & DURRANT (2010), <http://www.gillaw.com/Mediation/Land-Condemnation.html>.

144. See *Estate of Sharboneau*, 48 S.W.3d at 182.

bought by one who desires to buy, but is under no necessity of buying.”<sup>145</sup> The most common approach to determining the market value of the landowner’s entire property, due to its approval by courts, is the comparable sales method.<sup>146</sup> The comparable sales method works by collecting data of what other similar properties sold for and then using those numbers to help approximate the value of the land in question.<sup>147</sup> Ideally, the data would come from land with similar characteristics (such as actual use of land, physical characteristics, and location), but the approach does not mandate that appraisers use any specific characteristics.<sup>148</sup> Although this approach best satisfies the voluntary sales requirement, land is unique in that no other piece is identical.<sup>149</sup> As a result, appraisers rely on a great deal of subjective analytical techniques when using another piece of land as a basis for comparison.<sup>150</sup>

Another factor that increases the subjectivity of determining the market value of land is the ability of landowners to value their land at the “highest and best use” for which the landowner can reasonably put the land to use.<sup>151</sup> For example, if the land—even though the landowner currently uses it for agricultural endeavors—actually has greater value as commercial or residential property, then the landowner can value his land as such.<sup>152</sup> The landowner, however, cannot base the value of the land on any remote, speculative, or conjectural uses.<sup>153</sup> Further, damages that are merely incidental to the taking, such as future construction work, noise, and traffic cannot be allocated as damages because they are damages suffered by the public at large—not just the specific landowner.<sup>154</sup> These competing subjective factors make it difficult just to calculate the market value for an

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145. *Id.* (quoting *State v. Carpenter*, 89 S.W.2d 979, 979 (Tex. Comm’n App. 1936, holding approved)).

146. *See id.* The other two methods are the income method and the cost method. *See id.* at 183. The cost method works by determining how much it would cost to replace the land lost, and the income method works by calculating the loss of income that occurs because of the takings. *See id.*

147. *See id.* at 182.

148. *See id.* Courts typically provide appraisers wide discretion when scrutinizing the relevancy of the data used under the comparable sales method. *See State v. Petropoulos*, 346 S.W.3d 525, 529 (Tex. 2011).

149. *See Estate of Sharboneau*, 48 S.W.3d at 182.

150. *See id.*

151. *City of Sugar Land v. Home & Hearth Sugarland, L.P.*, 215 S.W.3d 503, 511 (Tex. App.—Eastland 2007, pet. denied) (concluding that “[t]he highest and best use is defined as ‘[t]he reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value.’” (quoting APPRAISAL INSTITUTE, *THE APPRAISAL OF REAL ESTATE* 209 (9th ed. 1987))); *see also Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 628 (Tex. 2002) (a presumption exists that the current use of the land is the highest and best use of the land, but the landowner can present evidence to rebut the presumption).

152. *See Home & Hearth Sugarland*, 215 S.W.3d at 511.

153. *Coble v. City of Mansfield*, 134 S.W.3d 449, 455 (Tex. App.—Fort Worth 2004, no pet.).

154. *See State v. Bristol Hotel Asset Co.*, 293 S.W.3d 170, 173 (Tex. 2009).

entire tract of land, and the difficulty increases significantly when the condemning authority takes only a portion of the property.<sup>155</sup>

When the condemning authority seeks only to condemn a part of the landowner's land—as is the case in acquiring easements for transmission lines—appraisers utilize a slightly different approach.<sup>156</sup> The traditional approach requires a two-step process.<sup>157</sup> First, the appraiser must determine the market value of the portion actually condemned—similar to the approach taken when the condemning authority takes the landowner's entire property.<sup>158</sup> Second, the appraiser must determine if there is any diminution in value to the remainder of the property caused by the actual takings.<sup>159</sup> If the remaining land decreases in value, then the condemning authority must pay the difference, but if the taking actually increases the value of the land, then the condemning authority is only required to pay for the portion of land taken.<sup>160</sup>

A common approach to determining a diminution in value on the remainder of the property is the “income approach.”<sup>161</sup> The income approach works by essentially determining the difference in income the land generates before and after the takings.<sup>162</sup> Although this method may work well in commercial situations in which the land is used to generate income, it fails to adequately protect landowners who own land for any sort of purpose other than solely generating income.<sup>163</sup> For example, aesthetic damages are nearly impossible to incorporate into a pure income approach because aesthetic damages are not realized under an income approach.<sup>164</sup> Farmers, therefore, may receive adequate damages due to the reduction in land to grow crops because that will reduce their income, but they will not receive adequate compensation for aesthetic damages caused by a 150-foot transmission line running across the property.<sup>165</sup> Further, having a transmission line running through the property will likely deter future buyers because they can buy similar agricultural land without a 150-foot transmission line running through it.<sup>166</sup> Although landowners may hire an appraiser to value the damage to the remainder based on a different approach, nothing prevents condemning authorities from utilizing the

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155. *See generally id.* (demonstrating the intense disagreements between parties when calculating damages to the remainder of a portion of property).

156. *See Zwahr*, 88 S.W.3d at 627.

157. *See id.*

158. *See id.*

159. *See id.*

160. *See id.* at 627-28.

161. *See State v. Bristol Hotel Asset Co.*, 293 S.W.3d 170, 172 (Tex. 2009).

162. *Id.*

163. *See id.*

164. *See id.*

165. *See id.*

166. *See id.*

income approach when it is to their benefit.<sup>167</sup> As a result, condemnation adjudications typically become more of a battle of experts between the different appraisers, rather than a focus on fully compensating the landowner for his loss.<sup>168</sup> Because of these differences, the second step generates the most heated contentions between landowners and condemning authorities.

#### IV. CONDEMNATION IN TEXAS PRIOR TO THE ENACTMENT OF SENATE BILL 18

Land holds a special significance to Texans.<sup>169</sup> Thus, it becomes a deeply contentious issue when the government, or quasi-government entity, tries to forcefully take title to it.<sup>170</sup> In fact, Texans feel so strongly about land ownership rights that they safeguarded them in the Bill of Rights of the Texas Constitution.<sup>171</sup> Section 17 of article I defines both the entities and the circumstances under which the Texas Constitution authorizes the use of eminent domain.<sup>172</sup> Especially important in regards to electrical transmission lines is the legislature's ability to delegate the power of eminent domain to certain nongovernmental entities, subject still to the same constitutional limits that apply to the governmental entities.<sup>173</sup> Even with these constitutional protections, condemnation proceedings still play an important role in the acquisition of private property.<sup>174</sup>

##### *A. The First Hurdle: Requiring the Condemning Authority to Plead That the Parties Are "Unable to Agree"*

Most entities that possess the power of eminent domain are not seeking to utilize it whenever the option presents itself.<sup>175</sup> Instead, they prefer to acquire land by reaching an agreement with landowners as quickly

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167. *See id.*

168. *See id.*

169. *See, e.g.,* Arnold Garcia, Jr., *Celebrate Texas' Past by Looking to its Future*, STATESMAN (Mar. 1, 2010, 6:05 PM), <http://www.statesman.com/opinion/celebrate-texas-past-by-looking-to-its-future-306990.html?printArticle=y> (statement of David Crockett) ("I must say as to what I have seen of Texas, it is the garden spot of the world. The best land and the best prospects for health I ever saw, and I do believe it is a fortune to any man to come here . . .").

170. *See* Greg Abbott, *Understanding Eminent Domain: Texas Landowner's Bill of Rights*, ATT'Y GEN. OF TEX., <https://www.oag.state.tx.us/agency/weeklyag/2008/0308eminentdomain.pdf> (last visited May 23, 2012).

171. TEX. CONST. art. I, § 17 (amended Nov. 3, 2009).

172. *Id.*

173. *See id.*; *Imperial Irr. Co. v. Jayne*, 138 S.W. 575, 580 (1911).

174. *See generally, e.g.,* *Tex. Elec. Serv. Co. v. Linebery*, 327 S.W.2d 657 (Tex. Civ. App.—El Paso 1959, writ dismissed) (involving a condemnation petition to acquire a fifty-foot easement totaling over 22,000 acres of a landowner's property for use by an electric utility company).

175. *See, e.g.,* Rubinkam, *supra* note 141.

as possible in order to keep the specific project running smoothly.<sup>176</sup> It would be naive, however, to assume that all entities seeking to acquire land utilize the power of eminent domain wisely.<sup>177</sup> Unfortunately, some condemning authorities abuse the power of eminent domain when landowners are unwilling to accept initial offers.<sup>178</sup> Texas, therefore, requires that a condemning authority demonstrate that the two parties were unable to come to an agreement before resorting to the court system for adjudication of the issue.<sup>179</sup>

Almost every acquisition of property by a condemning authority begins with an initial offer to purchase the desired property.<sup>180</sup> In a perfect world, the condemning authority and the landowner negotiate a deal that ensures that the landowner receives full compensation for his or her loss, yet still allows the condemning authority to proceed on schedule.<sup>181</sup> Unfortunately, however, negotiations can break down for various reasons. Typically, breakdowns in negotiations stem from disagreements between the different appraisers hired to value the land.<sup>182</sup> When this occurs, the law provides the condemning authority the ability to seek a resolution by means of the court system.<sup>183</sup>

Under Texas law, the condemning authority can file a condemnation petition in either the county court at law or the district court in which the property is located.<sup>184</sup> The petition must plead certain requirements, with arguably the most controversial being a statement “that the [condemning authority] and the property owner are unable to agree on the damages.”<sup>185</sup> The purpose behind the requirement is “to forestall litigation and to prevent needless appeals to the courts when the matter may have been settled by negotiations between the parties.”<sup>186</sup> Neither the legislature nor the courts, however, created a single bright-line test that would objectively demonstrate that the parties were “unable to agree.”<sup>187</sup> One line of

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176. *See id.*

177. *See id.*

178. *See id.*

179. Act effective Jan. 1, 1984, 68th Leg., R.S., ch. 576, 1983 Tex. Gen. Laws 3498 (amended 2011) (current version at TEX. PROP. CODE ANN. §21.012 (West Supp. 2011)).

