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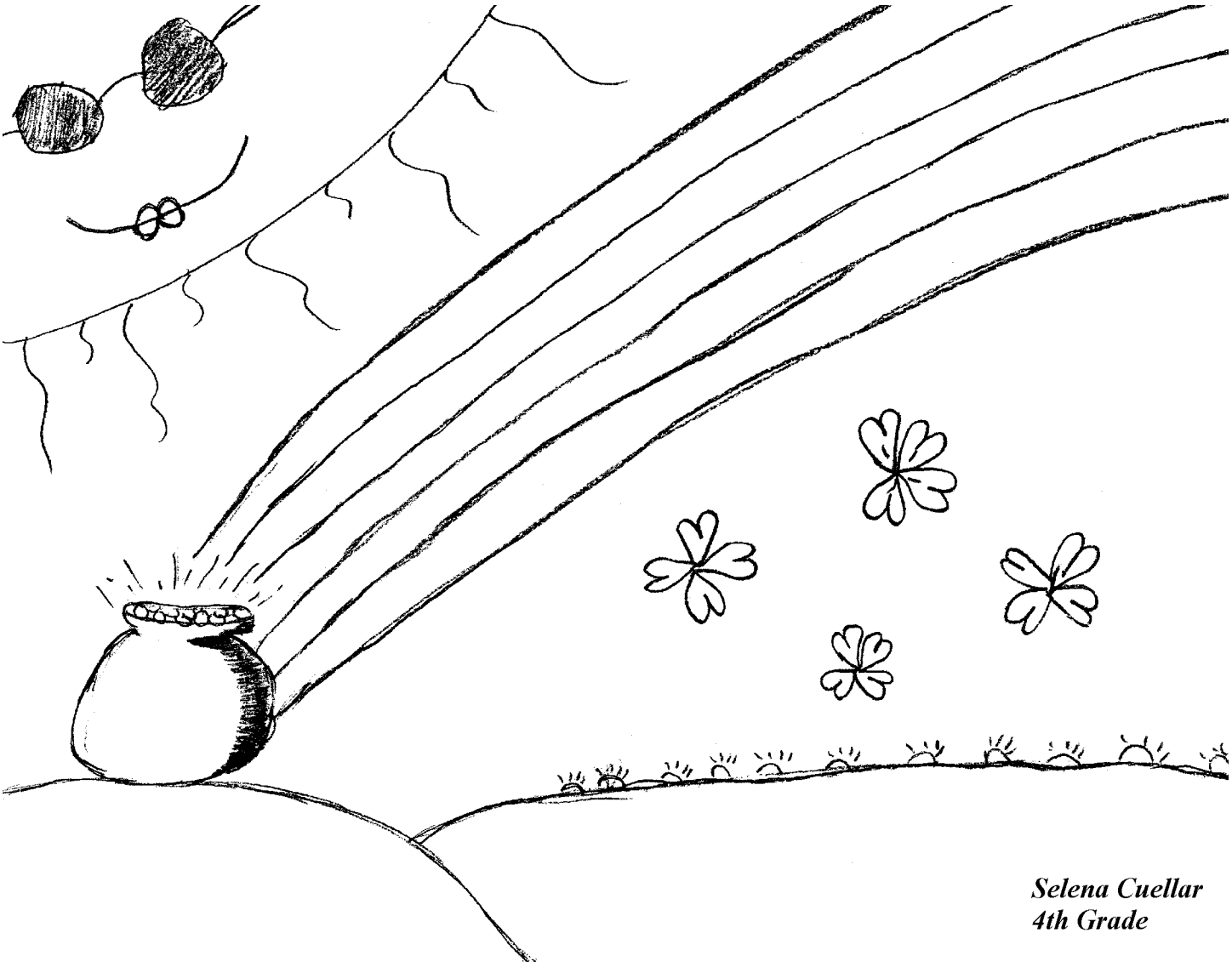

Selena Cuellar
4th Grade

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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Open Meetings

A notice of a meeting filed with the Secretary of State by a state governmental body or the governing body of a water district or other district or political subdivision that extends into four or more counties is posted at the main office of the Secretary of State in the lobby of the James Earl Rudder Building, 1019 Brazos, Austin, Texas.

Notices are published in the electronic *Texas Register* and available on-line.
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To request a copy of a meeting notice by telephone, please call 463-5561 if calling in Austin. For out-of-town callers our toll-free number is (800) 226-7199. Or fax your request to (512) 463-5569.

Information about the Texas open meetings law is available from the Office of the Attorney General. The web site is http://www.oag.state.tx.us. Or phone the Attorney General's Open Government hotline, (512) 478-OPEN (478-6736).

For on-line links to information about the Texas Legislature, county governments, city governments, and other government information not available here, please refer to this on-line site. http://www.state.tx.us/Government

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for March 4, 2003

Appointed to the Texas Online Authority for a term to expire February 1, 2007, Ross Fischer of Kendalia. Mr. Fischer is replacing Reagan Greer of San Antonio who is no longer eligible.

Appointed to the Texas Online Authority for a term to expire February 1, 2009, Aurora F. LeBrun of Wimberley. Ms. LeBrun is being reappointed.

Appointed to the Texas Online Authority for a term to expire February 1, 2009, Pamela K. Quinn of Garland. Ms. Quinn is being reappointed.

Appointed to the Texas Online Authority for a term to expire February 1, 2009, Lee H. Zieben of Houston. Mr. Zieben is replacing Douglas Scott of Carrollton whose term expired.

Appointed to the Department of Information Resources, Board of Directors for a term to expire February 1, 2009, William L. Transier of Houston. Mr. Transier is replacing Carole Greisdorf of Plano whose term expired.

Appointed to the Texas Lottery Commission for a term to expire February 1, 2009, James A. Cox, Jr. of Austin. Mr. Cox is being reappointed.

Appointed to the South Texas Regional Review Committee for terms to expire January 1, 2004, Judith G. Gutierrez, Commissioner, of Laredo; Fernando Pena, Mayor, of Roma.

Appointments for March 6, 2003

Appointed to the Texas Board of Health for a term to expire February 1, 2009, George Harrison McCleskey of Lubbock. Mr. McCleskey is being reappointed.

Appointed to the Texas Online Authority for a term to expire February 1, 2007, John Ryan Miri of Austin. Mr. Miri is replacing William Transier of Houston who resigned.

Appointed to the Department of Information Resources Board of Directors for a term to expire February 1, 2009, Cliff Mountain of Austin. Mr. Mountain is replacing Mario Gonzalez of Austin whose term expired.

Rick Perry, Governor

TRD-200301634

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THE ATTORNEY GENERAL

Under provisions set out in the Texas Constitution, the Texas Government Code, Title 4, §402.042, and numerous statutes, the attorney general is authorized to write advisory opinions for state and local officials. These advisory opinions are requested by agencies or officials when they are confronted with unique or unusually difficult legal questions. The attorney general also determines, under authority of the Texas Open Records Act, whether information requested for release from governmental agencies may be held from public disclosure. Requests for opinions, opinions, and open records decisions are summarized for publication in the *Texas Register*. The attorney general responds to many requests for opinions and open records decisions with letter opinions. A letter opinion has the same force and effect as a formal Attorney General Opinion, and represents the opinion of the attorney general unless and until it is modified or overruled by a subsequent letter opinion, a formal Attorney General Opinion, or a decision of a court of record. You may view copies of opinions at http://www.oag.state.tx.us. To request copies of opinions, please fax your request to (512) 462-0548 or call (512) 936-1730. To inquire about pending requests for opinions, phone (512) 463-2110.

Office of the Attorney General

Open Records Decision

Requestor: The Honorable Gwyn Shea, Secretary of State, P.O. Box 12887, Austin, Texas 78711

RE: Whether the confidentiality afforded to certain identifying information by section 552.1175 of the Government Code endures when a county voter registrar transfers the information to the Secretary of State and other authorized recipients.

SUMMARY: A county voter registrar must not publicly release a voter registration list that includes information made confidential by section 552.1175 of the Government Code. A registrar may transfer information that is confidential under section 552.1175 to other governmental entities and authorized recipients. Information in the possession of a registrar that is confidential under section 552.1175 is not confidential when in the possession of governmental entities and authorized recipients to whom the information is transferred, such as election officials, the Secretary of State, and the county, until those entities and authorized recipients receive a proper section 552.1175 notification. The Secretary of State must not publicly release a voter registration list that includes information made confidential by section 552.1175 of the Government Code.

TRD-200301673
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: March 11, 2003

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Opinions

Opinion No. GA-0028

The Honorable Carole Keeton Strayhorn

Comptroller of Public Accounts

Lyndon B. Johnson Building

111 East 17th Street

Austin, Texas 78701

Re: Whether the Comptroller of Public Accounts may disclose certain information relating to state tax liens (RQ-0592-JC)

S U M M A R Y

The Comptroller may disclose the amount of current tax, penalty, and interest owed by a delinquent taxpayer when that amount is actually secured by a publicly available state tax lien notice to the extent this information is disclosed to supplement information available in the state tax lien notice.

Opinion No. GA-0029

The Honorable Harold Dutton

Chair, Juvenile Justice and Family Issues

Committee

Texas House of Representatives

P.O. Box 2910

Austin, Texas 78768-2910

Re: Meaning of "civil liability" in section 791.006(a) of the Government Code, which permits interlocal cooperation contracts for fire department services (RQ-0593-JC)

S U M M A R Y

Under section 791.006(a) of the Government Code, if governmental units contract for fire department services, the governmental unit that would have been responsible for furnishing those services in the absence of the contract "is responsible for any civil liability that arises from the furnishing of those services." TEX. GOV'T CODE ANN. § 791.006(a) (Vernon Supp. 2003). "Civil liability" in section 791.006(a) is a broad term and encompasses any damages and injunctive relief available in a civil action against a city under Texas law, and does not necessarily exclude personnel or retirement benefits.

Opinion No. GA-0030

The Honorable Randal Lee

Cass County Criminal District Attorney

P.O. Box 839

Linden, Texas 75563

Re: Allocation of appraisal district's expenses between its appraisal and collection functions (RQ-0598-JC)

S U M M A R Y

The budget of a tax appraisal district may allocate to the taxing units within the district only the costs of operating the appraisal district for its appraisal purposes. The costs of tax assessment or collection, which

the appraisal district may opt to perform for taxing units under contract, are paid for by the taxing unit that has contracted with the district for these services and are not allocated to all taxing units within the district regardless of whether or not the unit contracted with the district for assessment or collection services.

Opinion No. GA-0031

The Honorable Jeri Yenne

Brazoria County Criminal District Attorney

111 East Locust, Suite 408A

Angleton, Texas 77515

Re: Whether a school district employee who is also a city council member may participate in matters regarding the school district that come before the council (RQ-0600-JC)

S U M M A R Y

A school district is not a business entity within chapter 171 of the Local Government Code, which pertains to conflicts of interest involving local public officers. Thus, a school district employee who is also a city council member is not barred by Local Government Code chapter 171 from discussing and voting on issues involving the school district that come before the city council.

For further information, please access the website at www.oag.state.tx.us. *or call the Opinion Committee at (512) 463-2110.*

TRD-200301723
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: March 12, 2003

♦ ♦ ♦

Request for Opinions

RQ-0020-GA

The Honorable Frank Madla

Chair, Intergovernmental Relations Committee

Texas State Senate

P.O. Box 12068

Austin, Texas 78711

Re: Whether the City of San Antonio may impose right-of-way fees against a metropolitan transit authority created under chapter 451 of the Transportation Code (Request No. 0020-GA)

Briefs requested by April 10, 2003

For further information, please access the website at www.oag.state.tx.us. *or call the Opinion Committee at (512) 463-2110.*

TRD-200301717
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: March 12, 2003

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 353. MEDICAID MANAGED CARE

The Health and Human Services Commission (HHSC) proposes to amend Medicaid Managed Care rules Subchapter A, §§353.1 - 353.3, Subchapter B, §§353.102- 353.105, and Subchapter E, §§353.402, 353.403, 353.405, 353.407, 353.409, 353.411, 353.413, 353.415, 353.417 and 353.419. The proposed rule change would accommodate a new voluntary managed care model for rural areas, sponsored by the Statewide Rural Health Care System, also known as the Rural Community Health System (RCHS). In 1997, the Texas Legislature adopted Senate Bill 1246, allowing the creation of the statewide RCHS to provide health care services in rural areas. During the 77th Legislative Session, Senate Bill 1394 was adopted, authorizing HHSC to use the RCHS for a voluntary pilot or demonstration program for the Medicaid Program. HHSC plans to implement the pilot in a multi-county area in the Texas Panhandle.

The proposed rule change would allow a default to the RCHS Managed Care Organization (MCO) without assignment to a primary care physician (PCP). In the pilot, members who fail to select the RCHS MCO or the fee-for-service option during the period established by HHSC would be defaulted to the RCHS MCO. The proposed rule change would also permit HHSC to allow an exemption from the restriction against direct contact marketing. Since RCHS MCO will be the only health plan in the pilot area and therefore not competing with other health plans, this restriction may not be necessary. For the pilot, RCHS will partner with a health insurance company rather than a Health Maintenance Organization (HMO). The proposed rule would therefore expand the financial standards to include a solvency provision applicable for health insurance companies. It would also require the RCHS MCO to participate in experience rebates, just as all HMOs participating in the Medicaid Managed Care program must do. Finally, the proposed rule would revise outdated language, such as references to "TDH" instead of "HHSC" as the Medicaid operating agency.

Tom Suehs, Deputy Commissioner of Financial Services, has determined that, during the first five years that the proposed rule is in effect, the fiscal impact will be as follows: start-up systems costs are estimated to total $234,600 for all funds while systems changes, enrollment broker services, and ongoing enrollment broker services are estimated to total $293,786 for all funds for SFY 04. Savings attributed to the pilot are estimated to total $606,620 for all funds in SFY 03 and $3,639,718 for all funds in SFY 04. The savings achieved under this program may be overstated because not all HHSC administrative costs to support the managed care program are included. The contract period for the pilot is July 1, 2003, through August 31, 2004.There is no anticipated fiscal impact on local health and human service agencies. Local governments will not incur additional costs.

Mr. Suehs has also determined that for each year of the first five years the proposed rule is in effect, the public will benefit from adoption of the rule. The anticipated public benefit will be increased choice for Medicaid clients in their health care delivery.

The proposed rule will not result in additional costs to persons required to comply with the proposed rule, nor does the proposed rule have any anticipated adverse affect on small or micro-businesses. RCHS plans to reimburse providers at Medicaid fee-for-service rates. The proposed rule will not negatively affect local employment.

HHSC has determined that the proposed rule is not a "major environmental rule" as defined by §2001.0225, Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rule is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

HHSC has evaluated the takings impact of the proposed rule under §2007.043, Government Code. HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of governmental action and therefore does not constitute a taking. The proposed rule is reasonably taken to fulfill requirements of state law.

Comments on the proposal may be submitted in writing to Kay Ghahremani, Medicaid/CHIP Division, Texas Health and Human Services Commission, 1100 W. 49th Street, MC H-310, Austin, Texas 78756-3199, or by e-mail to kay.ghahremani@hhsc.state.tx.us within the 30 days following publication of this proposal in the *Texas Register*.

A public hearing is scheduled for April 9, 2003, from 10 a.m. to 11:30 a.m. The hearing will be held in the Big Bend Conference Room, Health and Human Services Commission, 12555 Riata Vista Circle, Bldg. #3, Austin, Texas 78727.

SUBCHAPTER A. GENERAL PROVISIONS

1 TAC §§353.1 - 353.3

The amendments are proposed under the authority granted to HHSC by Government Code §531.033, which provides the Commissioner of HHSC with broad rulemaking authority, and under the Human Resources Code §32.021, and the Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed amendments affect Chapter 531 of the Government Code and Chapter 32 of the Human Resources Code. No other statutes, articles, or codes are affected by the proposed rule.

§353.1. Rules of Other Agencies.

These rules shall be read in conjunction with rules adopted by other state agencies charged with operation of the state's Medicaid managed care program, including [~~the Texas Department of Health, at 25 TAC §§30.21-30.32 (Standards for the State of Texas Access Reform (STAR)), and~~] the Texas Department of Mental Health and Mental Retardation, at 25 TAC [~~§§409.401-409.406~~] §§412.301-305 (Mental Health Community Services Standards) [~~(Standards for Managed Care Organizations Providing Behavioral Healthcare Services to Medicaid Recipients)~~].

§353.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the content clearly indicates otherwise.

(1) Behavioral health services--Allowable services for the treatment of mental or emotional disorders and treatment of chemical dependency disorders.

(2) Client--Any Medicaid eligible recipient and, where the context indicates, a Medicaid eligible recipient who meets the qualifications for enrollment in Medicaid managed care. See also "member."

(3) Complaint--Any dissatisfaction, expressed by a complainant orally or in writing to the managed care organization (MCO), with any aspect of the MCO's operation, including but not limited to dissatisfaction with plan administration; the denial, reduction or termination of a service; the way a service is provided; or disenrollment decisions expressed by a complainant. A complaint is not a misunderstanding or misinformation that is resolved informally by supplying the appropriate information for clearing up the misunderstanding to the satisfaction of the member.

(4) Health care services--Physical medicine, behavioral health care and health-related services.

(5) HHSC--The Texas Health and Human Services Commission.

(6) MCO--Managed care organization. An entity which has a current Texas Department of Insurance certificate of authority to operate as a health maintenance organization under Texas Insurance Code, Article 20A, or as an approved nonprofit health corporation under Texas Insurance Code, Article 21.52F , or an organization sponsored by the Statewide Rural Health Care System, established by the Texas Insurance Code, Chapter 20C.

(7) Medical home--A primary care provider who has accepted the responsibility for providing accessible, continuous, comprehensive and coordinated care to members participating in the state's Medicaid managed care program.

(8) Member--Any eligible Medicaid recipient who is enrolled in the state's Medicaid managed care program.

(9) Member education program--A planned program of education:

(A) regarding access to health care through the managed care organization and about specific health topics;

(B) that is approved by the Health and Human Services Commission; [~~Texas Department of Health;~~] and

(C) is provided to members through a variety of mechanisms which must include, at a minimum, written materials and face-to-face or audiovisual communications.

(10) Primary care provider--An individual who has agreed with the state or an MCO to provide a medical home for members.

(11) Provider--An individual or entity and its employees and contractors that provide health care services to members under the state's Medicaid managed care program.

(12) Provider education program--Program of education about the Medicaid managed care program and about specific health care issues presented by the managed care organization to its providers through written materials and training events.

(13) Statewide Rural Health Care System- A quasi-governmental nonprofit organization authorized to sponsor, provide, or arrange for the provision of health care services in rural areas under the Texas Insurance Code, Chapter 20C.

(14) [~~(13)~~] STAR Program--The State of Texas Access Reform, which is the name of the State of Texas managed care program established in response to legislative mandate and by federal waiver.

§353.3. Experience Rebate in the STAR and STAR+Plus Programs.

(a) Each health maintenance organization (HMO) and the Statewide Rural Health Care System participating in the State of Texas Access Reform (STAR) and the State of Texas Access Reform Plus (STAR+Plus) program must pay to the state an experience rebate calculated according to the graduated rebate method described in subsection (b) of this section. The experience rebate is based on the excess of allowable HMO or Statewide Rural Health Care System revenues, as defined by the state, over allowable HMO or Statewide Rural Health Care System expenses, as defined by the state, as reviewed and confirmed by the state.

(b) The graduated rebate method is as follows:

(1) The HMO or Statewide Rural Health Care System retains 100 percent of that portion of excess allowable revenues that falls between zero and less than or equal to three percent of total allowable revenues.

(2) The HMO or Statewide Rural Health Care System retains 75 percent of that portion of excess allowable revenues that falls between three percent and less than or equal to seven percent of total allowable revenues. The remaining 25 percent is paid to the state.

(3) The HMO or Statewide Rural Health Care System retains 50 percent of that portion of excess allowable revenues that falls between seven percent but less than or equal to 10 percent of total allowable revenues. The remaining 50 percent is paid to the state.

(4) The HMO or Statewide Rural Health Care System retains 25 percent of that portion of excess allowable revenues that falls between 10 percent but less than or equal to 15 percent of total allowable revenues. The remaining 75 percent is paid to the state.

(5) The HMO or Statewide Rural Health Care System pays to the state 100 percent of that portion of excess allowable revenues that is greater than 15 percent of total allowable revenues.

(c) The experience rebate is based on a pre-tax basis.

(d) Losses incurred for one contract period can only be carried forward to the next contract period.

(e) There are two settlements for payment of the experience rebate and will be paid by the HMO or Statewide Rural Health Care System to the state as prescribed by the state. The state reserves the right to make corrections to the settlements based on an audit/review by the state or other documentation acceptable to the state. The state may also adjust the experience rebate if the state determines that the HMO or Statewide Rural Health Care System paid affiliates amounts for goods or services that are higher than the fair market value of the goods and services in the service area.

(f) The state has the final authority in assessing the amount of the experience rebate.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 10, 2003.

TRD-200301651
Steve Aragon
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 424-6756

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SUBCHAPTER B. PROVIDER AND MEMBER EDUCATION PROGRAMS

1 TAC §§353.102 - 353.105

The amendments are proposed under the authority granted to HHSC by Government Code §531.033, which provides the Commissioner of HHSC with broad rulemaking authority, and under the Human Resources Code §32.021, and the Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed amendments affect Chapter 531 of the Government Code and Chapter 32 of the Human Resources Code. No other statutes, articles, or codes are affected by the proposed rule.

§353.102. Provider and Member Education Programs Generally.

The managed care organizations that contract with the Health and Human Services Commission [~~Texas Department of Health~~] to provide health care services through the Medicaid program shall provide education programs for providers and members using a variety of techniques and media as described in this chapter and in the contract between the Health and Human Services Commission [~~Texas Department of Health~~] and the managed care organization.

§353.103. Contract Compliance.

Managed care organizations shall comply with all terms of their contract with the Health and Human Services Commission [~~Texas Department of Health~~] regarding components of the education programs, means of providing the required education, reporting to the Health and Human Services Commission [~~Texas Department of Health~~] and other state agencies about the education programs and any other terms included in the contract.

§353.104. Member Education Program.

A member education program must present information in a manner that is easy to understand. In addition to any requirements specified in the contract between the managed care organization and the Health and Human Services Commission, [~~Texas Department of Health~~] a program must include, at a minimum, information on:

(1) a member's rights and responsibilities under the bill of rights and the bill of responsibilities prescribed by this chapter;

(2) how to access health care services, including how to access behavioral health services;

(3) how to access complaint procedures and the member's right to bypass the managed care organization's internal complaint system and use the notice and appeal procedures otherwise provided by the Medicaid program;

(4) Medicaid policies, procedures, eligibility standards, and benefits;

(5) the policies and procedures of the managed care organization; and

(6) the importance of prevention, early intervention and appropriate use of services.

§353.105. Provider Education Program.

In addition to any requirements specified in the contract between the managed care organization and the Health and Human Services Commission, [~~Texas Department of Health~~] a provider education program must include, at a minimum, information on:

(1) Medicaid policies, procedures, eligibility standards and benefits;

(2) the specific problems and needs of Medicaid clients;

(3) screening, identification and referral processes for coordinating behavioral health and other health care services; and

(4) the rights and responsibilities of members under the bill of rights and the bill of responsibilities prescribed by this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 10, 2003.

TRD-200301652
Steve Aragon
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 424-6756

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SUBCHAPTER E. STANDARDS FOR THE STATE OF TEXAS ACCESS REFORM (STAR)

1 TAC §§353.402, 353.403, 353.405, 353.407, 353.409, 353.411, 353.413, 353.415, 353.417, 353.419

The amendments are proposed under the authority granted to HHSC by Government Code §531.033, which provides the Commissioner of HHSC with broad rulemaking authority, and under the Human Resources Code §32.021, and the Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed amendments affect Chapter 531 of the Government Code and Chapter 32 of the Human Resources Code. No other statutes, articles, or codes are affected by the proposed rule.

§353.402. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) Behavioral health services--Allowable services for the treatment of mental or emotional disorders and treatment of chemical dependency disorders.

(2) Chronic or complex condition--A physical or developmental condition which may have no known cure and/or is progressive and/or can be debilitating or fatal if left untreated or under-treated.

(3) Client--Any Medicaid eligible recipient and, where the context indicates, a Medicaid eligible recipient who meets the qualifications for enrollment in Medicaid managed care. See also "member."

(4) Commission--The Texas Health and Human Services Commission.

(5) CMS-The Centers for Medicare & Medicaid Services, the federal agency charged with oversight of all states participating in the Medicaid program.

(6) [~~(5)~~] Complainant--A member or a treating provider or other individual designated to act on behalf of the member, who files a complaint.

(7) [~~(6)~~] Complaint--Any dissatisfaction, expressed by a complainant orally or in writing to the MCO, with any aspect of the MCO's operation, including but not limited to dissatisfaction with plan administration; appeal of an adverse determination; the denial, reduction or termination of a service; the way a service is provided; or disenrollment decisions expressed by a complainant. A complaint is not a misunderstanding or misinformation that is resolved promptly by supplying the appropriate information or clearing up the misunderstanding to the satisfaction of the member.

(8) [~~(7)~~] Contract administrator--An entity contracting with the Commission [~~department~~] to carry out specific administrative functions under the state's Medicaid managed care program.

(9) [~~(8)~~] Cultural competency--The ability of individuals and systems to provide services effectively to people of various cultures, races, ethnic backgrounds, and religions in a manner that recognizes, values, affirms, and respects the worth of the individuals and protects and preserves their dignity.

(10) [~~(9)~~] Default--Assignment of a client to a PCP and MCO by the Commission [~~department~~] if the client does not select a PCP and MCO during the enrollment period established by the Commission[~~department~~]. For the Statewide Rural Health Care System, default means the assignment by the Commission of a client to the Statewide Rural Health Care System MCO if the client fails to select either the Statewide Rural Health Care System MCO or the fee-for-service option.

~~[(10) Department--The Texas Department of Health].~~

(11) Disability--A physical or mental impairment that substantially limits one or more of the major life activities of an individual.

(12) Elective enrollment--Selection of a PCP and MCO by a client during the enrollment period established by the Commission [~~department~~]. For the Statewide Rural Health Care System, the selection of the Statewide Rural Health Care System or the fee-for-service option during the enrollment period established by the Commission.

(13) Emergency behavioral health condition--Any condition, without regard to the nature or cause of the condition, which requires immediate intervention and/or medical attention without which members would present an immediate danger to themselves or others or which renders members incapable of controlling, knowing or understanding the consequences of their actions.

(14) Emergency behavioral health services--Inpatient or outpatient behavioral health services provided in response to an emergency behavioral health condition.

(15) Emergency care--Physical medicine, emergency behavioral health services and health-related services provided in response to any condition requiring immediate intervention and/or medical treatment, including emergency labor and delivery and any medical condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in:

(A) placing the patient's health in serious jeopardy;

(B) serious impairment to bodily functions;

(C) serious dysfunction of any bodily organ or part; or

(D) an emergency behavioral health condition.

(16) EPSDT--The federally mandated Early and Periodic Screening, Diagnosis and Treatment program contained at 42 United States Code 1396d(r). (See definition for Texas Health Steps.) The name has been changed to Texas Health Steps in the state of Texas.

(17) EPSDT-CCP--The Early and Periodic Screening, Diagnosis and Treatment-Comprehensive Care Program, under which the Commission [~~department~~] added comprehensive care benefits to the federal EPSDT program requirements. The name has been changed to Texas Health Steps in the state of Texas.

(18) Federal waiver--Any waiver permitted under federal law which allows states to implement Medicaid managed care, in accordance with a waiver from compliance with federal law, approved by the federal government. Federal waivers include a §1915(b) waiver, §1115 waiver, or any other allowable waiver of federal law which would enable the state to implement Medicaid managed care.

~~[(19) HCFA--The Health Care Financing Administration, the federal agency charged with oversight of all states participating in the Medicaid program.]~~

(19) [~~(20)~~] Health care services--Physical medicine, behavioral health care and health-related services which an enrolled population might reasonably require in order to be maintained in good health, including, as a minimum, emergency care and inpatient and outpatient services.

(20) [~~(21)~~] HEDIS--The Health Plan Employer Data and Information Set. (See definition for Medicaid HEDIS.)

(21) [~~(22)~~] HMO (Health maintenance organization)--An organization which holds a certificate of authority from the Texas Department of Insurance to operate as an HMO under Chapter 20A of the Texas Insurance Code.

(22) [~~(23)~~] Inpatient stay--At least a 24-hour stay in a facility licensed to provide hospital care.

(23) [~~(24)~~] Major life activities--Functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(24) [~~(25)~~] Managed care--A health delivery system in which the overall care of a patient is coordinated by or through a single provider or organization.

(25) [~~(26)~~] MCO--Managed care organization. An entity which has a current Texas Department of Insurance certificate of authority to operate as an HMO under Chapter 20A of the Texas Insurance Code or as an approved nonprofit health corporation under Chapter 21.52F of the Texas Insurance Code, or an organization sponsored by the Statewide Rural Health Care System, established by the Texas Insurance Code, Chapter 20C.

(26) [~~(27)~~] Medicaid HEDIS--A standardized set of performance measures published by the National Committee for Quality Assurance, which are designed specifically to assess how well Medicaid clients are served by managed care organizations in a capitated managed care system.

(27) [~~(28)~~] Medical home--A primary care provider who has accepted the responsibility for providing accessible, continuous, comprehensive and coordinated care to members participating in the state's Medicaid managed care program.

(28) [~~(29)~~] Medically necessary behavioral health services--Those behavioral health services which:

(A) are reasonably necessary for the diagnosis or treatment of a mental health or chemical dependency disorder or to improve or to maintain or to prevent deterioration of functioning resulting from such a disorder;

(B) are in accordance with professionally accepted clinical guidelines and standards of practice in behavioral health care;

(C) are furnished in the most appropriate and least restrictive setting in which services can be safely provided;

(D) are the most appropriate level or supply of service which can safely be provided; and

(E) could not have been omitted without adversely affecting the member's mental and/or physical health or the quality of care rendered.

(29) [~~(30)~~] Medically necessary health services--Health services other than behavioral health services which are:

(A) reasonably necessary to prevent illnesses or medical conditions, or provide early screening, interventions, and/or treatments for conditions that cause suffering or pain, cause physical deformity or limitations in function, threaten to cause or worsen a handicap, cause illness or infirmity of a member, or endanger life;

(B) provided at appropriate facilities and at the appropriate levels of care for the treatment of members' medical conditions;

(C) consistent with health care practice guidelines and standards that are issued by professionally recognized health care organizations or governmental agencies;

(D) consistent with the diagnoses of the conditions; and

(E) no more intrusive or restrictive than necessary to provide a proper balance of safety, effectiveness, and efficiency.

(30) [~~(31)~~] Member--Any Medicaid eligible recipient who is enrolled in the state's Medicaid managed care program.

(31) [~~(32)~~] Participating MCOs--Those MCOs which have a contract with the Commission [~~department~~] to provide services to Medicaid managed care members.

(32) [~~(33)~~] PCCM (Primary care case management)--PCCM is a managed care delivery system allowed under federal waiver in which the Commission [~~department~~] contracts with providers to form a managed care provider network.

(33) [~~(34)~~] Primary care physician or primary care provider--A physician or provider who has agreed with the Commission [~~department~~] or an MCO to provide a medical home to members and who is responsible for providing initial and primary care to patients, maintaining the continuity of patient care, and initiating referral for care.

(34) [~~(35)~~] Provider--An individual or entity and its employees and contractors that provide health care services to members under the state's Medicaid managed care program.

(35) [~~(36)~~] QARI guidelines--The Quality Assurance Reform Initiative guidelines of CMS [~~HCFA~~].

(36) [~~(37)~~] Service area--The counties included in a site selected for a STAR pilot program, within which a participating MCO must provide services.

(37) Statewide Rural Health Care System- A quasi-governmental nonprofit organization authorized to sponsor, provide, or arrange for the provision of health care services in rural areas under the Texas Insurance Code, Chapter 20C.

(38) Significant traditional provider--A provider with whom Medicaid recipients have well-established or longstanding provider/client relationships, or to whom the recipients have typically or traditionally gone for health care, emergency care or family planning advice. A provider falling within this definition shall be determined by criteria established by the [~~department and the~~] Commission.

(39) [~~(40)~~] Special hospital--An establishment that:

(A) offers services, facilities, and beds for use for more than 24 hours for two or more unrelated individuals who are regularly admitted, treated, and discharged and who require services more intensive than room, board, personal services, and general nursing care;

(B) has clinical laboratory facilities, diagnostic X-ray facilities, treatment facilities, or other definitive medical treatment;

(C) has a medical staff in regular attendance; and

(D) maintains records of the clinical work performed for each patient.

(40) [~~(41)~~] STAR Program--The State of Texas Access Reform Program and is the name of the State of Texas Medicaid managed care program established in response to legislative mandate and by federal waiver.

(41) [~~(42)~~] THSteps--Texas Health Steps.

(42) [~~(43)~~] Texas Health Steps--The name adopted by the State of Texas for the federally mandated Early and Periodic Screening, Diagnostic and Treatment (EPSDT) program. It includes the state's Comprehensive Care Program extension to EPSDT, which adds benefits to the federal EPSDT requirements contained in 42 United States Code §1396d(r), and defined and codified at 42 Code of Federal Regulations §440.40 and §§441.56-62. The department's rules are contained in Chapter 33 of the title (relating to Early and Periodic Screening, and Diagnosis and Treatment).

§353.403. Enrollment.

(a) For the purposes of this section, a managed care organization (MCO) includes a primary care case management (PCCM) provider network.

(b) The Commission [~~department~~] shall determine which Medicaid eligible clients residing in a STAR Program service area will be mandatory or voluntary members and which Medicaid eligible clients may be excluded from participation in managed care.

(c) The Commission [~~department~~] shall conduct enrollment and disenrollment activities or contract with another agency or contractor to assume administration of these functions. The Commission [~~department~~] may not contract with a participating managed care organization to serve as the administrator for enrollment or disenrollment activities in any area of the state.

(d) The Commission [~~department~~] shall establish procedures for enrollment into participating MCOs and primary care providers (PCP), including enrollment periods and time limits within which enrollment must occur. Members who are mandatory members must select an MCO or PCP within the time period allowed by the Commission [~~department~~] or be defaulted to an MCO or PCP.

(e) Members who are voluntary members in a service delivery area in which the Statewide Rural Health Care System MCO is the only participating MCO must select the Statewide Rural Health Care System MCO or fee-for-service. Members who fail to select the Statewide Rural Health Care System MCO or fee-for-service during the enrollment period established by the Commission will be defaulted to the Statewide Rural Health Care System MCO.

(f) [~~(e)~~] Mandatory members who fail to select an MCO or PCP during the period established by the Commission [~~department~~] will have an MCO or PCP selected for them by the Commission [~~department~~] or its contractor using criteria determined by the Commission [~~department~~]. The Commission [~~department~~] shall establish a detailed default methodology that incorporates the following requirements.

(1) A member who does not select a PCP and MCO will be assigned a PCP and MCO through the default process established by the Commission [~~department~~]. A member who selects an MCO but not a PCP, will be assigned to the selected MCO and the member will be assigned to a PCP through the default process. A member who selects a PCP but not an MCO will be assigned to the PCP chosen by the member, subject to PCP restrictions on client age, gender, and capacity, and the member will be assigned to an MCO through a manual default process that is established by the Commission [~~department~~] based on the provisions of paragraph (6) of this subsection.