180. *See, e.g.,* Hubenak v. San Jacinto Gas Transmission Co., 141 S.W.3d 172, 175 (Tex. 2004) (stating that the condemning authority made two offers before filing a condemnation petition).

181. *See id.* at 176.

182. *See supra* Part III.A.

183. *See* TEX. PROP. CODE ANN. § 21.001 (West 2004).

184. *Id.*

185. Act effective Jan. 1, 1984, 68th Leg., R.S., ch. 576, 1983 Tex. Gen. Laws 3498 (amended 2011) (current version at TEX. PROP. CODE ANN. §21.012 (West Supp. 2011)).

186. *Hubenak*, 141 S.W.3d at 184 (quoting *Nueces Cnty. v. Rankin*, 303 S.W.2d 455, 457 (Tex. Civ. App.—Eastland 1957, no writ)) (internal quotations omitted).

187. *See id.* at 184-86. The “unable to agree” requirement does not go towards deciding whether a court has subject matter jurisdiction over the case. *See id.* at 180. Should a condemning authority fail to sufficiently plead the “unable to agree” requirement, the court will normally abate the case temporarily to allow the condemning authority to satisfy the requirement. *See id.* at 184.

decisions holds that the condemning authority must engage in a series of “bona fide” offers and that it must base all offers on thorough investigation and research.<sup>188</sup> Alternatively, the other line of decisions holds that the unable-to-agree requirement is satisfied merely through an offer that lacks ill will or dishonesty.<sup>189</sup> Under this latter interpretation, a condemning authority that makes only one offer satisfies the unable-to-agree requirement as long as the lone offer was not arbitrary or capricious.<sup>190</sup>

The *Hubenak* decision was the most recent attempt by the courts to resolve the ambiguity over what satisfies the unable-to-agree requirement, but it only added greater uncertainty to a statute that was already lacking clarity.<sup>191</sup> Rather than adhering to one of the two prominent views, the court instead held that so long as the value offered to the landowner was reasonable, there was no requirement that the parties negotiate in good faith.<sup>192</sup> Even if the condemning authority sought to acquire more rights than it was legally entitled to obtain, the unable-to-agree requirement was still satisfied.<sup>193</sup> Thus, *Hubenak* heightened the tension between both sides and became a cornerstone of the reform efforts passed under S.B. 18.<sup>194</sup>

### B. The Second Hurdle: The Administrative Hearing

Assuming that the condemning authority files a sufficient petition in the correct court of its choosing, Texas law provides for a two-part procedure.<sup>195</sup> The first part consists of an administrative hearing conducted by a panel of appointed commissioners charged with the sole responsibility of determining the amount of compensation required.<sup>196</sup> The second part, if necessary, consists of a traditional civil trial should either party contest the outcome of the administrative hearing or raise an issue that the special commissioners cannot resolve.<sup>197</sup> When examining the administrative

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188. See *Brinton v. Hous. Lighting & Power Co.*, 175 S.W.2d 707, 710 (Tex. Civ. App.—Galveston 1943, writ ref’d), *disapproved of by Hubenak*, 141 S.W.3d at 172.

189. See *State v. Hipp*, 832 S.W.2d 71, 77-78 (Tex. App.—Austin 1992, writ granted), *rev’d*, *State v. Dowd*, 867 S.W.2d 781 (Tex. 1993).

190. See *Hubenak*, 141 S.W.3d at 184-86. The willingness and desire of the landowner to continue negotiating is not sufficient to demonstrate that the “unable to agree” requirement was not satisfied. See *id.*

191. See B. Tyler Milton, Comment, *The “Unable To Agree” Requirement & Texas Condemnation Law: A Critical Analysis of Hubenak v. San Jacinto Gas Transmission Co.*, 37 ST. MARY’S L.J. 569, 589-91 (2006).

192. See *id.*

193. See *id.*

194. See *infra* Part V.B.1.

195. *Amason v. Natural Gas Pipeline Co.*, 682 S.W.2d 240, 241 (Tex. 1984).

196. *Id.*; see also *Nat’l Gas Pipeline Co. of Am. v. White*, 436 S.W.2d 944, 949 (Tex. Civ. App.—Amarillo 1968), *aff’d*, 444 S.W.2d 298 (Tex. 1969) (citing *Pearson v. State*, 315 S.W.2d 935, 936-37 (Tex. 1958)) (“An action to condemn land is a special statutory proceeding, wholly administrative in nature, at least until the commissioners’ decision is filed with the county judge.”).

197. See *Amason*, 682 S.W.2d at 241.

aspect of a condemnation proceeding, it is best to do so by analyzing who can serve as a commissioner and what powers a commissioner possesses.

### *I. Who Can Serve as a Commissioner?*

Upon the filing of a proper petition from the condemning authority, the judge in charge of the proceeding will appoint three disinterested freeholders to serve as the special commissioners in charge of the administrative hearing.<sup>198</sup> Judges typically appoint individuals that both parties can agree upon, but judges also possess the power to independently appoint all three commissioners if the parties cannot reach an agreement.<sup>199</sup> Further, Texas law does not even provide a specific list of qualifications to serve as a special commissioner, outside of the freeholder requirement, and courts are reluctant to hold that the statute imposes any additional requirements.<sup>200</sup> *City of Bryan v. Moehlman*, a 1955 case, best illustrates why courts are unwilling to read in any additional qualifications to the statute.<sup>201</sup> The case involved the City of Bryan's desire to acquire a fifty-foot strip of land that Moehlman owned for purposes of building a sidewalk.<sup>202</sup> When the parties were unable to agree, the City of Bryan filed a condemnation petition and the judge appointed the three freeholders to serve as special commissioners.<sup>203</sup> Two of the commissioners appointed by the judge, however, served on the City's Board of Equalization (Board).<sup>204</sup> Upon discovering this fact, Moehlman sought an injunction from the district court to prevent the City from commencing construction on the condemned property.<sup>205</sup> Specifically, Moehlman argued that the two commissioners who served on the Board could not qualify as disinterested freeholders as a

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198. Act effective Jan. 1, 1984, 68th Leg., R.S., ch. 576, 1983 Tex. Gen. Laws 3499 (amended 2011) (current version at TEX. PROP. CODE ANN. § 21.014(a) (West Supp. 2011)). A freeholder is defined as a person who owns real property, commonly in fee simple. See BLACK'S LAW DICTIONARY 598 (5th ed. 1979).

199. See *Sullivan v. Mo., K. & T. Ry. Co. of Tex.*, 68 S.W. 745, 746 (Tex. Civ. App.—San Antonio 1902, no writ).

200. See *Schooler v. State*, 175 S.W.2d 664, 670 (Tex. Civ. App.—El Paso 1943, writ ref'd w.o.m.) (holding that commissioners were not disqualified even though they had discussions with the condemning authority about the value of the land prior to hearings taking place and had worked with the condemning authority on several prior condemnation proceedings); *Angier v. Balser*, 48 S.W.2d 668, 671 (Tex. Civ. App.—Austin 1932, writ ref'd) (holding that an appointed freeholder who is related to the judge's wife is not per se unqualified to serve as a special commissioner).

201. See *City of Bryan v. Moehlman*, 282 S.W.2d 687, 690 (Tex. 1955).

202. *Id.* at 688.

203. *Id.* The city chose to file its condemnation petition in the county court of law rather than the district court. *Id.*

204. *Id.* The board has the power to adjust the value of real property, primarily for tax purposes, in order to create equalization between the counties. 72 AM. JUR. 2D *State and Local Taxation* § 727 (2001).

205. *Moehlman*, 282 S.W.2d at 688. The special commissioners awarded Moehlman \$200 as compensation for the taking. *Id.*

matter of law because they were employed by the City.<sup>206</sup> The district court rejected the argument and dismissed the case.<sup>207</sup> The court of appeals reversed, holding the commissioners' award was improper based on the arguments raised by Moehlman in the district court.<sup>208</sup> The City of Bryan filed a writ to the Texas Supreme Court, which subsequently reversed the court of appeals and reinstated the district court's decision.<sup>209</sup> The court supported its holding on two grounds.<sup>210</sup> First, Moehlman had an adequate remedy through the filing of objections with the county court at law challenging the sufficiency of the award.<sup>211</sup> Second, the independent and quasi-judicial nature of the Board outweighed any ties it had with the City.<sup>212</sup> The expansive holding essentially prevents any potential future challenge by a landowner to the qualifications of any selected commissioner because, at the very least, the landowner will always have an ability to appeal the special commissioners' decision.<sup>213</sup>

## 2. *The Powers of the Commissioners' Court*

The powers of the commissioners are different from those of a typical state or federal judge.<sup>214</sup> Unlike traditional judicial judges, the commissioners are merely administrative fact finders and therefore lack the power to resolve matters of law.<sup>215</sup> In fact, the special commissioners only resolve the amount of compensation a landowner is entitled to receive due to the taking.<sup>216</sup> This restriction necessarily means that should landowners desire to raise claims that the proposed taking is not in fact for a public use, or that the condemning authority lacks the proper authority to condemn the particular piece of land, they must first navigate an administrative hearing before having their claims heard in a civil court.<sup>217</sup> The lack of power to resolve matters of law prevents the special commissioners from ruling on evidentiary matters.<sup>218</sup> As a result, neither party is bound to abide by the

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206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *See id.* at 689-90.