(2) Each member, who has not selected a PCP, will be defaulted to the PCP with whom there is the most recent Medicaid managed care encounter history. The number of encounters between the member and the PCP may also be considered.

(3) If there is no Medicaid managed care encounter history, each member will be defaulted to the PCP with whom there is the most recent traditional Medicaid claims history. The number of prior encounters between the member and the PCP may also be considered.

(4) If a member does not have history with a PCP, the member will be defaulted to a PCP on the basis of geographical proximity to the PCP.

(5) The Commission [~~department~~] may identify other criteria to be used along with the criteria based on geographical proximity such as, but not limited to, capacity of the PCP, PCP performance, and greatest variance between the percentage of elective and default enrollments (with the percentage of default enrollments subtracted from the percentage of elective enrollments).

(6) The Commission [~~department~~] shall develop a methodology for assignment of defaults to each MCO in the service area. Such methodology may be based on MCO performance, the greatest variance between the percentage of elective and default enrollments (with the percentage of default enrollments subtracted from the percentage of elective enrollments), or other factors determined by the Commission [~~department~~].

(7) Members who cannot be assigned to a PCP and MCO on the basis of an automated default process may be assigned through a manual default process determined by the Commission [~~department~~].

(8) Members with special medical needs may be defaulted on the basis of a manual default methodology if such members can be identified and if the automated default process cannot be administered for such members.

(9) A member who is defaulted to a PCP who is contracted with only one MCO shall be assigned to that MCO.

(10) PCP restrictions on client age, gender, and capacity shall be considered as limitations to default assignments to PCPs.

(11) Family members shall be defaulted to the same PCP and MCO to the maximum extent possible within the limitation of PCP restrictions on client age, gender, and capacity by MCO as well as geographical proximity considerations.

(12) The detailed default methodology developed by the Commission [~~department~~] shall be fully applicable to each MCO in the Medicaid managed care program by service area. However, the number of defaults assigned to the state administered PCCM network shall be restricted as follows:

(A) If a member is defaulted to a PCP who is contracted only with PCCM program, the member will be defaulted to the PCCM program;

(B) If a member is defaulted to a PCP who is contracted with the PCCM program and an HMO, the member will be defaulted to the HMO;

(C) If a member is defaulted to a PCP who is contracted with the PCCM program and two or more HMOs, the member will be defaulted to one of the HMOs on the basis of paragraph (6) of this subsection;

(D) A member will be defaulted to the PCCM program if a PCCM provider is the only PCP within reasonable geographical proximity to the member as defined by the Commission [~~department~~].

(g) [~~(f)~~] A member may request to change MCOs at any time and for any reason, regardless of whether the MCO was selected by the member or assigned by the Commission [~~department~~]. Disenrollment will take place no later than the first day of the second month after the month in which the member has requested termination. MCOs must inform members of disenrollment procedures at the time of enrollment. MCOs must notify members in appropriate communication formats.

(h) [~~(g)~~] The Commission [~~department~~] shall establish limits for the number of members each PCP may accept to ensure members have reasonable access to the provider. The Commission [~~department~~] shall develop criteria to allow exceptions to this limit on a case-by-case basis, provided the exceptions do not adversely affect member access.

(i) [~~(h)~~] The Commission [~~department~~] may not enroll any Medicaid eligible recipient who is excluded from participation by federal rule or regulation.

(j) [~~(i)~~] Recipients who are located more than 30 miles from the nearest PCP in an MCO cannot be enrolled in the MCO unless an exception is made by the Commission [~~department~~].

[~~(j) Medicaid recipients and Medicare beneficiaries must constitute less than 75% of the total enrollment of an MCO, unless the MCO has received a waiver for this requirement under 42 Code of Federal Regulations §434.26.~~]

§353.405. Marketing.

(a) Managed care organizations (MCO) must submit a marketing plan and all marketing materials to the Commission [~~department~~] for prior written approval.

(b) MCOs may present their marketing materials to eligible Medicaid clients through any method or media determined to be acceptable by the Commission [~~department~~]. The media may include but are not limited to: written materials, such as brochures, posters, or fliers which can be mailed directly to the client or left at Texas Department of Human Services eligibility offices; Commission [~~department~~] -sponsored community enrollment events; and public service announcements on radio.

(c) MCO enrollment or marketing representatives are required to complete the Commission's [~~department~~] marketing orientation and training program prior to engaging in marketing activities on behalf of the MCO.

(d) Prohibited marketing practices.

(1) MCOs and providers shall not conduct any direct contact marketing except through Commission [~~department~~] -sponsored enrollment events, unless an exception is allowed by the Commission.

(2) MCOs and providers shall not make any written or oral statement containing material misrepresentations of fact or law relating to their plan or the STAR Program.

(3) MCOs and providers shall not make false, misleading or inaccurate statements relating to services or benefits, or providers or potential providers through their plan.

(4) MCOs and providers shall not offer Medicaid recipients material or financial gain as an inducement for enrollment, unless an exception is made by the Commission [~~department~~].

(5) Marketing or enrollment practices of MCOs and providers shall not discriminate against a client because of a client's race, creed, age, color, religion, national origin, ancestry, marital status, sexual orientation, physical or mental disability, health status, or existing need for medical care.

§353.407. Selection of Managed Care Organizations (MCO).

(a) An entity or person that contracts with the Commission [~~department~~] under a federal waiver to provide or arrange for services under this subchapter on a risk comprehensive basis, as defined at 42 CFR 434.21(b), must be an MCO as defined in this subchapter.

(b) Entities or individuals who subcontract with an MCO to provide benefits or perform services, or carry out any essential function of the MCO contract shall meet the same qualifications and contract requirements as the MCO for the service, benefit, or function delegated under the subcontract.

(c) The Commission [~~department~~] shall require all MCOs to comply with the Commission's [~~department's~~] policy on contracting and subcontracting with historically underutilized businesses (HUBs). The Commission's [~~department's~~] policy is to meet the goals and good faith effort requirements as stated in the Texas Building and Procurement Commission[~~MF3~~] [~~General Services Commission~~] rules, at 1 Texas Administrative Code (TAC) §§111.11-111.24.

§353.409. Scope of Services.

(a) All Managed Care Organizations (MCO) shall provide services and benefits available to Medicaid recipients under the purchased or fee for service Medicaid program, except services which are excluded from the STAR Program or by contract.

(b) The Commission [~~department~~] shall establish the scope and level of benefits which all MCOs must agree to provide as a condition for participation. These requirements may exceed the scope and level of covered benefits and services available to purchased or fee-for-service Medicaid recipients. These requirements shall be contained in all contracts entered into by MCOs and the Commission [~~department~~].

(c) MCOs are encouraged to provide any services or benefits beyond the level and scope required as a condition for participation in the competitive procurement process. Any services or benefits offered by an MCO beyond those required by the state will be considered as a selection factor during the competitive procurement process. These services or benefits can be any that may make member access to services easier, increase the quality or timeliness of services or benefits offered members, or increase the scope of services offered by the MCO. These services and benefits cannot increase the cost borne or capitation rates paid by the Commission [~~department~~] during any current contract term or in any subsequent contract term. These services or benefits cannot violate any other state or federal rule or regulation.

§353.411. Accessibility of Services.

(a) Managed care organizations (MCO) must provide a broad-based and accessible primary care provider (PCP) network within the service area to ensure member accessibility to providers in time, distance, cultural competency and language.

(b) MCOs shall have pediatric and family practitioner PCPs in their network of providers in sufficient numbers to provide regular and preventive pediatric care and THSteps services to all eligible children enrolled in the service area.

(c) MCOs shall have PCPs available throughout the service area to ensure that no member must travel more than 30 miles to access the PCP, unless an exception has been made by the Commission [~~department~~].

(d) MCOs shall have PCPs in sufficient numbers to ensure that PCPs do not exceed the maximum allowable enrolled members, that no member must wait an unreasonable amount of time for an appointment, and that no member must wait an unreasonable amount of time to be seen at their appointed time.

(e) MCOs shall ensure the reasonable availability and accessibility of specialists in all areas of medical and behavioral health practice. Specialists must also be reasonably accessible to members in time, distance, cultural competency and language.

(f) A member shall not be required to travel in excess of 75 miles to secure initial contact with referral specialists; special hospitals; psychiatric hospitals; diagnostic and therapeutic services; and single service health care physicians, dentists or providers except as provided in subsections (g) and (h) of this section.

(g) If any service or provider is not available to a member within the mileage radius specified in subsection (f) of this section, the MCO shall submit to the Commission [~~department~~] for approval health care utilization data which indicates a normal pattern for securing health care services within the service area.

(h) The provisions in subsection (f) of this section do not preclude an MCO from making arrangements with another source outside

the service area for members to receive a higher level of skill or specialty than the level which is available within the MCO service area such as, but not limited to, treatment of cancer, burns, and cardiac diseases.

(i) MCOs shall provide education and training to providers on the specific health and behavioral health problems and needs of STAR Program members, and the contract and rule requirements for accessibility and availability. MCOs and the Commission [~~department~~] shall cooperate and coordinate education and training activities for providers.

(j) MCOs shall develop a written cultural competency plan describing how the MCO will effectively provide health care services to members from varying cultures, races, ethnic backgrounds and religions to ensure those characteristics do not pose barriers to gaining access to needed services. As part of the requirement to develop the cultural competency plan, the MCO must at a minimum:

(1) employ multi-cultural and multi-lingual staff;

(2) make available interpreter services for members as necessary to ensure availability of effective communication regarding treatment, medical history or health education;

(3) display to the Commission [~~department~~] through the written plan a method for incorporating the plan into the MCO's policy-making process, administration, and daily practices; and

(4) submit the written plan to the Commission [~~department~~] for review and approval at intervals specified by the Commission [~~department~~].

(k) MCOs must ensure that communication or physical access barriers do not deter members' timely access to health care services. The MCOs shall provide information in appropriate communication formats, including formats accessible to people with disabilities.

(l) MCOs are prohibited from excluding significant traditional Medicaid providers from their network for a period of time and under conditions determined by the state and specified in the contract.

(m) MCOs shall develop written provider manuals clearly stating the policies and procedures adopted by the MCO to meet the provider's duties and obligations required by these and other agency rules and the contract.

§353.413. Managed Care Benefits and Services for Children Under 21 Years of Age.

(a) The Commission [~~department~~] shall require all participating managed care organizations (MCO) to provide comprehensive, timely and cost-effective diagnostic, screening and treatment services of the medical, vision, hearing, and dental needs of eligible STAR Program members under the age of 21, at a level and frequency that meet the requirements of the federal EPSDT Program found at 42 United States Code §1396d(r) and the Texas Health Steps Program (THSteps) found at Chapter 33 of Title 25 [~~this title~~] (relating to Early and Periodic Screening, Diagnosis and Treatment). These requirements shall be contained in all contracts.

(b) The Commission [~~department~~] shall require the MCOs to make available special training about THSteps benefits and goals to all providers of health and dental services contracting with the MCO, to providers' staffs, and to all employees and contractors of the MCO who will provide oral presentations or marketing to members or prospective members. To fulfill this requirement, the MCOs may use the training programs created by the Commission [~~department~~] or its contractors, or they may create their own training programs. Any training program created by the MCO under this subsection must meet the requirements of the Commission [~~department~~] and be approved by the Commission [~~department~~].

(c) MCOs shall coordinate and cooperate with the Commission [~~department~~] in developing effective outreach, access, and monitoring systems to ensure that all qualified members receive THSteps benefits.

(d) The managed care programs of participating MCOs are intended to complement and enhance the effectiveness and availability of THSteps benefits in the service areas. The Commission [~~department~~] shall not delegate the responsibility and accountability of monitoring and for ensuring that THSteps benefits are available and accessible to all eligible children.

§353.415. Member Complaint Procedures.

(a) Managed care organizations (MCO) shall develop and maintain a system and process for taking, tracing, reviewing, and reporting member complaints.

(b) MCOs shall establish and maintain internal procedures for the resolution of member complaints. The procedures must be in writing. The procedures must be detailed and specific regarding how complaints are to be taken, to whom complaints are referred, and by when a complaint must be resolved.

(c) MCOs shall establish a procedure to assist members in understanding and using the MCO's internal complaint process. The members' complaint procedure must be in writing and distributed to each member upon enrollment. The member must also receive written notice of the procedure each time the member's benefits are being reduced, denied, or terminated for any reason. The procedure must be easy for members to understand and simple to follow. The procedure must contain a prominent notice to the member that they retain all of their rights as Medicaid recipients to a fair hearing through the Commission [~~department~~], in addition to the MCO's complaint process.

(d) The Commission [~~department~~] shall review the MCO's complaint procedures to determine they comply with the Commission's [~~department's~~] standards before approval for MCO use of the complaint procedure is given by the Commission [~~department~~]. Reports containing complaint summaries shall be submitted to the Commission [~~department~~] in compliance with Commission [~~department~~] policy.

(e) The Commission [~~department~~] shall retain the authority to make the final decision following the Commission 's [~~department's~~] fair hearing process.

§353.417. Quality Improvement.

(a) Each managed care organization (MCO) shall develop and follow quality standards based on current Quality Assurance Reform Initiative (QARI) and Health Plan Employer Data and Information Set (HEDIS) guidelines as a minimum requirement of its internal quality improvement program (QIP). MCOs shall establish a QIP system that includes at least the following:

(1) a system of oversight and supervision for the MCO quality improvement (QI) processes;

(2) an independent organizational structure within the MCO responsible for performing QI functions. This organization must meet operational and documentation requirements of the Commission [~~department~~], including the requirement that membership includes Medicaid managed care members and members with disabilities or a chronic or complex condition;

(3) written contracts for all QI functions subcontracted to outside contractors;

(4) written policies and procedures for ensuring providers in the MCO's network are qualified and properly credentialed, and a system to periodically update and review qualifications and credentials of all providers;

(5) policies and procedures for disciplinary actions against providers and an appeal process for providers who have disciplinary action taken against them;

(6) a procedure for informing MCO members of their rights and responsibilities, benefits and services, MCO policies, and other information required in the [~~Texas Health and Human Services~~] Commission's rules on client education and member bill of rights and responsibilities, and the MCO contract with the Commission [~~department~~];

(7) performance standards for the availability of and accessibility to routine and emergency care, referral to specialists, and telephone services;

(8) time standards within which providers must respond to the medically necessary physical and behavioral health needs of the members;

(9) standards for the confidentiality, accessibility, and availability of medical records;

(10) a written utilization review and management program which gives guidelines and criteria for determining medical necessity, preauthorization, and utilization of services;

(11) an effective referral and coordination of care system to ensure comprehensive and coordinated care for members through the PCPs; and

(12) a complaint system for members as described in §30.29 of Title 25 [~~this title~~] (relating to Member Complaint Procedures).

(b) The QIP functions may be subcontracted but the responsibility for QIP compliance cannot be delegated by the MCO.

(c) The Commission [~~department~~] shall develop monitoring and review systems and procedures to ensure MCO compliance with MCO contracts, this subchapter, and all related state and federal rules, regulations, and guidelines. Commission [~~Department~~] monitoring and review shall include but not be limited to the following.

(1) The Commission [~~department~~] shall monitor each MCO to ensure it is following its QIP standards.

(2) The Commission [~~department~~] shall require MCOs to submit QIP information at regular and periodic intervals.

(3) The Commission [~~department~~] shall require all MCOs to submit to periodic inspection and review to determine compliance with all contract terms, and state and federal rules, regulations, and policies.

(d) Evaluations of each MCO's quality of services in each Medicaid managed care service area and the cost-effectiveness, member access, and quality of care under each waiver shall be conducted by independent, external entities after initial implementation of Medicaid managed care in a particular service delivery area. The quality evaluation shall be conducted at the end of the first year following initial implementation; and the assessment of cost-effectiveness, member access, and quality of care under each waiver shall be conducted once during the first two years of the time period for which a waiver has been approved. The periodicity of both evaluation types shall be re-evaluated by the Commission [~~department~~] after each evaluation is initially completed in a managed care service delivery area.

§353.419. Financial Standards.

(a) Managed care organizations (MCO) must meet solvency standards established by the Texas Department of Insurance at 28 TAC Chapter 11, Subchapter S, or be covered by the Texas Life, Accident, Health and Hospital Service Insurance Guaranty Association, and meet solvency standards established [~~and~~] by the Commission [~~department~~] in its competitive procurement proposals.

(b) The state may share in profits realized by MCOs providing services on a risk basis at a rate determined by the Commission [~~department~~], as long as the profit-sharing arrangement complies with federal law and is contained in the contract between the MCO and the Commission [~~department~~].

(c) The Commission [~~department~~] may establish incentive payment programs to encourage MCOs to meet or exceed the goals and objectives of the STAR Program established by the Commission [~~department~~] through its contract.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 10, 2003.

TRD-200301653
Steve Aragon
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 424-6756

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CHAPTER 355. MEDICAID REIMBURSEMENT RATES

SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 2. MEDICAID HOME HEALTH PROGRAM

1 TAC §355.8021

The Health and Human Services Commission (HHSC) proposes to amend §355.8021 concerning the reimbursement methodology for home health services.

The proposed rule amendment adds options for the home health services reimbursement methodology for durable medical equipment (DME) and medical supplies provided under the Texas Medical Assistance Program. The revisions to the rule include the following methodologies: fixed unit pricing determined by Request for Information; and establishing a purchase methodology for long-term rental of equipment. The maximum allowable fee for DME and medical supplies will be the lesser of any of the specified reimbursement limits contained in the rule. The proposed rule authorizes HHSC to utilize fixed unit pricing determined through a Request for Information, and to determine a purchase price for durable medical equipment as additional reimbursement methodologies for DME and medical supplies.

Tom Suehs, Deputy Commissioner of Financial Services, has determined that for each year of the first five years the section is in effect, there will be no fiscal implications as a result of enforcing or administering the section as proposed. The amendment does not have foreseeable implications relating to cost or revenues of local governments.

Mr. Suehs has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing the section will be to provide an alternative Medicaid reimbursement. There will be no effect on small businesses or micro-businesses to comply with this section as proposed. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices to comply with the proposed rule. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There will be no impact on local employment.

HHSC has determined that the proposed rule amendment is not a "major environmental rule" as defined by §2001.0225, Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rule amendment is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

HHSC has evaluated the takings impact of the proposed rule amendment under §2007.043, Government Code. HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of governmental action and therefore does not constitute a taking. The proposed provision is reasonably taken to fulfill requirements of state law.

Comments on the proposal may be submitted to Paula Clark, Medicaid/CHIP Benefits, Texas Health and Human Services Commission, 1100 W. 49th Street, Mail Code H-310, Austin, Texas 78756-3199 or faxed to (512) 338-6546 and should be addressed to Paula Clark, Medicaid/CHIP Benefits. Comments must be received within 30 days of publication of the proposed amendments.

A public hearing to receive comments is scheduled for April 3, 2003, from 3:00 p.m. to 4:00 p.m. The hearing will be held in the Public Hearing Room, Health and Human Services Commission, 12555 Riata Vista Circle, Bldg. #3, Austin, Texas 78727.

The amendment is proposed under the Texas Government Code, §531.033, which provides the Commissioner of HHSC with broad rulemaking authority, and under the Human Resources Code, §32.021, and the Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas and the Texas Government Code, §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

The proposed amendment affects the Government Code, Chapter 531, and Chapter 32 of the Human Resources Code. No other statutes, articles, or codes are affected by the proposed amendment.

§355.8021. Reimbursement Methodology for Home Health Services.

(a) Reimbursement methodology for services provided by a home health agency.

(1) Except for expendable medical supplies and DME, authorized home health services provided for eligible Medicaid recipients are reimbursed the lesser of:

(A) the amount billed to Medicaid by the agency; or

(B) the fee established for the specific authorized home health service and published as part of a fee schedule developed by the commission in accordance with paragraph (2) of this subsection.

(2) HHSC will establish a fee schedule for Medicaid-reimbursable therapy, nursing, and aide services provided by a home health agency in accordance with this paragraph.

(A) HHSC bases the initial fee schedule upon an analysis of providers' Medicaid payments for providing Medicaid-reimbursable therapy, nursing, and aide services.

(B) HHSC calculates a Weighted Average Rate (WAR) for the initial fee schedule developed under this paragraph.

(i) The WAR is based on a representative sampling of Medicaid payments to "high-volume" Medicaid providers for therapy, nursing, and aide services that are eligible for reimbursement by Medicaid. For purposes of this paragraph, a "high-volume" Medicaid provider is a provider that is identified in the top 45% of recipients of Medicaid payments for these services for the most recent six months of available data.

(ii) HHSC averages the sampled Medicaid payments received by all high-volume providers for a specified home health service. HHSC weights the average Medicaid payment by the total number of services reimbursed by Medicaid in this sample. HHSC applies the weighted average rate to the fee schedule.

(C) Following development of the initial fee schedule, HHSC will conduct an analysis no later than December 31, 2004. HHSC will conduct an analysis that will include, but not be limited to, payments for as well as the costs associated with providing these Medicaid-reimbursable therapy, nursing, and aide services at least every four (4) years thereafter. HHSC will seek input from contracted home health services providers and other interested parties in performing this analysis.

(b) Reimbursement methodology for expendable medical supplies provided by enrolled home health agencies and DME providers/suppliers. Participating providers are reimbursed according to the maximum allowable fee for expendable medical supplies established by the HHSC [~~department~~]. The maximum allowable fee is based upon the lesser of the following:

(1) the billed amount;

(2) the Medicare fee schedule in place prior to October 1, 2000, as defined in §354.1031 of this title, [~~25 TAC §29.301~~] (relating to General); [~~or~~]

(3) the expendable medical supply acquisition fee as defined in [~~25 TAC §29.301~~] §354.1031 of this title, minus a discount as defined in §355.8021(c)(2); or

(4) a fee established by the HHSC through a request for information.

(c) Reimbursement methodology for durable medical equipment provided by enrolled home health agencies and DME providers/suppliers. Participating providers are reimbursed the maximum allowable fee for durable medical equipment established by the HHSC [~~department~~]. The maximum allowable fee for durable medical equipment is based on the lesser of the following:

(1) the billed amount;

(2) the durable medical equipment acquisition fee, which is based upon the manufacturer's suggested retail price minus a discount; [~~.~~]

(A) the manufacturer's suggested retail price is the listed price that the manufacturer recommends as the retail selling price;

(B) the discount from the manufacturer's suggested retail price is determined from the total discount that vendors receive from manufacturers. The [~~initial~~] value of the discount shall be 18%. Thereafter the HHSC [~~department~~] is responsible for periodically conducting a representative sample by which a discount is determined. Participating providers must, at the HHSC's [~~department's~~] written request, provide necessary information needed to determine the discount. The HHSC [~~department~~] shall review the discount at least every five years.

(3) the Medicare fee schedule as defined in [~~25 TAC §29.301~~] §354.1031 of this title (relating to General); [~~or~~]

(4) if no discount is provided, the incurred cost to the dealer plus a percentage to be determined by the HHSC[~~department~~] or

(5) a fee established by the HHSC through a request for information.

(d) The HHSC shall determine whether durable medical equipment shall be rented, purchased or repaired, based upon the duration and utilization needs of the recipient. Periodic rental payments are made only for the lesser of:

(1) the period of time the equipment is medically necessary; or

(2) when the total monthly rental payments equal the reasonable purchase cost for the equipment.

(e) Purchase is justified when the estimated duration of need, multiplied by the rental payments would exceed the reasonable purchase cost of the equipment or it is otherwise more practical to purchase the equipment.

(f) The rental price is determined by dividing the Medicaid established purchase price by thirteen, allowing for thirteen months rental before the item is considered purchased. In these instances, equipment will not be rented beyond thirteen months.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 10, 2003.

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Steve Aragon
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 424-6756

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 2. OWNER-BUILDER LOAN PROGRAM

SUBCHAPTER A. GENERAL PROVISIONS

10 TAC §§2.1 - 2.4

The Texas Department of Housing and Community Affairs (the Department) proposes new §§2.1-2.4, concerning the Owner-Builder Loan Program. The purpose of these sections is to provide hearing establish the requirements of this program pursuant to Subchapter FF of Chapter 2306, Texas Government Code.

Ms. Edwina P. Carrington, Executive Director, has determined that for the first five-year period the proposed sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Carrington also has determined that for each year of the first five years the proposed sections are in effect, the public benefit anticipated as a result of enforcing these sections will be will be more affordable housing for the State of Texas. There will be no effect on persons, small businesses or micro-businesses. There are no anticipated economic costs to persons, small businesses or micro-businesses who are required to comply with these sections as proposed. The proposed new sections will not have an impact on any local economy.

Comments may be submitted to Anne O. Paddock, Deputy General Counsel, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas, 78711-3941 or by email at the following address: apaddock@tdhca.state.tx.us.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306.

The new sections affect no other code, article or statute.

§2.1. General Provisions.

(a) Purpose. The purpose of this subchapter is to establish the requirements governing the Owner-Builder Loan Program created pursuant to Subchapter FF of Chapter 2306, Texas Government Code.

(b) Definitions and abbreviations. The following words and terms, when used in this chapter shall have the following meaning, unless the context clearly indicates otherwise.

(1) Department--The Texas Department of Housing and Community Affairs.

(2) Owner-Builder--A person, other than a person who owns or operates a construction business, who undertakes to make improvements to property owned or being purchased as described in subparagraphs (A) or (B) of this paragraph:

(A) real property owned or purchased through a warranty deed or a warranty deed and deed of trust; or

(B) real property purchased under a contract for deed entered into before January 1, 1999.

(3) Texas Bootstrap Loan Program--The popular name of the Owner-Builder Loan Program.

§2.2. Owner-Builder Eligibility.

(a) A priority is established for loans made to Owner-Builders with an annual income of less than $17,500.

(b) To be eligible for a loan, an Owner-Builder:

(1) may not have an annual income that exceeds 60 percent, as determined by the Department, of the greater of the state or local median family income, when combined with the income of any person who resides with the Owner-Builder;

(2) must have resided in this state for the preceding six months;

(3) must have successfully completed an Owner-Builder education class pursuant to §2.11 of this chapter; and

(4) must agree to:

(A) provide at least 60 percent (60%) of the labor necessary to build or rehabilitate the proposed housing by working through a owner-builder housing program certified by the Department as described in §2.10 of this chapter; or

(B) provide an amount of labor equivalent to the amount required under subparagraph (A) of this paragraph in connection with building housing for others through a Nonprofit Owner-Builder Housing Program certified by the Department, pursuant to §2.10 of this chapter.

§2.3. Loan Amount and Loan Terms.

(a) At least two-thirds of the dollar amount of loans made under this subchapter in each fiscal year must be made to Owner-Builders whose property is located in a county that is eligible to receive financial assistance under Subchapter K, Chapter 17, Water Code.

(b) The Department may establish a minimum of $1,000 loan amount under this subchapter and a maximum loan amount of $30,000.

(c) If $30,000 is not adequate for this purpose, the Owner-Builder must obtain the amount necessary that exceeds $30,000 from one or more local governmental entities, nonprofit organizations, or private lenders.

(d) The total amount of loans made by the Department and other entities pursuant to this subchapter may not exceed $60,000.

(e) A loan made by the Department under this subchapter:

(1) may not exceed a term of 30 years;

(2) may bear interest at a fixed rate of not more than three percent (3%) or bear interest in the manner described in subparagraphs (A) through (D) of this paragraph:

(A) no interest for the first two years of the loan;

(B) beginning with the second anniversary of the loan date, interest at the rate of one percent (1%) per year;

(C) beginning with the third anniversary of the loan date and ending on the sixth anniversary of the loan date, interest at a rate of one percent (1%) greater than the rate borne in the preceding year; and

(D) beginning with the sixth anniversary of the loan date was made and continuing through the remainder of the loan term, interest at the rate of five percent (5%); and

(3) may be secured by a lien on the real property, including a lien that is subordinate to a lien that secures a loan made under subsection (b) of this section and that is greater than the Department's lien.

(f) If an Owner-Builder is purchasing real property under a contract for deed, the Department will not disburse any portion of a loan made under this subchapter until the owner-builder:

(1) fully completes the owner-builder's obligation under the contract and receives a deed to the property; or

(2) refinances the Owner-Builder's obligation under the contract and converts the obligation to a note secured by a deed of trust.

(g) The Department shall give priority to loans to owner-builders who will reside in counties or municipalities that agree in writing to waive capital recovery fees, building permit fees, inspection fees, or other fees related to the building or rehabilitation of the housing to be built with the loan proceeds.

§2.4. Certification of Owner-Builder Housing Programs.

The Department may select Nonprofit Owner-Builder Housing Programs, pursuant to §2.10 of this chapter, to certify the eligibility of Owner-Builders to receive a loan under this subchapter. A nonprofit housing assistance organization selected by the Department shall use the eligibility requirements established by the Department to certify the eligibility of an Owner-Builder for this program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 10, 2003.

TRD-200301636
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 475-3726

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SUBCHAPTER B. A NONPROFIT OWNER-BUILDER HOUSING PROGRAM ELIGIBILITY

10 TAC §2.10, §2.11

The Texas Department of Housing and Community Affairs (the Department) proposes new §2.10 and §2.11, concerning the Nonprofit Owner-Builder Housing Program. The purpose of these sections is to provide hearing establish the requirements of this program pursuant to Subchapter FF of Chapter 2306, Texas Government Code.

Ms. Edwina P. Carrington, Executive Director, has determined that for the first five-year period the proposed sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Carrington also has determined that for each year of the first five years the proposed sections are in effect, the public benefit anticipated as a result of enforcing these sections will be will be more affordable housing for the State of Texas. There will be no effect on persons, small businesses or micro-businesses. There are no anticipated economic costs to persons, small businesses or micro-businesses who are required to comply with these sections as proposed. The proposed new sections will not have an impact on any local economy.

Comments may be submitted to Anne O. Paddock, Deputy General Counsel, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas, 78711-3941 or by email at the following address: apaddock@tdhca.state.tx.us.

The new sections are proposed pursuant to the authority of the Texas Government Code, Chapter 2306.

The new sections affect no other code, article or statute.

§2.10. A Nonprofit Owner-Builder Housing Program.

A Nonprofit Owner-Builder Housing Program, pursuant to Sections 2306.752 and 2306.753, Texas Government Code, which may become certified by the Department by providing services to potential Owner-Builders as set out in paragraphs (1) through (4) of this subsection, means a tax-exempt organization listed under section 501(c)(3), Internal Revenue Code of 1986, as amended, or through the colonia self-help

centers established under Chapter 2306, Subchapter Z, Texas Government Code, to:

(1) qualify potential Owner-Builders for loans under this subchapter;

(2) provide Owner-Builder education classes under Section 2306.756, Texas Government Code;

(3) assist Owner-Builders in building housing; and

(4) originate or service loans made under subchapter A of this chapter.

§2.11. Owner-Builder Education Classes.

(a) A state-certified Nonprofit Owner-Builder Housing Program shall offer Owner-Builder education classes to potential owner-builders as set out in subchapter A of this chapter.

(b) Owner-Builder Education Classes must provide information on:

(1) the financial responsibilities of an owner-builder under this chapter, including the consequences of an Owner-Builder's failure to meet those responsibilities;

(2) the building of housing by Owner-Builders;

(3) resources for low-cost building materials available to Owner-Builders; and

(4) resources for building assistance available to Owner-Builders as set out in subchapter A of this chapter.

(c) A Nonprofit Owner-Builder Housing Program may charge a potential Owner-Builder who enrolls in a class under this subchapter a reasonable fee not to exceed fifty dollars ($50.00) to offset the program's costs in providing the class.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER R. CUSTOMER PROTECTION RULES FOR RETAIL ELECTRIC SERVICE

16 TAC §§25.486 - 25.490

The Public Utility Commission of Texas (commission) proposes new §25.486, relating to Establishment of Service for Customers Disconnected for Non-Payment; §25.487, relating to Obligations Related to Move-In Transactions; §25.488, relating to Termination of Service to a Premise with No Contract; §25.489, relating to Treatment of Premises with No Retail Electric Provider of Record; and §25.490, relating to Moratorium on Disconnection on Move-Out. Project Number 27084 has been assigned to this proceeding.

The primary goal of the project is to standardize the move-in and move-out processes to reduce the number of customers without a retail electric provider (REP) of record, reduce the amount of unaccounted for energy (UFE) and implement performance standards to lift the moratorium on disconnections when a customer moves out of a premise. These rules will reduce costs to market participants, reduce confusion from customers, and provide certainty in the competitive retail electric market in Texas.

Proposed new §25.486, relating to Establishment of Service for Customers Disconnected for Non-Payment, will clarify switching procedures when a customer is due to be disconnected by their REP, therefore reducing the possibility or length of time that the customer will be without electric service. Proposed new §25.487, relating to Obligations Related to Move-In Transactions, will ensure that customers who move into a premise will receive power in a timely manner. Proposed new §25.488, relating to Termination of Service to a Premise with No Contract, will require a REP to either establish a contract for service with the new customer or transfer the customer to the affiliated REP.

In January 2002, transmission and distribution utilities (TDUs) stopped disconnecting electric service when a residential customer moves out of a premise. This suspension of the move-out disconnection procedure was meant to be a temporary workaround to facilitate the timelier provisioning of service when a new customer moved into a recently vacated premise. The commission directed TDUs to continue the workaround until automated move-in transaction processing was operating successfully. A consequence of this workaround has been that when customers move into an energized premise, they may continue to receive service without selecting a REP. The energy used by these customers is not assigned to any REP, and is therefore UFE. Proposed new §25.489, relating to Treatment of Premises with No Retail Electric Provider of Record, will standardize the procedures TDUs must take to provide notice to these customers, will reduce the number of customers who are receiving energy but have no REP of record, and will reduce the amount of UFE. Finally, proposed new §25.490, relating to Moratorium on Disconnection on Move-Out, will establish a performance threshold for TDUs to meet before the moratorium is lifted.

Carrie Collier, Analyst, Retail Market Oversight, Electric Division, has determined that for each year of the first five-year period the proposed sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Collier has also determined that for each year of the first five years the proposed sections are in effect the public benefit anticipated as a result of enforcing the sections will be a well-ordered and more efficient market place that protects customers while promoting competition in the provision of retail electric power service to customers. Furthermore, there will be no adverse economic effect on small businesses or micro- businesses as a result of enforcing these sections. There may be economic costs to persons who are required to comply with the proposed sections. These costs are likely to vary from business to business

and are difficult to ascertain. However, it is believed that the benefits accruing from implementation of the proposed sections will outweigh these costs.

Ms. Collier has determined that for each year of the first five years the proposed sections are in effect there should be no effect on a local economy, and, therefore, no local employment impact statement is required under Administrative Procedure Act 2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Wednesday, May 7, 2003, 1:30-4:00 p.m. The request for a public hearing must be received no later than April 21, 2003.

The commission seeks comments on the proposed new section from interested persons. Comments on the proposal (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326. The deadline for submission of comments is April 21, 2003. Reply comments are due by April 30, 2003. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should be filed in Project Number 27084.

In addition to the proposed new sections, the commission requests comments on the following questions:

Should the rule allow TDUs to bill retail customers for past transmission and distribution charges who have been receiving electricity but have not been billed because there is no REP of record associated with the premise? If backbilling for past TDU charges is appropriate, should the TDU be required to pass the charges through the customer's REP, or should the TDU be permitted to bill the consumer directly? Should the rule limit the TDU's backbilling to six months? What recourse, if any, should the TDU have if the customer with no REP of record does not pay the TDU for backbilled wires charges?

The commission proposes these new sections pursuant to the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2003) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. The commission also proposes these sections pursuant to PURA §39.101, which grants the commission authority to establish various, specific protections for retail customers; PURA §39.102, which provides retail customer choice; and PURA chapter 17, subchapters A, C and D, which deal, respectively, with general provisions relating to customer protection policy, the retail customer's right to choice, and protection of the retail customer against unauthorized charges.