211. *See id.* at 689.

212. *See id.* at 690.

213. *See id.* at 689-90.

214. *Compare* *Morrow v. Corbin*, 62 S.W.2d 641, 644-45 (Tex. 1933) (holding that judicial power includes the ability to determine matters of law and enter judgments), *with* *Amason v. Natural Gas Pipeline Co.*, 682 S.W.2d 240, 241-42 (Tex. 1984) (holding that special commissioners cannot rule on matters of law or evidence).

215. *Amason*, 682 S.W.2d at 242.

216. *Id.*

217. *See id.* at 241-42.

218. *See* *Dueitt v. Harris Cnty.*, 249 S.W.2d 636, 639 (Tex. Civ. App.—Galveston 1952, writ ref'd).

rules of evidence or civil procedure.<sup>219</sup> With the rules of evidence and civil procedure not in play, parties typically introduce large amounts of inadmissible evidence because the opposing party cannot raise hearsay objections or question the authenticity of the evidence.<sup>220</sup>

Following the administrative hearing, the commissioners must determine the appropriate amount of compensation landowners are entitled to receive and certify the award, in writing, for approval by the presiding judge.<sup>221</sup> If either party, or both, disagrees with the commissioners' determination, which is common, that party may file a list of objections with the court.<sup>222</sup> Further, should either party wish to raise an issue for which the condemning authority lacked the power to resolve, that party must also file a list of objections with the court.<sup>223</sup> Regardless of the nature of the objection, the party must file the list of objections with the court "on or before the first Monday following the 20th day after the day the commissioners file their findings with the court."<sup>224</sup> Assuming the party files a proper list of objections, the proceeding now shifts from an administrative proceeding to a traditional civil proceeding in a court of law.<sup>225</sup>

### C. *The Third Hurdle: The Civil Court Proceeding*

Even though the district court, or county court at law, gains jurisdiction only after a party appeals a determination rendered by the commissioners' court, the court does not operate like a traditional appellate court.<sup>226</sup> The district or county court is not limited to reviewing the determination by the commissioners' court, but rather conducts a new trial *de novo*.<sup>227</sup> Once the proceeding becomes a traditional civil case, it proceeds as if the administrative phase never occurred.<sup>228</sup> Consequently, parties cannot introduce into evidence any decisions made by the

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219. See TEX. PROP. CODE ANN. § 21.014 (West Supp. 2011). Enforcing the rules of evidence and procedure in the administrative hearing would be impossible because the commissioners are not required to have a legal background. See *id.*

220. See *Dueitt*, 249 S.W.2d at 639.

221. See *Sinclair v. City of Dallas*, 44 S.W.2d 465, 466 (Tex. Civ. App.—Waco 1931, writ ref'd).

222. See *id.*

223. See *State v. Jackson*, 388 S.W.2d 924, 925 (Tex. 1965). A party wishing to raise an issue other than adequacy of damage compensation should not use any money paid by the condemning authority because such action necessarily waives the party's right to contest any issue besides the adequacy of the compensation itself. See *id.* The party objecting also has the burden of serving the opposition with citation (a form of notice), and any untimely delay in serving a citation may result in a dismissal of the case. See *Denton Cnty. v. Brammer*, 361 S.W.2d 198, 200 (Tex. 1962).

224. TEX. PROP. CODE ANN. § 21.018 (West 2004 & Supp. 2011).

225. See *PR Invs. & Specialty Retailers, Inc. v. State*, 251 S.W.3d 472, 476 (Tex. 2008).

226. See *id.*

227. *Id.*

228. See *id.*

commissioners' court, including the final award submitted by the commissioners.<sup>229</sup>

Although the procedure is undoubtedly harsh on a party satisfied with the commissioners' determination, the goal of the law as currently stated is to ensure that each party has a right to a trial by jury.<sup>230</sup> Courts, therefore, interpret the law as willing to sacrifice efficiency in order to ensure that any party can have his case heard by a jury of his peers.<sup>231</sup> As the plaintiff, the condemning authority necessarily has the burden of proof and production at the outset of the case, but unlike at the commissioners' hearing, the condemning authority now must comply with the rules of evidence and civil procedure.<sup>232</sup> The additional burden of complying with the rules of evidence and civil procedure, however, is lessened by the fact that the new trial allows condemning authorities to present new evidence and even amend their pleading to incorporate new arguments.<sup>233</sup>

Once the court renders its verdict—either by jury or bench trial—the court must assess costs upon the party.<sup>234</sup> Prior to S.B. 18, the losing party bore the responsibility of paying court costs and other similar administrative costs.<sup>235</sup> Regardless of the decision rendered by the special commissioners' or civil court, a party could not generally recover attorney's fees.<sup>236</sup> On its face, this rule might seem insignificant, but the central goal of ensuring that the landowner receives just compensation for his or her property loss inevitably makes this rule more controversial.<sup>237</sup> For instance, a landowner may hypothetically receive \$100,000 as compensation for a taking. Once the landowner pays the typical 33% attorney's fees, however, the landowner is now only 67% whole because he or she only ends up with approximately \$67,000.<sup>238</sup> This single example demonstrates the importance of reaching an agreement without having to resort to the courts.

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229. *See id.*

230. *See* Eppoleto v. Bournias, 764 S.W.2d 284, 285-86 (Tex. App.—Waco 1988, no writ).

231. *See PR Invs. & Specialty Retailers*, 251 S.W.3d at 478.

232. *In re State*, 65 S.W.3d 383, 388 (Tex. App.—Tyler 2002, no pet.).

233. *See PR Invs. & Specialty Retailers*, 251 S.W.3d at 476.

234. *See* Act effective Jan. 1, 1984, 68th Leg., R.S., ch. 576, 1983 Tex. Gen. Laws 3506 (amended 2011) (current version at TEX. PROP. CODE ANN. § 21.047(a) (West Supp. 2011)).

235. *Id.*

236. *See, e.g.,* City of Sherman v. Williams, 296 S.W. 663, 664 (Tex. Civ. App.—Amarillo 1927, no writ).

237. *See id.*

238. *See Texas Eminent Domain Attorney*, BIERSDORF ASSOCS., <http://www.condemnation-law.com/main/eminant-domain-attorney/texas-eminant-domain-attorney> (last visited Jan. 2, 2012).

## V. HOW SENATE BILL 18 IMPACTS CONDEMNATION IN TEXAS

A. *Third Time's a Charm: The Build-up to Senate Bill 18*

The enactment of S.B. 18 was the successful climax of previous efforts to reform Texas's eminent domain laws following the controversial *Kelo v. City of New London* decision in 2005.<sup>239</sup> In *Kelo*, the Supreme Court, in a 5–4 decision, grossly expanded the power of the government to condemn land by creating a liberal standard for what constitutes a “taking” for public use.<sup>240</sup> The Court held that the economic development satisfied the public use requirement so long as the public benefitted from it at some point in the future.<sup>241</sup> Thus, *Kelo* gave the government the power to transfer property from one private entity to another under the justification that it was part of a publically beneficial economic development plan.<sup>242</sup> After the decision, several states, including Texas, feared that private property ownership was under attack from the federal government.<sup>243</sup> The Texas Legislature responded to the *Kelo* decision by passing multiple bills dedicated to curbing the power of the state to take private property.<sup>244</sup> Incorporated within these bills, however, was a concurrent desire to equip private landowners with more tools to protect their private property against condemning authorities seeking to utilize their powers of eminent domain.<sup>245</sup>

The first attempt to enact comprehensive eminent domain reform was House Bill 2006 (H.B. 2006) in 2007.<sup>246</sup> H.B. 2006 focused on reforming three important aspects of eminent domain law. First, it expanded the amount and type of evidence that the special commissioners' court could hear.<sup>247</sup> Specifically, the proposed law would allow property owners to

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239. See *infra* notes 240-59 and accompanying text.

240. See *Kelo v. City of New London*, 545 U.S. 469, 480 (2005). The case centered on New London's plan to condemn private property located in distressed portions of the city. *Id.* at 472. The city officials planned to give the condemned land to private businesses in hopes that they would revitalize the economy by creating jobs and renovating the property. *Id.*

241. *Id.* at 477.

242. See *id.* at 477-79.

243. See Bill Peacock, *Fixing Texas' Kelo Problem: Testimony Before the Committee on Land and Resource Management*, TEX. PUB. POL'Y FOUND. (Feb. 28, 2011), <http://www.texaspolicy.com/pdf/2011-02-testimony-FixingTexasKeloProblem-CEF-bp.pdf>.