Cross Reference to Statutes: PURA §§14.002, 39.101, 39.102, and PURA chapter 17, subchapters A, C, and D.

§25.486. Establishment of Service for Customers Disconnected for Non-payment.

(a) Applicability. This section applies to all retail electric providers (REPs).

(b) Customer right to switch. A customer who has received notice of disconnection from the customer's current REP, consistent with §25.483 of this title (relating to Disconnection of Service), may enroll with another REP, consistent with §25.474 of this title (relating to Selection or Change of Retail Electric Provider).

(c) Pending disconnects. If a customer has received a disconnection notice, but has not yet been disconnected, and arranges service with another REP:

(1) the connecting REP shall request a switch that does not conform with the customer's normal meter reading cycle (out-of-cycle switch) if the switch can be completed prior to the disconnection; or

(2) the connecting REP shall request the initiation of service through a move-in transaction, in accordance with §25.487 of this title (relating to Obligations Related to Move-In Transactions), if an out-of-cycle switch would not be completed until after the scheduled disconnection. In this instance, the customer shall be responsible for the payment of any usage incurred during the three-day cancellation period, as provided for in §25.474(h) of this title.

(d) Completed disconnects. If a customer has been disconnected by the customer's current REP, consistent with §25.483 of this title, and arranges for service with another REP, the connecting REP shall request the initiation of service through a move-in transaction, in accordance with §25.487 of this title. In this instance, the customer is responsible for the payment of any usage incurred during the three day cancellation period, as provided for in §25.474(h) of this title.

§25.487. Obligations Related to Move-In Transactions.

(a) Applicability. This section applies to all retail electric providers (REPs).

(b) Definition. For this section, the term "safety-net process" means a process developed and implemented by the stakeholders in the Texas retail electric market in 2002 to ensure that a customer who moves into a residence at which a meter is already installed receives power in a timely manner.

(c) Standard move-in request. In order to fulfill the request of a customer of any class to begin electric service, a REP shall submit a move-in transaction to the registration agent electronically, in accordance with applicable protocols and guidelines of the independent organization.

(d) Safety-net move-in request. In the event a REP does not receive a confirmation that the transmission and distribution utility (TDU) has received the appropriate move- in request transaction from the Electric Reliability Council of Texas (ERCOT) on or before 5:00 p.m. two days prior to the customer's move-in date, the REP shall then submit the move-in request using the safety-net process.

(1) The safety-net process shall be used only for premises that already have a meter installed at the premise. Where installation of a meter is required, the REP shall follow the transactions specified in the ERCOT protocols and not the safety-net process.

(2) In submitting a move-in request using the safety-net process, the REP establishes its right to serve the customer at the location identified by the electric service identifier (ESI ID) from the date the TDU receives the safety-net move-in request. The date the TDU receives the safety-net request is the effective date for all wires charges and fees associated with that ESI ID. The TDU may bill monthly wires charges and fees to the REP, even if the TDU does not receive the standard move-in transaction by the date the TDU would bill the REP for delivery of service to the location.

(3) Even if a safety-net process move-in has been initiated or has taken place, the REP shall ensure that the standard move-in electronic transaction is submitted to ERCOT in accordance with applicable protocols. The REP shall work with ERCOT and the TDU to ensure that the appropriate premise information and enrollment response transaction is sent to and received by the REP and that appropriate notice is sent to any prior REP of record in the TDU's or ERCOT's system.

§25.488. Termination of Service to a Premise with No Contract.

(a) Applicability. This section applies to all retail electric providers (REPs).

(b) Service to premise with no contract. If a REP finds that a customer at a premise is not the customer with whom the REP currently has a contract for retail electric service, or has had a contract for retail electric service that has expired, the REP may:

(1) establish service with the new customer. The REP shall obtain verification of the customer's election to establish service with the REP consistent with the requirements of §25.474 of this title (relating to Selection or Change of Retail Electric Provider); or

(2) issue a notice of termination of service to the customer. The notice shall contain the following:

(A) The date the termination will occur, provided that the termination date shall not be sooner than ten business days from the date the notice is issued;

(B) For notices issued by a non-affiliated REP in the case of residential and small non-residential customers, as those terms are defined in §25.43 of this title (relating to Provider of Last Resort (POLR)), the customer's service shall be transferred to the affiliated REP if the customer does not respond within ten business days after issuance of the notice;

(C) For notices issued by the affiliated REP to residential and small non- residential customers, as those terms are defined in §25.43 of this title, service shall be disconnected if the customer does not respond within ten business days after the issuance of the notice;

(D) For notices issued to large non-residential customers, as that term is defined in §25.43 of this title, service shall be transferred to the provider of last resort if the customer does not respond within ten business days after the issuance of the notice;

(E) What actions the customer must take if they believe they have received the notice in error or desire to establish service with the REP; and

(F) A statement that informs the customer of the right to obtain service from another licensed REP and that information about other REPs can be obtained from the commission.

(c) Termination of service to residential and small non-residential customer by non- affiliated REPs. If a non-affiliated REP terminates service with the customer, the REP shall transfer that customer to the affiliated REP using the procedures established by the independent organization in order to effectuate the termination of contract provision in §25.482(b) of this title (relating to Termination of Contract). The affiliated REP shall submit a switch request within three business days after receiving the transfer request to be effective on the next meter read date. The non-affiliated REP that is terminating the service may request an out-of-cycle meter switch, but it shall reimburse the affiliated REP for the out-of-cycle meter read charge.

(d) Disconnection of residential and small non-residential customer by affiliated REP. If an affiliated REP disconnects service with the customer, it shall comply with the requirements of §25.483 of this title (relating to Disconnection of Service).

(e) Termination of service to a large non-residential customer. If a REP terminates electric service at a location to a large non-residential customer, the REP shall transfer that customer to the provider of last resort in accordance with §25.43(n) of this title.

(f) Prohibition on using move-out transactions. A REP may not submit a move-out transaction, as defined by ERCOT protocols, to effectuate the transfers under this section.

§25.489. Treatment of Premises with No Retail Electric Provider of Record.

(a) Applicability. This section applies to all transmission and distribution utilities (TDUs) and retail electric providers (REPs) in areas open to retail customer choice.

(b) Definition. For this section, the term "no REP of record" means a premise that is receiving electricity but does not have a REP designated as serving the premise in the TDU's system.

(c) Obligation of TDUs to identify premises with no REP of record. Each TDU shall implement the following procedures to identify those premises that have no REP of record:

(1) Each TDU shall prepare a No REP of record list identifying all premises with consumption greater than 150 kilowatt hours (kWh) but no REP of record in the TDU's Customer Information System on a monthly basis;

(2) Each TDU shall delete a premise from the list if there is evidence of erroneous meter reads for a residential premise;

(3) Each TDU shall cross reference the list with ERCOT's pending orders to identify any move-in transactions that indicate that a REP is initiating service at a premise on the list and remove such premises from the list;

(4) Each TDU shall review safety-net move-in requests to initiate service and remove such premises from the list; and

(5) Each TDU shall review its internal systems for pending transactions and any correspondence from REPs claiming that a premise should be assigned to the REP. Any corresponding matches of premises shall be removed from the list.

(d) Submission of no REP of record list to REPs. Each TDU shall send the No REP of Record List to all REPs offering service in its service area. Within three business days after receiving a TDU's list, a REP shall inform the TDU in writing if it has a contract with a customer for a location on the list. The TDU shall delete all claimed premises from the list. Door hangers shall be used to provide notice of possible termination of service at the locations on the final list in accordance with subsections (f)-(g) of this section.

(e) Prohibition on use of No REP of Record List. REPs shall not use the No REP of Record List as a marketing tool. The list is a means of "cleaning up" those accounts and synchronizing responsibilities in the market. Nothing in this section is meant to absolve a REP of its responsibilities under §25.474 of this title (relating to Selection or Change of Retail Electric Provider).

(f) Customer notification. TDUs shall issue standard bilingual residential and commercial door hangers for all remaining premises on the final No REP of Record List in a format consistent with subsection (h) of this section.

(g) Wires charges billed to customer with no REP of record. Once a customer at a premise with no REP of record has enrolled with a REP, the TDU may send a bill to the customer for wires charges from

the date of the last move-out transaction that completed the transaction life cycle, or for the previous six months, whichever is less. The TDU invoice statement shall display the usage at the premise for each back-billed month. Prior to issuing any such bills, the TDU shall submit to commission staff for review, a prototype of the invoice statement.

(h) Door hanger format. Door hangers shall have the identifying code #999 printed in bold letters to enable the REPs to identify customers contacting them as premises on the No REP of Record List and shall comply with the content requirements of this subsection.

(1) The Door hangers shall include the following information and be formatted as follows:
Figure: 16 TAC §25.489(h)(1)

(2) A comprehensive list of REPs serving residential customers in the TDU's territory, including each REP's toll-free number and website address (if available), shall be listed on the door hanger.

(i) REP obligation to submit move-in transaction. A REP that enrolls a premise in response to the door hanger shall submit a move-in transaction, not a switch transaction, to the registration agent in accordance with the requirements of §25.487 of this title (relating to Obligations Related to Move-In Transactions).

(j) Disconnection of premise with no REP of record. Each TDU may disconnect a premise with no REP of record eleven business days after the customer receives the door hanger notification. Prior to disconnecting the service for a premise with no REP of record, each TDU shall repeat the procedures listed in subsection (c) of this section (other than issuing notice by a door hanger) to prevent the disconnection of a customer who has initiated service with a REP. A TDU shall not disconnect any premise that has been claimed by a REP in accordance with this section.

§25.490. Moratorium on Disconnection on Move-Out.

(a) Applicability. This section applies to all transmission and distribution utilities (TDUs).

(b) Moratorium on disconnection on move-out. A TDU shall not disconnect a residential premise after receiving a move-out transaction unless the requirements of this section have been met.

(c) Filing requirement. A TDU shall report monthly its success rate in processing standard electronic move-in requests on or before the requested date. A TDU shall also report its success rate in processing requests for reconnection of electric service on or before the requested date. Such reports shall be due on the 10th day following the last day of the reporting month.

(d) Relaxation of moratorium on disconnection. A TDU may disconnect residential premises after receiving a move-out transaction, as defined in the Electric Reliability Council of Texas (ERCOT) protocols, if it demonstrates that it has for three consecutive months or more processed 95% or greater of all move-in and requests for reconnection of electric service on or before the requested date. A TDU shall immediately stop disconnecting residential premises on move-out if its success rate reported in subsection (c) of this subsection falls below 95% for more than two consecutive months or below 85% in one month.

(e) Elimination of reporting requirement. The reporting requirement in subsection (c) of this section will no longer apply to a TDU that demonstrates a 95% success rate for 12 consecutive months.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 7, 2003.

TRD-200301604
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 936-7308

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TITLE 22. EXAMINING BOARDS

PART 2. TEXAS STATE BOARD OF BARBER EXAMINERS

CHAPTER 51. PRACTICE AND PROCEDURE
SUBCHAPTER D. BARBER SHOPS

22 TAC §51.98

The Texas State Board of Barber Examiners proposes amendments to §51.98, concerning State-Mandated Fee for Occupational Licensing Transactions Using the Internet. The proposed amendments are pursuant to Senate Bill 187 and Senate Bill 645, 77th Texas Legislature, Regular Session (now codified as Texas Government Code, §2054.252) and provide that all manicurists, upon renewal, shall pay a $3 fee to TexasOnline Authority in addition to the renewal fee. By rule, barbers already pay a $6 TexasOnline fee.

Douglas A. Beran, Ph.D., Executive Director, has determined that for the first five-year period the rule is in effect, there will be an increase in revenue to state government of approximately $639 per year as a result of enforcing or administering this amendment (approximately 213 manicurist renewals per year x $3). These amounts will be transferred directly to the TexasOnline Authority. Because the fee would be collected through ongoing administrative procedures, there would be no additional costs to the state as a result of enforcing or administering the rule. The proposed amendment has no foreseeable economic implications relating to costs or revenues for local government. There is no anticipated impact on small businesses or micro businesses as a result of implementing the section.

Dr. Beran also has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rule will be to ensure that licensed manicurists comply with the licensing requirements of the rules of the board and may be able to do so over the internet. The anticipated economic costs to persons who are required to comply with the rules as adopted will be $3 per licensee whether or not the licensee renews his/her manicurist license over the internet.

Comments on the proposed amendments may be submitted to Mary Feys, Texas State Board of Barber Examiners, 5717 Balcones Dr., Suite 217, Austin, Texas 78731 (1-512-458-0111; 1-888-870-8755; Fax 512-458-4901; e-mail mary.feys@tsbbe.state.tx.us) no later than 30 days from the date that the proposed action is published in the *Texas Register*.

The amendments are proposed under the requirements of Senate Bill 187 and Senate Bill 645, 77th Texas Legislature, Regular Session (now codified at Texas Government Code §2054.252), the Texas Occupations Code Chapter 1601.155 Authority to Set Fees, and 1601.151 General Powers and Duties of the Board which vests the board with the authority to make and enforce all

rules and regulations necessary for the performance of its duties, to establish standards of conduct and ethics for all persons licensed or practicing under the provision of the Texas Barber Law, and to regulate the practice and teaching of barbering in keeping with the intent of the Texas Barber Law and to ensure strict compliance with the Texas Barber Law.

No other article or statute is affected by these proposed amendments.

§51.98. State-Mandated Fee for Occupational Licensing Transactions Using the Internet.

As required by Senate Bill 187 and Senate Bill 645, 77th Texas Legislature, Regular Session, each licensee, upon renewal, shall pay the following [a ~~$6.00~~] State-Mandated Fee for Occupational Licensing Transactions Using the Internet: $6.00 for a barber; $3.00 for a manicurist. This fee is in addition to the renewal fee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 7, 2003.

TRD-200301621
Douglas A. Beran, PhD.
Executive Director
Texas State Board of Barber Examiners
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 458-1091

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PART 12. BOARD OF VOCATIONAL NURSE EXAMINERS

CHAPTER 231. ADMINISTRATION
SUBCHAPTER A. DEFINITIONS

22 TAC §231.1

The Board of Vocational Nurse Examiners proposes amendment to §231.1(12) definition relating to Direct Supervision providing protection to the public by allowing direct supervision during the period of time the person is completing supervised employment or other criteria for re-licensure.

Terrie L. Hairston, Executive Director, has determined that for the first five year period the rules are in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the rule.

Mrs. Hairston has also determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be consistency in the rules. There will be no effect on small businesses. There is no anticipated economic costs to persons who are required to comply with the rules as proposed.

Comments may be submitted to Terrie L. Hairston, Executive Director, Board of Vocational Nurse Examiners, 333 Guadalupe, Suite 3-400, Austin, Texas 78701.

The amendment is proposed under Chapter 302, Texas Occupations Code, Subchapter D, Section 302.151 (b), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purpose of the law.

No other statute, article or code will be affected by this proposal.

§231.1. Definitions.

The following words and terms, when used throughout this manual, shall have the following meanings, unless the context clearly indicates otherwise:

(1)-(11) (No Change)

(12) Direct Supervision - requires the vocational nurse holding a temporary permit/license to work under the direction of a Licensed Vocational Nurse, Registered Nurse, or licensed Physician who is physically present on the same unit and is readily available to provide immediate consultation and assistance.

(13)-(30) (No Change)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 7, 2003.

TRD-200301632
Terrie Hairston, RN, CHE
Executive Director
Board of Vocational Nurse Examiners
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 305-7653

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CHAPTER 235. LICENSING
SUBCHAPTER A. APPLICATION FOR LICENSURE

22 TAC §235.18

The Board of Vocational Nurse Examiners proposes new §235.18 relating to Disabled Candidate reflects change in test service.

Terrie L. Hairston, Executive Director, has determined that for the first five year period the rules are in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the rule.

Mrs. Hairston has also determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be consistency in the rules. There will be no effect on small businesses. There is no anticipated economic costs to persons who are required to comply with the rules as proposed.

Comments may be submitted to Terrie L. Hairston, Executive Director, Board of Vocational Nurse Examiners, 333 Guadalupe, Suite 3-400, Austin, Texas 78701.

The amendment is proposed under Chapter 302, Texas Occupations Code, Subchapter D, Section 302.151 (b), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purpose of the law.

No other statute, article or code will be affected by this proposal.

§235.18. Disabled Candidate.

(a) - (b) (No Change)

(c) The request must be submitted with the application for licensure and must include the following:

(1) - (3) (No Change)

(4) candidate's choice of a Pearson's Professional[~~Sylvan Technology~~] Center location so that the special accommodations can be made in a timely manner.

(d) (No Change)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 7, 2003.

TRD-200301631
Terrie Hairston, RN, CHE
Executive Director
Board of Vocational Nurse Examiners
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 305-7653

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PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 291. PHARMACIES
SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

22 TAC §291.32

The Texas State Board of Pharmacy proposes amendments to §291.32, concerning Personnel. The amendment, if adopted, will clarify the requirements for supervision of pharmacy technicians who enter prescription data into a data processing system.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state government as a result of enforcing or administering the rule. There are no anticipated fiscal implications for local government.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to clarify the requirements for supervision of pharmacy technicians and permit electronic supervision under certain conditions. There is no fiscal impact anticipated for small or large businesses or to other entities who are required to comply with this section.

Written comments on the amendment may be submitted to Steve Morse, R.Ph., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Box 21, Austin, Texas, 78701-3942, FAX (512) 305-8082. Comments must be received by 5 p.m., May 8, 2003.

The amendment is proposed under §§551.002, 554.051, and 554.053 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051 as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §554.053 as authorizing the agency to establish rules for the duties of pharmacy technicians in a licensed pharmacy including supervision of technicians.

The statutes affected by this rule: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.32. Personnel.

(a) - (b) (No change.)

(c) Pharmacists.

(1) General.

(A) - (C) (No change.)

(D) Pharmacists shall directly supervise pharmacy technicians who are entering prescription data into the pharmacy's data processing system by one of the following methods.

(i) Physically present supervision. A pharmacist shall be physically present to directly supervise a pharmacy technician who is entering prescription data into the data processing system. If the pharmacist is not physically present due to a temporary absence as specified in §291.33(b)(4) of this subchapter, on return the pharmacist must:

(I) conduct a drug regimen review for the prescriptions data entered during this time period as specified in §291.33(c)(2) of this subchapter; and

(II) verify that prescription data entered during this time period was entered accurately prior to delivery of the prescription to the patient or patient's agent.

(ii) Electronic supervision. A pharmacist may electronically supervise a pharmacy technician who is entering prescription data into the data processing system provided the pharmacist:

(I) is on-site, in the pharmacy where the technician is located;

(II) has immediate access to any original document containing prescription information or other information related to the dispensing of the prescription. Such access may be through imaging technology provided the pharmacist has the ability to review the original, hardcopy documents if needed for clarification; and

(III) verifies the accuracy of the data entered information prior to the release of the information to the system for storage and/or generation of the prescription label.

(E) [~~(D)~~] All pharmacists while on duty, shall be responsible for complying with all state and federal laws or rules governing the practice of pharmacy.

(F) [~~(E)~~] A dispensing pharmacist shall ensure that the drug is dispensed and delivered safely, and accurately as prescribed. In addition, if multiple pharmacists participate in the dispensing process, each pharmacist shall ensure the safety and accuracy of the portion of the process the pharmacist is performing. The dispensing process shall include, but not be limited to, drug regimen review and verification of accurate prescription data entry, packaging, preparation, compounding and labeling and performance of the final check of the dispensed prescription.

(2) - (3) (No change.)

(d) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 5, 2003.

TRD-200301575

Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 305-8028

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22 TAC §291.33, §291.36

The Texas State Board of Pharmacy proposes amendments to §291.33, concerning Operational Standards and §291.36, concerning Class A Pharmacies Compounding Sterile Pharmaceuticals (Operational Standards). The amendments, if adopted, will: (1) permit an individual pharmacist employee of a pharmacy to perform a drug regimen review from outside the pharmacy; and (2) clarify library requirements for pharmacies.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rules are in effect, there will be no fiscal implications for state government as a result of enforcing or administering the rules. There are no anticipated fiscal implications for local government.

Ms. Dodson has determined that, for each year of the first five-year period the rules will be in effect, the public benefit anticipated as a result of enforcing the rules will be: (1) improved patient care through the increased availability of timely drug regimen review; and (2) streamlined reference library requirements for pharmacies. There is no fiscal impact anticipated for small or large businesses or to other entities who are required to comply with the sections.

Written comments on the amendments may be submitted to Steve Morse, R.Ph., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Box 21, Austin, Texas, 78701-3942, FAX (512) 305-8082. Comments must be received by 5 p.m., May 8, 2003.

The amendments are proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051 as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.33. Operational Standards.

(a) - (b) (No change.)

(c) Prescription dispensing and delivery.

(1) (No change.)

(2) Pharmaceutical care services.

(A) Drug regimen review.

(i) For the purpose of promoting therapeutic appropriateness, a pharmacist shall, prior to or at the time of dispensing a prescription drug order, review the patient's medication record. Such review shall at a minimum identify clinically significant:

(I) - (X) (No change.)

(ii) (No change.)

(iii) The drug regimen review may be conducted by remotely accessing the pharmacy's electronic data base from outside the pharmacy by an individual Texas licensed pharmacist employee of the pharmacy, provided the pharmacy establishes controls to protect the privacy of the patient and the security of confidential records.

(B) (No change.)

(3) - (7) (No change.)

(d) (No change.)

(e) Library. A reference library shall be maintained which includes the following in hard-copy or electronic format:

(1) (No change.)

(2) at least one current or updated reference from each of the following categories:

(A) (No change.)

(B) drug interactions: a reference text on drug interactions, such as Drug Interaction Facts. A separate reference is not required if other references maintained by the pharmacy contain drug interaction information including information needed to determine severity or significance of the interaction and appropriate recommendations or actions to be taken [~~Phillip D. Hansten's Drug Interactions~~];

(C) a general information reference text, such as:

(i) - (ii) (No change.)

(iii) Clinical Pharmacology;

(iv) [~~(iii)~~] American Hospital Formulary Service with current supplements; or

(v) [~~(iv)~~] Remington's Pharmaceutical Sciences; and

(3) (No change.)

(f) - (j) (No change.)

§291.36. Class A Pharmacies Compounding Sterile Pharmaceuticals.

(a) - (c) (No change.)

(d) Operational standards.

(1) - (3) (No change.)

(4) Pharmaceutical care services.

(A) The following pharmaceutical care services shall be provided by pharmacists of the pharmacy.

(i) (No change.)

(ii) Drug regimen review.

(I) For the purpose of promoting therapeutic appropriateness, a pharmacist shall, prior to or at the time of dispensing, evaluate prescription drug orders and patient medication records for:

(-a-) - (-k-) (No change.)

(II) (No change.)

(III) The drug regimen review may be conducted by remotely accessing the pharmacy's electronic data base from outside the pharmacy by an individual Texas licensed pharmacist employee of the pharmacy, provided the pharmacy establishes controls to protect the privacy of the patient and the security of confidential records.

(iii) (No change.)

(B) (No change.)

(5) (No change.)

(6) Library. A reference library shall be maintained which includes the following in hard-copy or electronic format:

(A) (No change.)

(B) at least one current or updated reference from each of the following categories:

(i) (No change.)

(ii) drug interactions. A reference text on drug interactions, such as Drug Interaction Facts. A separate reference is not required if other references maintained by the pharmacy contain drug interaction information including information needed to determine severity or significance of the interaction and appropriate recommendations or actions to be taken [~~Hansten's and Horn's Drug Interactions~~];

(iii) a general information reference text, such as:

(I) - (IV) (No change.)

(V) Clinical Pharmacology [~~Micromedex~~];

(iv) (No change.)

(C) a specialty reference appropriate for the scope of pharmacy services provided by the pharmacy, e.g., if the pharmacy prepares cytotoxic drugs, a reference [~~text~~] on the preparation and safe handling of cytotoxic drugs[~~, such as Procedures for Handling Cytotoxic Drugs~~];

(D) - (E) (No change.)

(7) - (9) (No change.)

(e) - (f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 5, 2003.

TRD-200301576
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 305-8028

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SUBCHAPTER C. NUCLEAR PHARMACY (CLASS B)

22 TAC §291.54

The Texas State Board of Pharmacy proposes amendments to §291.54, concerning Operational Standards. The amendment, if adopted, will permit an individual pharmacist employee of a pharmacy to perform a drug regimen review from outside the pharmacy.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state government as a result of enforcing or administering the rule. There are no anticipated fiscal implications for local government.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be improved patient care through the increased availability of timely drug regimen review.

There is no fiscal impact anticipated for small or large businesses or to other entities who are required to comply with this section.

Written comments on the amendment may be submitted to Steve Morse, R.Ph., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Box 21, Austin, Texas, 78701-3942, FAX (512) 305-8082. Comments must be received by 5 p.m., May 8, 2003.

The amendment is proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051 as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.54. Operational Standards.

(a) - (c) (No change.)

(d) Pharmaceutical Care Services.

(1) The following minimum level of pharmaceutical care services shall be provided whenever a therapeutic prescription drug order is dispensed and, when in the professional judgement of the pharmacist dispensing a diagnostic prescription drug order, the services are necessary to protect the patient's health while striving to produce positive patient outcomes. When it is determined that the following services are necessary, the dispensing pharmacist shall assure that efforts are made to gather the information necessary to properly perform the services.

(A) (No change.)

(B) Drug regimen review.

(i) For the purpose of promoting therapeutic appropriateness, an authorized nuclear pharmacist shall, prior to or at the time of dispensing, evaluate therapeutic prescription drug orders and patient medication history for:

(I) - (XI) (No change.)

(ii) (No change.)

(iii) The drug regimen review may be conducted by remotely accessing the pharmacy's electronic data base from outside the pharmacy by an individual Texas licensed pharmacist employee of the pharmacy, provided the pharmacy establishes controls to protect the privacy of the patient and the security of confidential records.

(2) (No change.)

(e) - (i) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 5, 2003.

TRD-200301577
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 305-8028

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SUBCHAPTER D. INSTITUTIONAL PHARMACY (CLASS C)

22 TAC §291.74

The Texas State Board of Pharmacy proposes amendments to §291.74, concerning Operational Standards. The amendment, if adopted, will: (1) permit an individual pharmacist employee of a pharmacy to perform a drug regimen review from outside the pharmacy; and (2) clarify library requirements for pharmacies.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state government as a result of enforcing or administering the rule. There are no anticipated fiscal implications for local government.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be: (1) improved patient care through the increased availability of timely drug regimen review; and (2) streamlined reference library requirements for pharmacies. There is no fiscal impact anticipated for small or large businesses or to other entities who are required to comply with this section.

Written comments on the amendment may be submitted to Steve Morse, R.Ph., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Box 21, Austin, Texas, 78701-3942, FAX (512) 305-8082. Comments must be received by 5 p.m., May 8, 2003.

The amendment is proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051 as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this rule: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.74. Operational Standards.

(a) - (c) (No change.)

(d) Library. A reference library shall be maintained which includes the following in hard-copy or electronic format:

(1) (No change.)

(2) at least one current or updated reference from each of the following categories:

(A) drug interactions. A reference text on drug interactions, such as Drug Interaction Facts. A separate reference is not required if other references maintained by the pharmacy contain drug interaction information including information needed to determine severity or significance of the interaction and appropriate recommendations or actions to be taken [~~Hansten's and Horn's Drug Interactions~~];

(B) a general information reference text, such as:

(i) - (iv) (No change.)

(v) Clinical Pharmacology [~~Micromedex~~];

(3) - (4) (No change.)

(5) if the pharmacy compounds sterile pharmaceuticals, specialty references appropriate for the scope of services provided by the pharmacy, e.g., if the pharmacy prepares cytotoxic drugs, a reference [~~text~~] on the preparation and safe handling of cytotoxic drugs[~~, such as Procedures for Handling Cytotoxic Drugs~~];

(6) (No change.)

(e) - (f) (No change.)

(g) Pharmaceutical care services.

(1) The pharmacist-in-charge shall assure that at least the following pharmaceutical care services are provided to patients of the facility.

(A) (No change.)

(B) Drug regimen review.

(i) - (iii) (No change.)

(iv) The drug regimen review may be conducted by remotely accessing the pharmacy's electronic data base from outside the pharmacy by an individual Texas licensed pharmacist employee of the pharmacy, provided the pharmacy establishes controls to protect the privacy of the patient and the security of confidential records.

(C) - (D) (No change.)

(2) (No change.)

(h) - (j) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 5, 2003.

TRD-200301578
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 305-8028

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SUBCHAPTER F. NON-RESIDENT PHARMACY (CLASS E)

22 TAC §291.104

The Texas State Board of Pharmacy proposes amendments to §291.104, concerning Operational Standards. The amendment, if adopted, will clarify that pharmacists in Class E (Non-resident) Pharmacies must: (1) exercise sound professional judgment when dispensing a prescription; and (2) determine that the prescription is a valid prescription that was issued on the basis of a valid patient-practitioner relationship.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state government as a result of enforcing or administering the rule. There are no anticipated fiscal implications for local government.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be increased patient safety by clarifying that prescriptions may be dispensed only if issued pursuant to a valid patient-practitioner relationship. There is no fiscal impact anticipated for small or large businesses or to other entities who are required to comply with this section.

Written comments on the amendment may be submitted to Steve Morse, R.Ph., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Box 21, Austin, Texas, 78701-3942, FAX (512) 305-8082. Comments must be received by 5 p.m., May 8, 2003.

The amendment is proposed under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §554.051(b) as authorizing the agency to make a rule concerning the operation of a licensed pharmacy located in this state applicable to a pharmacy licensed by the board that is located in another state, if the board determines the rule is necessary to protect the health and welfare of the citizens of this state.

The statutes affected by this rule: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.104. Operational Standards.

(a) (No change.)

(b) Prescription dispensing and delivery.

(1) General.

(A) - (C) (No change.)

(D) All Pharmacists shall exercise sound professional judgment with respect to the accuracy and authenticity of any prescription drug order they dispense. If the pharmacist questions the accuracy or authenticity of a prescription drug order, he/she shall verify the order with the practitioner prior to dispensing.

(E) Prior to dispensing a prescription, pharmacists shall determine, in the exercise of sound professional judgment, that the prescription is a valid prescription. A pharmacist may not dispense a prescription drug if the pharmacist knows or should have known that the prescription was issued on the basis of an Internet-based or telephonic consultation without a valid patient-practitioner relationship.

(F) Subparagraph (E) of this paragraph does not prohibit a pharmacist from dispensing a prescription when a valid patient-practitioner relationship is not present in an emergency situation (e.g. a practitioner taking calls for the patient's regular practitioner).

(2) - (3) (No change.)

(c) - (f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 5, 2003.

TRD-200301579
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 305-8028

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CHAPTER 295. PHARMACISTS

22 TAC §295.8

The Texas State Board of Pharmacy proposes amendments to §295.8, concerning Continuing Education Requirements. The amendment, if adopted, will allow continuing education credit for courses which are part of an advanced pharmacy degree program.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state government as a result of enforcing or administering the rule. There are no anticipated fiscal implications for local government.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to increase the availability of quality continuing education programs for pharmacists. There is no fiscal impact anticipated for small or large businesses or to other entities who are required to comply with this section.

Written comments on the amendment may be submitted to Steve Morse, R.Ph., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Box 21, Austin, Texas, 78701-3942, FAX (512) 305-8082. Comments must be received by 5 p.m., May 8, 2003.

The amendment is proposed under §§551.002, 554.051, and 559.052 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051 as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets §559.052 as authorizing to approve continuing education programs which will be accepted for renewal of a license to practice pharmacy.

The statutes affected by this rule: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§295.8. Continuing Education Requirements.

(a) - (d) (No change.)

(e) Approved Programs.

(1) (No change.)

(2) Courses which are part of a professional degree program or an advanced pharmacy degree program offered by [~~in~~] a college of pharmacy which has a [~~the~~] professional degree program [~~of which has been~~] accredited by ACPE.

(A) - (B) (No change.)

(3) - (6) (No change.)

(f) - (g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 5, 2003.

TRD-200301580
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 305-8028

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TITLE 25. HEALTH SERVICES

PART 16. TEXAS HEALTH CARE INFORMATION COUNCIL

CHAPTER 1301. HEALTH CARE INFORMATION

SUBCHAPTER A. COLLECTION AND RELEASE OF HOSPITAL DISCHARGE DATA

25 TAC §§1301.11, 1301.12, 1301.14 - 1301.19

The Texas Health Care Information Council (Council) proposes amendments to §§1301.11, 1301.12, 1301.14, 1301.15, 1301.16, 1301.17, 1301.18, and 1301.19 in part to comply with the change in billing claim format as required by the Public Law 104-191, Health Insurance Portability and Accountability Act of 1996 (HIPAA), and to provide access to more Public Use Data elements regarding external causes of injury, charges, service utilization, and to clarify language.

The proposed amendments to §1301.11 add definitions of "ANSI 837 Institutional Guide," "HCPCS" and "HIPPS," delete the definition of "Batch file," amend the definitions of : "Data Format," "Discharge file," "Discharge claim," "Discharge report," "Facility Type Indicators," "Patient control number," "Public Use Data File," "Required minimum data set" and "Submission." The proposed amendment to Data Format aligns the chapter with amendments in §1301.11(8), §1301.14(c) and §1301.19(a)(3). The proposed amendments to "Discharge File" and "Discharge report" align the terminology used in this chapter with the language used in the American National Standards Institute's Accredited Standards Committee X12N Form 837 Health Care Institutional Claims Guide (ANSI 837 Institutional Guide). The amended definitions of "Discharge file" and "Discharge claim" are made to clarify confusing language within this chapter. The proposed amendment to "Facility Type Indicator" adds "Long Term Acute Care" facilities. The proposed amendment to the term "Required minimum data set" clarifies that the specified data element list only includes the claim level data elements and does not specify the other data elements that are required to submit a compliant electronic discharge claim to the Council. The proposed amendment to the definition of the term "Submission" is intended to clarify that a submission is a transfer of the required data elements to constitute a discharge report.

The Council proposes to amend §1301.12 (a) and (b) and (d), §1301.15(a), §1301.16(a) and (c), §1301.17(a), §1301.18(a) and (e), and §1301.19(e) as a result of proposing to substitute the definition of "Discharge claim" and as a result of amending the definitions of "Patient control number," "Public Use Data File," and "Required minimum data set."

The Council proposes to amend the references sections in §§1301.12(a) and (b)(4) as a result of the renumbering of subsection in §1301.19.

The Council proposes to amend §1301.14(a)(1) and (2) and §1301.14(b) by removing the record length requirement because the ANSI 837 Institutional Guide has no such requirement.

The Council proposes to amend §1301.14(a)(2)(B) to add in the phrase "THCIC 6-digit Identifier" to clarify which facility identifier is required on the magnetic media.

The Council proposes to delete the following sections requirements for submitting on paper in §1301.11(8), §1301.14(c), §1301.15(a)(3) and the option of submitting on paper in §1301.19(a)(3).

The Council proposes to delete §1301.15(a)(4) as the only data-reporting standard would be the ANSI ASC X12N Form 837.

The Council proposes to amend §1301.18(c)(11) as follows: Replace "Source of Payment, Non-Standard Codes" with "Claim Type Indicator Code" as the combination of the Standard and Non-Standard Source of Payment Codes are included in the ANSI 837 Institutional Guide's "Claim Type Indicator Code"; Delete "Source of Payment Code, Standard Codes"; Expand the number of occurrences for "Other Diagnosis Codes," "Other Procedure Codes" and "Other Procedure Dates" to allow up to 24 codes for each; Remove the previous individually identified "Other Diagnosis Codes" (2) through (8), from the list along with the "Other Procedure Codes" (2) through (5) ; Add the following new data elements: "Encounter Identifier," "Service Line Revenue Code," "Service Line Procedure Code," "HCPCS/HIPPS Procedure Code," "HCPCS/HIPPS Procedure Modifiers," "Service Line Charge Amount," "Service Line Unit Code," "Service Line Unit Count," "Service Line Non-Covered Charge Amount," and "Patient Country"; Delete the qualifying phrases "Beginning with 2000 data" for "Uniform Physician Identifier assigned to Attending Physician" and "Uniform Physician Identifier assigned to Operating or Other Physician"; Delete the qualifying phrase "Beginning with third quarter 2000" from previous data elements relating to charges.

The Council proposes to amend §1301.18(e)(2) to only allow late claims from one quarter prior to the quarter being processed for public use distribution by replacing the word "year" with "quarter."

The Council proposes to amend §1301.19 as follows:

Require in subsection (a) that health care facilities submit discharge reports in the ANSI 837 Institutional Guide, in subsection (a)(1) eliminate the option.

In subsection (a)(1) delete the option to submit discharge claim data in the previously acceptable HCFA UB92 Electronic File format.

Delete the first two sentences in subsection (b) because they duplicate language contained in §1301.19(a).

In subsection (c) inserting the phrase "ANSI 837 Institutional Guide" for "Texas UB-92 Manual" and for the phrase "HCFA UB-92 Electronic Format."

In subsection (c)(1) provide the location in ANSI 837 Institutional Guide and acceptable codes for submitting the race code of a patient.

In subsection (c)(2) provide the location in ANSI 837 Institutional Guide and acceptable codes for submitting the ethnicity code of a patient.

Delete Social Security Number in subsection (c)(3) as the data element has a specified location in the ANSI 837 Institutional Guide.

Delete location of the "Standard Source of Payment Code" and the "Non-standard Source of Payment Code" in subsection (c)(4) as the data elements have been replaced by the "Claim Type Indicator Code," which has a specified location in the ANSI 837 Institutional Guide.

Delete location of the "Facility Name," "Facility address" and "Facility city" (respectively) in subsection (c)(5)-(7) as the ANSI 837 Institutional Guide has specified locations for these data elements.

Delete subsection (d) as it is not needed and the ANSI 837 Institutional Guide specifies the characteristics and formatting of each data element.

Reorder and renumber the required data elements list in subsection (d). Also in subsection (d):

"Patient Address Line 1" replaces "Patient Address";

"Patient Account Number" replaces "Patient Control Number";

"Statement Dates" replaces "Statement Covers Period From" date and Statement Covers Period Through" date;

"Other Diagnosis Codes - up to 24 occurrences (all applicable)" replaces "Other Diagnosis Codes (all applicable)";

"External Cause of Injury (E-Codes) - up to 9 occurrences (if applicable)" replaces External cause of injury (E-Code) (if applicable)";

"Other Procedure Codes - up to 24 occurrences (if applicable)" replaces "Other Surgical Procedure Code (if applicable);

"Other Procedure Dates - up to 24 occurrences (if applicable)" replaces "Other Surgical Procedure Dates";

"Attending Physician Last Name," "Attending Physician First Name" and "Attending Physician Middle Initial" replaces "Attending Physician Name";

"Operating Physician or Other Practitioner Last Name," "Operating Physician or Other Practitioner First Name" and "Operating Physician or Other Practitioner Middle Initial" replaces "Operating or Other Physician Name";

"Service Provider Name" replaces "Facility Name";

"Service Provider Address Line 1"and "Service Provider Address Line 2 (if applicable)" replaces "Facility Address";

"Service Provider City" replaces "Facility City";

"Service Provider ZIP" replaces "Facility ZIP";

Add the following data elements to subsection (d):

"Patient Address Line 2 (if applicable)";

"Patient Country";

"Claim Filing Indicator Code";

"Payer Name";

"National Plan Identifier";

"Admission/ Start of Care Hour"; "Patient Discharge Hour";

"Occurrence Span Code - up to 24 occurrences (if applicable)";

"Occurrence Span Code Associated Date - up to 24 occurrences (if applicable)";

"Occurrence Code - up to 24 occurrences (if applicable)";

"Occurrence Code Associated Date - up to 24 occurrences (if applicable)";

"Value Code - up to 24 occurrences (if applicable)";

"Value Code Associated Amount - up to 24 occurrences (if applicable)";

"Condition Code - up to 24 occurrences (if applicable)";

"Total Claim Charges";

Revenue Service Line Details (up to 999 service lines) (all applicable)

"Revenue Code";

"Procedure Code";

"HCPCS/HIPPS Procedure Modifier 1";

"HCPCS/HIPPS Procedure Modifier 2";

"HCPCS/HIPPS Procedure Modifier 3";

"HCPCS/HIPPS Procedure Modifier 4";

"Charge Amount";

"Unit Code";

"Unit Quantity";

"Unit Rate";

"Non-covered Charge Amount";

"Service Provider Primary Identifier - Provider Federal Tax ID (EIN) or National Provider Identifier (when HIPAA rule is implemented)";

"Service Provider State"; "Service Provider Secondary Identifier - THCIC 6-digit Hospital ID assigned to each facility"

Delete the data element "Reason for no Social Security number" in subsection (d) as it is not a data element in the ANSI ASC X12N Form 837 Institutional Guide or Standard.

Replace the HCFA UB92 Record and Field locations in subsection (f)(1-11) with the corresponding ANSI 837 Institutional Guide, loop and segment identifiers.

Delete subsection (g) as it is no longer required.

Jim Loyd, Executive Director, has determined that for the first five-year period that the proposed sections are in effect, there will be anticipated costs to the State of $29,400. The changes to the Council's application software are included as part of the cost of the recently renewed contract with Commonwealth Clinical Systems for auditing/editing and warehousing the health care data collection system for hospital discharge data. The Council anticipates a one-time programming cost to hospitals associated with the requirements in the following paragraphs: §1301.19 (c)(1), (2) and (3). The other specified changes are resultant to ANSI 837 Institutional Guide requirements and the state owned hospitals would be including those changes as result of converting to the HIPAA compliancy requirements. The following hospitals estimate a cost of $4,900 to make the initial changes to their system to accommodate the THCIC 837 submission requirements: The University of Texas, M.D. Anderson Cancer Center, Texas State Hospitals (for 10 hospitals), South Texas Hospital, Texas Center for Infectious Disease, the University of Texas Health Center in Tyler, Harris County Psychiatric Hospital. The University of Texas, Medical Branch Hospital at Galveston estimates no additional costs to make the initial change to its systems. The Council anticipates no additional recurring costs for submitting this information. The costs are based upon an estimated average salary of computer personnel in Texas of $34.40/hr: ($32.76 [average of four major Metropolitan Areas, Austin-San Marcos, Dallas-Fort Worth, Houston-Galveston-Brazoria and San Antonio] with an estimated five percent increase, Bureau of Labor Statistics for

Texas, 2002), and based on an estimated maximum of 40 hours programming time for the additional data elements.

Mr. Loyd has also determined that, for the first five-year period the proposed sections are in effect, there will be $4,900 in anticipated costs to affected local governments as a result of enforcing or administering the amended sections. The anticipated costs are for local governments that own hospitals or hospital districts and are required to report data to the Council. The initial cost is dependent upon each hospital's information systems capabilities and their staff resources. The Council anticipates a one-time programming costs associated with the requirements in the following paragraphs: §1301.19 (c)(1), (2) and (3) of $4,900. The Council does not anticipate any recurring costs to the their information systems.

Mr. Loyd also has determined that, for each year the of the first five year period that the rules are in effect, there will be $4,900 additional costs to persons or hospitals who are required to comply with the amended section. The Council anticipates a one-time programming costs associated with the requirements in the following paragraphs: §1301.19 (c)(1), (2) and (3) of $4,900.

Mr. Loyd also has determined that, for each year of the first five-year period the proposed sections are in effect, the anticipated public benefit will be greater ease in identifying individual encounters in the Public Use Data File and viewing individual revenue codes submitted by hospitals, continuation of collection of racial and ethnic data on patients, and increased information on external cause of injuries on inpatients.

Comments on the proposed sections may be submitted to Bruce M. Burns, D.C., Program Specialist, Texas Health Care Information Council, Two Commodore Plaza, 206 East 9th Street, Suite 19.140, Austin, Texas 78701. Comments must arrive no later than 31 calendar days from the date that these proposed sections are published in the *Texas Register*.

The Council will entertain requests for a public hearing until the 25th day after the date the rules are published in the *Texas Register*.

The amendments are proposed under the Health and Safety Code, §108.006 and §108.009. The Council interprets §108.006 as authorizing it to adopt rules necessary to carry out Chapter 108, including rules concerning data dissemination requirements. The Council interprets §108.009 as authorizing the Council to adopt rules regarding the collection of data from hospitals in uniform submission formats in order for the incoming data to be substantially valid, consistent, compatible and manageable.

The Health and Safety Code, §§108.002, 108.006, 108.009, 108.010 and 108.011 are affected by these amendments.

§1301.11. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Accurate and Consistent data--Data that has been edited by the Council and subjected to provider validation and certification.

(2) ANSI 837 Institutional Guide--American National Standards Institute, Accredited Standards Committee X12N, 837 Health Care Institutional Claim Implementation Guide.

(3) [~~(2)~~] Attending Physician--The individual licensed under the Medical Practice Act (Occupations Code, Chapter 151) who would normally be expected to certify and recertify the medical necessity of the services rendered or the licensed health professional primarily responsible for the care of the patient during the hospital episode. For Skilled Nursing Facility (SNF) services, the attending physician is the individual who certifies the SNF plan of care.

~~[(3) Batch file--A set of computer records as specified in §1301.19 of this title (relating to Discharge Reports --Records, Data Fields and Codes) which contains one or more discharge files and other required header and trailer records. A batch contains discharge files for only one hospital.]~~

(4) Certification Process--The process by which a provider confirms the accuracy and completeness of the encounter data set required to produce the public use data file as specified in §1301.17 of this title (relating to Certification of Discharge Reports).

(5) Charge--The amount billed by a provider for specific procedures or services provided to a patient before any adjustment for contractual allowances, government mandated fee schedules or write-offs for charity care, bad debt or administrative courtesy. The term does not include co-payments charged to health maintenance organization enrollees by providers paid by capitation or salary in a health maintenance organization.

(6) Comments--The notes or explanations submitted by the hospitals, physicians or other health professionals concerning the provider quality reports or the encounter data for public use as described in the Texas Health and Safety Code, §108.010(c) and (e) and §108.011(g) respectively.

(7) Council--The Texas Health Care Information Council.

(8) Data format--The sequence or location of data elements in an [~~on a paper form or~~] electronic record according to prescribed specifications.

(9) Discharge--The formal release of a patient by a hospital; that is, the termination of a period of hospitalization by death or by disposition to a residence or another health care provider.

(10) Discharge claim[~~file~~]--A set of computer records as specified in §1301.19 of this title (relating to Discharge Reports --Records, Data Fields and Codes) relating to a specific patient. "Discharge claim" corresponds to the ANSI 837 Institutional Guide term, "Transaction set."

(11) Discharge report--A computer file as defined in §1301.19 of this title (relating to Discharge Reports--Records, Data Fields and Codes) periodically submitted on or on behalf of a Hospital in compliance with the provisions of this chapter. "Discharge report" corresponds to the ANSI 837 Institutional Guide terms, "Communication Envelope" or "Interchange Envelope."

(12) DRG--Diagnosis Related Group

(13) EDI--Electronic Data Interchange--A method of sending data electronically from one computer to another. EDI helps providers and payers maintain a flow of vital information by enabling the transmission of claims and managed care transactions.

(14) Edit--An electronic standardized process developed and implemented by the Council to identify potential errors and mistakes in data elements by reviewing data fields for the presence or absence of data and the accuracy and appropriateness of data.

(15) Electronic filing--The submission of computer records in machine readable form by modem transfer from one computer to another (EDI) or by recording the records on a nine track magnetic tape, computer diskette or other magnetic media acceptable to the executive director.

(16) Error--Data submitted on a discharge report which are not consistent with the format and data standards contained in this section or with editing criteria established by the executive director, or the failure to submit required data.

(17) Ethnicity--The status of patients relative to Hispanic background. Hospitals shall report this data element according to the following ethnic types: Hispanic or Non-Hispanic.

(18) Executive director--The chief administrative officer of the Council, or, in the event the Council is without an executive director, the person designated by the chairperson of the Council to perform the functions and exercise the authority of the executive director.

(19) Facility Type Indicators--An indicator that provides information to the data user as to the type of facility or the primary health services delivered at that facility (e.g., Teaching, Acute Care, Rehabilitation, Psychiatric, Pediatric, Cancer, Skilled Nursing, Long Term Acute Care or other Long Term Care Facility). A facility may have more than one indicator. Hospitals may request updates to this field.

(20) Geographic identifiers--A set of codes indicating the public health region and county in which the patient resides.

(21) HCPCS--HCFA's Common Procedure Coding System (HCFA-Health Care Finance Administrations (Now called Centers for Medicare and Medicaid Services)).

(22) [~~(21)~~] Health care facility--A hospital, an ambulatory surgery center licensed under Chapter 243 of the Health and Safety Code, a chemical dependency treatment facility licensed under Chapter 464 of the Health and Safety Code, a renal dialysis center, a birthing center, a rural health clinic or a federally qualified health center as defined by 42 United States Code, §1396(1)(2)(B).

(23) HIPPS--Health Insurance Prospective Payment System.

(24) [~~(22)~~] Hospital--A public, for-profit, or nonprofit institution licensed or owned by this state that is a general or special hospital, private mental hospital, chronic disease hospital or other type of hospital.

(25) [~~(23)~~] ICD--International Classification of Disease.

(26) [~~(24)~~] Inpatient--A patient, including a newborn infant, who is formally admitted to the inpatient service of a hospital and who is subsequently discharged, regardless of status or disposition. Inpatients include patients admitted to medical/surgical, intensive care, nursery, subacute, skilled nursing, long-term, psychiatric, substance abuse, physical rehabilitation and all other types of hospital units.

(27) [~~(25)~~] Operating or Other Physician--The "physician" licensed by the Texas State Board of Medical Examiners, or "other health professional" licensed by the State of Texas who performed the principal procedure or performed the surgical procedure most closely related to the principal diagnosis.

(28) [~~(26)~~] Other exempted provider--A hospital exempt from state franchise, sales, ad valorem, or other state and local taxes that does not seek or receive reimbursement for providing health care services to patients from any source, including the patient or any person legally obligated to support the patient; a third party payer; or Medicaid, Medicare, or any other federal, state or local program for indigent health care.

(29) [~~(27)~~] Other health professional--A person licensed to provide health care services other than a physician. An individual other than a physician who admits patients to hospitals or who provides diagnostic or therapeutic procedures to inpatients. The term encompasses persons licensed under various Texas practice statutes, such as psychologists, chiropractors, dentists, nurse practitioners, nurse midwives, and podiatrists who are authorized by the hospital to admit or treat patients.

(30) [~~(28)~~] Patient account[~~control~~] number--A number assigned to each patient by the hospital, which appears on each computer record in a patient discharge claim[~~file~~]. This number is not consistent for a given patient from one hospital to the next, or from one admission to the next in the same hospital. The Council deletes or encrypts this number to protect patient confidentiality prior to release of data.

(31) [~~(29)~~] Physician--An individual licensed under the laws of this state to practice medicine under the Medical Practice Act, Occupations Code, Chapter 151.

(32) [~~(30)~~] Provider--A physician or health care facility.

(33) [~~(31)~~] Provider quality data--A report or reports authored by the Council on provider quality or outcomes of care, as defined in Chapter 108 of Health and Safety Code, created from data collected by the Council or obtained from other sources.

(34) [~~(32)~~] Public use data file--A data file composed of discharge claims[~~files~~] with risk and severity adjustment scores which have been altered by the deletion, encryption or other modification of data fields to protect patient and physician confidentiality and to satisfy other restrictions on the release of hospital discharge data imposed by statute.

(35) [~~(33)~~] Race--A division of patients according to traits that are transmissible by descent and sufficient to characterize them as distinctly human types. Hospitals shall report this data element according to the following racial types: American Indian, Eskimo, or Aleut; Asian or Pacific Islander; Black; White; or Other.

(36) [~~(34)~~] Required minimum data set--The list of data elements which hospitals are required to submit in a discharge claim [~~file~~] for each inpatient stay in the hospital. The required minimum data set is specified in §1301.19(d) of this title[.] (relating to Discharge Reports --Records, Data Fields and Codes). This list does not include the data elements that are required by the ANSI 837 Institutional Guide to submit an acceptable discharge report. For example: Interchange Control Headers and Trailers, Functional Group Headers and Trailers, Transaction Set Headers and Trailers and Qualifying Codes (which identify which qualify subsequent data elements).

(37) [~~(35)~~] Research data file--A customized data file, which includes the data elements in the public use file and may include data elements other than the required minimum data set submitted to the Council, except those data elements that could reasonably identify a patient or physician. The data elements maybe released to a requestor when the requirements specified in §1301.18(l)[~~(f)~~] of this title (relating to Hospital Discharge Data Release) are completed.

(38) [~~(36)~~] Risk adjustment--A statistical method to account for a patient's severity of illness at the time of admission and the likelihood of development of a disease or outcome, prior to any medical intervention.

(39) [~~(37)~~] Rural provider--A health care facility located in a county with a population of not more than 35,000 as of July 1 of the most recent year according to the most recent United States Bureau of the Census estimate; or located in a county with a population of more than 35,000 but with 100 or fewer licensed hospital beds and not located in an area that is delineated as an urbanized area by the United States Bureau of the Census; and is not state owned, or not managed or directly or indirectly owned by an individual, association, partnership, corporation, or other legal entity that owns or manages one or more other hospitals. A health care facility is not a rural provider if

an individual or legal entity that manages or owns one or more other hospitals owns or controls more than 50% of the voting rights with respect to the governance of the facility.

(40) [~~(38)~~] Scientific Review Panel--The Council's appointees or agent who have experience and expertise in ethics, patient confidentiality, and health care data who review and approve or disapprove requests for data or information other than the public use data. Described in §1301.20 of this title (relating to Scientific Review Panel).

(41) [~~(39)~~] Service Unit Indicator--An indicator derived from submitted data (based on Bill type or Revenue Codes) and represents the type of service unit or units (e.g., Coronary Care Unit, Detoxification Unit, Intensive Care Unit, Hospice Unit, Nursery, Obstetric Unit, Oncology Unit, Pediatric Unit, Psychiatric Unit, Rehabilitation Unit, Sub acute Care Unit or Skilled Nursing Unit) where the patient received treatment.

(42) [~~(40)~~] Severity adjustment--A method to stratify patient groups by degrees of illness and mortality.

(43) [~~(41)~~] Submission--The transfer of a [~~A~~] set of computer records as specified in §1301.19 of this title (relating to Discharge Reports --Records, Data Fields and Codes) that constitutes the discharge report for one or more hospitals.

(44) [~~(42)~~] Submitter--The person or organization, which physically prepares discharge reports for one or more hospitals and submits them to the Council. A submitter may be a hospital or an agent designated by a hospital or its owner.

(45) [~~(43)~~] THCIC Identification Number--A string of six characters assigned by the Council to identify health care facilities for reporting and tracking purposes.

(46) [~~(44)~~] Uniform facility identifier--A unique number assigned by the Council to each health care facility licensed in the state. For hospitals, this will include the hospital's state license number. For hospitals operating multiple facilities under one license number and duplicating services, the Council will assign a distinguishable uniform facility identifier for each separate facility. The relationship between facility identifier and the name and license number of the facility is public information.

(47) [~~(45)~~] Uniform patient identifier--A unique identifier assigned by the Council to an individual patient and composed of numeric, alpha, or alphanumeric characters, which remains constant across hospitals and inpatient admissions. The relationship of the identifier to the patient-specific data elements used to assign it is confidential.

(48) [~~(46)~~] Uniform physician identifier--A unique identifier assigned by the Council to a physician or other health professional who is reported as attending or treating a hospital inpatient and which remains constant across hospitals. The relationship of the identifier to the physician-specific data elements used to assign it is confidential. The uniform physician identifier shall consist of alphanumeric characters.

(49) [~~(47)~~] Validation--The process by which a provider verifies the accuracy and completeness of data and corrects any errors identified before certification.

§1301.12. Collection of Hospital Discharge Data.

(a) All hospitals in operation for all or any of the reporting periods described in §1301.13 of this title (relating to Schedule for Filing Discharge Reports) shall submit discharge claims [~~files~~] as specified in §1301.19 of this title (relating to Discharge Reports--Records, Data Fields and Codes) on all discharged inpatients to the Council. To the extent the admission, treatment, or discharge is made by a health professional, other than a physician, data elements specified in §1301.19(d)(36)-(41)[~~(e)(39)-(42)~~] shall be filled accordingly or data elements (38) or (41)[~~(39)-(40)~~] shall be marked with one of the Council approved temporary "Physician" or "Other health professional" code numbers and data elements (36)(A-C) or (39)(A-C)[~~(41)-(42)~~] may be left blank. Hospitals owned by the federal government and hospitals exempted as rural providers may submit hospital discharge claim [~~files~~].

(b) All inpatient discharges shall be reported. Except as noted in paragraphs (1)-(4)[~~(5)~~] of this subsection, one or more discharge claims [~~files~~] shall be submitted for each patient for each discharge covering all services and charges from admission through discharge.

(1) Separate discharge claims [~~files~~] shall be submitted for mothers and newborns.

(2) Hospitals shall either submit separate discharge claims [~~files~~] corresponding to each interim, revised, or final discharge claims [~~files~~] or submit a single consolidated final discharge claim [~~file~~] for each discharged patient.

(3) For all patients for which the hospital prepares one or more bills for inpatient services, the hospital shall submit a discharge claim [~~file~~] corresponding to each bill containing the [~~required~~] data elements required by §1301.19 of this title (relating to Discharge Reports - Records, Data Fields and Codes). For all patients for which the hospital does not prepare a bill for inpatient services, the hospital shall submit a discharge claim [~~file~~] containing the required minimum data set.

(4) For all patients that are covered by 42 USC 290dd-2 and 42 CFR Part 2.1, a hospital shall submit a discharge claim [~~file~~] containing the required data elements specified by §1301.19 of this title (relating to Discharge Reports - Records, Data Fields and Codes). The hospital shall replace the patient identifying information with the default values specified in §1301.19(e)[~~(f)~~] of this title (relating to Discharge Reports - Records, Data Fields and Codes) or submit the patient identifying information if release of patient identifying information is authorized in writing by the patient or patient's guardian.

(c) All hospitals shall file discharge reports by electronic filing unless the hospital receives an exemption letter from the Council.

(d) All hospitals shall submit discharge claims [~~files~~] and discharge reports in the format specified in §1301.19 of this title (relating to Discharge Reports--Records, Data Fields and Codes).

(e) Hospitals shall submit discharge reports, data certifications, exemption requests and other required information to the Council or its agents at physical or telephonic addresses specified by the executive director. The executive director shall notify all hospitals and submitters in writing and by publication in the *Texas Register* at least 30 calendar days before any change in the addresses.

(f) Hospitals may submit discharge reports, or may designate an agent to submit the reports. If a hospital designates an agent, it shall inform the Council of the designation in writing at least 30 calendar days prior to the agent's submission of any discharge report. The hospital shall inform the Council in writing at least 30 calendar days prior to changing agents or making the submissions itself. Designation of an agent does not relieve the hospital of responsibility for compliance with this chapter or other related law.

(g) If requested by the Council, a hospital shall provide the executive director or the director's agent, the Texas Department of Health, access to, copies of and/or information from the hospital documents

and records underlying and documenting the discharge reports submitted, as well as other patient related documentation deemed necessary to audit hospital data to verify its accuracy and reliability. Each request from the Council shall detail the reasons for such request, provide the hospital with at least 14 calendar days advance notice, and ensure that confidentiality of patient records is maintained.

§1301.14. Instructions for Filing Discharge Reports.

(a) Magnetic Media. A discharge report may be filed on computer diskettes, nine track tapes or other magnetic media approved by the executive director. All discharges shall be reported using the same file and record formats specified in §1301.19 of this title (relating to Discharge Reports--Records, Data Fields and Codes) regardless of medium.

(1) Media specifications are:

(A) Diskette: MS-DOS formatted; PC Text file (ASCII); [~~Record length = 192 characters, fixed;~~] 3.5 inch diskette, 1.4 megabyte, high density.

(B) Nine track tape: Density = 1600 or 6250 BPI, nine track; Collating sequence = EBCDIC; [~~Record length = 192 characters, fixed; Blocking = blocked (170 records per block recommended; 40 records per block minimum)~~]; Labeling = IBM standard or facsimile.

(C) Other magnetic media: Discharge reports may be filed on other magnetic media only with the prior written approval of the executive director. The executive director will not normally approve any medium which the Council is not currently equipped to read.

(2) Hospitals shall submit no more than one tape or two diskettes per submission, with the following external identification affixed as listed in subparagraphs (A)-(G) of this paragraph:

(A) hospital name;

(B) facility identifier (THCIC 6 digit identifier);

(C) reporting period for discharges;

(D) number of transaction sets [~~records by record type~~];

(E) tape density: 1600/6250 BPI (if applicable);

(F) collating sequence for tapes (if applicable);

(G) the description: "DISCHARGE DATA."

(3) Data for more than one hospital may be submitted on a single tape if the submitter provides external identification items (A) through (D) for each hospital.

(4) In addition to the provisions of this section, the Council shall document instructions for filing discharge reports on magnetic media and shall make this documentation available to hospitals at no charge and to the public for the cost of reproduction. The Council shall notify hospitals or their designated agents directly in writing at least 90 days in advance of any change in instructions for filing discharge reports on magnetic media. The Council's instructions shall follow Department of Information Resources standards for magnetic media established under 1 TAC Chapter 201.

(b) Electronic Data Interchange. Discharge reports may be filed by modem using electronic data interchange (EDI). All discharges shall be reported using the same file and record formats specified in §1301.19 of this title (relating to Discharge Reports - Records, Data Fields and Codes) regardless of the medium of transmission, unless the hospital has obtained an exemption authorized by §1301.15 of this title (relating to Exemptions from Filing). [~~Record length is 192 characters for all records.~~] The Council shall document instructions for filing discharge reports by EDI and shall make this documentation available to hospitals at no charge and to the public for the cost of reproduction. The Council shall notify hospitals and their designated agents directly in writing at least 90 days in advance of any change in instructions for filing discharge reports by EDI. The Council's instructions shall follow Department of Information Resources standards for EDI.

[~~(c) Paper Forms. Only hospitals granted an exemption from electronic filing of discharge reports may file discharge reports using paper UB-92 billing forms. Hospitals using paper forms are required to provide all data elements specified in §1301.19 of this title (relating to Discharge Reports--Records, Data Fields and Codes).~~]

[~~(1) All UB-92 forms filed shall be on the form currently approved by the federal Health Care Finance Administration. Photocopies are not acceptable.~~]

[~~(2) Hospitals shall submit no more than one batch of paper forms per submission, with the following external identification affixed as listed in subparagraphs (A)-(E) of this paragraph:~~]

[~~(A) hospital name;~~]

[~~(B) facility identifier;~~]

[~~(C) reporting period for discharges;~~]

[~~(D) number of forms; and~~]

[~~(E) the description: "DISCHARGE DATA."~~]

[~~(3) In addition to the provisions of this section, the Council shall document instructions for filing paper UB-92 forms and shall make this documentation available to hospitals at no charge and to the public for the cost of reproduction. The Council shall notify hospitals or their designated agents at least 90 days in advance of any change in instructions for filing paper forms.~~]

§1301.15. Exemptions from Filing Requirements.

(a) Types of Exemptions.

(1) Exemption as a rural provider or other exempted provider. All hospitals except those owned by the federal government shall submit discharge reports to the Council unless the Council determines that the hospital is a rural provider or other exempted provider. The executive director shall make a determination of which hospitals are entitled to this exemption at least annually and shall notify qualifying hospitals by publication in the *Texas Register* and by regular United States mail. Hospitals which are not initially given an exemption may apply for an exemption. This exemption, if granted, may be revoked by the Council should the hospital cease to meet the criteria for exemption based upon the most current data issued by the United States Bureau of the Census or changes in hospital ownership or management relationships. Hospitals that cease to be exempted as rural providers or as other exempted providers shall be responsible for submitting discharge claims [~~files~~] on all discharges that occur 30 days after loss of the exemption. The initial discharge report shall not be due until 90 days after notice is given. Subsequent discharge reports are due as specified in §1301.13(a) of this title (relating to Schedule for Filing Discharge Reports).

(2) Exemptions from Quarterly Filing of Discharge Reports. Hospitals that wish to submit discharge reports to the Council more often than quarterly may do so by requesting an exemption to the standard submission schedule. The Council may also issue general exemptions based on the processing arrangements for data collection. Exemption requests meeting the following criteria as shown in subparagraphs (A)-(D) of this paragraph will normally be approved.

(A) The exemption request includes the specific schedule on which the hospital will make its discharge reports, which will usually be daily, weekly or monthly.

(B) The exemption request states the medium in which submissions will be made.

(C) The exemption request will not result in data on any discharge being submitted to the Council at a later date than it would have been if the standard schedule had been followed.

(D) The hospital agrees to adhere to the schedule specified in the exemption request until the hospital notifies the executive director in writing that it wishes to end the exemption and report according to the standard schedule, or until a new exemption letter is issued.

~~[(3) Exemption from Electronic Filing of Discharge Reports. The Council will grant exemptions from electronic filing of discharge reports only when a hospital can demonstrate that it lacks electronic data processing capacity. If granted, the exemption is valid for one year and must be renewed annually by the hospital. The exemption from electronic filing of discharge reports does not change the data the hospital is required to file on each discharge as specified in §1301.19 of this title (relating to Discharge Reports--Records, Data Fields and Codes), nor the schedule for submission specified in §1301.14 of this title (relating to Instructions for Filing Discharge Reports). Exemptions from electronic reporting to the Council will not normally be granted unless the hospital shows that it does not currently electronically file UB-92 bills with any payer, or has not done so in the last 12 months prior to the request for exemption.]~~

~~[(4) Exemption from electronic filing in standard formats. Exemptions from electronic filing of discharge reports in the standard formats specified in §1301.19 of this title (relating to Discharge Reports - Records, Data Fields and Codes) shall be granted to hospitals that demonstrate that alternative formats are universally accepted by payers and other entities to whom hospitals are required by law or contract to furnish hospital discharge data for complementary purposes. The exemption from electronic filing of discharge reports in the standard formats does not change the data elements the hospital is required to file on each discharge as specified in §1301.19 of this title (relating to Discharge Reports - Records, Data Fields and Codes), or the schedule for submission specified in §1301.14 of this title (relating to Instructions for Filing Discharge Reports).]~~

(b) Requests for exemptions shall be submitted and processed using the following procedures as shown in paragraphs (1)-(4) of this subsection.

(1) A hospital requesting an exemption shall submit to the executive director a letter requesting the exemption and providing all information necessary to establish the hospital's entitlement to the exemption. The exemption request shall be signed by the chief executive officer of the hospital who shall certify that all information contained in the request is true and correct.

(2) The executive director shall review the request for exemption. The executive director may request additional information from the hospital relevant to the exemption request. Within 30 days of receipt of a request, the executive director shall issue a letter granting or denying the exemption. If denied, the letter shall state in detail the reasons for the denial. The executive director shall notify Council members of exemptions requested and the disposition of these requests for information only.

(3) If the executive director denies an exemption request the hospital may:

(A) resubmit the request along with any additional information or analysis the hospital deems relevant to the executive director. The resubmission shall be considered in the same manner as an initial submission; or

(B) appeal the executive director's decision to the Council. The hospital may make an appeal directly to the Council. In making its determination, the Council will consider only those facts and issues which have been previously presented to the executive director. The Council will decide exemption appeals by majority vote of members present.

(4) The executive director may revoke any type of exemption if facts indicate that a hospital no longer meets the criteria required for an exemption. The executive director shall give the hospital written notice of the revocation at least 30 days prior to the effective date of the revocation. The notice shall include a detailed statement of the facts on which the revocation is based. A hospital may challenge the revocation of its exemption by:

(A) requesting the executive director to reconsider the revocation by submitting any information or analysis the hospital deems relevant to the executive director in writing at least ten days prior to the effective date of the revocation; and

(B) by appealing to the Council if the executive director does not grant the request for reconsideration. In making its determination, the Council will consider only those facts and issues which have been previously presented to the executive director. The Council will decide exemption appeals by majority vote of members present.

(c) Reporting loss of exemptions. Hospitals shall notify the executive director in writing within 30 days of their loss of an entitlement to an exemption authorized by subsection (a) of this section.

§1301.16. Acceptance of Discharge Reports and Correction of Errors.

(a) To verify the accuracy of all discharge claims ~~[files]~~ prior to public release, the executive director shall establish procedures for the review of all discharge reports to determine whether the report is acceptable, as required by Health and Safety Code, §108.011.

(b) Upon receipt of a discharge report, the executive director shall determine if it satisfies minimum criteria for processing. If it does not, the executive director shall return the discharge report in the same submission format and media that is approved for that provider and state the deficiencies in writing within ten calendar days of receipt. The hospital shall resubmit the report within ten calendar days of notification by the executive director. A discharge report does not meet minimum standards for processing under the following circumstances as shown in paragraphs (1)-(3) of this subsection.

(1) The physical media and labeling do not conform to the specifications in §1301.14 of this title (relating to Instructions for Filing Discharge Reports).

(2) The physical media are unreadable due to physical damage.

(3) The file structure does not conform to the specifications in §1301.19 of this title (relating to Discharge Reports - Records, Data Fields and Codes), unless the hospital has received a letter from the Council authorizing filing in another format.

(c) Correction of Errors.

(1) The executive director shall review all discharge reports accepted for processing and will process all discharge claims ~~[files]~~ against the editing criteria established by this section and by the executive director. Within 10 calendar days of receipt of an accepted discharge report, the executive director shall notify the hospital in detail of all errors detected in the discharge report.

(2) Within 30 calendar days of receiving initial notice of errors in a discharge report, the hospital shall correct all discharge

claims [~~files~~] containing errors, add any discharge claims [~~files~~] determined to be missing from the initial discharge report and resubmit the corrected and/or previously missing discharge claims [~~files~~]. If the hospital disagrees with any identified error, the hospital may indicate that the discharge claim [~~file~~] is as accurate as it can be or cannot be corrected. Each hospital shall submit such modified and/or additional discharge claims [~~files~~] as may be required to allow the chief executive officer or the chief executive officer's designated agent to certify the quarterly discharge report as required by §1301.17 of this title (relating to Certification of Discharge Reports). Corrections to a discharge report shall be submitted on approved media and formats as specified in §1301.14 of this title (relating to Instructions for Filing Discharge Reports) and §1301.19 of this title (relating to Discharge Reports-Records, Data Fields and Codes) unless the executive director approves another medium or format.

(3) Within ten calendar days of receiving corrections to a discharge report from a hospital, the executive director shall notify the hospital of any remaining errors. The hospital shall have ten calendar days from receipt of this notice to correct the errors noted or indicate why the data should be deemed acceptable and complete. This process may be repeated until the data is substantially accurate and the hospital is able to certify the discharge report as required by §1301.17 of this title (relating to Certification of Discharge Reports) or the deadline for submitting corrections prior to certification is reached. Corrected data is required to be submitted on or before the following dates for the respective quarter's discharges; Quarter 1 - August 1, Quarter 2 - November 1, Quarter 3 - February 1, Quarter 4 - May 1. No individual hospitals will be granted extensions to the dates. The executive director may grant an extension to all hospitals when deemed necessary.