244. See *id.*

245. See *id.* H.B. 2006 was the first attempt to incorporate new rules that would incentivize and encourage negotiations prior to involving the court system, because legislators realized that pre-judicial negotiations would be more likely to result in a just outcome for the property owner and would substantially reduce the costs incurred by both parties. See House Comm. on Land & Res. Mgmt., Bill Analysis, Tex. H.B. 2006, 80th Leg., R.S. 1-3 (2007), available at <http://www.hro.house.state.tx.us/pdf/ba80r/hb2006.pdf#navpanes=0>.

246. See Peacock, *supra* note 243.

247. See House Comm. on Land & Res. Mgmt., Bill Analysis, Tex. H.B. 2006, 80th Leg., R.S. 4 (2007).

introduce evidence that highlighted the crucial fact that the property owners would not be selling the property but for the fact that the condemning authority was involuntarily taking the property.<sup>248</sup> Further, the proposed law required condemning authorities to incorporate this factor when determining the value of a piece of property.<sup>249</sup> Second, H.B. 2006 provided for a strict definition of “public use” to mean “a use of property . . . that allows the state, a political subdivision of the state, or the general public of the state to possess, occupy, and enjoy the property.”<sup>250</sup> The legislature intended that narrowing the definition of public use would eliminate the ability of condemning authorities to take land solely for economic gain—eliminating a potential repeat of *Kelo*.<sup>251</sup> Third, H.B. 2006 added a “bona fide offer” requirement that was a starting point for balancing out the immense advantage condemning authorities have over private landowners when it comes to negotiating a fair purchase value for the land subject to condemnation.<sup>252</sup> The bona fide offer requirement provided a list of requirements including that the offer “is based on a reasonably thorough investigation.”<sup>253</sup>

Even though H.B. 2006 received widespread support in both the Texas House of Representatives and the Texas Senate—passing both bodies by near unanimous decisions—Governor Perry ultimately vetoed the legislation.<sup>254</sup> The major concern cited by Governor Perry was the cost that taxpayers would have to pay in order to enact the various eminent domain reforms.<sup>255</sup> Specifically, Governor Perry disagreed with the potential amount of recovery a private landowner could recover when only a portion of land was condemned.<sup>256</sup> Following the veto, a mutual compromise never materialized, and H.B. 2006 never came to fruition.<sup>257</sup>

Two years later, in 2009, Senator Estes introduced S.B. 18; although it ultimately failed to become law, it served as the foundation for the 2011 version of S.B. 18.<sup>258</sup> Specifically, the 2009 version of S.B. 18 reintroduced

248. *See id.*

249. *See id.*

250. Tex. H.B. 2006, 80th Leg., R.S. 1 (2007), available at <http://www.capitol.state.tx.us/tlodocs/80R/billtext/pdf/HB02006F.pdf#navpanes=0> (enrolled version).

251. *See* House Comm. on Land & Res. Mgmt, Bill Analysis, Tex. H.B. 2006, 80th Leg., R.S. 4 (2007).

252. *See id.* at 4-5.

253. Tex. H.B. 2006, 80th Leg., R.S. 6 (2007). The full list of requirements for a “bona fide offer” is almost identical to those incorporated in the enacted 2011 version of S.B. 18. *See* discussion *infra* Part V.B.1.

254. S.J. of Tex., 80th Leg., R.S. 2965, 4669 (2007); *see Proclamation by the Governor of the State of Texas* (June 15, 2007), <http://www.lrl.state.tx.us/scanned/vetoes/80/hb2006.pdf#navpanes=0> (vetoing Tex. H.B. 2006).

255. *See Proclamation by the Governor of the State of Texas*, *supra* note 254.

256. *See id.*

257. *See id.*

258. *See* H.J. of Tex., 81st Leg., R.S. 3038 (2009) (S.B. 18 died in committee). Senator Estes, along with Senator Duncan, is the co-author of both versions of S.B. 18. *Senator Craig Estes: District*

the bona fide offer requirement first introduced in H.B. 2006, and it included the proposed assessment of certain costs and fees in hopes of encouraging negotiated settlements.<sup>259</sup>

## *B. Improvements Enacted Under Senate Bill 18*

### *1. Codifying a “Bona Fide Offer” Provision*

The bona fide offer provision was a major reform enacted under S.B. 18. The provision was put in place to help attempt to shift some of the power away from the condemning authority and towards the landowner.<sup>260</sup> Specifically, the bona fide offer provision was the culmination of prior legislative attempts to resolve the confusion over what actions both parties must undertake prior to seeking a judicial remedy.<sup>261</sup> Previously, the only requirement, that the parties be unable to reach an agreement, created enormous confusion and varying approaches in demonstrating the inability to agree.<sup>262</sup> The new bona fide offer requirement resolves the confusion by creating a definitive timeline that both parties must follow before they can involve the courts.<sup>263</sup> Along with creating a definite timeline, the new provision sets out an offer scheme that requires more interaction between the two parties.<sup>264</sup>

Unlike the old procedure, in which courts specifically allowed condemning authorities to make a single take-it-or-leave-it offer, the new procedure expressly requires condemning authorities to make at least two separate offers.<sup>265</sup> In particular, the condemning authority must make an initial offer and then wait at least thirty days before making a final offer.<sup>266</sup> Prior to making a final offer, the condemning authority must obtain a certified appraisal and must base the final offer off the findings contained

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30, SENATE OF TEX., <http://www.estes.senate.state.tx.us/> (last visited Jan. 31, 2012). Senator Estes serves as the chair of the Agriculture and Rural Affairs Committee and vice-chair of the Natural Resources Committee. *Id.*

259. See House Comm. on Land & Res. Mgmt., Bill Analysis, Tex. S.B. 2009, 81st Leg., R.S. 3-5 (2009).

260. See TEX. PROP. CODE ANN. § 21.0113 (West Supp. 2011); see also House Comm. on Land & Res. Mgmt., Bill Analysis, Tex. S.B. 18, 82d Leg., R.S. 9-10 (2011) (stating that supporters of S.B. 18 believed the “bona fide offer” requirement would encourage the condemning authorities to provide fair offers).

261. See *supra* notes 252-59 and accompanying text.

262. See *supra* notes 184-94 and accompanying text.

263. See § 21.0113(b)(1)-(3).

264. See *id.*

265. Compare *State v. Hipp*, 832 S.W.2d 71, 77-78 (Tex. App.—Austin 1992, writ granted), *rev'd*, *State v. Dowd*, 867 S.W.2d 781 (Tex. 1993) (holding that a condemning authority only needs to make one offer before seeking judicial relief), with § 21.0113(b)(1)-(2) (mandating that condemning authorities provide the landowner with at least two written offers that are spaced out sufficiently to provide the landowner sufficient time to consider both offers).

266. § 21.0113(b)(3).

within the appraisal.<sup>267</sup> After the condemning authority makes its final offer, it must provide the landowner with at least fourteen days to respond to the offer before ending the negotiation process.<sup>268</sup>

Although the new provision only changes the procedure and does not explicitly require either party to engage in earnest negotiations, the amount of time both parties must expend before going to court indirectly provides a stronger incentive to settle the case.<sup>269</sup> The increase in time is crucial because the more time the condemning authority must wait before obtaining a resolution, the higher the costs of completing the project becomes.<sup>270</sup> The higher costs stem from both increases in litigation expenses and delays in revenue generation caused by the project's later completion date.<sup>271</sup> Further, since condemning authorities must make at least two offers, the provision essentially requires an exchange of concerns and values between the two parties through the first offer, response, and final offer stages.<sup>272</sup> If condemning authorities choose not to engage in meaningful negotiations, they increase the risk that a judge will rule that their offer fails to satisfy the bona fide offer requirement.<sup>273</sup> If this occurs, the judge will abate the suit and order the condemning authority to pay litigation costs associated with the violation.<sup>274</sup> Thus, even though the bona fide offer requirement makes no mention of negotiations, the statute indirectly incentivizes negotiations and potentially penalizes condemning authorities that do not take the incentives to negotiate seriously.<sup>275</sup>

## 2. Reforming the Administrative Process

S.B. 18 amended various procedures associated with the administrative portion of a condemnation proceeding. The enacted administrative changes focused primarily on the makeup of the special commissioners' court.<sup>276</sup> First, the new bill modernizes the qualifications to serve as a special commissioner from one who is a freeholder to one who is a real property

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267. See § 21.0113(b)(4).

268. See § 21.0113(b)(7).

269. See § 21.0113. At the very minimum, forty-four days must elapse before either party can seek judicial relief. See § 21.0113(b)(3), (7). Thirty days must elapse between the initial and final offers, and fourteen more days must elapse after the final offer in order to allow the landowner more time to review the final offer. See *id.*

270. See Fiscal Note, Tex. S.B. 18, 82d Leg., R.S. (2011) (providing a description of which specific provisions of S.B. 18 will increase fiscal spending by both the state and private entities utilizing the power of eminent domain).

271. See *id.*

272. See § 21.0113(b)(7).

273. See *id.* § 21.047(d).

274. § 21.047(d)(1)-(2). The amount the court will award the landowner is determined on a case-by-case basis depending on the discretion of what the judge finds to be a reasonable amount. See § 21.047(d)(2).