(4) Discharge claims [~~files~~] that have not been previously submitted shall be submitted prior to the deadline for the following quarter's data. Correction and certification of these previously missing or additional discharge claims [~~files~~] for the prior calendar quarter shall be made according to the deadlines established for following quarter in which the data that is scheduled to be processed as specified in §1301.13(a)(1) of this title (relating to the Schedule for Filing Discharge Reports), paragraph (3) of this subsection (relating to the Acceptance of Discharge Reports and Correction of Errors) and §1301.17 (b) and (d) of this title (relating to the Certification of Discharge Encounter Data). Corrections to discharge claims [~~files~~] previously submitted or that have a discharge date prior to calendar quarter immediately before the calendar quarter being processed scheduled will not be processed.

(d) The executive director will document and the Council will approve all acceptance and editing criteria utilized in reviewing discharge reports. If acceptance and editing criteria are incorporated into computer software, and if the software is the property of the Council, the executive director will make copies of the portions of the software containing the criteria available on paper or magnetic media. The executive director shall make this information available to submitters without charge and to others for the cost of reproduction.

(e) Failure to correct or comment on a discharge report which has been filed but contains errors or omissions, known to the hospital, within the due dates in §1301.13 of this title (relating to Schedule for Filing Discharge Reports) is punishable by a civil penalty pursuant to Health and Safety Code, §108.014.

§1301.17. Certification of Discharge Reports.

(a) Within five months after the end of each reporting quarter, the executive director shall compile one or more electronic data files for each reporting hospital using all discharge claims [~~files~~] received from each hospital. The file shall have one record for each patient discharged during the reporting quarter and one record for any patient discharged during one prior reporting quarter for whom additional discharge claims [~~files~~] have been received. This file will include all data submitted by the hospital, which the executive director intends to use in the creation of the public use data file. The data files, including reports and any additional information returned to the hospital, allows the hospital to provide physicians and other health professionals the opportunity to review, request correction of, and comment on records of discharged patients for whom they are shown as "attending" or "operating or other". The executive director shall determine the format and medium in which the quarterly file will be delivered to hospitals.

(b) The chief executive officer or chief executive officer's designated agent of each hospital shall indicate whether the hospital is certifying or not certifying the discharge encounter data specified in subsection (a) of this section, sign and return the form corresponding to the discharge report for each quarter using forms supplied by the Council. The certification form may be signed by a person designated by the chief executive officer and acting as the officer's agent. Designation of an agent does not relieve the chief executive officer of personal responsibility for the certification. If the chief executive officer or chief executive officer's designated agent does not believe the quarterly file is accurate, the officer shall provide the executive director with detailed comments regarding the errors or submit a written request (on a form supplied by the Council) and provide the data necessary to correct any inaccuracy and certify the file subject to those corrections being made prior to the deadlines specified in this subsection. Corrections to certification discharge data shall be submitted on or prior to the following schedule: Quarter 1 - October 15; Quarter 2 - January 15; Quarter 3 - April 15; Quarter 4 - July 15. Chief Executive Officers or designees that elect not to certify shall submit a reasoned justification explaining their decision to not certify their discharge encounter data and attach the justification to the certification form. Election to not certify data does not prevent data from appearing in the public use data file. Data that is not corrected and submitted by the deadline may appear in the public use data file.

(c) The signed certification form shall represent that:

(1) policies and procedures are in place within the hospital's processes to validate and assure the accuracy of the discharge encounter data and any corrections submitted; and

(2) all errors and omissions known to the hospital have been corrected or the hospital has submitted comments describing the errors and the reasons why they could not be corrected; and

(3) to the best of their knowledge and belief, the data submitted accurately represents the hospital's administrative status of discharged inpatients for the reporting quarter; and

(4) the hospital has provided physicians and other health professionals a reasonable opportunity to review and comment on the discharge data of patients for which they were reported in one of the available physician number and name fields provided on the acceptable formats specified in §1301.19 of this title (relating to Discharge Reports --Records, Data Fields and Codes) (for example, "attending physician" or "operating or other physician" as applicable. The physicians or other health professionals may write comments and have errors brought to the attention of the chief executive officer or the chief executive officer's designated agent and the chief executive officer or the chief executive officer's designated agent, shall address any comments by the physicians or other health professionals.

(5) if the chief executive officer or the officer's designee elects not to certify the discharge encounter data for a specific quarter, a written justification of any unresolved data issues concerning the accuracy and completeness of the data at the time of the certification shall be included on the certification form. Discharge data that has

been edited, returned to hospital and is not certified may be released and published in the public use data file.

(d) Each hospital shall submit its certification form for each quarter's data to the Council by the first day of the ninth month (Quarter 1 - December 1; Quarter 2 - March 1; Quarter 3 - June 1; Quarter 4 - September 1) following the last day of the reporting quarter as specified in §1301.13 (a) (1)-(4) of this title (relating to Schedule for Filing Discharge Reports). Individual hospital requests for an extension to these deadlines will not be granted. The executive director may extend the deadline for all hospitals when deemed necessary.

(e) Hospitals, physicians or other health professionals may submit concise written comments regarding any data submitted by them or relating to services, they have delivered which may be released as public use data. Comments shall be submitted to the Council on or before the dates specified in subsection (d) of this section, regarding the submission of the certification form. Commenters are responsible for assuring that the comments contain no patient or physician identifying information. Comments shall be submitted electronically using the method described in §1301.14(a) and (b) of this title (relating to Instructions for Filing Discharge Reports).

(f) Failure to submit a signed certification form that is supplied by the Council on or before the dates specified in subsection (d) of this section corresponding to discharge data previously submitted is punishable by a civil penalty pursuant to Health and Safety Code, §108.014.

(g) Failure to either correct a discharge report which has been submitted and contains errors or omissions known to the hospital on or prior to the dates specified in subsection (b) of this section or to address in the comments the errors known to the hospital contained in the data and return the comments on or prior to the dates specified in subsection (d) of this section is punishable by a civil penalty pursuant to Health and Safety Code, §108.014(b).

§1301.18. Hospital Discharge Data Release.

(a) Council records are public records under Government Code, Chapter 552, except as specifically exempted by Health and Safety Code, §108.010 and §108.013. Copies of such records may be obtained upon request and upon payment of user fees established by the Council. The public use data file shall be available for public inspection during normal business hours. Discharge claims [~~files~~] in the original format as submitted to the Council are not available to the public, are not stored at the Council's office and are exempt from disclosure pursuant to Health and Safety Code, §108.010 and §108.013, and shall not be released. Likewise, patient and physician identifying data collected by the Council through editing of hospital data shall not be released.

(b) Creation of codes and identifiers. The executive director shall develop the following codes and identifiers, as listed in paragraphs (1)-(2) of this subsection, required for creation of the public use data file and for other purposes.

(1) The executive director shall create a process for assigning uniform patient identifiers, uniform physician identifiers and uniform other health professional identifiers using data elements collected. This process is confidential and not subject to public disclosure. Any documents or records produced describing the process or disclosing the person associated with an identifier are confidential and not subject to public disclosure.

(2) The executive director shall create a process for assigning geographic identifiers to each discharge record.

(c) Creation of public use data file. The executive director will create a public use data file by creating a single record for each inpatient discharge and adding, modifying or deleting data elements in the following manner as listed in paragraphs (1)-(11) of this subsection:

(1) delete patient, and insured name, Social Security Number, address and certificate data elements and any patient identifying information, if submitted; delete patient control and medical record numbers.

(2) convert patient birth date to age;

(3) convert admission and discharge dates to a length of stay measured in days and a code for the day of the week of the admission;

(4) convert procedure and occurrence dates to day of stay values;

(5) delete physician and other health professional names and numbers and assign a alphanumeric uniform physician identifier for the physicians and other health professionals who were reported as "attending" or "operating or other" on discharged patients;

(6) assign codes indicating the primary and secondary sources of payment;

(7) the minimum cell size required by §108.011(i)(2) of the Health and Safety Code shall be five, unless the executive director determines that a higher cell size is required to protect the confidentiality of an individual patient or physician. When determining a higher cell size, the executive director shall consider comments submitted by a hospital and recommendations submitted by the technical advisory committee as identified in the Texas Health and Safety Code §108.003(g)(5);

(8) convert all procedure codes to ICD codes (in the version that is current for the date the data was due to be submitted or the version in effect at the date of service);

(9) add risk and severity adjustment scores utilizing an algorithm approved by the Council;

(10) suppress admission source data at patient level when the admission type code represents "Newborn";

(11) data elements to be included in the public use data file:

(A) Discharge Year and Quarter

(B) Provider Name (Facility Name)

(C) THCIC Identification Number

(D) Facility Type Indicators

(E) Patient Sex/Gender

(F) Type of Admission

(G) Source of Admission

(H) Patient ZIP Code

(I) County Code

(J) Public Health Region Code

(K) Patient State

(L) Patient Status

(M) Patient Race

(N) Patient Ethnicity

(O) Claim Type Indicator Code [~~Source of Payment Code, Non-Standard Codes (Primary payer (and Secondary payer (if applicable))) (Beginning with third quarter 2000 data the second payer code information will be published)~~]

~~[(P) Source of Payment Code, Standard Codes (Primary payer (and Secondary payer (if applicable))) (Beginning with third quarter 2000 data the second payer code information will be published)]~~

(P) [~~(Q)~~] Type of Bill

(Q) [~~(R)~~] Encounter Indicator: This indicates whether more than one claim was used to create the encounter

(R) [~~(S)~~] Principal Diagnosis Code (Current version of ICD codes at the time data is submitted)

(S) [~~(T)~~] Other Diagnosis Codes (Up to 24 diagnosis codes can be submitted and reported. [~~(1)~~] (Current version of ICD codes at the time data is submitted)

~~[(U) Other Diagnosis Codes (2) (Current version of ICD codes at the time data is submitted)]~~

~~[(V) Other Diagnosis Codes (3) (Current version of ICD codes at the time data is submitted)]~~

~~[(W) Other Diagnosis Codes (4) (Current version of ICD codes at the time data is submitted)]~~

~~[(X) Other Diagnosis Codes (5) (Current version of ICD codes at the time data is submitted)]~~

~~[(Y) Other Diagnosis Codes (6) (Current version of ICD codes at the time data is submitted)]~~

~~[(Z) Other Diagnosis Codes (7) (Current version of ICD codes at the time data is submitted)]~~

~~[(AA) Other Diagnosis Codes (8) (Current version of ICD codes at the time data is submitted)]~~

(T) [~~(BB)~~] Principal Procedure code (if applicable) (Current version of ICD codes at the time data is submitted)

(U) [~~(CC)~~] Other Procedure codes (Up to 24 procedure codes can be submitted and report [~~code (1)~~] (Current version of ICD codes at the time data is submitted)

~~[(DD) Other Procedure code (2) (Current version of ICD codes at the time data is submitted)]~~

~~[(EE) Other Procedure code (3) (Current version of ICD codes at the time data is submitted)]~~

~~[(FF) Other Procedure code (4) (Current version of ICD codes at the time data is submitted)]~~

~~[(GG) Other Procedure code (5) (Current version of ICD codes at the time data is submitted)]~~

(V) [~~(HH)~~] Admitting Diagnosis (Current version of ICD codes at the time data is submitted)

(W) [~~(II)~~] External Cause of Injury (E-codes), (if applicable) (Current version of ICD codes at the time data is submitted) up to 9 E-codes can be submitted and reported

(X) [~~(JJ)~~] Day of Week Patient is admitted code (Sun. = 1, Mon. = 2, Tues. = 3, Wed. = 4, Thur. = 5, Fri. = 6, Sat. = 7)

(Y) [~~(KK)~~] Length of Stay

(Z) [~~(LL)~~] Age of patient

(AA) [~~(MM)~~] Day number of Principal Procedure (Calculated: Principal Procedure Date minus Admission/Start of Care Date)

(BB) [~~(NN)~~] Day number of Procedure (1) (Calculated: Procedure Date (1) minus Admission/Start of Care Date)

(CC) [~~(OO)~~] Day number of Procedure (2) (Calculated: Procedure Date (2) minus Admission/Start of Care Date)

(DD) [~~(PP)~~] Day number of Procedure (3) (Calculated: Procedure Date (3) minus Admission/Start of Care Date)

(EE) [~~(QQ)~~] Day number of Procedure (4) (Calculated: Procedure Date (4) minus Admission/Start of Care Date)

(FF) [~~(RR)~~] Day number of Procedure (5) (Calculated: Procedure Date (5) minus Admission/Start of Care Date)

(GG) [~~(SS)~~] Major Diagnostic Category (MDC)

(HH) [~~(TT)~~] HCFA-DRG Code (Obtained from the 3M HCFA-DRG Grouper)

(II) [~~(UU)~~] APR-DRG Code (Obtained from 3M APR-DRG Grouper)

(JJ) [~~(VV)~~] Risk of Mortality Score (Obtained from 3M APR-DRG Grouper)

(KK) [~~(WW)~~] Severity of Illness Score (Obtained from 3M APR-DRG Grouper)

(LL) [~~(XX)~~] Uniform Physician Identifier assigned to Attending Physician [~~(Beginning with 2000 data)~~]

(MM) [~~(YY)~~] Uniform Physician Identifier assigned to Operating or Other Physician [~~(Beginning with 2000 data)~~]

(NN) [~~(ZZ)~~] Service unit indicator from which the patient received services

(OO) [~~(AAA)~~] Accommodations Private Room Charges [~~(Beginning with third quarter 2000 data)~~]

(PP) [~~(BBB)~~] Accommodations Semi-Private Charges [~~(Beginning with third quarter 2000 data)~~]

(QQ) [~~(CCC)~~] Accommodations Ward Charges [~~(Beginning with third quarter 2000 data)~~]

(RR) [~~(DDD)~~] Accommodations Intensive Care Charges [~~(Beginning with third quarter 2000 data)~~]

(SS) [~~(EEE)~~] Accommodations Coronary Care Charges [~~(Beginning with third quarter 2000 data)~~]

(TT) [~~(FFF)~~] Ancillary Service--Other Charges [~~(Beginning with third quarter 2000 data)~~]

(UU) [~~(GGG)~~] Ancillary Service--Pharmacy Charges [~~(Beginning with third quarter 2000 data)~~]

(VV) [~~(HHH)~~] Ancillary Service--Medical/Surgical Supply Charges [~~(Beginning with third quarter 2000 data)~~]

(WW) [~~(III)~~] Ancillary Service--Durable Medical Equipment Charges [~~(Beginning with third quarter 2000 data)~~]

(XX) [~~(JJJ)~~] Ancillary Service--Used Durable Medical Equipment Charges [~~(Beginning with third quarter 2000 data)~~]

(YY) [~~(KKK)~~] Ancillary Service--Physical Therapy Charges [~~(Beginning with third quarter 2000 data)~~]

(ZZ) [~~(LLL)~~] Ancillary Service--Occupational Therapy Charges [~~(Beginning with third quarter 2000 data)~~]

(AAA) [~~(MMM)~~] Ancillary Service--Speech Pathology Charges [~~(Beginning with third quarter 2000 data)~~]

(BBB) [~~(NNN)~~] Ancillary Service--Inhalation Therapy Charges [~~(Beginning with third quarter 2000 data)~~]

(CCC) [~~(OOO)~~] Ancillary Service--Blood Charges [~~(Beginning with third quarter 2000 data)~~]

(DDD) [~~(PPP)~~] Ancillary Service--Blood Administration Charges [~~(Beginning with third quarter 2000 data)~~]

(EEE) [~~(QQQ)~~] Ancillary Service--Operating Room Charges [~~(Beginning with third quarter 2000 data)~~]

(FFF) [~~(RRR)~~] Ancillary Service--Lithotripsy Charges [~~(Beginning with third quarter 2000 data)~~]

(GGG) [~~(SSS)~~] Ancillary Service--Cardiology Charges [~~(Beginning with third quarter 2000 data)~~]

(HHH) [~~(TTT)~~] Ancillary Service--Anesthesia Charges [~~(Beginning with third quarter 2000 data)~~]

(III) [~~(UUU)~~] Ancillary Service--Laboratory Charges [~~(Beginning with third quarter 2000 data)~~]

(JJJ) [~~(VVV)~~] Ancillary Service--Radiology Charges [~~(Beginning with third quarter 2000 data)~~]

(KKK) [~~(WWW)~~] Ancillary Service--MRI Charges [~~(Beginning with third quarter 2000 data)~~]

(LLL) [~~(XXX)~~] Ancillary Service--Outpatient Services Charges [~~(Beginning with third quarter 2000 data)~~]

(MMM) [~~(YYY)~~] Ancillary Service--Emergency Service Charges [~~(Beginning with third quarter 2000 data)~~]

(NNN) [~~(ZZZ)~~] Ancillary Service--Ambulance Charges [~~(Beginning with third quarter 2000 data)~~]

(OOO) [~~(AAAA)~~] Ancillary Service--Professional Fees Charges [~~(Beginning with third quarter 2000 data)~~]

(PPP) [~~(BBBB)~~] Ancillary Service--Organ Acquisition Charges [~~(Beginning with third quarter 2000 data)~~]

(QQQ) [~~(CCCC)~~] Ancillary Service--ESRD Revenue Setting Charges [~~(Beginning with third quarter 2000 data)~~]

(RRR) [~~(DDDD)~~] Ancillary Service--Clinic Visit Charges [~~(Beginning with third quarter 2000 data)~~]

(SSS) [~~(EEEE)~~] Total Charges--Accommodations[~~, for the Claim (Beginning with third quarter 2000 data)~~]

(TTT) [~~(FFFF)~~] Total Charges--Ancillary[~~, for the Claim (Beginning with third quarter 2000 data)~~]

(UUU) [~~(GGGG)~~] Total Non-Covered Accommodation Charges[~~, for the Claim (Beginning with third quarter 2000 data)~~]

(VVV) [~~(HHHH)~~] Total Non-Covered Ancillary Charges[~~, for the Claim (Beginning with third quarter 2000 data)~~]

(WWW) [~~(III)~~] Total Charges[~~, for the Claim (Beginning with third quarter 2000 data)~~]

(XXX) [~~(JJJ)~~] Total Non-Covered Charges[~~, for the Claim (Beginning with third quarter 2000 data);~~]

(YYY) Encounter Identifier - a unique number for each encounter for the quarter

(ZZZ) Service Line Revenue Code

(AAAA) Service Line Procedure Code

(BBBB) HCPCS/HIPPS Procedure Code

(CCCC) HCPCS/HIPPS Procedure Modifiers (Up to 4 may be submitted and reported)

(DDDD) Service Line Charge Amount

(EEEE) Service Line Unit Code

(FFFF) Service Line Unit Count

(GGGG) Service Line Non-Covered Charge Amount

(HHHH) Patient Country (when address is not in United States of America and confidentiality can be maintained)

(d) Release of public use data files. The Council shall release in an aggregate form, without uniform patient, physician or other health professional identifiers, public use data relating to hospitals described by the Health and Safety Code, §108.0025(1) that are not rural providers because they do not meet the requirements of §108.0025(2).

(e) The executive director will make available a public use data file on electronic, magnetic or optical media for each quarter:

(1) The executive director shall release public use data from hospitals that have certified the data as required by §1301.17 of this title (relating to Certification of Discharge Reports). A hospital's failure to execute the certification form by the dates specified in §1301.17(d) of this title, or elects to not certify the discharge encounter data shall not prevent the executive director from releasing the hospital's data if the director believes the data submitted is reasonably accurate and complete. The executive director, with the recommendation of the Hospital Discharge Data Committee, may suppress for any quarter's data one or more data elements if deemed necessary to comply with provisions of the statutes. If an element is ordered suppressed by a judicial authority, the executive director may suppress the element without the recommendation of the Hospital Discharge Data Committee.

(2) If additional discharge claims[~~files~~] (not previously submitted as specified in §1301.16(c)(4) of this title (relating to Acceptance of Discharge Reports and Correction of Errors), excluding replacement, adjustments and void/cancel discharge claims [~~files~~] become available after the initial release of the public use data file for any quarter, the executive director will add the discharge claims [~~files~~], that are received on or prior to the date specified in §1301.13(a)(1) of this title (relating to Schedule for Filing Discharge Reports) of the following quarter [~~year~~], to the public use data file and make the additional records available to the public.

(3) The other sections of these rules notwithstanding, the executive director shall not create a public use data file from the discharge reports covering discharges occurring in 1998. It is the intent of the Council to utilize this data only for testing and calibration of its data processing systems and to allow hospitals the opportunity to test and calibrate their own data reporting systems.

(4) The first public use data file available for release will cover discharges for the first and second quarter of 1999. The Council will initially release six months of data in order to provide a more reliable body of data for analysis and decision-making and to make available public use data files on a quarterly schedule thereafter.

(f) Texas State agencies that request data solely for internal use in accordance with Health and Safety Code, §108.012(b) shall abide by the data users agreement.

(g) The executive director shall establish procedures for screening all requests to assure that filling the request will not violate the provisions of Health and Safety Code, §108.013(c).

(h) The data elements specified for discharge reports in §1301.19 of this title (relating to Discharge Reports --Records, Data Fields and Codes) do not constitute "Provider Quality Data" as discussed in Health and Safety Code, §108.010.

(i) A public use data file which is specified by the requestor shall not be considered a "report issued by the Council" as referenced in Health and Safety Code, §108.011(f).

(j) Requests for data files including data on one or more providers are matters of public record and copies of all requests shall be maintained by the Council for two years from the date of receipt. The executive director shall make available on the Council's Internet site and publish in the Council's numbered letter for hospitals a summary of all requests received for public use data.

(k) With any public use data file prepared by the Council, the executive director shall attach all comments submitted by providers, which relate to any data included in the file. The Council shall also make these comments available at the Council's offices and on the Council's Internet site.

(l) A research data file may be released provided the following criteria are met:

(1) the Texas Health Care Information Council Research Data Request Form is completed and submitted to the Council's executive director; and

(2) the requestor has made payment according to the Council's fee schedule. The Council's fee includes a non-refundable "Review of Request Fee"; and

(3) the Scientific Review Panel reviews the research request and has determined the proposed research outcome can be achieved with the requested data; and

(4) the Council's Scientific Review Panel grants authorization to the request or restricts access to specified data elements determined to be inappropriate for the research proposal in accordance with this subsection of this title (relating to Scientific Review Panel); and

(5) the requestor agrees to dispose of the research data using authorized methods by the established end date stated on the written data release agreement, and

(6) the requestor has signed a written data release agreement.

§1301.19. Discharge Reports--Records, Data Fields and Codes.

(a) Hospitals that have not obtained an exemption letter authorized by §1301.15 of this title (relating to Exemptions from Filing) shall submit discharge reports, [~~in one of the following formats as listed in paragraphs (1)-(3) of this subsection:~~]

[~~(1) electronically in the national standard flat file format for inpatient hospital bills defined by the United States Department of Health and Human Services, Health Care Finance Administration (HCFA), commonly known as the HCFA UB-92 Electronic Format. HCFA updates this format from time to time by issuing new versions. The Council will accept discharge reports in the latest version or versions accepted by HCFA at the service end date specified in the discharge file or at the time of submission of the data to THCIC.~~]

[~~(2)~~] electronically in the file format for inpatient hospital bills defined by the American National Standards Institute (ANSI), commonly known as the ANSI ASC X12N form 837 Health Care Claims (ANSI 837 Institutional Guide) transaction for institutional claims and/or encounters. ANSI updates this format from time to time by issuing new versions. [~~The Council will accept discharge reports in the latest version or in a version approved by HCFA at the service end date specified in the discharge file.~~]

[~~(3) for paper filing, the UB-92 paper form currently approved by the Health Care Finance Administration, also known as the HCFA 1450 paper version.~~]

(b) [~~Except as otherwise provided in this section, discharge reports shall be submitted using the data element specifications as required by HCFA. Hospitals shall submit discharge reports using the data element specifications in effect as of the date of the discharge or as of the date submitted.~~] The Council will make detailed specifications for these data elements available to submitters and to the public.

(c) In addition to the data elements contained in the ANSI 837 Institutional Guide,[~~Texas UB-92 Manual~~] the Council has defined the following data elements shown in this subsection and [~~has~~] as defined the location in the ANSI 837 Institutional Guide [~~HCFA UB-92 Electronic Format~~] where each element is to be reported. Data element content, format and locations may change as federal and state legislative requirements change in regards to Public Law 104-191, Health Insurance Portability and Accountability Act of 1996 (HIPAA) is implemented.

(1) Patient race - This data element shall be reported at Loop 2010BA or 2010CA in the segment DMG05-3 [~~Record Type 22, Field 7, Beginning Position 86; Form Locator 11 (upper line)~~] as a numeric value. Acceptable codes are 10025[~~1~~] = American Indian/Eskimo/Aleut, 20289[~~2~~] = Asian or, 20768 = Native Hawaiian or Pacific Islander, 20545[~~3~~] = Black or African American, 21063[~~4~~] = White and 21311[~~5~~] = Other Race, includes mixed or interracial patients. In order to obtain this data, the hospital staff retrieves the patient's response from a written form or asks the patient, or the person speaking for the patient to classify the patient. If the patient, or person speaking for the patient, declines to answer, the hospital staff is to use its best judgment to make the correct classification based on available data.

(2) Patient ethnicity - This data element shall be reported at Loop 2300 in the segment NTE02 [~~Record Type 22, Field 8, Beginning Position 98; Form Locator 11 (lower line)~~] as a numeric value. Acceptable codes are 21352[~~1~~] = Hispanic or Latino Origin and 21865[~~2~~] = Not of Hispanic or Latino Origin. In order to obtain this data, the hospital staff retrieves the patient's response from a written form or asks the patient, or the person speaking for the patient to classify the patient. If the patient, or person speaking for the patient, declines to answer, the hospital staff is to use its best judgment to make the correct classification based on available data.

(3) Other E-codes - These additional E-codes (maximum of nine (9)) shall be reported in the following ANSI X12N Form 837 locations: Loop 2300, segments, HI05-2, HI06-2, HI07-2, HI08-2, HI09-2, HI10-2, HI11-2 and HI12-2. (The first E-code is reported in Loop 2300 segment HI04-2). [~~Patient Social Security Number - This data element shall be reported at Record Type 22, Field 5, Beginning Position 27; Form Locator 2 (upper line) a numeric value. In the event the patient is a newborn or child of United States citizenship for whom a Social Security Number has not been assigned, the hospital shall leave the field blank or shall insert "999999999" and shall indicate a response code in the Record Type 22, Field 6, Beginning Position 56; Form Locator 2 (lower line) as to the reason no Social Security Number was submitted. Acceptable codes are: F = Foreign national, does not have a Social Security Number; N = Newborn or Infant of United States citizenship for whom a Social Security Number has not been assigned; O = Other; R = Refused to provide a social security number;~~]

(4) THCIC Identification Number - This data element shall be submitted in data segment REF02 of Loop 2010AA or Loop 2010AB (in the Pay-to provider reported provided the services), or Loop 2310E (if the Service Facility Provider is submitted). [~~Source of payment code - This data element shall be reported at Record 30, Field 04, Beginning Position 25 as an alphanumeric value. Primary and secondary payer source codes shall be submitted when the hospital submits claim data for the patient to more than one payer.~~]

[~~(A) Acceptable codes are:~~]

~~*(i)* A = Self pay;~~]

~~*(ii)* B = Workers' Compensation;~~]

~~*(iii)* C = Medicare;~~]

~~*(iv)* D = Medicaid;~~]

~~*(v)* E = Other Federal Programs (includes Veterans Administration);~~]

~~*(vi)* F = Commercial;~~]

~~*(vii)* G = Blue Cross;~~]

~~*(viii)* H = Champus;~~]

~~*(ix)* I = Other.~~]

[~~(B) Non-Standard Codes shall be reported at the Alternate Code Site Record 22, Field 9, Position 111:~~]

~~*(i)* T = State or Local Government Programs;~~]

~~*(ii)* U = Commercial PPO;~~]

~~*(iii)* V = Medicare Managed Care;~~]

~~*(iv)* X = Medicaid Managed Care;~~]

~~*(v)* Y = Commercial HMO;~~]

~~*(vi)* Z = Charity.~~]

[~~(5) Facility Name - This data element shall be the name of the hospital where the services were rendered and shall be reported at Record Type 10, Field 12.~~]

[~~(6) Facility Address - This data element shall be the actual physical address of the hospital where the services were rendered and shall be reported at Record Type 10, Field 13.~~]

[~~(7) Facility City - This data element shall be the name of the city where the hospital that rendered the services is located and shall be reported in Record Type 10, Field 14.~~]

[~~(d) Data may be numeric or alphanumeric. All numeric data shall be right justified and zero-filled. All alphanumeric data shall be left justified. The length of all records is 192 characters. Conditional data fields shall be filled with spaces when other data is not present.~~]

(d) [~~(e)~~] Hospitals shall submit the required minimum data set for all patients for which a discharge claim[~~file~~] is required by this title. The required minimum data set includes the following data elements as listed in [~~paragraphs (1)-(46) of~~] this subsection:

(1) Patient Name

(A) Patient Last Name

(B) Patient First Name

(C) Patient Middle Initial

(2) Patient Address

(A) Patient Address Line 1

(B) Patient Address Line 2 (if applicable)

(C) Patient City

(D) Patient State

(E) Patient ZIP

(F) Patient Country (if address is not in United States of America, or one of its territories)

(3) Patient Birth Date

(4) Patient Sex

(5) Patient Race

(6) Patient Ethnicity

(7) Patient Social Security Number

(8) Patient Account Number

(9) Patient Medical Record Number

(10) Claim Filing Indicator Code (Payer Source - primary and secondary (if applicable for secondary payer source)

(11) Payer Name - Primary and secondary (if applicable, for both)

(12) National Plan Identifier - for primary and secondary (if applicable) payers (National Health Plan Identification number, if applicable and when assigned by the Federal Government)

(13) Type of Bill

(14) Statement Dates (replaces Statement From and Statement Thru dates)

(15) Admission / Start of Care

(A) Admission / Start of Care Date

(B) Admission / Start of Care Hour

(16) Admission Type

(17) Admission Source

(18) Patient (Discharge) Status

(19) Patient Discharge Hour

(20) Principal Diagnosis

(21) Admitting Diagnosis

(22) Principle External Cause of Injury (E-Code)

(23) Other Diagnosis Codes - up to 24 occurrences (all applicable)

(24) External Cause Of Injury (E-Code) - up to 9 occurrences (if applicable)

(25) Principal Procedure Code (if applicable)

(26) Principal Procedure Date (if applicable)

(27) Other Procedure Codes - up to 24 occurrences (if applicable)

(28) Other Procedure Dates - up to 24 occurrences (if applicable)

(29) Occurrence Span Code - up to 24 occurrences (if applicable)

(30) Occurrence Span Code Associated Date - up to 24 occurrences (if applicable)

(31) Occurrence Code - up to 24 occurrences (if applicable)

(32) Occurrence Code Associated Date - up to 24 occurrences (if applicable)

(33) Value Code - up to 24 occurrences (if applicable)

(34) Value Code Associated Amount - up to 24 occurrences (if applicable)

(35) Condition Code - up to 24 occurrences (if applicable)

(36) Attending Physician or Attending Practitioner Name

(A) Attending Practitioner Last Name

(B) Attending Practitioner First Name

(C) Attending Practitioner Middle Initial

(37) Attending Practitioner Primary Identifier (National Provider Identifier, when HIPAA rule is implemented)

(38) Attending Practitioner Secondary Identifier (Texas state license number or UPIN)

(39) Operating Physician or Other Practitioner Name (if applicable)

(A) Operating Physician or Other Practitioner Last Name

(B) Operating Physician or Other Practitioner First Name

(C) Operating Physician or Other Practitioner Middle Initial

(40) Operating Physician or Other Practitioner Primary Identifier (National Provider Identifier, when HIPAA rule is implemented)

(41) Operating Physician or Other Practitioner Secondary Identifier (Texas state license number or UPIN)

(42) Total Claim Charges

(43) Revenue Service Line Details (up to 999 service lines) (all applicable)

(A) Revenue Code

(B) Procedure Code

(C) HCPCS/HIPPS Procedure Modifier 1

(D) HCPCS/HIPPS Procedure Modifier 2

(E) HCPCS/HIPPS Procedure Modifier 3

(F) HCPCS/HIPPS Procedure Modifier 4

(G) Charge Amount

(H) Unit Code

(I) Unit Quantity

(J) Unit Rate

(K) Non-covered Charge Amount

(44) Service Provider Name

(45) Service Provider Primary Identifier - Provider Federal Tax ID (EIN) or National Provider Identifier (when HIPAA rule is implemented)

(46) Service Provider Address

(A) Service Provider Address Line 1

(B) Service Provider Address Line 2 (if applicable)

(C) Service Provider City

(D) Service Provider State

(E) Service Provider ZIP

(47) Service Provider Secondary Identifier - THCIC 6-digit Hospital ID assigned to each facility

~~[(1) Patient race;]~~

~~[(2) Patient ethnicity;]~~

~~[(3) Patient Social Security Number;]~~

~~[(4) Patient control number;]~~

~~[(5) Patient last name;]~~

~~[(6) Patient first name;]~~

~~[(7) Patient middle initial;]~~

~~[(8) Patient sex;]~~

~~[(9) Patient birth date;]~~

~~[(10) Type of admission;]~~

~~[(11) Source of admission;]~~

~~[(12) Source of Payment Code (THCIC's standard codes and non-standard codes for the Primary and Secondary payers);]~~

~~[(13) Patient address;]~~

~~[(14) Patient city;]~~

~~[(15) Patient state;]~~

~~[(16) Patient zip;]~~

~~[(17) Admission/start of care date;]~~

~~[(18) Statement covers period from;]~~

~~[(19) Statement covers period through;]~~

~~[(20) Patient status;]~~

~~[(21) Medical record number;]~~

~~[(22) Type of bill;]~~

~~[(23) Accommodations revenue codes (all applicable);]~~

~~[(24) Accommodations rates (all applicable);]~~

~~[(25) Accommodation days (all applicable);]~~

~~[(26) Accommodation total charges (all applicable);]~~

~~[(27) Inpatient ancillary revenue code (all applicable);]~~

~~[(28) Units of service (all applicable);]~~

~~[(29) Ancillary charges total (all applicable);]~~

~~[(30) Principal diagnosis code;]~~

~~[(31) Other diagnosis codes (all applicable);]~~

~~[(32) Principal surgical procedure code (if applicable);]~~

~~[(33) Principal surgical procedure date (if applicable);]~~

~~[(34) Other surgical procedure codes (all applicable);]~~

~~[(35) Other surgical procedure dates (all applicable);]~~

~~[(36) Admitting diagnosis;]~~

~~[(37) External cause of injury (if applicable);]~~

[(38) Procedure coding method used;]

[(39) Attending physician number;]

[(40) Operating or other physician number (if applicable);]

[(41) Attending physician name;]

[(42) Operating or other physician name (if applicable);]

[(43) Facility Name;]

[(44) Facility Address;]

[(45) Facility City;]

[(46) Reason for no Social Security number.]