275. See § 21.047(d)(1)-(2).

276. See *id.* § 21.014(a).

owner.<sup>277</sup> Although there is no real difference between a freeholder and a real property owner, the distinction demonstrates the legislature's intent to modernize and simplify the condemnation process in Texas.<sup>278</sup>

Second, and more importantly, S.B. 18 inserts a new provision that allows either party to "strike one of the three [special] commissioners appointed by the judge."<sup>279</sup> Prior to S.B. 18, neither party played a direct role in the appointment of the three special commissioners.<sup>280</sup> Instead, the judge had almost complete control over the appointment of the commissioners, except for the fact that the judge was to give preference to potential commissioner both parties approved.<sup>281</sup> Under the new law, however, both parties now have the potential to directly influence the makeup of the special commissioners' court.<sup>282</sup> Given that the majority of counties in Texas are rural, especially those counties in which landowners are involved with condemnation proceedings due to the CREZ project, the ability to strike just one commissioner could dramatically influence the outcome rendered by the special commissioners' court.<sup>283</sup>

### *C. Failures of Senate Bill 18: Why Texas Failed to Include an Attorney's Fees Provision*

The awarding of attorney's fees was a controversial provision in S.B. 18. The provision divided the house, which supported an attorney's fees provision, and the senate, which opposed such a provision.<sup>284</sup> As originally drafted, S.B. 18 did not include a provision authorizing courts to award attorney's fees if the compensation awarded by the court exceeded the offer made by the condemning authority.<sup>285</sup> In fact, the original version of S.B. 18 only authorized courts to award attorney's fees if the court determined that the condemning authority did not make a bona fide offer prior to seeking judicial relief.<sup>286</sup> The awarding of attorney's fees was not for the

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277. *See id.*

278. *See* House Comm. on Land & Res. Mgmt., Bill Analysis, Tex. S.B. 18, 82d Leg., R.S. 3 (2011).

279. *See* § 21.014(a).

280. *See In re State*, 325 S.W.3d 848, 850 (Tex. App.—Austin 2010, no pet.) (holding that the judge has the power to appoint the three special commissioners).

281. *Angier v. Balsler*, 48 S.W.2d 668, 671 (Tex. Civ. App.—Austin 1932, writ ref'd).

282. *See* § 21.014(a).

283. *See, e.g., Angier*, 48 S.W.2d at 672 (noting that damage calculation by two of the three judges was sufficient).

284. *Compare* House Comm. on Land & Res. Mgmt., Bill Analysis, Tex. S.B. 18, 82d Leg., R.S. 4-5 (2011) (indicating that the house included a provision that awarded landowners their attorney's fees under certain situations), *with* Senate Comm. on Land & Res. Mgmt., Bill Analysis, Tex. S.B. 18, 82d Leg., R.S. 8 (2011) (removing any mention of a provision that would award the landowner attorney's fees upon a successful litigation outcome).

285. *See* TEX. PROP. CODE ANN. § 21.047 (West Supp. 2011).

286. *See id.*

entire case, however, but only for the costs accrued up to that point.<sup>287</sup> Because the proceeding is only abated temporarily so that the condemning authority can make a bona fide offer, the landowner conceivably was still liable for future attorney's fees should the proceeding resume—regardless of whether the landowner prevails in the end.<sup>288</sup>

Following unanimous passage in the senate, the house took up consideration of S.B. 18 and amended the bill to add a new provision that would substantially expand the circumstances under which a court could award attorney's fees.<sup>289</sup> Under the house substitute version of S.B. 18, drafted by the Land and Resource Management Committee, condemning authorities would be liable to pay attorney's fees under the following circumstances:

[When] the special commissioners or a court awards damages in a condemnation proceeding in an amount that is greater than 110[%] of the amount of damages the condemnor offered to pay before the proceedings began, the commissioners or the court shall award reasonable attorney's fees and other professional fees to the property owner in addition to costs awarded under Section 21.047.<sup>290</sup>

Although the substitute bill drafted by the Land and Resource Management Committee passed the entire house unanimously, the ten members appointed to the Conference Committee completely stripped the attorney's fees provision from the final bill.<sup>291</sup> The most likely cause for the removal of the attorney's fees provision was fear over the negative fiscal impacts associated with such a provision.<sup>292</sup> Opponents of the provision focused their attacks on the projected \$7 million increase in annual spending allegedly caused by an attorney's fees provision.<sup>293</sup> Opponents felt that this increase in spending would deter vital institutions (such as schools and universities) from acquiring land needed to expand in order to accommodate future needs.<sup>294</sup> Regardless of the reason, the lack of an attorney's fees provision in S.B. 18 will make it easier for condemning

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287. *See id.*

288. *See id.*

289. S.J. of Tex., 82d Leg., R.S. 301, 1203 (2011).

290. Tex. C.S.S.B. 18, 82d Leg., R.S. 16 (2011).

291. *Id.* at 1631, 1640.

292. *See* House Comm. on Land & Res. Mgmt., Bill Analysis, Tex. S.B. 18, 82d Leg., R.S. 10 (2011). Supporters of an attorney's fee provision argue that the negative fiscal impact concern raised by lawmakers is merely a cover to conceal the fact that they support the ability of private entities to take private property. *See Buyer Beware: Perry's Eminent Domain Bill Is a Disaster for Landowners*, BLOGSPOT (Jan. 12, 2011), <http://corridornews.blogspot.com/2011/01/texas-sb-18-expands-number-of-entities.html>.

293. *See* House Comm. on Land & Res. Mgmt., Bill Analysis, Tex. S.B. 18, 82d Leg., R.S. 10 (2011).

294. *See id.*

authorities to sidestep around the newly enacted provisions and remain in a position of power over private landowners.<sup>295</sup>

## VI. REMEDYING THE PROBLEM: HOW OTHER STATES AWARD ATTORNEY'S FEES IN EMINENT DOMAIN CASES

Several states now include provisions that require condemning authorities to pay the attorney's fees of the landowner. The four major approaches are listed below: the threshold percentage approach adopted by Wisconsin, the strict mandatory approach adopted by Montana, the purely discretionary approach adopted by California, and the multi-tiered recovery structure adopted by Florida.<sup>296</sup> Although the approaches differ substantially, the goal of leveling the playing field between condemning authority and landowner is the same.

### A. *The Wisconsin Approach*

The Wisconsin approach incorporates a threshold percentage requirement that a court compensation award must exceed before condemning authorities become liable for the landowner's attorney's fees.<sup>297</sup> Specifically, the statute states that "litigation expenses shall be awarded to the condemnee if . . . [t]he jury verdict [or the condemnation commission award] as approved by the court . . . exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least \$700 and at least 15%."<sup>298</sup> The Supreme Court of Wisconsin concluded that the legislature enacted the statute, which included the 15% threshold and the minimum \$700 requirement, in order to make sure that landowners have the best opportunity to receive full and just compensation while still maintaining a check against landowners pursuing frivolous lawsuits in the hopes of gaining the system.<sup>299</sup> Further, the Wisconsin Legislature—realizing the subjectivity and uncertainty inherent in valuing land—felt that the 15% threshold was the best way to reduce the chances that condemning authorities would have to pay attorney's fees solely because of this subjectivity factor.<sup>300</sup>

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295. See TEX. PROP. CODE ANN. §§ 21.0113, .047 (West Supp. 2011). These new provisions are largely procedural changes and only penalize the condemning authority for not following the specific procedure. See *id.* While procedural penalties are important, they focus the condemning authority's attention on satisfying a checklist rather than ensuring the landowners receive just compensation. See *id.*

296. CAL. CIV. PROC. CODE § 1250.410(b) (West 2007); FLA. STAT. ANN. § 73.092 (West 2004); MONT. CODE ANN. § 70-30-305 (2009); WIS. STAT. ANN. § 32.28 (West 2006).

297. See WIS. STAT. ANN. § 32.28(d)-(e).

298. *Id.* § 32.28(e).

299. See *Klemm v. Am. Transmission Co.*, 2011 WI 37, 798 N.W.2d 223, 237.

300. See *id.* at 238.

Other states, including Oklahoma and Colorado, follow a similar approach to Wisconsin. Oklahoma has a stricter standard than Wisconsin utilizes.<sup>301</sup> Oklahoma provides for the awarding of attorney's fees if the court-awarded compensation exceeds the final offer made by the condemning authority by 10%.<sup>302</sup> On the other end, Colorado provides a less strict standard when compared to Wisconsin because Colorado only awards attorney's fees when the court-awarded compensation exceeds the final offer made by the condemning authority by 30%.<sup>303</sup>

### *B. The Montana Approach*

Compared to other approaches that allow for some level of flexibility in the awarding of attorney's fees, Montana utilizes a rather extreme approach. Montana mandates that condemning authorities pay the attorney's fees of the landowner as long as the landowner prevails in the litigation.<sup>304</sup> Because of this approach, only two requirements stand between the landowner and recovering the costs of attorney's fees: litigation and a judicial victory.<sup>305</sup> The only reprieve for condemning authorities is that courts measure the jury-awarded compensation against the highest offer made by the condemning authority prior to trial.<sup>306</sup> Thus, condemning authorities—following the special commissioners' findings—can provide a new offer, and courts will then use their amended offer to determine whether the condemning authority is liable for the attorney's fees of the landowner.<sup>307</sup>

### *C. The California Approach*

The California approach allows for the most flexibility in determining whether to award the landowner attorney's fees.<sup>308</sup> Section 1250.410(b) allows judges to award the landowner attorney's fees if, in their discretion, they find the condemning authority's offer to be unreasonable.<sup>309</sup> In order to determine whether the condemning authority's offer is unreasonable, the judge will compare the final offer made by the condemning authority—which is filed with the court and served on the defendant at least twenty

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301. See OKLA. STAT. ANN. tit. 66, § 55 (West 2011).