(e) [(f)] For patients which are covered by 42 USC 290dd-2 and 42 CFR Part 2.1, the hospital shall submit the following patient identifying information or default values in the specified Record and Field locations as required by subsection (a) of this section or the Form Locator for authorized hospitals as required by §1301.14(c) of this title (relating to Instructions for Filing Discharge Reports, Paper Forms):

(1) Patient Account[Control] Number - This alphanumeric patient control number shall be reported in Loop 2300, segment CLM01[Record 20 Field 03, or Form Locator 3]. This number is unique to the institution and episode of care and will be used by the hospital to review and certify data.

(2) Last Name - The patient's last name shall be removed and replaced with "Doe" in Loop 2010BA (Subscriber) or 2010CA (Patient), segment NM103[Record 20 Field 04, Form Locator 12].

(3) First Name - The patient's first name shall be removed and replaced with "Jane" if female, or "John" if male, and can include a sequential number (e.g., John1, John2, John3... etc.) in Loop 2010BA (Subscriber) or 2010CA (Patient), segment NM104[Record 20 Field 05, Form Locator 12].

(4) Middle Initial - The patient's middle initial shall be removed and left blank (space filled) in Loop 2010BA (Subscriber) or 2010CA (Patient), segment NM105[Record 20 Field 06, Form Locator 12].

(5) Date of Birth - The patient's date of birth shall be placed in Loop 2010BA (Subscriber) or 2010CA (Patient), segment DMG02[Record 20 Field 08, Form Locator 14].

(6) Address - The patient's residence address shall be removed and replaced with the hospital's street address in Loop 2010AA (Billing Provider) or 2010AB (Pay-to Provider) loops or 2310E (Service Facility Name), segment NM103[Record 20 Field 12, Form Locator 13].

(7) City - The patient's city of residence shall be reported in 2010BA (Subscriber) or 2010CA (Patient), segment N401[Record 20 Field 14, Form Locator 13].

(8) State - The patient's state of residence shall be reported in 2010BA (Subscriber) or 2010CA (Patient), segment N402 [Record 20 Field 15, Form Locator 13].

(9) ZIP Code - The patient's ZIP code of residence shall be reported in 2010BA (Subscriber) or 2010CA (Patient), segment N403 [Record 20 Field 16, Form Locator 13].

(10) Medical Record Number - The patient's medical record number shall be removed and replace with "99999" and reported in Loop 2300, segment REF02[Record 20 Field 25, Form Locator 23].

(11) Social Security Number - The patient's Social Security Number shall be removed and replaced with "999999999" in 2010BA (Subscriber) or 2010CA (Patient), Segment REF02. [Record 22 Field 05, Form Locator 2 (Upper Line) Also, place the letter "O" in Record 22 Field 06, Form Locator 2 (Lower Line) as specified in subsection (c)(3) of this section.]

[(g) A submission will consist of a set of the following types of records from the HCFA UB-92 Electronic Format specification as shown in paragraphs (1)-(13) of this subsection.]

[(1) Processor Label Data (Record 01). Files will be formatted so that this is a data record, not a conventional label. From a system standpoint, this will be a "labelless" file. This record will be the first record in the file.]

[(2) Provider Data (Record 10). The provider's batch record describes the types of claims submitted for a specific provider. Field 02 of this record identifies the specific type of claim. A provider may be authorized to submit more than one claim type. In that case, more than one batch will be required to identify each claim type. Each claim in the batch will be edited for claim type. Record 40, Field 04 identifies claim type and will be matched to the batch record for claim type. Each batch record must be followed by claim records and then Provider Batch Control Record (Record 95). This record is required at the beginning of each batch.]

[(3) Patient Data (Record 20). The patient record is the first record of a claim. It is required for all claim types as it contains the patient's demographic data.]

[(4) Third Party Payer Data (Record 30). The third party payer record identifies the primary insurance payer information and the secondary insurance payer for each patient. If the patient has no third party payer and is paying with personal finances, the hospital shall submit one Record 30 01 (or first Record 30) with Field 04 = A and Record 22 01 Field 09 shall be left "blank". If a non-standard source of payment code is selected, the hospital shall submit a Record 30 with Field 04 = I (Other) or "the most appropriate corresponding standard source of payment code" and the selected non-standard source of payment code shall appear in Record 22, Field 09. For example: If the patient has no third party payer and is treated as a charity patient, where no reimbursement is expected. The hospital shall submit one Record 30 01 with Field 04 = I and a Record 22 01 with Field 09 = Z, if the patient has a commercial PPO plan as the primary payer and Medicare Managed Care Plan for a secondary source of payment, the hospital shall submit two Record 30s'; Record 30 01 Field 04 = F (Commercial) and Record 22 01 Field 09 = U (Commercial PPO), Record 30 02 Field 04 = C (Medicare) and Record 22 Field 09 = V (Medicare Managed Care). Records must be in the correct payer priority sequence. The '01' (First Record 30 and Record 22) Record determines which source of payment code will be considered as primary.]

[(5) Claim Data (Record 40). The claim data record identifies miscellaneous data needed to process a claim.]

[(6) Claim Data Conditions and Values (Record 41). This record is used to report condition and value codes. If none are needed, this record is not necessary.]

[(7) Inpatient Accommodations (Record 50). This record identifies the room charges (revenue codes 100-219) for an inpatient claim.]

[(8) Inpatient Ancillary Services (Record 60). This record identifies the inpatient ancillary services (revenue codes 220-999). Revenue code "001" (total) is required for all lines of business. It must be the last revenue code listed and must contain the correct totals.]

[(9) Medical Data (Record 70). This record identifies the diagnosis and surgical procedure code requirements.]

[(10) Physician Data (Record 80). This record is for the Texas physician license number as assigned by the state licensing boards and name or Unique Physician Identification Number (UPIN) assigned by HCFA and name.]

[(11) Discharge Totals (Record 90). This record is the final record for each discharge and is required for all discharge types. The record count and charges associated with the discharges will be edited to this record. The discharge will be rejected when the counts or totals do not agree to those accumulated while processing the individual records of each discharge. If a record is not submitted for a discharge, enter "0" for that record count.]

[(12) Provider Batch Control (Record 95). The provider's batch control record contains information for all the claims of a specific claim type. The system will accumulate totals as it processes each claim. The totals are then edited to the batch totals record. When the totals are out of balance, the batch will be rejected.]

[(13) File Control Totals (Record 99). The processor's file control record contains control information for all the claims in the file.]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 10, 2003.

TRD-200301640
Jim Loyd
Executive Director
Texas Health Care Information Council
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 482-3320

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 122. FEDERAL OPERATING PERMITS PROGRAM

The Texas Commission on Environnmental Quality (commission) proposes the repeal of §122.131 and §§122.511 - 122.516.

These sections provide for an application option that has not been used and is now expired, and for industry and county-specific general operating permits that have now become non-rule general operating permits. The commission will also be accepting public comment on the submission of previously adopted §122.217 to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP). No changes are being proposed to §122.217.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED REPEALS

Title V of the Federal Clean Air Act Amendments of 1990 (FCAA) as codified in 42 United States Code (USC) required all states to develop operating permit programs that met federal criteria. The EPA has promulgated a final rule identifying the criteria for state operating permit programs, 40 Code of Federal Regulations (CFR) Part 70, State Operating Permit Programs. The general goal of the operating permit program requirement is to facilitate compliance and improve enforcement by issuing permits that consolidate all applicable requirements into a federally-enforceable document.

The rules in Chapter 122 were originally developed to meet this federal requirement. The commission is now proposing to repeal §122.131 because the phased permit process has not been used by any facilities and the scheduled dates have since passed. The commission is also proposing the repeal of §§122.511 - 122.516 since the types of permits referenced have been converted to non- rule general operating permits and no longer exist.

On November 20, 2002, the commission adopted amendments to §122.217 regarding minor revision procedures. However, the commission did not submit §122.217 to the EPA as a revision to the SIP. Public comment will be accepted on this section being submitted as a revision to the SIP. The adopted rule for §122.217 can be viewed on the *Texas Register web site at: http://www.sos.state.tx.us*

SECTION BY SECTION DISCUSSION

The commission proposes the repeal of §122.131, Phased Permit Detail. The phased permit process has not been used by any facilities and the scheduled dates have since passed. The commission also proposes the repeal of §§122.511 - 122.516, Oil and Gas General Operating Permit - Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties; Oil and Gas General Operating Permit - Gregg, Nueces, and Victoria Counties; Oil and Gas General Operating Permit - Aransas, Bexar, Calhoun, Matagorda, San Patricio, and Travis Counties; Oil and Gas General Operating Permit - All Texas Counties Except for Aransas, Bexar, Brazoria, Calhoun, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Gregg, Hardin, Harris, Jefferson, Liberty, Matagorda, Montgomery, San Patricio, Tarrant, Travis, Victoria, and Waller Counties; Bulk Fuel Storage Terminal General Operating Permit; and Site-wide General Operating Permit. The contents of these sections were industry and county-specific general operating permits that have now become non- rule general operating permits.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeffrey Horvath, Analyst with Strategic Planning and Appropriations, has determined that for each year of the first five-year period the proposed repeals are in effect, there will be no fiscal implications to units of state or local government as a result of the implementation and administration of the proposed repeals.

The proposed repeals are intended to simplify current rules relating to the Federal Operating Permits Program under Title V of the FCAA. Title V of the FCAA required all states to develop operating permit programs that met federal criteria and the original rules were developed to meet these requirements. The proposed rulemaking repeals provisions relating to a phased permit process and provisions referencing certain types of permits in certain areas.

The phased permit provision allows sites with 75 or more emission units in a nonattainment area, and sites with 150 or more emission units in an attainment area to submit permit applications in phases to allow for flexibility in the permit

application process. However, regulated entities have never used the phased permit process and the deadline for submitting a phased permit application has passed (July 2000).

The proposed repeals also remove provisions relating to certain types of general operating permits, including oil and gas general operating permits in specific counties, bulk fuel storage terminal general operating permits, and site-wide general operating permits. The contents of these sections for industry and county-specific general operating permits have already been incorporated into non-rule general operating permits now used by the agency and regulated facilities, resulting in no change to current practices.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed repeals are in effect, the public benefit anticipated from the enforcement of and compliance with the proposed repeals would be the clarification and simplification of rule language relating to the Title V Operating Permits Program by removing outdated and unused rule language.

No fiscal implications are anticipated to individuals or businesses as a result of implementing and administering the proposed repeals, as the proposed repeals have no effect on current practices of the agency, businesses, or individuals regarding the Federal Operating Permits Program. The proposed repeals are intended to simplify current rules relating to the Federal Operating Permits Program under Title V of the FCAA. The proposed rulemaking repeals provisions relating to a phased permit process and provisions referencing certain types of permits in certain areas.

The phased permit provision allows sites with 75 or more emission units in a nonattainment area, and sites with 150 or more emission units in an attainment area to submit permit applications in phases to allow for flexibility in the permit application process. However, regulated entities have never used the phased permit process and the deadline for submitting a phased permit application has passed (July 2000).

The proposed repeals also remove provisions relating to types of general operating permits, including oil and gas general operating permits in specific counties, bulk fuel storage terminal general operating permits, and site-wide general operating permits. The contents of these sections for industry and county-specific general operating permits have already been incorporated into non-rule general operating permits now used by the agency and regulated facilities.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses resulting from the implementation of the proposed repeals, as they are intended to simplify rule language relating to the Title V Operating Permits Program by removing outdated and unused rule language. In addition, the proposed repeals have no effect on current practices of the agency, businesses, or individuals regarding the Federal Operating Permits Program.

The proposed rulemaking is intended to simplify current rules by repealing provisions relating to a phased permit process and provisions referencing certain types of general operating permits in certain areas.

The phased permit provision allows sites with 75 or more emission units in a nonattainment area, and sites with 150 or more emission units in an attainment area to submit permit applications in phases to allow for flexibility in the permit application process. However, regulated entities have never used the phased permit process and the deadline for submitting a phased permit application has passed (July 2000).

The proposed repeals also remove provisions relating to certain types of general operating permits, including oil and gas general operating permits in specific counties, bulk fuel storage terminal general operating permits, and site-wide general operating permits. The contents of these sections for industry and county-specific general operating permits have already been incorporated into non-rule general operating permits now used by the agency and regulated facilities, resulting in no change to current practices.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rulemaking will be in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in accordance with the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule. A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Although the rules adopted by the commission to implement the requirements of 42 USC, §§7661 - 7661e, are intended to protect the environment or reduce risks to human health from environmental exposure through increased compliance with requirements already applicable to facilities, the proposed rules are not anticipated to have adverse effects on the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rulemaking merely repeals sections that are unnecessary.

The requirements of the proposed repeals are expected to result in little or no impacts on the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. All facilities affected by the proposed repeals no longer have the opportunity to select the phased permit detail process since the deadlines have passed and have the option of using non-rule general operating permits in place of the rule-based general operating permits proposed for repeal in this rulemaking.

Additionally, the analysis required by Texas Government Code, §2001.0225(c), does not apply because the proposed repeals do not meet any of the four applicability requirements of a major environmental rule. The proposed repeals do not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency. The proposed repeals do not exceed the requirements of either 42 USC, §§7661 - 7661e (the requirements for the federal operating permit program), or related provisions of the Texas Clean Air Act (TCAA). Additionally, the proposed repeals do not exceed a

requirement of a delegation agreement, since there is no agreement that is applicable to this rulemaking, and are not proposed solely under the general powers of the agency.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed repeals and performed an analysis of whether the proposed repeals are subject to Texas Government Code, Chapter 2007. The purpose of the proposed repeals is to remove unnecessary provisions of the state operating permit program, required by 42 USC, §§7661 - 7661e and 40 CFR Part 70. All facilities affected by the proposed repeals no longer have the opportunity to select the phased permit detail process since the deadlines have passed and have the option of using non-rule general operating permits in place of the rule-based general operating permits proposed for repeal in this rulemaking.

The commission's analysis indicates that Texas Government Code, Chapter 2007, does not apply to the proposed repeals because this is an action that is reasonably taken to fulfill an obligation mandated by federal law, which is exempt under Texas Government Code, §2007.003(b)(4). The proposed repeals will implement requirements of 42 USC, §§7661 - 7661e. While the proposed repeals are not specifically mandated by federal law, the state is required to maintain a state operating permit program to avoid the imposition of sanctions under 42 USC, §7509, and the deletion of these unnecessary sections will provide for a better, more clear program. Additionally, promulgation and enforcement of the repeals will not burden private real property. The proposed repeals do not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of governmental action. Consequently, the proposed repeals do not meet the definition of a takings under Texas Government Code, §2007.002(5).

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process. The commission reviewed this action for consistency and has determined that the repeal of §§122.131 and 122.511 -122.516 does not impact any CMP goals or policies because it is administrative. Additionally, the repeals will not adversely impact any CMP goals or policies since the deadline for submitting an application under the phased permit detail process has passed, and there are non-rule general operating permits available to those facilities which would previously have used the general operating permits proposed for repeal in this rulemaking. The commission seeks public comment on the consistency of the proposed repeals with applicable CMP goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

This proposal has no impact on owners and operators of sites subject to the operating permit program since the repeal of the sections merely deletes unnecessary sections. The dates of the phased permit detail have passed and the only general operating permits that are now available are non-rule general operating permits which are now being used by those subject to the Federal Operating Permits Program.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on April 14, 2003 at 10:00 a.m. in Building F, Room 2210, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before the hearing, and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the hearing, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Joyce Spencer, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Comments must be received by 5:00 p.m., April 21, 2003, and should reference Rule Log Number 2002-056-122-AI. For further information, please contact Debra Barber, Policy and Regulations Division at (512) 239-0412.

SUBCHAPTER B. PERMIT REQUIREMENTS

DIVISION 3. PERMIT APPLICATION

30 TAC §122.131

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeal is proposed under Texas Health and Safety Code (THSC), TCAA, §382.011, which authorizes the commission to administer the requirements of the TCAA; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.051, which authorizes the commission to issue permits and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under this chapter; §382.054, which requires sources to obtain a federal operating permit; §382.0541, which authorizes the administration and enforcement of federal operating permits; and Texas Water Code (TWC), §5.103, which authorizes the commission to propose rules.

The repeal implements THSC, §382.011, concerning General Powers and Duties; §382.017, concerning Rules; §382.051, concerning Permitting Authority of Board and Rules; §382.054, concerning Federal Operating Permits; §382.0541, concerning the Administration and Enforcement of Federal Operating Permits; and TWC, §5.103, concerning Rules.

§122.131. Phased Permit Detail.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 7, 2003.

TRD-200301616
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 239-5017

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SUBCHAPTER F. GENERAL OPERATING PERMITS
DIVISION 2. AVAILABLE GENERAL PERMITS

30 TAC §§122.511 - 122.516

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Environmental Quality or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeals are proposed under Texas Health and Safety Code (THSC), TCAA, §382.011, which authorizes the commission to administer the requirements of the TCAA; §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; §382.051, which authorizes the commission to issue permits and adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under this chapter; §382.054, which requires sources to obtain a federal operating permit; §382.0541, which authorizes the administration and enforcement of federal operating permits; and Texas Water Code (TWC), §5.103, which authorizes the commission to propose rules.

The repeals implement THSC, §382.011, concerning General Powers and Duties; §382.017, concerning Rules; §382.051, concerning Permitting Authority of Board and Rules; §382.054, concerning Federal Operating Permits; §382.0541, concerning the Administration and Enforcement of Federal Operating Permits; and TWC, §5.103, concerning Rules.

§122.511. Oil and Gas General Operating Permit - Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Hardin, Harris, Jefferson, Liberty, Montgomery, Orange, Tarrant, and Waller Counties.

§122.512. Oil and Gas General Operating Permit - Gregg, Nueces, and Victoria Counties.

§122.513. Oil and Gas General Operating Permit - Aransas, Bexar, Calhoun, Matagorda, San Patricio, and Travis Counties.

§122.514. Oil and Gas General Operating Permit - All Texas Counties Except for Aransas, Bexar, Brazoria, Calhoun, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Gregg, Hardin, Harris, Jefferson, Liberty, Matagorda, Montgomery, San Patricio, Tarrant, Travis, Victoria, and Waller Counties.

§122.515. Bulk Fuel Storage Terminal General Operating Permit.

§122.516. Site-wide General Operating Permit.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 239-5017

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TITLE 34. PUBLIC FINANCE
PART 1. COMPTROLLER OF PUBLIC ACCOUNTS
CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER G. CIGARETTE TAX

34 TAC §§3.101, 3.108, 3.110 - 3.112

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Comptroller of Public Accounts or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Comptroller of Public Accounts proposes the repeal of §§3.101, 3.108, 3.110, 3.111, and 3.112, concerning delivery of unstamped cigarettes, cigarette tax stamps and meter impressions, issuance of cigarette tax stamps to the Texas Alcoholic Beverage Commission, affixing of cigarette tax stamps by Texas Alcoholic Beverage Commission agents, and disposition of cigarettes seized by Texas Alcoholic Beverage Commission agents. The comptroller has determined that the consolidation of rules containing similar subject matter will benefit the taxpayers by providing a more effective means of obtaining information. These sections are repealed in order to simplify their consolidation into new §3.101.

James LeBas, Chief Revenue Estimator, has determined that repeal of the rule will not result in any fiscal implications to the state or to units of local government.

Mr. LeBas also has determined that the proposed repeal of these sections, and subsequent consolidation into a single rule, would benefit the public by providing a more effective means of accessing information regarding their tax responsibilities. This repeal is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There are no additional costs to persons who are required to comply with the repeal.

Comments on the repeal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

These repeals are proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The repeals implement the Tax Code, Chapter 154.

§3.101. Delivery of Unstamped Cigarettes.

§3.108. Cigarette Tax Stamps and Meter Impressions.

§3.110. Issuance of Cigarette Tax Stamps to the Texas Alcoholic Beverage Commission.

§3.111. Affixing of Cigarette Tax Stamps by Texas Alcoholic Beverage Commission Agents.

§3.112. Disposition of Cigarettes Seized by Texas Alcoholic Beverage Commission Agents.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 4, 2003.

TRD-200301541
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 475-0387

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34 TAC §3.101

The Comptroller of Public Accounts proposes a new §3.101, concerning cigarette tax and stamping activities. The comptroller has determined that the consolidation of sections of similar subject matter will benefit the taxpayers by providing a more effective means of obtaining information. Therefore, the existing §§3.101, 3.108, 3.110, 3.111, 3.112, 11.51, and 11.52 of this title are proposed for repeal. The new §3.101 consolidates the text in the current §3.101 with the text in existing §3.108 (relating to Cigarette Tax Stamps and Meter Impressions), §3.110 (relating to Issuance of Cigarette Tax Stamps to the Texas Alcoholic Beverage Commission), §3.111 (relating to Affixing of Cigarette Tax Stamps by Texas Alcoholic Beverage Commission Agents), §3.112 (relating to Disposition of Cigarettes Seized by Texas Alcoholic Beverage Commission Agents), §11.51 (relating to Evidence of Return of Cigarettes Unfit for Use), and §11.52 (relating to Importation of 200 or Fewer Cigarettes). The content of the existing sections has been updated pursuant to acts of the legislature. The 76th Legislature modified a provision to allow a person to transport 200 or fewer cigarettes into Texas for personal use from another state tax-free.

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that the proposed new rule, consolidating sections containing similar subject matter into a single rule, would benefit the public by providing a more effective means of obtaining information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This new section is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The new section implements Tax Code, Chapter 154, and Health and Safety Code, Chapter 161.

§3.101. Cigarette Tax and Stamping Activities.

(a) Imposition of tax. A tax is imposed on a person who uses or disposes of cigarettes in this state. The tax rate is $20.50 per thousand on cigarettes weighing three pounds or less per thousand plus $2.10 per thousand on cigarettes weighing more than three pounds per thousand. The tax becomes due and payable when a person in this state receives cigarettes to make a first sale. The ultimate consumer or user of cigarettes in this state bears the impact of the tax; and, if another person pays the tax, the amount of the tax is added to the price to the ultimate consumer or user. A person who pays the tax shall securely affix a stamp to each individual package of cigarettes to show payment of the tax. Absence of a stamp on an individual package of cigarettes is notice that the tax has not been paid.

(b) Cigarette tax stamp meters. Cigarette distributors are not authorized to use stamp metering machines as evidence of payment of the cigarette tax.

(c) Cigarette tax stamp credits.

(1) Allowance of credit for cigarette tax stamps. The comptroller may authorize credit on:

(A) stamps that are affixed to cigarette packages that have been damaged or are unfit for sale and have been returned to the manufacturer in accordance with Tax Code, §154.306;

(B) stamps that have been destroyed by vandalism, fire, flood, or other natural disasters. The distributor must present evidence that such stamps were purchased by the distributor and were subsequently destroyed by such natural disaster;

(C) stamps that have been erroneously affixed to cigarette carton flaps rather than the cigarette packages. The distributor must submit the stamped carton flaps to the comptroller in order to obtain credit. The comptroller will issue an authorization for refund of the tax with disallowance of the stamping discount;

(D) stamps used to restamp cigarette packages provided that the original tax stamps were of an illegible quality and the restamping is required by the comptroller's office. There is no stamping allowance for restamped cigarettes; or

(E) stamps that have been torn or otherwise damaged by a stamping machine. The distributor must submit the damaged stamps to the comptroller in order to obtain credit. The comptroller will notify the distributor of the amount of stamp credit authorized.

(2) Disallowance of credit for cigarette tax stamps. The comptroller will not authorize credit for stamps lost due to theft, negligence, or any unaccountable loss or for stamps that have been affixed two or more times to the same package of cigarettes resulting in double stamping.

(d) Cigarette tax stamp payments. All persons who purchase cigarette tax stamps from the comptroller shall transfer payments by electronic funds transfer.

(e) Evidence of return of cigarettes unfit for use. A distributor who requests replacement of cigarette tax stamps affixed to cigarettes that have been returned to the manufacturer must submit the following documentation to the comptroller:

(1) a credit memorandum from the manufacturer to whom the cigarettes were returned, verifying the number of cigarettes returned for credit;

(2) an affidavit from the manufacturer confirming that the tax stamps affixed to the cigarettes listed in the memorandum have been destroyed and listing the number, denomination, and the value of such stamps; and

(3) an affidavit from the distributor stating that the distributor returned the number of cigarettes listed in the manufacturer's credit memorandum and that the number, denomination, and the value of state

cigarette tax stamps shown in the manufacturer's affidavit were affixed to the cigarettes returned.

(f) Delivery of unstamped cigarettes to instrumentalities of the United States government.

(1) Distributors may use their own vehicles to deliver previously invoiced quantities of unstamped cigarettes to instrumentalities of the United States government. These tax-free cigarettes must be packaged in a manner that prevents the unstamped cigarettes from commingling with any other cigarettes in the distributor's vehicle.

(2) Each sale of unstamped cigarettes by a distributor to an instrumentality of the United States government shall be supported by a separate sales invoice and a properly completed federal exemption certificate. Sales invoices must be numbered and dated and must show the name of the seller, name of the purchaser, and the destination.

(g) Issuance of cigarette tax stamps to the Texas Alcoholic Beverage Commission (TABC).

(1) The comptroller shall sell cigarette tax stamps to the Texas Alcoholic Beverage Commission for the purpose of collecting the cigarette tax at ports of entry into the state.

(2) Payment for the cigarette tax stamps sold will be made by that agency according to the terms and conditions stipulated in the interagency cooperation contract between the comptroller and the Texas Alcoholic Beverage Commission.

(h) Affixing of cigarette tax stamps by Texas Alcoholic Beverage Commission agents. Cigarette tax stamps affixed by agents of the Texas Alcoholic Beverage Commission must be affixed to the cellophane wrapper on the bottom of each individual package of cigarettes.

(i) Disposition of cigarettes seized by Texas Alcoholic Beverage Commission agents.

(1) Texas Alcoholic Beverage Commission agents shall seize all cigarettes for which the holder refuses to pay the tax imposed by Tax Code, §154.021.

(2) Cigarettes seized shall be released to agents of the comptroller for ultimate disposition.

(j) Importation of 200 or fewer cigarettes.

(1) A person 18 years of age or older, or a person younger than 18 years when the individual possesses the cigarettes in the presence of an adult parent, a guardian, or a spouse of the individual, who imports and personally transports 200 or fewer cigarettes into this state from another state, for personal use and not for sale is not required to pay the tax imposed by Tax Code, §154.021.

(2) Texas Alcoholic Beverage Commission employees shall collect the tax imposed by Tax Code, §154.021, at ports of entry from each person who imports and personally transports more than 200 cigarettes into this state from another state and who is at least 18 years of age or who is younger than 18 and possesses the cigarettes in the presence of an adult parent, a guardian, or a spouse of the individual.

(3) A person younger than 18 years of age may not import and personally transport cigarettes of any quantity into this state, except in the presence of an adult parent, a guardian, or a spouse of the individual.

(4) Texas Alcoholic Beverage Commission employees shall seize at ports of entry all cigarettes in the possession of a person younger than 18 years of age, except in situations where paragraph (3) of this subsection applies.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 4, 2003.

TRD-200301542
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 475-0387

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34 TAC §§3.102, 3.104, 3.106, 3.107, 3.114

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Comptroller of Public Accounts or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Comptroller of Public Accounts proposes the repeal of §§3.102, 3.104, 3.106, 3.107, and 3.114, concerning cigarette permits for trucks and cars, transfer and correction of permits, change of date for filing cigarette reports and payments, weight of cigarettes defined, and investigation of applicants for permits. The comptroller has determined that the consolidation of sections containing similar subject matter will benefit the taxpayers by providing a more effective means of obtaining information. These sections are repealed in order to simplify their consolidation into new §3.102.

James LeBas, Chief Revenue Estimator, has determined that repeal of the rule will not result in any fiscal implications to the state or to units of local government.

Mr. LeBas also has determined that the proposed repeal of these sections, and subsequent consolidation into a single rule, would benefit the public by providing a more effective means of accessing information regarding their tax responsibilities. This repeal is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There are no additional costs to persons who are required to comply with the repeal.

Comments on the repeals may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

These repeals are proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

These repeals implement the Tax Code, Chapter 154.

§3.102. Cigarette Permits for Trucks and Cars.

§3.104. Transfer and Correction of Permits.

§3.106. Change of Date for Filing Cigarette Reports and Payments.

§3.107. Weight of Cigarettes Defined.

§3.114. Investigation of Applicants for Permits.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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34 TAC §3.102

The Comptroller of Public Accounts proposes a new §3.102, concerning applications, definitions, permits, and reports. The comptroller has determined that the consolidation of sections of similar subject matter will benefit the taxpayers by providing a more effective means of obtaining information. Therefore, the existing §§3.102, 3.104, 3.106, 3.107, and 3.114 of this title are proposed for repeal. The new §3.102 consolidates the text from the current §3.102 with the text from existing §3.104 (relating to Transfer and Correction of Permits), §3.106 (relating to Change of Date for Filing Cigarette Reports and Payments), §3.107 (relating to Weight of Cigarettes Defined), and §3.114 (relating to Investigation of Applicants for Permits).

James LeBas, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. LeBas also has determined that the proposed new rule, consolidating sections containing similar subject matter into a single rule, would benefit the public by providing a more effective means of obtaining information regarding tax responsibilities. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This new section is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new section implements Tax Code, Chapter 154.

§3.102. Applications, Definitions, Permits, and Reports.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Agency--The Comptroller of Public Accounts of the State of Texas or the comptroller's duly authorized agents and employees.

(2) Bonded agent--A person in this state who is an agent of a person outside this state and who receives cigarettes in interstate commerce and stores the cigarettes for distribution or delivery to distributors under orders from the person outside this state.

(3) Cigarette--A roll for smoking that is made of tobacco or tobacco mixed with another ingredient and wrapped or covered with a material other than tobacco. A cigarette is not a cigar.

(4) Cigarette weight--The weight of an individual cigarette shall consist of the combined weight of tobacco, nontobacco ingredients, wrapper, filter tip, mouthpiece, and any other attachments thereto that make up the total product in the form available for sale to the consumer. The weight of a cigarette does not include a carton, box, label, or other packaging materials.

(5) Commercial business location--For purposes of this section, a commercial business location means the entire premises occupied by a permit applicant or a person required to hold a permit under the Tax Code, Chapter 154. The premises where cigarettes are stored or kept cannot be a residence or a unit in a public storage facility.

(6) Common carrier--A motor carrier registered under the Transportation Code, Chapter 643, or a motor carrier operating under a certificate issued by the Interstate Commerce Commission or a successor agency to the Interstate Commerce Commission.

(7) Consumer--A person who possesses cigarettes for personal consumption.

(8) Distributor--A person who is authorized to purchase for the purpose of making a first sale in this state cigarettes in unstamped packages from manufacturers. A person who is authorized to stamp cigarette packages. A person who ships, transports, or imports cigarettes into this state; acquires, possesses, and makes a first sale of cigarettes in this state.

(9) Export warehouse--A place where cigarettes from manufacturers in unstamped packages are stored for the purpose of making sales to authorized persons for resale, use, or consumption outside the United States.

(10) First sale--Except as otherwise provided, first sale means the first transfer of possession in connection with a purchase, sale, or any exchange for value of cigarettes in intrastate commerce; the first use or consumption of cigarettes in this state; or the loss of cigarettes in this state whether through negligence, theft, or other unaccountable loss. First sales also includes giving away cigarettes as promotional items.

(11) Importer or import broker--A person who ships, transports, or imports into this state cigarettes manufactured or produced outside the United States for the purpose of making a first sale in this state.

(12) Licensing--The agency process concerning the issuance, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license or permit.

(13) Manufacturer--A person who manufactures and sells cigarettes to a distributor.

(14) Manufacturer's representative--A person employed by a manufacturer to sell or distribute the manufacturer's stamped cigarette packages.

(15) Permit--Any agency license, certificate, approval, registration, or similar form of permission required by law to buy, sell, stamp, store, transport, or distribute cigarettes.

(16) Permit holder--A person who has been issued a bonded agent, distributor, importer, manufacturer, wholesaler, or retailer permit under Tax Code, §154.101.

(17) Place of business--A commercial business location where cigarettes are sold; a commercial business location where cigarettes are kept for sale or consumption or otherwise stored; or a vehicle from which cigarettes are sold.

(18) Retailer--A person who engages in the practice of selling cigarettes to consumers. The owner of a coin-operated cigarette vending machine is a retailer.

(19) Stamp--A stamp includes only a stamp that is printed, manufactured, or made by authority of the comptroller; shows payment of the tax imposed by Tax Code, §154.021; and is consecutively numbered and uniquely identifiable as a Texas cigarette tax stamp.

(20) Wholesaler--A person, including a manufacturer's representative, who sells or distributes cigarettes in this state for resale. A wholesaler is not a distributor.

(b) Permits required.

(1) To engage in business as a distributor, importer, manufacturer, wholesaler, bonded agent, or retailer, a person must apply for and receive the applicable permit from the comptroller. The permits are not transferable. A new application is required if a change in ownership occurs (sole ownership to partnership, sole ownership to corporation, partnership to limited liability company, etc.). Each legal entity must apply for its own permit(s). All permits issued to a legal entity will have the same taxpayer number. Tax Code, §154.501(a)(2), provides that a person who engages in the business of a bonded agent, distributor, importer, manufacturer, wholesaler, or retailer without a valid permit is subject to a penalty of not more than $2,000 for each violation. Tax Code, §154.501(c), provides that a separate offense is committed each day on which a violation occurs.

(2) Each distributor, importer, manufacturer, wholesaler, bonded agent, or retailer shall obtain a permit for each place of business owned or operated by the distributor, importer, manufacturer, wholesaler, bonded agent, or retailer. A new permit shall be required for each physical change in the location of the place of business. Correction or change of street listing by a city, state, or U.S. Post Office shall not require a new permit so long as the physical location remains unchanged.

(3) Permits are valid for one place of business at the location shown on the permit. If the location houses more than one place of business under common ownership, an additional permit is required for each separate place of business. For example, each retailer who operates a cigarette vending machine shall place a retailer's permit on the machine.

(4) A vehicle from which cigarettes are sold is considered to be a place of business and requires a permit. A motor vehicle permit is issued to a bonded agent, distributor, or wholesaler holding a current permit. Vehicle permits are issued bearing a specific motor vehicle identification number and are valid only when physically carried in the vehicle having the corresponding motor vehicle identification number. Vehicle permits may not be moved from one vehicle to another. No cigarette permit is required for a vehicle used only to deliver invoiced cigarettes.

(5) The comptroller may issue a combination permit for cigarettes, tobacco products, or cigarettes and tobacco products to a person who is a distributor, importer, manufacturer, wholesaler, bonded agent, or retailer as defined by Tax Code, Chapter 154 and Chapter 155. A person who receives a combination permit pays only the higher of the two permit fees.

(c) Permit period.

(1) Bonded agent, distributor, importer, manufacturer, wholesaler, and motor vehicle permits expire on the last day of February of each year.

(2) Retailer permits expire on the last day of May of each even-numbered year.

(d) Permit fees. An application for a bonded agent, distributor, importer, manufacturer, wholesaler, motor vehicle, or retailer permit must be accompanied by the appropriate fee.

(1) The permit fee for a bonded agent is $300.

(2) The permit fee for a distributor is $300.

(3) The permit fee for a manufacturer with representation in Texas is $300.

(4) The permit fee for a wholesaler is $200.

(5) The permit fee for a motor vehicle is $15.

(6) The permit fee for a retailer permit issued or renewed on or after September 1, 1999, is $180.

(7) A $50 fee is assessed in addition to the regular permit fee for failure to obtain a permit in a timely manner.

(8) No permit fee is required to obtain an importer permit or to register a manufacturer if the manufacturer is located out of state with no representation in Texas.

(9) The comptroller prorates the permit fee for new permits according to the number of months remaining in the permit period. If a permit will expire within three months of the date of issuance, the comptroller may collect the prorated permit fee for the current permit period and the total permit fee for the next permit period.