302. *Id.*

303. COLO. REV. STAT. ANN. § 38-1-122 (West 2011).

304. See MONT. CODE ANN. § 70-30-305 (2009).

305. See *Bozeman Parking Comm'n v. First Trust Co. of Mont.*, 619 P.2d 168, 171 (Mont. 1980).

306. See *State, By & Through State Highway Comm'n v. Donnes*, 609 P.2d 1213, 1216 (Mont. 1980).

307. See *id.*

308. See CAL. CIV. PROC. CODE § 1250.410(b) (West 2007).

309. *Id.*

days prior to trial—against the final court-determined compensation award.<sup>310</sup>

Even though the California approach provides a great deal of flexibility, the lack of any bright-line test creates inconsistencies over whether an offer is unreasonable.<sup>311</sup> Specifically, courts can consider factors ranging from the novelty and difficulty of questions presented to the experience and reputation of the attorneys involved in the litigation.<sup>312</sup> Courts generally find that offers made by condemning authorities that constitute 60% or less of the court-awarded compensation amount are necessarily unreasonable.<sup>313</sup> Given the broad range of factors, however, there is no guarantee that a judge will find any one particular offer made by the condemning authority to be reasonable.<sup>314</sup>

Louisiana incorporates a similar approach to California, although with slight modifications. Louisiana, like California, allows judges to utilize their discretion in determining whether landowners should recover their attorney's fees.<sup>315</sup> Unlike California, however, Louisiana allows a judge to award landowners their attorney's fees upon any successful outcome.<sup>316</sup> Therefore, in some ways, a judge in Louisiana actually has more discretion in deciding whether to award attorney's fees than a judge in California because Louisiana judges need not base any decision upon whether the offer made by the condemning authority was reasonable.<sup>317</sup> Theoretically, a judge could require the condemning authority to pay the attorney's fees of the landowner even if the court-awarded compensation exceeds the offer made by the condemning authority by \$1.<sup>318</sup> Although this may increase the incentive for condemning authorities to provide better offers initially, it provides both parties even less certainty than the California approach as to when a court will reimburse landowners for their attorney's fees.<sup>319</sup>

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310. See § 1250.410(a).

311. See, e.g., *People ex rel. Dep't of Transp. v. Yuki*, 37 Cal. Rptr. 2d 616, 626 (Ct. App. 1995).

312. *Id.*

313. See *Cnty. Redev. Agency v. Krause*, 209 Cal. Rptr. 1, 4 (Ct. App. 1984).

314. Compare *id.* at 4 (finding that the condemning authority's offer, which constituted 82% of the amount awarded by the court, was unreasonable), with *California ex rel. State Pub. Works Bd. v. Turner*, 153 Cal. Rptr. 156, 159 (Ct. App. 1979) (Wiener, J., dissenting) (finding that the condemning authority's offer, which constituted 78% of the amount awarded by the court, was reasonable).

315. See LA. REV. STAT. ANN. § 19:8 (2004).

316. See *id.*

317. See *id.*

318. See *id.* A situation in which the court orders the condemning authority to pay the attorney's fees of the landowner when the difference between the final offer and the court-awarded compensation is only \$1 is unlikely to occur because of the series of factors that Louisiana courts are required to consider. See *State v. Ransome*, 392 So. 2d 490, 495 (La. Ct. App. 1980). These factors include the importance of the litigation, the character of the project, and the knowledge and skill of the attorney. See *id.*

319. Compare *City of New Orleans v. Condon*, 600 So. 2d 78, 81 (La. Ct. App.), *writ denied*, 605 So. 2d 1130 (La. 1992) (holding that courts should award attorney's fees when the amount awarded by the court is substantially higher than the offer made by the condemning authority), with *Claiborne Elec. Co-op., Inc. v. Garrett*, 357 So. 2d 1251, 1258 (La. Ct. App.), *writ denied*, 359 So. 2d 1306 (La. 1978)

Without any guidance, it makes it harder for landowners to decide whether to challenge a condemning authority's offer because they do not know whether it is worth the litigation costs.

#### *D. The Florida Approach*

Florida incorporates an approach that is unique when compared to the approaches described above. Florida relies on a multi-tiered recovery approach to determine the amount of attorney's fees the landowner can recover.<sup>320</sup> The schedule provides three different rates at which the landowner can recover attorney's fees.<sup>321</sup> The first rate level allows the landowner to recover 33% of any benefit received up to \$250,000; the second level allows the landowner to recover 20% of any benefit received between \$250,000 and \$1 million; and the third level allows the landowner to recover 20% of any benefit received over \$1 million.<sup>322</sup> Florida defines the benefit received by the landowner as the difference between the court-awarded compensation and the final offer made by the condemning authority.<sup>323</sup>

The Florida approach can best be explained by looking at an illustration. Assume that the condemning authority made a final written offer to the landowner to buy the particular piece of land in question for \$500,000. The landowner, feeling that the offer is low, challenges the offer in court. Upon the completion of litigation, the court awards the landowner \$2 million, creating a difference of \$1.5 million between the court-awarded compensation and the final offer made by the condemning authority. This \$1.5 million figure will be the amount plugged into the recovery schedule to determine how much additional compensation the landowner will recover in the form of attorney's fees. The first \$250,000 entitles the landowner to recover 33% as attorney's fees—equaling \$82,500. The next \$750,000 entitles the landowner to recover 25% as attorney's fees—equaling \$187,500. The final \$500,000 that exceeds \$1 million entitles the landowner to recover 20% as attorney's fees—equaling \$100,000. Adding up the three different levels of recovery entitles the landowner to recover a total of \$370,000 for attorney's fees.

Although the Florida approach is rather unique, others have suggested that their state adopt this strategy with certain modifications, such as a discretionary element.<sup>324</sup> The appeal of that approach is that it provides

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(holding that courts should award attorney's fees whenever the amount awarded by the court is higher than the offer made by the condemning authority).

320. See FLA. STAT. ANN. § 73.092 (West 2004).

321. See *id.*

322. See *id.*

323. See *id.*

324. See generally Crystal Genteman, Comment, *Eminent Domain and Attorneys' Fees in Georgia: A Growing State's Need for a New Fee-Shifting Statute*, 27 GA. ST. U. L. REV. 829 (2011) (providing an

judges the opportunity to not award attorney's fees when they otherwise would be awarded because the particular case presents unique facts that make the awarding of attorney's fees unjust.<sup>325</sup> It remains to be seen, however, whether other states will switch and follow a recovery approach similar to Florida.

## VII. TEXAS SHOULD ENACT AN ATTORNEY'S FEES PROVISION THAT UTILIZES ELEMENTS FROM BOTH FLORIDA AND WISCONSIN

### *A. The Framework of the Proposed Provision*

The proposed provision would state:

- (1) If the special commissioners or a court awards damages in a condemnation proceeding in an amount that exceeds by 10% the amount of damages the condemnor offered to pay before the proceedings began, the commissioners or the court shall award attorney's fees and other professional fees to the property owner in addition to costs awarded under § 21.047.
- (2) The court shall award attorney's fees based on the following schedule:
  - (a) If the difference between the final offer made by the condemning authority and the court-awarded judgment is greater than 10% but less than or equal to 30%, the landowner shall receive attorney's fees in the amount of 20% of the total compensation awarded by the court.
  - (b) If the difference between the final offer made by the condemning authority and the court-awarded judgment is greater than 30%, the landowner shall receive attorney's fees in the amount of 33% of the total compensation awarded by the court.

### *B. Why Texas Needs an Attorney's Fees Provision*

The central goal of any eminent domain law should focus on ensuring that landowners receive full and just compensation for any amount of land that a condemning authority involuntarily takes from a landowner.<sup>326</sup> Texas explicitly enumerates this point in its constitution by stating: "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made."<sup>327</sup> The consensus remains

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in-depth discussion on why Georgia should adopt an attorney's fees provision similar to the one that exists in Florida).

325. *See id.* at 868.

326. *See* Tex. Highway Dep't v. Weber, 219 S.W.2d 70, 72 (Tex. 1949). Justice Harvey of the Texas Supreme Court went further by stating that the right to just compensation "exists independent of constitutional provision and is a right inherent in organized society itself." *Id.*

327. TEX. CONST. art. I, § 17 (amended Nov. 3, 2009).

that the best chance that a landowner has to receive full compensation occurs during a negotiated settlement rather than an amount determined through the court system.<sup>328</sup> In order to encourage negotiated settlements, however, both parties need incentives before actively engaging in constructive negotiations. Although most landowners are willing to negotiate a fair settlement, Texas's current eminent domain laws, even after the passage of S.B. 18, fail to provide condemning authorities sufficient incentives to shift their focus towards obtaining a negotiated settlement.<sup>329</sup>

The best strategy to encourage constructive negotiations is for Texas to enact an attorney's fees provision that incorporates elements of both the Wisconsin and Florida approaches. This "selective incorporation" provides the best opportunity to level the playing field between the landowner and the condemning authority.

Opponents of awarding the landowner attorney's fees under any condition focus their concerns over the potential increases in costs to condemn land.<sup>330</sup> Opponents of awarding attorney's fees in Texas focused on the potential \$7 million increase in fiscal spending that the 110% provision proposed by the House Land Management and Resource Committee created.<sup>331</sup> Further, opponents argued that the provision would inflate initial offers and that condemning authorities would ultimately pass on these increases in costs to the taxpayer or consumer.<sup>332</sup> While these arguments have merit, they mistake the true motive behind enacting an attorney's fees provision, and they fail to take into account any long-term potential savings.

If landowners are receiving less than full and just compensation, increases in spending and costs associated with the condemnation process should naturally be expected to increase.<sup>333</sup> By opposing an eminent domain provision simply because of its potential to increase costs, opponents necessarily fail to consider why the costs are increasing.<sup>334</sup> Although taxpayers and consumers would prefer not to have to pay more money, it would defy ideals of fairness if the public at large received a public benefit and did not have to pay the landowner for providing the benefit. Any argument based on the potential for increases in costs,

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328. *See, e.g.*, *Klemm v. Am. Transmission Co.*, 2011 WI 37, 798 N.W.2d 223, 232 (explaining that it would be unreasonable to suggest that a legislature intends to treat parties willing to negotiate worse than those parties who are unwilling to negotiate and force the proceeding into court).

329. *See* House Comm. on Land & Res. Mgmt., Bill Analysis, Tex. S.B. 18, 81st Leg., R.S. (2009) (stating that several opponents of the 2009 version of S.B. 18, which is nearly identical to the 2011 version of S.B. 18, felt that by not including an attorney's fees provision, the bill failed to provide sufficient penalties against the condemning authority to force them to change their strategy).

330. *See* House Comm. on Land & Res. Mgmt., Bill Analysis, Tex. S.B. 18, 82d Leg., R.S. 10 (2011).

331. *See id.*

332. *See id.*

333. *See* *Warehouse II, LLC v. State Dep't of Transp.*, 2006 WI 62, 715 N.W.2d 213, 223-24.

334. *See id.* at 220-21.

therefore, should only be considered in the context of whether landowners receive full and just compensation for giving up their land.

Second, although condemning authorities may increase the amounts they offer initially due to the fear of having to pay attorney's fees if they go to court, these short-term increases of costs incurred by the condemning authorities will likely be offset by the reduction in litigation expenses. As described above, the condemnation proceeding is a potentially lengthy two-part process requiring the help of appraisers to appear and testify as expert witnesses.<sup>335</sup> These costs—plus the additional increases in time spent negotiating required by the enactment of S.B. 18—provide the potential to far exceed any increases in costs associated with condemning authorities making higher offers.<sup>336</sup> Opponents, however, never address these potential savings, focusing instead on only the increases in fiscal spending in a given fiscal year.<sup>337</sup> Thus, any provision that potentially forces a condemning authority to pay the attorney's fees of the landowner is not likely to increase the costs for condemning authorities when viewed in the long term.<sup>338</sup>

*C. How the CREZ Project Specifically Highlights the Need for Texas to Enact the Proposed Provision*

When condemning authorities seek to acquire land for transmission lines, the damages that are most frequently in dispute are (if there are any at all) the damages to the remainder of the property.<sup>339</sup> The damages to the remainder are normally in the form of aesthetic or recreational damages to the land caused by the presence of 150 to 200 foot tall transmission poles scattered across the property.<sup>340</sup> Typically, condemning authorities seeking to construct these massive transmission lines rarely factor in aesthetic damages when they formulate an offer because aesthetic damages are inherently tricky to translate into a monetary amount.<sup>341</sup> Aesthetic damages

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335. See *supra* Part IV.B-C.

336. See *supra* Part IV.B-C.

337. See Fiscal Note, Tex. S.B. 18, 82d Leg., R.S. (2011) (projecting increases in spending only to the 2012 fiscal year and failing to address any potential increases in savings that might occur in the long term); see also House Comm. on Land & Resource Mgmt., Bill Analysis, Tex. S.B. 18, 82d Leg., R.S. 10 (2011) (estimating increased costs that the Bill will cause in the 2012 fiscal year).

338. See House Comm. on Land & Res. Mgmt., Bill Analysis, Tex. S.B. 18, 82d Leg., R.S. 7-9.

339. See *Tex. Elec. Serv. Co. v. Etheredge*, 324 S.W.2d 322, 323 (Tex. Civ. App.—Eastland 1959, no writ) (involving discrepancies between the parties as to how much the construction of H-frames damaged the remainder of the property outside of the actual easement); see also *Heddin v. Delhi Gas Pipeline Co.*, 522 S.W.2d 886, 887-88 (Tex. 1975) (involving discrepancies between the parties as to how much the construction of a gas pipeline damaged the remainder of the property).

340. See *Tex. Elec. Serv. Co. v. Linebery*, 327 S.W.2d 657, 660-61 (Tex. Civ. App.—El Paso 1959, writ *dism'd*) (holding that the key difference between the parties was the damage, if any, to the remainder of the property).

341. See *Dep't of Highways v. Raybourne*, 364 S.W.2d 814, 816-17 (Ky. 1963); see also *Tex. Power & Light Co. v. Jones*, 293 S.W. 885, 886-87 (Tex. Civ. App.—Dallas 1927, writ *ref'd*) (illustrating the argument raised by condemning authorities over why courts should not be allowed to

are inherently tricky to value because landowners are subjective in nature; landowners value aesthetic damages higher because they have a closer attachment to the land.<sup>342</sup> Further, under the current scheme, condemning authorities are encouraged to disregard any aesthetic damages when drafting an offer because the likelihood the landowner will go to court purely on aesthetic damages is rare.<sup>343</sup> The risks are simply too high for the landowner because even a successful judgment, which incorporates aesthetic damages into the compensation award, most likely will not cover the litigation costs incurred by the landowner.<sup>344</sup>

Under the proposed statute, however, condemning authorities are more likely to consider a wider range of damages than they consider presently because the risks of going to court would be substantially higher.<sup>345</sup> The 1959 case of *Texas Electric Service Co. v. Linebery* best illustrates the risks condemning authorities would face if Texas enacted the proposed provision.<sup>346</sup> *Linebery* involved an electric company seeking to condemn 6.37 acres of land for a transmission line easement.<sup>347</sup> In calculating its offer prior to resorting to the court, the electric company failed to take into account any damages to the remainder of 22,407.37 acres of property.<sup>348</sup> The jury disagreed with the electric company and determined that the remaining 22,407.37 acres were damaged at the rate of \$1.90 per acre.<sup>349</sup> The court, therefore, ordered the electric company to pay \$44,646.90, which was considerably more than the approximately \$379.20 the condemning authority was willing to pay.<sup>350</sup> With the proposed statute in place, the

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factor in aesthetic damages when determining the amount of compensation to which landowners are entitled).

342. See *Raybourne*, 364 S.W.2d at 816-17; see also Michael Montgomery & James K. Spives, *Power Project Brings Land Condemnation Issues to Light*, SAN ANTONIO BUS. J. (Oct. 10, 2010), [http://www.coxsmith.com/portalresource/lookup/wosid/intelliun-104-8202/media.name=/Cox%20Smith%20Matthews%20\(SABJ-10%2010%2010\)%20idd.pdf](http://www.coxsmith.com/portalresource/lookup/wosid/intelliun-104-8202/media.name=/Cox%20Smith%20Matthews%20(SABJ-10%2010%2010)%20idd.pdf) (detailing the eminent domain process as it relates to the CREZ project and describing how condemning authorities go about valuing damages caused by transmission lines).

343. See House Comm. on Land & Resource Mgmt., Bill Analysis, Tex. S.B. 18, 82d Leg., R.S. 12-13 (2011).

344. See *id.*

345. See Fiscal Note, Tex. S.B. 18, 82d Leg., R.S. (2011) (stating that the attorney's fees provision combined with the "bona fide offer" requirement would cause the amount of money offered by the condemning authority to increase substantially).

346. See *Tex. Elec. Serv. Co. v. Linebery*, 327 S.W.2d 657, 660-61 (Tex. Civ. App.—El Paso 1959, writ dismissed).

347. *Id.*

348. See *id.* at 661 (describing how the witness for the utility company felt the damage was limited to a small fifty-foot strip of land on either side of the actual easement).

349. *Linebery*, 327 S.W.2d at 660. The monetary amounts are adjusted for inflation in order to make it easier for the reader to compare the proposed provision to other approaches adopted in different states. See generally *Inflation Calculator: The Changing Value of a Dollar*, DOLLARTIMES, <http://www.dollartimes.com/calculators/inflation.htm> (last visited Feb. 8, 2012) (allowing viewers to convert the worth of money from one year to another).