(10) An unexpired permit may be returned to the comptroller for credit on the unexpired portion only upon the purchase of a permit of a higher classification.

(e) Permit issuance, denial, suspension, or revocation.

(1) The comptroller shall issue a permit to a distributor, importer, manufacturer, wholesaler, bonded agent, or retailer if the comptroller receives an application and any applicable fee, believes that the applicant has complied with Tax Code, §154.101, and determines that issuing the permit will not jeopardize the administration and enforcement of Tax Code, Chapter 154.

(2) If the comptroller determines that an existing permit should be suspended or revoked or a permit should be denied because of the applicant's prior conviction of a crime and the relationship of the crime to the license, the comptroller will notify the applicant or permittee in writing by personal service or by mail of the reasons for the denial, suspension, revocation, or disqualification, the review procedure provided by Occupations Code, §53.052, and the earliest date that the permit holder or applicant may appeal the denial, suspension, revocation, or disqualification.

(f) Reports. All cigarette distributor and manufacturer reports and payments must be filed on or before the last day of each month following the month in which the transactions take place.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 4, 2003.

TRD-200301544
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 475-0387

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CHAPTER 11. CIGARETTE AND TOBACCO PRODUCTS TAX

SUBCHAPTER B. CIGARETTE TAX

34 TAC §11.51, §11.52

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Comptroller of Public Accounts or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Comptroller of Public Accounts proposes the repeal of §11.51 and §11.52, concerning evidence of return of cigarettes unfit for use and importation of 200 or fewer cigarettes. The comptroller has determined that the consolidation of sections containing similar subject matter will benefit the taxpayers by providing a more effective means of obtaining information. These sections are repealed in order to simplify their consolidation into new §3.101 of this title (relating to Cigarette Tax and Stamping Activities).

James LeBas, Chief Revenue Estimator, has determined that repeal of the rule will not result in any fiscal implications to the state or to units of local government.

Mr. LeBas also has determined that the proposed repeal of these sections, and subsequent consolidation into a single rule, would benefit the public by providing a more effective means of accessing information regarding their tax responsibilities. This repeal is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There are no additional costs to persons who are required to comply with the repeal.

Comments on the repeals may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

These repeals are proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The repeals implement Tax Code, Chapter 154.

§11.51. Evidence of Return of Cigarettes Unfit for Use.

§11.52. Importation of 200 or Fewer Cigarettes.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 4, 2003.

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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 421. STANDARDS FOR CERTIFICATION

37 TAC §421.3, §421.9

The Texas Commission on Fire Protection (TCFP) proposes changes to §421.3 and §421.9, concerning standards for certification, to make grammatical corrections and to remove references to Notice of Employment and Change of Discipline forms.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed changes are in effect, there will be no significant fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed changes are in effect, the public benefit anticipated as a result of enforcing the proposals will be a clearer understanding of the rules regarding termination of fire protection personnel. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed rule actions.

Comments on the proposals may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P. O. Box 2286, Austin, Texas 78768-2286 or e- mailed to info@tcfp.state.tx.us.

The rule changes are proposed under Texas Government Code, §419.008, which provides the TCFP with authority to propose rules for the administration of its powers and duties, and Texas Government Code, §419.022, which requires reports, §419.032 and §419.0321, which defines the appointment of fire protection personnel and part-time fire protection employees.

Texas Government Code, §419.032 and §419.0321, are affected by the proposed changes.

§421.3. Minimum Standards Set by the Commission.

(a) (No change.)

(b) Functional position descriptions.

(1)-(3) (No change.)

(4) Fire inspection personnel. The following general position description for fire inspection personnel serves as a guide for anyone interested in understanding the qualifications, competencies, and tasks required of the fire inspector operating in the State of Texas. It is ultimately the responsibility of an employer to define specific job descriptions within each jurisdiction.

(A) Qualifications. Successfully complete a commission approved course; achieve a passing score on certification examinations; must be at least 18 years of age; generally, the knowledge and skills required [~~to~~] show the need for a high school education or equivalent; ability to communicate verbally, via telephone and radio equipment; ability to lift, carry, and balance weight equivalent to weight of common tools and equipment necessary for conducting an inspection; ability to interpret written and oral instructions; ability to work effectively with the public; ability to work effectively in an environment with potentially loud noises; ability to function through an entire work shift; ability to calculate area, weight and volume ratios; ability to read and understand English language manuals including chemical, construction and technical terms, building plans and road maps; ability to accurately discern street signs and address numbers; ability to document, in writing, all relevant information in prescribed format in light of legal ramifications of such; ability to converse in English with coworkers and other personnel. Demonstrate knowledge of characteristics and behavior of fire, and fire prevention principles. Good manual dexterity with the ability to perform all tasks related to the inspection of structures and property; ability to bend, stoop, and crawl on uneven surfaces; ability

to climb ladders; ability to withstand varied environmental conditions such as extreme heat, cold, and moisture; and the ability to work in low light, confined spaces, elevated heights, and other dangerous environments.

(B) (No change.)

(5) Fire Investigator personnel. The following general position description for fire investigator personnel serves as a guide for anyone interested in understanding the qualifications, competencies, and tasks required of the fire investigator operating in the State of Texas. It is ultimately the responsibility of an employer to define specific job descriptions within each jurisdiction.

(A) Qualifications. Successfully complete a commission approved course; achieve a passing score on certification examinations; be at least 18 years of age; generally, the knowledge and skills required [~~to~~] show the need for a high school education or equivalent; ability to communicate verbally, via telephone and radio equipment; ability to lift, carry, and balance weight equivalent to weight of common tools and equipment necessary for conducting an investigation; ability to interpret written and oral instructions; ability to work effectively with the public; ability to work effectively in a hazardous environment; ability to function through an entire work shift; ability to calculate area, weight and volume ratios; ability to read and understand English language manuals including chemical, legal and technical terms, building plans and road maps; ability to accurately discern street signs and address numbers; ability to document, in writing, all relevant information in prescribed format in light of legal ramifications of such; ability to converse in English with coworkers and other personnel. Good manual dexterity with the ability to perform all tasks related to fire investigation; ability to bend, stoop, and walk on uneven surfaces; ability to climb ladders; ability to withstand varied environmental conditions such as extreme heat, cold and moisture; and the ability to work in low light, confined spaces, elevated heights and other potentially dangerous environments.

(B) (No change.)

(6)-(7) (No change.)

§421.9. Designation of Fire Protection Duties.

(a)-(b) (No change.)

(c) A fire department regulated by the commission shall submit on the proper form a request to appoint fire protection personnel or part-time fire protection employees to a regulated discipline. No individual may be appointed to a discipline without approval by the commission. Termination[~~Removal from a discipline or termination~~] of fire protection personnel or part- time fire protection employees shall be reported to the commission on the proper form within 14 calendar days of the action. In the case of termination, the employing entity shall report an individual's last known home address to the commission. A Notice of Termination may be submitted without the employee's signature.

(d)-(e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 6, 2003.

TRD-200301588
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: April 20, 2003
For further information, please call: (512) 239-4913

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CHAPTER 437. FEES

37 TAC §437.17, §437.19

The Texas Commission on Fire Protection (TCFP) proposes changes to §437.17, concerning records review fees and §437.19 concerning a late filing penalty. The proposed changes establish procedures for reviewing the training records of paid in-state fire protection personnel and remove the references to notice of employment and change of discipline forms.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed changes are in effect there will be no significant fiscal impact on state and local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed changes are in effect, the public benefit anticipated as a result of enforcing the proposals will be a clearer understanding of the requirements of fees charged for training records review. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed rule actions.

Comments on the proposals may be submitted to Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P. O. Box 2286, Austin, TX 78768-2286 or e- mailed to info@tcfp.state.tx.us.

The rule changes are proposed under Texas Government Code, §419.008, which provides the TCFP with authority to propose rules for the administration of its powers and duties, and Texas Government Code, §419.026, which provides the TCFP with the authority to establish and collect fees for certification.

Texas Government Code, §419.026 is affected by the proposed changes.

§437.17. Records Review Fees.

(a) A non-refundable fee of $35 shall be charged for each [~~out-of-state and/or military~~] training records review conducted by the commission for the purpose of determining equivalency to the appropriate commission [~~basic~~] training program or to establish eligibility to test. Applicants submitting training records for review shall receive a written analysis from the commission.

[~~(b) A non-refundable fee of $10 shall be charged for each State Firemen's and Fire Marshals' Association of Texas or in-state volunteer records review conducted by the commission for the purpose of determining equivalency to the appropriate commission basic training program or to establish eligibility to test. Applicants submitting training records for review shall receive a written analysis from the commission.~~]

(b) [~~(c)~~] The fee provided for in this section shall not apply to an individual who holds an International Fire Service Accreditation Congress seal [~~certificate(s)~~] required to qualify for an examination or an individual who holds an advanced certificate from the State Firemen's and Fire Marshals' Association of Texas.

§437.19. Late Filing Penalty.

A fire department or local government entity regulated by the commission that fails to comply with §421.9(c) of this title [~~(relating to designation of fire protection duties)~~] in regard to [~~Notices of Employment, Changes of Discipline, and~~] Notices of Termination may be subjected to a $25 late filing penalty for each individual in violation. A repeated violation of this rule may result in other administrative actions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 445. ADMINISTRATIVE INSPECTIONS AND PENALTIES

37 TAC §445.1

The Texas Commission on Fire Protection (TCFP) proposes changes to §445.1, concerning fire department inspections, to include inspections of volunteer fire fighters and fire departments that participate in one or more component areas of the voluntary regulation program. TCFP is also proposing changes to the Chapter Title by deleting Subchapter A and Paid Fire Department Inspections since it will be obsolete language with the proposed repeal of Subchapter B.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed changes are in effect, there will be no significant fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed changes are in effect, the public benefit anticipated as a result of enforcing the proposals will be the safety and proficiency of volunteer fire fighters and fire departments. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed rule actions.

Comments on the proposals may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P. O. Box 2286, Austin, Texas 78768-2286 or e mailed to info@tcfp.state.tx.us.

The rule changes are proposed under Texas Government Code, §419.008, which provides the TCFP with authority to propose rules for the administration of its powers and duties, and §419.071, which defines the rules of a voluntary certification program for volunteer fire fighters and fire departments.

Texas Government Code, §419.071, is affected by the proposed changes.

§445.1. Entity Inspections.

(a) The commission shall conduct at least biennial inspections of the entities that fall under the regulatory authority of the commission.

(b) The purpose of these inspections shall be to promote safety and proficiency in the fire service by ensuring compliance with state law and commission rules pertaining to minimum standards for fire protection personnel education, protective clothing, self-contained breathing apparatus, or any other aspect of the fire service regulated by the commission.

(c) This shall include inspections of volunteer fire fighters and fire departments that participate in the voluntary regulation program pursuant to §419.071 of the Texas Government Code in one or more of the component areas.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Gary L. Warren, Sr.
Executive Director
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For further information, please call: (512) 239-4913

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SUBCHAPTER B. VOLUNTEER FIRE DEPARTMENT INSPECTIONS

37 TAC §§445.201, 445.203, 445.205, 445.207

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission on Fire Protection or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Commission on Fire Protection proposes the repeal of §§445.201, 445.203, 445.205, and 445.207, concerning volunteer fire department inspections. The subject matter of the repealed sections is no longer necessary and is covered in the proposed changes to §445.1, Entity Inspections.

Mr. Jake Soteriou, Director of Fire Service Standards and Certification Division, has determined that for the first five year period the repeal is in effect there will be no fiscal implications for state and local governments.

Mr. Soteriou, has also determined that for each of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be a clearer understanding of the rules of fire department inspections. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed rule actions.

Comments on the proposals may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P. O. Box 2286, Austin, Texas 78768-2286 or e- mailed to info@tcfp.state.tx.us.

The repeal is proposed under Texas Government Code, §419.008, which provides the TCFP with authority to propose rules for the administration of its powers and duties, and Texas Government Code, §419.071, which defines the rules of a voluntary certification program for volunteer fire fighters and fire departments.

Texas Government Code, §419.071 is affected by the proposed repeal.

§445.201. Request for Inspection.

§445.203. Report of Inspection.

§445.205. Administrative Penalties.

§445.207. Certificate of Compliance.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
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For further information, please call: (512) 239-4913

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CHAPTER 449. HEAD OF A FIRE DEPARTMENT

37 TAC §§449.1, 449.3, 449.5

The Texas Commission on Fire Protection (TCFP) proposes changes to §449.1, minimum standards for the Head of a Fire Department, §449.3, concerning minimum standards for certification as head of a suppression fire department, and §449.5, concerning minimum standards for certification as head of a prevention only department, to clarify certification and experience requirements of an individual who is appointed as head of a suppression fire department and an individual who is appointed as head of a prevention only fire department.

Mr. Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five year period the proposed changes are in effect, there will be no significant fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each of the first five years the proposed changes are in effect, the public benefit anticipated as a result of enforcing the proposals will be a clearer understanding of the rules regarding the appointment of head of department. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with the proposed rule actions.

Comments on the proposals may be submitted to: Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P. O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us.

The rule changes are proposed under Texas Government Code, §419.008, which provides the TCFP with authority to propose rules for the administration of its powers and duties, and §419.032(f), which defines the appointment of fire protection personnel to the position of head of a fire department.

Texas Government Code, §419.032(f) is affected by the proposed changes.

§449.1. Minimum Standards for the Head of a Fire Department.

(a) An individual who becomes employed and assigned as the head of a fire department, [~~on or after March 1, 1999,~~] must be certified by the commission as head of a fire department within one year of appointment.

(b) An individual appointed head of department must be eligible to be certified at time of appointment or will become eligible to be certified within one year of appointment.

(c) [~~(b)~~] Holding the head of a fire department certification does not qualify an individual for any other certification. An individual who seeks certification in another discipline must meet the requirements for that discipline.

(d) [~~(c)~~] Nothing contained in this chapter shall be construed to supercede Chapter 143, Local Government Code, in regard to appointment of a head of a fire department.

§449.3. Minimum Standards for Certification as Head of a Suppression Fire Department.

(a) In order to be certified as a head of a fire department providing fire suppression, an individual mustbe appointed as head of a fire department; and [:]

[~~(1) be assigned as head of a fire department; and~~]

(1) [~~(2)~~] hold a certification as a fire protection personnel in any discipline that has a commission approved curriculum that requires structural fire protection personnel certification and five years experience in a full-time fire suppression position; or

(2) an individual from another jurisdiction who possesses valid documentation of accreditation from the International Fire Service Accreditation Congress that is deemed equivalent to the commission's approved basic fire suppression curriculum and provide documentation in the form of a sworn non self serving affidavit of five years experience in a full-time fire suppression position and successfully pass a written commission examination based on the basic structural fire protection personnel curriculum as specified in Chapter 439; or

(3) provide documentation in the form of anon self serving sworn affidavit of ten years experience as an employee of a local governmental entity in a full-time structural fire protection personnel position in a jurisdiction other than Texas; and successfully pass a written commission examination based on the basic structural fire protection personnel curriculum as specified in Chapter 439; or

[~~(A) document completion of continuing education, that meets the requirements of Chapter 441, for each year the individual has been out of the fire service up to a maximum of five years; and~~]

[~~(B) successfully pass a written commission examination based on the basic structural fire protection personnel curriculum as specified in Chapter 439 of this title (relating to Examinations for Certification); or~~]

(4) provide documentation in the form of a sworn non self serving affidavit of ten years of experience as a certified structural part-time fire protection employee; or

(5) provide documentation in the form of a sworn non self serving affidavit of ten years experience as an active volunteer fire fighter in one or more volunteer fire departments that meet the requirements of subsection (b) of this section and successfully pass a written commission examination based on the basic structural fire protection personnel curriculum as specified in Chapter 439 [~~of this title~~].

(b) The ten years of volunteer service must include documentation of attendance at 40% of the drills for each year and attendance of at least 25% of a department's emergencies in a calendar year while a member of a volunteer fire department or departments with 10 or more active members that conducts a minimum of 48 hours of drills in a calendar year.

(c) Individuals certified as the head of a fire department must meet the continuing education requirement as provided for in Chapter 441 [~~of this title (relating to Continuing Education)~~].

(d) An individual certified as head of a fire department under this section may engage in fire fighting activities only as the head of a fire department. These activities include incident command, direction of fire fighting activities or other emergency activities typically associated with fire fighting duties, i.e. rescue, confined space and hazardous materials response.

§449.5. Minimum Standards for Certification as Head of a Prevention Only Department.

(a) In order to be certified as the head of a fire department providing fire prevention activities only, an individual must be appointed as head of a Fire Prevention Department; and[~~:~~]

[~~(1) be assigned as head of a fire department; and~~]

(1) [~~(2)~~] hold a certification as a fire inspector, fire investigator, or arson investigator and have five years of full-time experience in fire prevention activities; or

(2) an individual from another jurisdiction who posses valid documentation of accreditation from the International Fire Service Accreditation Congress that is deemed equivalent to the commission's approved fire investigator or fire inspector curriculum and provide documentation in the form of a sworn non self serving affidavit of five years experience in a full-time fire prevention position and successfully pass a written commission examination based on the basic inspector or investigator curriculum as specified in Chapter 439; or

(3) provide documentation in the form of a sworn non self serving affidavit of ten years experience as an employee of [~~with~~] a local governmental entity in a full-time, [~~part-time or volunteer~~] fire inspector, fire investigator, or arson investigator position in a jurisdiction other than Texas [~~with ten years of experience in fire prevention activities~~] and successfully pass a written commission examination based on the basic inspector or investigator curriculum as specified in Chapter 439; or

[~~(A) document completion of continuing education, that meets the requirements of Chapter 441, for each year the individual has been out of the fire service up to a maximum of five years; and~~]

[~~(B) successfully pass a written commission examination based on the basic inspector or investigator curriculum as specified in Chapter 439 of this title (relating to Examinations for Certification).~~]

(4) provide documentation in the form of a sworn non self serving affidavit of ten years experience as a certified fire investigator, fire inspector or arson investigator as a part-time fire prevention employee; or

(5) provide documentation in the form of a sworn non self serving affidavit of ten years experience as an active volunteer fire inspector, fire investigator, or arson investigator with ten years experience in fire prevention and successfully pass a written commission examination based on the basic inspector or investigator curriculum as specified in Chapter 439.

(b) [~~(4)~~] Individuals certified as the head of a fire department under this section must meet the continuing education requirement as provided for in Chapter 441 [~~of this title (relating to Continuing Education)~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on March 6, 2003.

TRD-200301592
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
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For further information, please call: (512) 239-4913

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

SUBCHAPTER R. PROVISIONS RELATING TO MUNICIPAL REGULATION AND RIGHTS-OF-WAY MANAGEMENT

16 TAC §26.469

The Public Utility Commission of Texas has withdrawn from consideration the proposed new §26.469 which appeared in the September 27, 2002, issue of the *Texas Register* (27 TexReg 9071).

Filed with the Office of the Secretary of State on March 6, 2003.

TRD-200301587
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: March 6, 2003
For further information, please call: (512) 936-7308

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. MEDICAID REIMBURSEMENT RATES

1 TAC §355.8443, §355.8445

The Government Code, §531.021(b), transferred rulemaking authority for Medicaid provider reimbursement rates to the Texas Health and Human Services Commission. In accordance with that statute, we are transferring 25 TAC §33.310 and §33.311, which concern dental services under the Early and Periodic Screening, Diagnosis, and Treatment Program. The rules are being renumbered as 1 TAC §355.8443 and §355.8445 under Title 1, Part 15, Chapter 355, Subchapter J, Division 23 of the *Texas Administrative Code.* The transfer became effective September 1, 1997.

A complete conversion chart is published in the Tables and Graphics section of this issue.

Figure: 1 TAC Chapter 355

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TRD-200301727

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CHAPTER 371. MEDICAID FRAUD AND ABUSE PROGRAM INTEGRITY

The Health and Human Services Commission (HHSC) adopts amendments to §§371.200, 371.201 and 371.210 and new §371.208, without changes to the proposed text as published in the October 4, 2002 issue of the*Texas Register* (27 TexReg 9241). The text of the rules will not be republished. HHSC adopts amendments to §371.203, §371.204 and §371.206 with changes to the proposed text as published in the October 4, 2002 issue of the *Texas Register* (27 TexReg 9239). The text of the rules will be republished. HHSC adopts the proposed repeal of §§371.202, 371.205, 371.207, 371.209, and 371.211, without changes to the proposed text as published in the October 4, 2002 issue of the *Texas Register* (27 TexReg 9244) and will not be republished.

The rules are amended, repealed, and adopted, respectively, in part to implement the utilization review function assigned to HHSC by Senate Bill 30, enacted by the 75th Legislature in 1997. The rules reflect the transfer of authority from the Texas Department of Human Services (TDHS) to HHSC. The amended rules also reflect updated review processes and current terminology, clarify language, and correct grammatical errors. The rule repeal eliminates redundancy.

HHSC received comments from the Texas Hospital Association (THA) and MHSHealth.com.

Comment: Concerning §371.203(a)(2), THA comments that the addition of the sentence "Insignificant conditions or signs or symptoms that resolve without treatment are not to be considered for DRG assignment" is inconsistent with the current version of the Coding Clinic guidelines. THA recommends that the proposed sentence prohibiting the coding of conditions, signs, or symptoms that have not been treated be deleted.

Response: HHSC agrees with the comment that the sentence is inconsistent with the recent revision of the ICD-9-CM Official Guidelines For Coding and Reporting. The sentence has been deleted from the adopted rule.

Comment: THA comments that the on-site review process should be clearly specified in rules §371.203 and §371.210.

Response: HHSC disagrees with THA regarding the clarity of the on-site review process set out in rules §371.203 and §371.210. The cited rules specify the required components of the review process. In addition, further details of the on-site review process are communicated to the hospitals prior to and during each review, both by correspondence and discussions between HHSC and hospital staff.

Comment: THA comments that the proposed deletion of the word "practicing" in §371.203(c), §371.206(a), and §371.210(c) not be adopted. THA suggests new language should be added describing the qualification of physician reviewers as practicing physician consultants under contract with the Commission and board-certified in the area of medical care under review. THA suggests an alternative definition of a qualified physician consultant as one who is board-certified in the area of medical review and actively engaged in the practice of medicine, or has been engaged in the active practice of medicine in the last three years.

Response: HHSC disagrees with the THA recommendation concerning new language describing the qualifications of physician consultant reviewers. HHSC does not believe and has not received any evidence to support the necessity for physician consultant reviewers to be board-certified in the area of medical care under review in order for the review to be credible and fair. HHSC also disagrees with the THA recommendation to retain the word "practicing". HHSC does not believe and has not received any evidence to support the necessity for physician consultant reviewers to diagnose and treat patients on a regular basis in order for the review to be credible and fair.

Comment: THA comments that the last sentence of proposed rule §371.204(a) be deleted based upon the opinion that it is

illogical and inappropriate for physician reviewers to deny an admission that has met admission criteria.

Response: HHSC disagrees with the THA recommendation to delete the last sentence of proposed rule §371.204(a) as there are other relevant criteria to be considered in determining the medical necessity of an inpatient admission. See 42 C.F.R. §440.2(a). HHSC does agree, however, that the proposed rule as written does not explain sufficiently the basis on which the physician consultant reviewer may determine that an inpatient admission was not medically necessary even though screening criteria has been met. HHSC has added explanatory language to §371.204(a).

Comment: THA recommends that §371.206(a)(4) be revised to read that, if it is determined that any days qualifying as outlier days during the admission were not medically necessary, HHSC will deny those days.

Response: HHSC agrees. The language of §371.206(a)(4) is revised in the adopted rule to indicate that, if it is determined that any days qualifying as outlier days during the admission were not medically necessary, HHSC will deny those days.

Comment: THA recommends revising proposed rules §371.203(c), §371.204(a), §371.206(a) and (b), and §371.210(c) by adding language which allows HHSC to deny physician claims associated with the hospital inpatient claim denials for lack of medical necessity or for being provided in an inappropriate setting.

Response: HHSC agrees in principle with the recommendation by THA to add language to §§371.203(c), 371.204(a), 371.206(a) and (b), and 371.210(c) which would allow HHSC to consider denial of physician claims which are associated with hospital inpatient claim denials for lack of medical necessity of inpatient admission or for being provided in an inappropriate setting. The proposed additions will be submitted separately as new proposed rule changes.

Comment: THA recommends that additional language be added to §371.203(c) and §371.210(c), to clarify that medical necessity is based on the prevailing community medical and hospital standards and practices, and to§§371.203(c), 371.204(a), 371.206(a) and (b), and §371.210(c) to state that the hospital denial notice provide an explanation of the clinical basis and rationale for the denial.

Response: HHSC disagrees with the THA's proposed changes to §§371.203(c), 371.204(a), 371.206(a) and (b), and 371.210(c). HHSC believes that the proposed rule language concerning medical necessity is appropriate for the purposes of utilization review. In addition, rationales for denials are already provided through correspondence with the hospital.

Comment: THA recommends providing language in §371.208 describing the appeal process.

Response: HHSC disagrees with this recommendation. A department within HHSC other than the Utilization Review Department handles appeals of review decisions. The Utilization Review Department has neither the authority nor the responsibility to promulgate rules for that department. In addition, the process of appeal is already described in the Texas Medicaid Provider Procedures Manual.

Comment: MHSHealth.com recommends describing the appeal process in §371.208.

Response: HHSC disagrees with this recommendation. A department within HHSC other than the Utilization Review Department handles appeals of review decisions. The Utilization Review Department has neither the authority nor the responsibility to promulgate rules for that department. In addition, the process of appeal is already described in the Texas Medicaid Provider Procedures Manual.

SUBCHAPTER C. UTILIZATION REVIEW

1 TAC §§371.200, 371.201, 371.203, 371.204, 371.206, 371.208, 371.210

The proposed amendments and new section are adopted under authority granted to HHSC by §531.033, Texas Government Code, which provides the Commissioner of HHSC with broad rulemaking authority, and under §531.021 (a), Texas Government Code, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

§371.203. Texas Medical Review Program (TMRP) Review Process.

(a) The TMRP review process includes, but is not limited to:

(1) Admission review to evaluate the medical necessity of the admission. For purposes of the TMRP, Tax Equity and Fiscal Responsibility Act (TEFRA), and LoneSTAR Select II Contract reviews, medical necessity means the patient has a condition requiring treatment that can be safely provided only in the inpatient setting.

(2) Diagnosis related group (DRG) validation to confirm that the critical elements necessary to assign a DRG are present in the medical record. Hospital staff are responsible and held accountable for the accuracy of the required critical elements. Those elements are age, sex, discharge status, admission date, discharge date, principal diagnosis, principal and secondary procedures, and any complications or comorbidities (secondary diagnoses). This process also determines that the principal and secondary diagnoses and procedures are sequenced correctly. The principal diagnosis is the diagnosis (condition) established after study to be chiefly responsible for occasioning the admission of the patient to the hospital for care. The secondary diagnoses are conditions that affect the patient care in terms of requiring: clinical evaluation, therapeutic treatment, diagnostic procedures, extended length of hospital stay, increased nursing care and/or monitoring, or in the case of a newborn, conditions the physician deems to have clinically significant implications for future health care needs. If the principal diagnosis, secondary diagnoses, or procedures are not substantiated in the medical record, are not sequenced correctly, or have been omitted, codes may be deleted, changed, or added. When the correct diagnosis and procedure coding and sequencing have been determined, the information will be entered into the applicable version of the Grouper software for a DRG assignment. The Centers For Medicare and Medicaid Services (CMS) approved DRG Grouper software considers the required critical elements and determines the final DRG assignment. If the DRG validation process results in deletions, changes, or additions to the critical elements, and these changes cause the DRG to be reassigned, the Texas Health and Human Services Commission (Commission) will direct the claims administrator to adjust the payment to the hospital accordingly.

(3) Quality of care review to assess whether the quality of care provided meets generally accepted standards of medical and hospital care practices or puts the patient at risk of unnecessary injury, disease, or death. Quality of care review includes the use of discharge screens and generic quality screens. If quality of care issues are identified, physician consultants under contract with the Commission, and of the specialty related to the care provided, will determine possible clinical recommendations or corrective actions.

(4) Readmission review to evaluate each admission on its individual merits and determine if the second or subsequent admissions resulted from a premature discharge or were required to provide services that should have been provided in a previous admission.

(5) Day outlier review to verify the medical necessity of each day of the admission and includes DRG validation.

(6) Cost outlier review to verify that services billed were medically necessary, ordered by a physician, rendered and billed appropriately, and substantiated in the medical record.

(b) The Commission will review the complete medical record for the requested admission(s) to make decisions on all aspects of this review process. The complete medical record may include: emergency room records, medical/surgical history and physical examination, discharge summary, physicians' progress notes, physicians' orders, lab reports, x-ray reports, operative reports, pathology reports, nurses' notes, medication sheets, vital signs sheets, therapy notes, specialty consultation reports, and special diagnostic and treatment records. If the complete medical record is not available during the review, the Commission will issue a preliminary technical denial and notify the facility.

(c) A physician consultant under contract with the Commission will make all decisions concerning medical necessity, cause of readmission, and appropriateness of setting for the service provided. In the event the physician consultant determines the services were not medically necessary, should have been provided in a previous admission, or were not provided in the appropriate setting, the claim will be denied, and the Commission will notify the hospital in writing.

§371.204. Hospital Screening Criteria for Texas Medical Review Program (TMRP), Tax Equity and Fiscal Responsibility Act (TEFRA), and LoneSTAR Select II Contract Reviews.

(a) The Texas Health and Human Services Commission (Commission) uses physician-developed and physician-approved inpatient hospital screening criteria. The criteria include Indications for Hospitalization (IH) and Treatment (T) criteria. Nonphysician reviewers use the criteria as guidelines for the initial approval or for the referral of inpatient reviews for medical necessity decisions. If the IH or T criteria are not met, or if the nonphysician reviewer has any questions concerning the appropriateness of coding or quality of care, the nonphysician reviewer will refer the medical record to a physician consultant under contract with the Commission for a decision. Even if the IH and T criteria are met, the physician consultant may determine that an inpatient admission was not medically necessary and the Commission will issue an admission denial. A physician consultant may determine that an inpatient admission was not medically necessary if a physician admitted a patient in observation status and the patient was discharged within twenty-four hours from that outpatient status.

(b) For the purposes of the TMRP, TEFRA, and LoneSTAR Select II Contract reviews, medical necessity means that the patient has a condition requiring treatment that can be safely provided only in the inpatient setting.

§371.206. Denials and Recoupments for Texas Medical Review Program (TMRP), Tax Equity and Fiscal Responsibility Act (TEFRA), and LoneSTAR Select II Contracted Hospitals.

(a) Reviews conducted under the Texas Medical Review Program (TMRP), Tax Equity and Fiscal Responsibility Act (TEFRA), and LoneSTAR Select II Contracting programs may result in denials of claims. The Texas Health and Human Services Commission (Commission) will notify the hospital in writing of the denial decision, and instruct the claims administrator to recoup payment. Types of denials are:

(1) Admission and days of stay denials. A physician consultant under contract with the Commission makes all decisions regarding medical necessity, cause of readmission, and appropriateness of setting.

(2) Technical denials. The Commission will issue a technical denial when a hospital fails to make the complete medical record available for review within specified time frames. These services may not be rebilled on an outpatient basis.

(A) For on-site reviews, if the complete medical record is not made available during the on-site review, the Commission will issue a preliminary technical denial at that time. The hospital is allowed sixty calendar days from the date of the exit conference to provide the complete medical record to the Commission. If the complete medical record is not received by the Commission within this time frame, the Commission will issue a final technical denial. If the Commission requests a copy of the medical record in writing, and the copy is not received within the specified time frame, the Commission will issue a preliminary technical denial by certified mail or fax machine. The hospital has sixty calendar days from the date of the notice to submit the complete medical record. If the complete medical record is not received by the Commission within this time frame, the Commission will issue a final technical denial.

(B) For mail-in reviews, the Commission will request copies of medical records in writing. If the Commission does not receive the complete medical record within the specified time frame, the Commission will issue a preliminary technical denial by certified mail or fax machine. The hospital has sixty calendar days from the date of the notice to submit the complete medical record. If the Commission does not receive the complete medical record within this specified time frame, the Commission will issue a final technical denial.

(3) Readmission denial. If it is determined that the services provided in the second or subsequent admissions were the direct result of a premature discharge or should have been provided in the first or previous admission, the Commission will deny the admission in question

(4) Day outlier denial. If it is determined that any days qualifying as outlier days during the admission were not medically necessary, the Commission will deny those days.

(5) Cost outlier denial. If it is determined that services delivered were not medically necessary, not ordered by a physician, not rendered or billed appropriately, or not substantiated in the medical record, the Commission will deny those services.

(b) When an admission denial or day of stay denial is issued, the Commission will direct the claims administrator to recoup payment. The Commission will make an exception in the case of TMRP hospitals if the patient was originally placed in observation, and the hospital has been notified by the Commission that they may submit a revised outpatient claim solely for medically necessary outpatient services provided during the observation period. A physician's order for observation must be present in the physician's orders to document that the patient was originally placed in outpatient observation. The hospital must submit the revised outpatient claim and a copy of the Commission's notification letter to the claims administrator at the address indicated in the notification letter. The claims administrator must receive the outpatient claim and copy of the notification letter within one hundred eighty calendar days of the date of the notification letter. The claims administrator may consider payment for the medically necessary services provided during the twenty-four hour observation period. The hospital may provide observation services in any part of the hospital where a patient can be assessed, monitored and treated.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 10, 2003.

TRD-200301655
Steve Aragon
General Counsel
Texas Health and Human Services Commission
Effective date: March 30, 2003
Proposal publication date: October 4, 2002
For further information, please call: (512) 424-6576

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1 TAC §§371.202, 371.205, 371.207, 371.209, 371.211

The proposed repeals are adopted under authority granted to HHSC by §531.033, Texas Government Code, which provides the Commissioner of HHSC with broad rulemaking authority, and under §531.021 (a), Texas Government Code, which authorizes HHSC to administer the federal medical assistance (Medicaid) program in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 10. COMMUNITY DEVELOPMENT

PART 5. TEXAS DEPARTMENT OF ECONOMIC DEVELOPMENT

CHAPTER 176. ENTERPRISE ZONE PROGRAM

10 TAC §176.3, §176.8

The Texas Department of Economic Development (agency) adopts amendments to Chapter 176. Enterprise Zone Program, §176.3 and §176.8, relating to state and local government incentives to induce investment in severely depressed areas of the state, as authorized by Government Code, Chapter 2303, as amended. The amendments are adopted with changes from the proposed text as published in the December 27, 2002, issue of the *Texas Register* (27 TexReg 12144).

The amendments are necessary to clarify current program requirements and practices. In addition, a typographical error and subsection lettering are being corrected. An amendment to §176.3 clarifies that an area that has been designated by the federal government as a federal empowerment zone, enterprise community or renewal community is automatically a state enterprise zone. Amendments to §176.8 specify the information that must be included in a job certification application job report.

Comments on the proposed rules were received from Encore Wire, Ethicon, Kiewit Offshore Services, Ryan & Company, Texas Taxpayers and Research Association, and 3M. All of the comments related to amendments to section 176(d)(5)(B) and (1) noted the typographical error, (2) suggested that a unique employee identification number be required instead of a social security number and (3) changed "and" to "or" in the list of requested information and (4) changed "economic status" to "economic disadvantaged status." All of the comments stated that requiring social security numbers could contribute to identity theft.