350. See *Linebery*, 327 S.W.2d at 660-61.

landowner in *Linebery* would also recover attorney's fees because the difference between the electric company's final offer and the court-awarded compensation exceeded 10%.<sup>351</sup> Further, the severe undervaluing present in the case would allow the landowner to recover attorney's fees at a rate of 33% (resulting in the landowner recovering \$14,733.47) because the difference between the court-awarded compensation amount exceeded the utility company's final offer by more than 30%.<sup>352</sup>

*D. How the Proposed Provision Improves upon the Wisconsin and Florida Approaches*

The Wisconsin approach does have beneficial aspects. Most importantly, it takes into account the subjectivity inherent in land valuation.<sup>353</sup> It achieves this goal by requiring that the court-awarded compensation exceed the final offer made by the condemning authority by 15% before allowing a landowner to recover attorney's fees.<sup>354</sup> This crucial feature protects condemning authorities from defending meritless lawsuits brought by landowners hoping to take advantage of the subjective nature inherent in condemnation proceedings.<sup>355</sup> Beyond this positive aspect, the Wisconsin approach suffers from a major problem. The problem with the approach is that it draws a single arbitrary line in the sand.<sup>356</sup> On one side, all offers are reasonable, but on the other side, all offers are unreasonable.<sup>357</sup> This approach would be sufficient if legislatures could pinpoint exactly the percentage at which offers switch from being reasonable to unreasonable, but this is practically problematic because land valuation will never be an exact science.<sup>358</sup> States adopting the Wisconsin approach illustrate the problem by drawing the line in the sand at substantially different percentages.<sup>359</sup> The proposed provision, on the other hand, provides a better solution because it incorporates a multi-tiered recovery system.<sup>360</sup> Under the proposed provision, penalties increase as the difference between

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351. *See id.*

352. *See supra* Part VII.A. The attorney's fee award of \$14,733.47 is calculated by multiplying the final judicial judgment by the 33% contingency fee, which is a common rate that eminent domain attorneys charge for a successful outcome. *See supra* Part VII.A.

353. *See supra* Part VI.A.

354. *See* WIS. STAT. ANN. § 32.28(d)-(e) (West 2006).

355. *See* *Klemm v. Am. Transmission Co.*, 2011 WI 37, 798 N.W.2d 223, 237.

356. *See* § 32.28(d)-(e).

357. *See id.*

358. *See Klemm*, 798 N.W.2d at 237.

359. *Compare* § 32.28(d)-(e) (determining that courts should award attorney's fees when the difference between the condemning authority's offer and the court-awarded compensation is greater than 15%), *with* OKLA. STAT. ANN. tit. 66, § 55 (West 2006) (determining that the difference need only be at least 10%), *and* COLO. REV. STAT. ANN. § 38-1-122 (West 2006) (determining that the difference must be at least 30% before the court can award attorney's fees).

360. *See supra* Part VII.A.

the final offer and the court-awarded compensation increases.<sup>361</sup> The penalties are smaller initially in recognition of the fact that certain states might not agree that penalties are warranted at such levels.<sup>362</sup> Penalties increase, however, when most states are likely to agree that the offer made by the condemning authority is unreasonable.<sup>363</sup> The proposed provision, therefore, reduces the risk of arbitrarily leveling severe attorney's fees penalties against condemning authorities.

The recovery approach of the proposed provision also improves upon the multi-tiered recovery approach adopted by Florida.<sup>364</sup> The multi-tiered recovery approach adopted by Florida suffers from three main problems. First, just like the Montana approach, it fails to take into account the subjectivity inherent in land valuation.<sup>365</sup> Second, and more importantly, the recovery structure applies the harshest penalties on offers that differ only slightly from the amount awarded by the court.<sup>366</sup> Specifically, Florida's approach allows a recovery of 33% for the initial \$250,000 of separation between the final offer and the court-awarded compensation.<sup>367</sup> If the difference between the final offer and the court-awarded compensation exceeds \$250,000, the penalty percentage actually decreases, and continues to decrease even more, as the difference between the two amounts increases.<sup>368</sup> This multi-tiered recovery structure will only further discourage negotiations because there is no reward for an offer made by a condemning authority that is relatively close to the amount awarded by the court.<sup>369</sup> Condemning authorities, as a result, will likely put fewer financial resources into the negotiation process.<sup>370</sup> Instead, condemning authorities will likely opt to pay a penalty once at the end rather than risk investing in preliminary negotiations and then still remaining liable later on for potential attorney's fees penalties should the case go to court.<sup>371</sup>

Third, the Florida approach calculates the attorney's fees award based upon the difference between the final offer made by the condemning authority and the compensation awarded by the court.<sup>372</sup> For example, if the condemning authority's final offer is \$90,000 but the court determines

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361. *See supra* Part VII.A.

362. *See supra* Part VI.A-B.

363. *See supra* Part VII.A-B.

364. *See* FLA. STAT. ANN. § 73.092 (West 2004).

365. *See supra* Part VI.B.

366. *See* § 73.092.

367. *Id.*

368. *See id.*

369. *See id.* *But see* Genteman, *supra* note 324, at 866-70 (providing an argument in favor of adopting Florida's approach).

370. *But see* Genteman, *supra* note 324, at 866-70.

371. *But see id.* at 868-70 (arguing that Florida's approach does not make land acquisition cost prohibitive to the condemning authority, nor does it decrease the willingness of condemning authorities to negotiate).

372. *See* § 73.092.

that the landowner is entitled to \$100,000, the percentage that the landowner is entitled to recover in attorney's fees is not based on the \$100,000 figure.<sup>373</sup> Instead, it is based on the difference between the \$100,000 the court awarded and the \$90,000 the condemning authority offered: \$10,000.<sup>374</sup> Courts will then multiply the \$10,000 difference by 33%, as dictated by Florida law, and ultimately award the landowner \$3,333.33 in attorney's fees.<sup>375</sup> This amount is miniscule, especially considering that the landowner could have recovered \$33,333.33 had Florida law based the recovery of attorney's fees solely on the amount awarded by the court. These potentially miniscule recovery amounts are unlikely to cover the legal fees incurred by the landowner, thus defeating the purpose of awarding attorney's fees in the first place.<sup>376</sup> Further, these potentially miniscule penalties are unlikely to deter condemning authorities from making unreasonably low offers.

Under the proposed recovery structure, the three problems facing the Florida approach are reduced or eliminated. First, there is no penalty for any difference between the court-awarded compensation and the condemning authority's final offer that is 10% or less.<sup>377</sup> This range of flexibility provides condemning authorities the reassurance that the law acknowledges that land valuation is subjective in nature.<sup>378</sup> Second, should the court-awarded compensation amount exceed the final offer made by the condemning authority by more than 10%—but not more than 30%—the condemning authority is only penalized at the lower rate of 20%.<sup>379</sup> This increasing penalty structure, unlike Florida's, encourages negotiations between the parties because the closer the two offers are in value, the less the penalty the condemning authority will have to pay.<sup>380</sup> Condemning authorities could potentially rationalize spending more money initially in trying to reach an equitable settlement because the recovery structure will reward the condemning authority with lower penalties should the proceeding still end up in court.

## VIII. CONCLUSION

Wind energy is a rapidly growing industry that provides the potential to help the United States reach its goal of energy independence.<sup>381</sup> While

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373. *See id.*

374. *See id.*

375. *See id.*

376. *See Pompano Beach Cmty. Redevel. Agency v. Holland*, 82 So.3d 1034, 1036-37 (Fla. Dist. Ct. App. 2011).

377. *See supra* Part VII.A.

378. *See supra* Part VII.A-B.

379. *See supra* Part VII.A.

380. *See supra* Part VII.A.

381. *See supra* Part II.A.

the full potential of wind energy is still unknown, it will never reach its full potential unless Congress, and all states, invests financial resources into updating the old, inadequate transmission grid.<sup>382</sup> Texas, through the development of the CREZ project, provides an example of how Congress and other states can invest in a reliable transmission grid.<sup>383</sup> Not only will the CREZ project meet the transmission needs of Texans today, but it will also provide a foundation for future expansion in renewable energy production.<sup>384</sup>

On the other hand, the CREZ project revealed the severe injustices that exist in the Texas condemnation process.<sup>385</sup> There is no doubt that new transmission lines are critical to ensure a reliable transmission grid exists for the good of the general public, but Texas landowners cannot take the blame for the government's failure to properly plan for future needs. The Texas Legislature must pay for its past failures in planning by ensuring that landowners receive just compensation for the land that condemning authorities take. S.B. 18 takes the first major step in addressing the uneven playing field that exists between landowners and condemning authorities.<sup>386</sup> The legislature, however, needs to do more. Specifically, the legislature must enact incentives that will encourage both sides to participate in meaningful negotiations. The best way the legislature can encourage negotiations is to adopt the proposed attorney's fees provision that takes the beneficial elements of both the Wisconsin and Florida approaches.<sup>387</sup> The proposed provision attaches a steadily increasing penalty for offers by condemning authorities that are unreasonably low, while still providing enough flexibility to incorporate the subjectivity that is inherent in any attempt to value land.<sup>388</sup> With an attorney's fees provision enacted, Texas will provide landowners with a powerful tool to fend off condemning authorities who refuse to provide landowners just compensation for their losses.

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382. *See supra* Part II.B.

383. *See supra* Part II.C.

384. *See* Commission Staff's Petition, *supra* note 95, at 20-21.

385. *See supra* Part II.B.

386. *See supra* Part V.

387. *See supra* Part VII.

388. *See supra* Part VII.