While the typographical error will be corrected, the other comments will not be adopted. The agency shares the concerns about identity theft, and intends to obtain only the last four digits of employee social security numbers for job certification purposes. However, since the program must reserve the right to ask for a complete social security number for audit purposes, the rule amendment will be adopted as proposed. A unique employee identification number is not satisfactory as it cannot be independently verified, creating opportunities for program abuse and fraud.

All of the information on the list is required, not optional, therefore use of the word "or" in place of "and" is not appropriate. Since economic status must be reported for each job certified and some employees might not be disadvantaged, the agency thinks that use of the phrase "economic status" is more appropriate than "economic disadvantaged status."

The rule amendments are adopted pursuant to Government Code §481.0044, which directs the Governing Board of the agency to adopt rules for the administration of agency programs, Government Code §2303.051, which authorizes the agency to adopt rules for the Enterprise Zone program, and Government Code, Chapter 2001, Subchapter B, which prescribes the standards for rulemaking by state agencies.

Texas Government Code, Chapter 2303, as amended, is affected by this proposal.

§176.3. Eligibility Requirements for Designation of an Enterprise Zone.

(a) An applicant may make written application to the department for designation of an area within the applicant's jurisdiction as an enterprise zone if such area meets the following eligibility criteria:

(1) the area has a continuous boundary;

(2) the area is at least one square mile in size but does not exceed the larger of the following:

(A) 10 square miles exclusive of lakes, waterways and transportation arteries; or

(B) 5.0% of the area of the municipality, county or combination of municipalities or counties nominating the area, but not more than 20 square miles, exclusive of lakes, waterways and transportation arteries; and

(3) the area is a depressed area as defined under §176.1(c)(9) of this title.

(b) The department may not designate an area as an enterprise zone if in the jurisdiction of the municipality or county nominating the area as an enterprise zone there are three enterprise zones in existence

that were nominated as enterprise zones by the governing body of that municipality or county.

(c) Areas receiving designation from the federal government as federal empowerment zones, enterprise communities or renewal communities are automatically state enterprise zones without further qualification and are valid for the term permitted by federal law, as authorized by the Act, §2303.109(b). Designation of these areas as state enterprise zones does not affect the number of state enterprise zones a governing body may have as authorized by the Act, §2303.112.

(d) The governing body of a county may not nominate area in a municipality or a municipality's extraterritorial jurisdiction to be included in a zone unless the municipality is a joint applicant with the county. However, a county with a population of 750,000 or more, according to the most recent federal census, may nominate area in a municipality's extraterritorial jurisdiction to be included in a zone without the consent of municipality, as authorized by the Act, §2303.103(e).

(e) Documentation. For the purpose of showing that an area is qualified to be designated as an enterprise zone, the applicant must submit documentation, including the source, methodology and certification of the data. The authorized data source for population estimates is the State Data Center. The authorized data source for labor force data is the Texas Workforce Commission. Data will be considered current from the State Data Center and the Texas Workforce Commission if they are the most recently published estimates or if the enterprise zone application containing the data is received by the department before the 61st day after the date revised estimates of that data are published. An industrial park may be included as part of the enterprise zone without averaging in the unemployment and poverty data. However, data will be required if part of the zone includes an area which is outside the industrial park but within the same census area. The industrial park may not exceed 25% of the proposed zone area. To show an area has been designated as an industrial park the applicant must include documentation of official action taken by the governing body.

(1) Unemployment data. The average rate of unemployment for the area nominated during the most recent 12-month period for which data is available from the Texas Workforce Commission must be at least one and one-half times the state average for that period. Computation of the average unemployment rate for the proposed enterprise zone area will require choosing the smallest area that contains the zone for which unemployment data is available from the Texas Workforce Commission.

(2) Loss of Population. Loss of population may be calculated using population estimates for the applicant's jurisdiction produced by the Texas State Data Center. The 12% loss of population is the accumulated population loss experienced during the most recent six-year period for which data is available. The alternative 4.0% population loss is the loss of population experienced during the most recent three-year period for which data is available.

(3) Income data. If a proposed zone includes portions of more than one city or county, the median income should be calculated using figures for each city or county which includes part of the zone. In order to meet the low-income criteria, the smallest number of census areas that entirely contain the zone must reflect that at least 70% of the residents or households in that zone have below 80% of the median residents or household income for the locality or state, whichever is lower. To determine a low-income poverty area, at least 20% of the residents of the zone must have an income below the national poverty level as determined by the most recent available census data that contains the zone area. Census tracts, block groups, or other official census areas may be used to show poverty rates.

(4) Chronic abandonment or demolition. To qualify, the applicant must demonstrate to the department that 25% or more of the structures in such area are found by the governing body to constitute substandard, slum, deteriorated, or deteriorating structures as defined by local law. If local law does not define what constitutes a substandard, slum, deteriorated, or deteriorating structure, the governing body of the applicant may consider as substandard a structure which:

(A) is abandoned;

(B) does not have plumbing;

(C) has been condemned or cited for building or fire code violations by the appropriate city authority;

(D) is in an inadequate state of repair under applicable public health, safety, fire, or building codes;

(E) is the subject of a tax or special assessment delinquency stated as a percentage of total taxes assessed, which exceeds the fair market value of the land involved and the improvements thereon; or

(F) is functionally or economically obsolete as determined by a qualified appraiser.

(5) Substantial tax arrearages. The applicant must certify and submit evidence that within the proposed zone area, at least 25% of the commercial or residential taxes have gone unpaid and have been delinquent for at least one year. For purposes of determining substantial tax arrearages, the tax rolls of the applicable city or county nominating an area as an enterprise zone must be used.

(6) Substantial loss of businesses or jobs. A substantial loss of businesses or jobs is defined as a loss of at least 20% over the most recent one-year period or a loss of 30% over the most recent three-year period in the proposed zone area. The applicant must seek advance approval of documentation to be provided to the department.

(7) Declaration of an area as a state or federal disaster area. The applicant must provide documentation by the applicable state or federal government that the area has been declared a state or federal disaster area within the most recent 18-month period.

(8) Substantial increase in individuals under the age of 18 arrested for criminal activity. The applicant must provide data from the appropriate law enforcement authority or authorities that the proposed zone area has had a substantial increase in the number of individuals younger than 18 years of age arrested due to criminal activity. A substantial increase in arrests is defined as at least a 20% increase over the most recent three-year period.

(f) Citizen participation. The department will not approve the designation of an area as an enterprise zone unless:

(1) the governing body of the applicant shall first notify the department of the date it will hold a public hearing as required under the Act, §2303.103, and these rules for the purpose of nominating an area as an enterprise zone or to amend the boundaries of a designated enterprise zone by encompassing additional land area into the zone. The notice to the department shall be given in writing not less than seven days prior to the date of the public hearing; and

(2) notice of such hearing is given to the public by publishing once in a newspaper of general circulation in the municipality or county or combination of municipalities or counties and posting a copy of the same at the city hall or county courthouse not later than seven days prior to the date of the hearing. Such notice shall contain a description of the area proposed by the municipality or county or combination of municipalities or counties to be designated as an enterprise zone, and the date, time, and location of such hearing. The description

of the area should be worded so that residents of the area and other interested parties may reasonably identify the area to be discussed at the public hearing. The notice shall also encourage all interested parties, including residents of the proposed zone to present their views at the hearing. The hearing must include a presentation on the proposed location of the zone and the provisions for any tax or other incentives applicable to business enterprises in the zone. A municipality or county or combination of municipalities or counties must adopt the enterprise zone nominating ordinance or order within 180 calendar days of the date the last public hearing was held. Further, the application for zone designation must be received by the department within 90 calendar days of the date of final approval of the nominating ordinance or order, or a new public hearing must occur and a new nominating ordinance or order must be enacted.

§176.8. Approval Standards.

(a) Final approval standards for designation of enterprise zones. Within 10 business days of final approval of the designation of a zone by the executive director, the staff shall present the form of the negotiated agreements to the governing body or bodies of the applicant. Such agreements must include designation of the zone and the administrative authority, if any, and its function and duties and any other information required under the Act and this chapter. The department shall complete the negotiations and sign the agreements in accordance with the Act, §2303.107.

(b) Approval standards for designation of enterprise projects. The department shall designate qualified businesses as enterprise projects on a competitive basis. Applications for designation of enterprise projects will be accepted on a quarterly basis on or before the following application deadlines:

(1) The application deadline for receipt of enterprise project applications by the department is 5:00 p.m., Austin, Texas time, on the first business day of every third month beginning with September 1995. The department may designate no more than 85 enterprise projects during any fiscal biennium, as specified by the Act, §2303.403.

(2) The department will designate qualified businesses as enterprise projects under the following conditions:

(A) The maximum number of qualified businesses that may be nominated by a governing entity(s) and designated as enterprise projects located in qualified enterprise zones during any state fiscal biennium is:

(i) Four, plus two additional bonus projects the department may award in a municipality or a county or any nominating combination thereof with a population of less than 250,000.

(ii) Six, if the governing body of the enterprise zone is the governing body of a municipality or a county with a population of 250,000 or more.

(iii) The enterprise project designations will be granted by the department on a first-come, first-served basis, subject to the limitations in this section and based upon the availability of enterprise project designations. Although enterprise project designations will be awarded on a first-come, first-served basis, applications will be scored for the purpose of determining if the project meets the minimum threshold score of 30 points, as well as for awarding bonus enterprise project designations as defined in subparagraph (B) of this paragraph.

(B) Each eligible enterprise project application will be scored against other eligible enterprise project applications approved during a quarterly deadline, as specified in paragraph (1) of this subsection. If an enterprise project application scores within the top quartile (25%) of the other eligible applications approved in a quarterly deadline, the nominating enterprise zone authority with a population of less than 250,000 may nominate a qualified business for a bonus enterprise project designation on any subsequent quarterly deadline within the state fiscal biennium. Designations will be awarded only if enterprise project designations are available. The bonus enterprise project applications will be scored in the same manner as all other enterprise project applications received on each quarterly deadline. If a bonus project application scores within the top quartile (25%) of all the bonus and regular applications received on a quarterly deadline, the nominating enterprise zone authority with a population of less than 250,000 may nominate an additional bonus enterprise project for designation on any subsequent quarterly deadline within the same fiscal biennium. The bonus enterprise project designations may only be located in an enterprise zone within the governing body's jurisdiction from which the bonus enterprise project designation was earned, subject to enterprise project availability. Each application submitted to the department will be evaluated on the commitments made by the community and qualified business as specified under the Act, §2303.405. In no case may an enterprise zone governing body have a combined total of more than six enterprise project designations, including regular and bonus designations, during the state fiscal biennium.

(C) In the event the number of enterprise project applications submitted during a quarterly round exceeds the number of remaining designations that may be made during the state fiscal biennium, as specified under paragraph (1) of this subsection, the applications that score the highest based upon the evaluation system specified in this chapter will be awarded designations.

(3) The criteria for evaluating enterprise project applications will be based on weighting as specified by the Act, §2303.406(b). The department will make its decision on a weighted scale in which:

(A) 50% of the evaluation weight will be evenly divided between the economic distress of:

(i) the enterprise zone in which a proposed enterprise project is or will be located; and

(ii) the area within the enterprise zone where the project is or will be located. In the event the zone was designated using primary or secondary distress criteria that are not available on a sub-community or sub-enterprise zone level, the economic distress of the zone will be evaluated using the data at the most discrete level available.

(B) 25% of the evaluation depends on the local effort to achieve development and revitalization of the enterprise zone. This evaluation criteria is designed to measure the level of local support on the part of the community or communities nominating the qualified business and the qualified business applying for enterprise project designation. This includes, but is not limited to, such factors as set forth in the Act, §2303.405(c) - (d) and §2303.516(a) and (b); and

(C) 25% of the evaluation depends on the evaluation criteria as determined by the department, which will be evenly divided between:

(i) the amount of capital investment and the number of jobs to be created or retained by the qualified business, as applicable; and

(ii) the type and wage level of the jobs to be created and retained by the qualified business. The wage level of the jobs will be evaluated on how they compare to the regional average salary of a high wage/high skill job.

(c) Period for which designation is in effect.

(1) An area may be designated as an enterprise zone for a maximum period of seven years. However, if an area is designated as a federal empowerment zone or a sub-designation of that initiative, the area may be designated for a longer period not to exceed that permitted by federal law. Any designation of an area as an enterprise zone, shall remain in effect during the designation period beginning on the date of the designation and ending on the earliest of:

(A) September 1 of the seventh calendar year following the calendar year in which such date ending the enterprise zone designation occurs, or in the case of federal enterprise zone designation, the date federal designation period ends, or

(B) following a public hearing, the date the department removes the designation of zone for the following reason:

(i) the area no longer qualifies for designation as an enterprise zone as forth in the Act, §2303.102 or this chapter; or

(ii) the department determines that the governing body has not complied with commitments made in the ordinance or order nominating the area as an enterprise zone.

(2) A qualified business may be designated as an enterprise project for a maximum period of five years. The designation of a qualified business as an enterprise project shall remain in effect during the period beginning on the date of the designation and ending on the earliest of:

(A) five years after the date the designation is made; or

(B) the last day that completes the original project designation period of a qualified business that has assumed the designation of the enterprise project through a lease or purchase of a designated qualified business for the purpose of continuing its operations in the applicable enterprise zone under a name or legal structure other than that of the qualified business originally receiving the designation and that has met the requirements of the department to qualify for the assumption, as specified under §176.6(c) of this title. The assumption of a project designation or a name change by a qualified business which must be made during the 5-year period, does not extend the original designation period, which is applicable to the original and subsequent designee, and which will end on the earliest of the last day of the original five-year designation; or

(C) following a public hearing by the governing body or bodies that nominated the qualified business for enterprise project designation, the date the department determines that the qualified business is not in compliance with any requirement for designation as an enterprise project. The governing body or bodies will be deemed to have held a public hearing if the removal of the designation of an enterprise project is included as an agenda item of a regular session in which the governing body or bodies meet to take official action. The department will act to dedesignate an enterprise project upon the written request of a governing body or bodies after:

(i) the governing body or bodies has provided written notice to the qualified business that has been designated an enterprise project, 30 calendar days in advance of the proposed action, that the governing body or bodies is initiating proceedings to remove the project designation. The notice must specify the reason why the governing body or bodies believes the project is in noncompliance and specify the time, date and location where the enterprise zone governing body or bodies plans to take official action to request the department to remove the designation. A copy of the notice and copies of any written responses to the notice by the qualified business must be provided to the department;

(ii) a public hearing is held and a resolution adopted that requests the department to remove the project designation as of a specific date. The resolution must specify the conditions that caused the dedesignation process to be initiated and include a finding that written notice as specified under this title has been given;

(iii) following the governing body's or bodies' written request to the department to dedesignate an enterprise project, the qualified business may appeal the governing body's or bodies' action to the department's executive director. Such appeal must be made in writing within thirty days of the governing body's or bodies' written request to the department for dedesignation. Upon receipt of such appeal, the executive director shall act upon the appeal within 30 days from the date the appeal is received.

(d) Approval standards for certification of a qualified business. Qualified business certification and the certification of new or retained jobs may be granted by the local governing body or bodies for purposes of local benefits, if applicable, or the department, for purposes of state benefits, as applicable, in accordance with the Act. The department shall provide the assistance the Comptroller requires in administering this section.

(1) Once certified by the local governing body, a qualified business must apply to the local governing body for local tax benefits.

(2) The governing body or bodies must provide written notification to the department of each commitment made to a qualified business for a one-time state sales tax refund, authorized under the Tax Code, §151.431, or state franchise tax refund, under the Tax Code, §171.501. Once certified a qualified business by the department, the business must apply to the Comptroller for state sales tax refunds, under the Tax Code, §151.431, or state franchise tax refunds, under the Tax Code, §171.501, as applicable. The written notification to the department must include:

(A) a copy of the request for the incentive sent to the governing body or bodies by the business;

(B) an original or a certified copy of the resolution adopted to nominate the qualified business and setting the nomination period during which the qualified business will create or retain the required jobs to receive the intended benefit; and

(C) a letter to the department from the governing body or bodies to the department forwarding the resolution and officially nominating the business.

(3) A business that is an enterprise project that is certified a qualified business must also apply to the Comptroller for state sales tax refunds, under §151.429, Tax Code or state franchise tax reductions, under §171.1015, Tax Code, as applicable.

(4) Refunds of state sales or use taxes provided to an enterprise project under the Tax Code, §151.429, are conditioned on the enterprise project maintaining at least the same level of employment of qualified employees as existed on the date it was certified as eligible for a refund for a period of three years from that date. The department shall annually certify to the Comptroller and the Legislative Budget Board whether that level of employment of qualified employees has been maintained. In the event that the department certifies that such a level has not been maintained, the Comptroller shall assess that portion of the refund attributable to any such decrease in employment, including penalty and interest from the date of refund.

(5) A state-designated project may request certification of its jobs created or retained, as specified in §176.2(b)(6) of this title, by the department on an annual or semi annual basis during the applicable five year designation period within the limits of the number of

jobs allocated at the time of its project designation in accordance with the Act, §2303.407. An enterprise project designated after August 31, 1995 may not receive a tax refund under the Tax Code, §151.429, or a tax reduction under the Tax Code, §171.1015, before September 1, 1997.

(A) The department shall establish a reporting format for all documentation related to certification of new or retained jobs at the qualified business.

(B) The job reports, which must be included in the certification application submitted to the department, shall include any information the department deems necessary including, but not limited to, a numeric listing of positions being claimed by the business, and for each position claimed

(i) a job title;

(ii) employee name;

(iii) employee's social security number;

(iv) payroll and actual hours worked during claim period;

(v) date of hire, and date of termination or current employment status;

(vi) indication of zone residency; and

(vii) economic status.

(6) Only qualified businesses that have been certified by the department to the Comptroller and the Legislative Budget Board are eligible for a franchise tax reduction under the Tax Code, §171.1015.

(e) Approval standards for certification of a builder as a qualified business.

(1) A builder must complete the enterprise project application form and other information as stipulated in this subsection to be eligible to be designated an enterprise project. A builder that meets the criteria in this chapter is eligible for the benefits allowed a qualified business under the Act. To be eligible to apply for enterprise project designation, the builder or consortium of builders that is certified as a qualified business must have permanent offices located in Texas. In addition to the information required of a business applying for enterprise project designation under §176.6 of this chapter, the applicant must provide:

(A) the name of the builder, name of company under which building occurs, principle business location, address of office serving the enterprise zone construction activity, telephone numbers, including the telecommunication devices for the deaf (TDD) number, if available, and facsimile numbers if applicable;

(B) five written references from satisfied homeowners for whom properties were constructed by the builder in the three years preceding the date of the application;

(C) current bank references and bank references for the past three years;

(D) financial evidence including two years of tax returns or other satisfactory evidence to substantiate financial viability as a builder; and

(E) documentation that supports participation in a 10-year insured warranty program.

(2) A builder proposing a housing project in an enterprise zone, must provide a complete description of the new residential housing to be constructed, including a statement concerning whether the housing constitutes affordable housing under the governing body's or bodies' criteria, preliminary building plans, the location(s) of planned construction, number of units to be constructed, estimated sales price of homes, statement of affirmative action participation in employment practices, a statement regarding the coordinated use of other federal, state, or local funds, and other enhancements to the project. The applicant builder(s) must meet all requirements other than physical headquarters location in the zone and hiring requirements required of other enterprise projects.

(f) Approval standards for certification of neighborhood enterprise associations.

(1) Such standards will be determined and final certification may be granted by local governing body or bodies or the department as applicable in accordance with the Act, §2303.302.

(A) The governing body or bodies or the department may not grant its approval unless the association has hired or appointed a chief executive officer.

(B) The department may not grant state certification to a neighborhood enterprise association, unless that association has first made a diligent effort to obtain certification from the applicable enterprise zone governing body or bodies and the association provides documentation to the department of that effort to obtain local certification and the reasons the association was unable to obtain certification from the applicable governing body or bodies.

(2) The neighborhood enterprise association may implement projects, other than those enumerated in the Act, by submitting an application to the governing body or the state for approval of the specific project or activity. Applications submitted for approval to the governing body or the state must describe the nature and benefit of the project, including:

(A) how it will contribute to the self-help efforts of the residents of the area involved;

(B) how it will involve the residents of the area in project planning and implementation;

(C) whether there are sufficient resources to complete the project and whether the association will be fiscally responsible for the project; and

(D) how it will enhance the enterprise zone in one of the following ways:

(i) by creating permanent jobs;

(ii) by physically improving the housing stock;

(iii) by stimulating neighborhood business activity; or

(iv) by preventing crime.

(3) An existing responsible unit of government may contract with a neighborhood enterprise association to provide services in an amount corresponding to the amount of money saved by the unit of government through this method of providing a service.

(g) If the governing body or bodies does not specifically disapprove of a project proposed by the association before the 45th day after the day of the receipt of the application, it shall be considered approved. If the governing body or bodies disapproves of the application, it shall specify its reasons for this decision and allow 60 days for the applicant to make amendments.

(h) The association may enter into contracts and participate in joint ventures with the state or a state agency or institution. The

association may receive money without approval of the governing body or bodies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 22. PRACTICE AND PROCEDURE

SUBCHAPTER M. PROCEDURES AND FILING REQUIREMENTS IN PARTICULAR COMMISSION PROCEEDINGS

16 TAC §22.251

The Public Utility Commission of Texas (commission) adopts new §22.251, relating to Review of Electric Reliability Council of Texas (ERCOT) Conduct, with changes to the proposed text as published in the October 11, 2002 *Texas Register* (27 TexReg 9521). The new section is necessary to establish procedures for affected entities to make written complaints to the commission regarding decisions or acts, committed or omitted, by ERCOT. The scope of permitted complaints includes ERCOT's performance as an independent organization under the Public Utility Regulatory Act (PURA) and ERCOT's promulgation and enforcement of protocols and procedures relating to reliability, transmission access, customer registration, and settlement. The new section is adopted under Project Number 25959.

In addition to this new section, the commission is also adopting under Project Number 25959 the following substantive rules in Chapter 25 of this title (relating to Substantive Rules Applicable to Electric Service Providers): an amendment to §25.361, relating to Electric Reliability Council of Texas (ERCOT), and new §25.362, relating to Electric Reliability Council of Texas (ERCOT) Governance.

The commission staff conducted a public hearing on the proposed new section on December 3, 2002, at which an ERCOT representative offered oral comments. These comments have been summarized herein, together with ERCOT's written comments.

The commission received comments on the proposed amendments on November 12, 2002 from the Alliance for Retail Marketers, an association consisting of the retail electric providers Constellation New Energy, Inc., Green Mountain Energy Co., and Strategic Energy Co. (ARM); American Electric Power (AEP); the City of Austin, doing business as Austin Energy, and the City of San Antonio, acting by and through the San Antonio City Public Service Board (City Utilities); CenterPoint Energy, Inc. (CenterPoint); a coalition of consumer organizations consisting of Texas Ratepayers' Organization to Save Energy, Texas Legal Services Center, Consumers Union Southwest Regional Office, and Public Citizen Texas Office (Consumers); ERCOT; and TXU Energy Trading Company L.P., TXU Energy Retail Company L.P., and Oncor Electric Delivery Co. (collectively, TXU). Reply comments were submitted by ERCOT, TXU and the Center for Public Policy Dispute Resolution (CPPDR). All comments have been fully considered by the commission.

The commission specifically requested comments on the following questions:

1. Does the requirement in the Administrative Procedure Act, Texas Government Code §2003.049(b), that the utility division of the State Office of Administrative Hearings "conduct hearings related to contested cases" bar a commission administrative law judge (ALJ) from conducting a hearing to determine whether to grant a request for suspension of enforcement, as contemplated by proposed §22.251(i) (relating to Suspension of Enforcement)? (Note that the proposed rule contained a mistaken reference in this question to §22.251(f), but correctly identified the title and substance of the referenced subsection.)

2. Does the requirement in the Administrative Procedure Act, Texas Government Code §2003.049(b), that the utility division of the State Office of Administrative Hearings "conduct hearings related to contested cases" bar a commission ALJ from conducting binding mini-trials and moderated settlement conferences by agreement of the parties as contemplated by proposed §22.251(n) (relating to Availability of Alternative Dispute Resolution)? (Note that the proposed rule contained a mistaken reference in this question to §22.251(m), but correctly identified the title and substance of the referenced subsection.)

3. Should proposed §22.251(b) be modified to clarify that all appeals and complaints of ERCOT decisions shall be heard by the commission pursuant to this section prior to an appeal to any court of competent jurisdiction?

4. Should §22.251(c)(1)(E) be deleted because it is duplicative of the flexibility contained in the good cause exception provision, §22.251(c)(2)?

Because each of the questions relates to a specific subsection of the new rule, the comments submitted in response to these questions are summarized together with the comments on the subsection to which they pertain.

ARM, in written comments, and ERCOT, in oral comments at the public hearing, generally supported the adoption of this rule.

§22.251(a) Purpose

City Utilities commented that the term "entity" should be employed where the new rule identifies those who may avail themselves of the procedures established by the rule. City Utilities represented that municipally owned utilities are not included within the definitions of persons, or affected persons contained in PURA, the Texas Government Code, and the commission's rules, or the definition of public utilities contained in PURA. CenterPoint, by contrast, commented the use of the term "party" is too broad, and should be changed to "Market Participant directly subject to the ERCOT Protocols and directly affected by ERCOT's decisions." Centerpoint also commented that commission Staff and the Office of Public Counsel (OPC)

can represent the public interest and interests of residential and small business customers.

In response to CenterPoint's comments, the commission declines to make non-market participants dependent on others to safeguard their rights. Instead, the new rule is intended to ensure that those who are or would be harmed by ERCOT actions have recourse to the commission for relief. Foreclosing an interested person from challenging an ERCOT action before the commission is likely to result in challenges in other forums, such as the courts, that are less well equipped to resolve them. The commission adopts the change proposed by City Utilities, that the word "entity" be substituted for "party" in the new rule, except where the term is used to refer to a participant in a proceeding at the commission.

§22.251(b) Scope of complaints

AEP, TXU, and ERCOT commented that, based on both the commission's statutory duty under PURA and the commission's substantive expertise, the commission should hear initial appeals of ERCOT issues, to the extent the appeal involves issues over which the commission has jurisdiction. Both AEP and Consumers commented that the commission could not determine the scope of its jurisdiction through this rulemaking. CenterPoint commented that the procedural path for review of ERCOT decisions should be made clearer.

The commission acknowledges that it is not empowered to carve out for itself areas of exclusive jurisdiction. The question posed in connection with this subsection of the proposed rule was intended to solicit input regarding whether the commission should make express the requirement that issues over which the commission has jurisdiction be brought first to the commission. The benefits that the commission envisioned of including such a requirement included limiting the exercise of concurrent jurisdiction and the inefficiencies attendant to cases pending simultaneously on an administrative and judicial level, helping to limit the cases in which courts are called upon to rule on areas involving technical issues without the benefit of the commission's expertise, and reducing confusion. Based on the comments and its own legal analysis, the commission is not including in the new rule a requirement that complaints about, and appeals of, ERCOT actions that are subject to commission jurisdiction must be made to the commission before the complaining or appealing entity seeks relief from Texas state courts. Nevertheless, the commission has an interest in court cases that construe ERCOT's protocols and ERCOT's obligations in the electricity market. In order that the commission gets prompt notice of any such lawsuits, it is adding a new subsection (p) that requires ERCOT to provide prompt notice that a lawsuit has been filed against it or that a proceeding against it has been initiated at the Federal Energy Regulatory Commission.

ERCOT suggested that the rule should refer to ERCOT "procedures" instead of ERCOT "rules," so as to avoid possible confusion with commission rules. ERCOT also commented that the term "settlement" in the proposed rule is a term of art and suggested the use instead of the statutory language that encompasses settlement issues: "accounting for the production and delivery of electricity among generators and all other market participants."

The commission agrees with ERCOT's suggestion and changes the references to ERCOT rules throughout the new rule to refer to ERCOT protocols and procedures, instead of rules. The commission also agrees with ERCOT's comment regarding the use of the term settlement, and the new rule therefore includes ERCOT's proposed language, instead of the term "settlement" that was included in the proposed rule.

§22.251(c) Requirement of compliance with ERCOT Protocols

ERCOT commented that language should be added to provide that the commission will dismiss complaints or appeals if the complainant has failed to comply with applicable ERCOT processes, including timely submittal to ERCOT of written comments on proposed protocols or protocol revisions, unless the commission finds good cause for the failure to comply with such procedures. ERCOT commented that language should be added to subsection (c)(1) and (c)(1)(B) of the new rule to expressly include the requirement that a complainant comply with the ERCOT protocol revision process or other applicable ERCOT prerequisites.

The commission agrees that complaints filed by entities that have not used the relevant ERCOT procedures are subject to dismissal or abatement, absent a showing of satisfaction of one of the conditions established by the rule for avoiding the necessity of complying with ERCOT procedures, and the rule has been clarified to that effect. The commission believes that an entity should participate in ERCOT processes prior to appealing to the commission the board's decision on that matter, unless there is good cause for not so participating. Of course, the rule also provides that the commission staff and OPC are excused from this requirement.

CenterPoint commented that subsection (c)(1) and (c)(1)(B) should be deleted. According to CenterPoint, only a market participant, Staff, or OPC should be allowed to bring a complaint.

The commission declines to exclude non-market participants from the procedures established by the new rule. As explained in connection with §22.251(a), the new rule is intended to ensure that those who are or would be harmed by ERCOT actions have recourse to the commission for relief.

ERCOT also commented that the language "bound to engage in" included in subsection (c)(1)(B) is subject to interpretation and proposed substituting "required to comply with."

The commission agrees that the proposed language was not very clear. The commission is revising §22.251(c)(1)(B) as suggested by ERCOT.

ERCOT commented on one of the exceptions to the requirement that an entity first attempt to resolve an issue in the ERCOT deliberative processes: the use of the standard of whether compliance with ERCOT procedures would *inhibit* the ability of the affected entity to provide continuous and adequate service, as included in subsection (c)(1)(C) of the proposed rule. ERCOT argued that this standard is vague and should be replaced by the more concrete and exacting standard of whether compliance with ERCOT procedures would *prevent* the ability of the affected entity to provide continuous and adequate service.

The commission believes that the use of the term "prevent" creates a standard that is too difficult to meet. Moreover, the commission's use of the term "inhibit" is based on the ERCOT's protocols. Section 20.1(3)(c) of the ERCOT Protocols reads: "Nothing in this ADR Procedure is intended to limit or restrict . . .. The right of a Market Participant or ERCOT to file a petition seeking direct relief from the PUCT or any other Governmental Authority without first utilizing this ADR Procedure where an action by ERCOT or a Market Participant *might inhibit the ability of the*

affected party to provide continuous and adequate electric service." (Emphasis supplied.) For all of these reasons, the commission declines to incorporate ERCOT's proposed change.

TXU commented that §22.251(c)(1)(D) should be deleted. According to TXU, ERCOT protocol processes are adequate, and it would be detrimental to allow complaints regarding the protocol adoption or revision process directly to the commission. ERCOT commented that §22.251(c)(1)(D) should be modified to better reflect what ERCOT understood to be Staff's interest in ensuring that a complainant not be required to engage in additional ERCOT processes prior to complaining to the commission.

Generally, the commission supports the use of ERCOT's protocol processes, except where the complaining entity can show good cause for not complying with those processes. Therefore, the commission has not included proposed subsection (c)(1)(D) in the new rule.

TXU and ERCOT commented generally that the new rule appropriately acknowledges the ERCOT ADR and Protocol Revision processes. However, both TXU and ERCOT commented that §22.251(c)(1)(E) could be used to avoid the employment of those ERCOT processes, and therefore suggested that §22.251(c)(1)(E) be deleted. CenterPoint and Consumers commented that inclusion of the futility exception in subsection (c)(1)(E) of the proposed rule is both duplicative of the not appropriate/good cause exception in subsection (c)(2), and creates an inconsistent, second standard for bypassing ERCOT's processes.

The commission agrees with the commenters that §22.251(c)(1)(E) of the proposed rule is unnecessary. A complainant contending that compliance with ERCOT processes would be futile can make such a claim pursuant to §22.251(c)(2), arguing that good cause exists for excusing compliance with ERCOT ADR or other applicable processes. Therefore, the commission has not included proposed subsection (c)(1)(E) in the new rule.

§22.251(d) Formal complaint

ERCOT commented that the timelines in the new rule should be shortened. ERCOT noted that most complaints would have already been subject to some process and that prompt resolution of the issues is desirable. ERCOT also commented that it appreciated the commission's adoption of the 35-day appeal period for complaints related to protocol revisions, but suggested more general language to embrace other ERCOT processes with specific timelines. Finally, ERCOT commented that issues for which a docket has already been established be excluded from the timeline established by subsection (d).

The deadlines in the proposed rule were intended to provide for prompt but orderly resolution of disputes, recognizing that interested parties must have an opportunity to prepare information to present their position to the commission and for the commission to consider it. The commission is adopting a uniform deadline of 35 days for filing appeals of ERCOT actions. Having more than one deadline for appeal might engender confusion, in some cases, about what the applicable deadline is. This confusion can be avoided by a uniform deadline for filing complaints. The commission is not shortening the other procedural deadlines in the rules. The commission does not believe that it is realistic to shorten the other procedural deadlines, if it is to afford parties a fair opportunity to present their position. The commission also declines to adopt ERCOT's proposed language to accommodate cases in which a deadline is established by ERCOT protocols. ERCOT's proposed language would allow ERCOT to unilaterally change the applicable timelines and might allow ERCOT to establish unreasonably short deadlines for filing a complaint.

With respect to ERCOT's comment that issues for which a docket has already been established should be excluded from the timeline established by subsection (d), ERCOT did not explain how such a docket might have already been established. Regardless, §22.251(d) of the new rule affords the presiding officer the flexibility to extend the deadline upon a showing of good cause. In addition, §22.251(k) allows the presiding officer to extend or shorten the time periods established by the new rule. The commission concludes that this flexibility is sufficient to accommodate the situations apparently contemplated by ERCOT and that the proposed change is therefore unnecessary.

Consumers commented that complainants may not be able to identify all persons who would be directly affected by the commission's decision, as required by proposed §22.251(d)(1)(B)(ii). Consumers suggested that the language therefore be modified to require the identification of all classes of persons who would be directly affected, to the extent those classes of persons can be identified.

The commission agrees that it may not always be possible for a complainant to name all persons who will be directly affected as a result of the commission's decision. Therefore, the new rule includes language requiring a complainant to identify all entities or classes of entities who will be affected, to the extent those entities or classes of entities can reasonably be identified.

ERCOT commented that §22.251(d)(1)(B)(iv) should have language added to clarify the applicable ERCOT protocols referred to, and to make clearer that the complainant must specify the provision of subsection (c) upon which the complainant relies to excuse its compliance with applicable ERCOT procedures.

The commission notes that the proposed rule contained a mistaken reference to subsection (b) and the new rule corrects that reference. The commission also agrees with the sentiment of ERCOT's comment and has added language clarifying the reference to ERCOT protocols and the statement required of complainants who contended that they are not required to use the ERCOT procedures pursuant to §22.251(c).

ERCOT commented that §22.251(d)(1)(C) should be modified to require complainants to provide a detailed and specific statement of the issues presented for commission review.

The commission agrees with ERCOT's proposed change and the new rule includes ERCOT's proposed language.

ERCOT commented that §22.251(d)(2) should make explicit reference to review of requests for suspension of enforcement under §22.251(i).

The commission agrees that the reference proposed by ERCOT might make the new rule clearer. The new rule is therefore modified to include a reference to §22.251(i).

ERCOT recommended that the rule require service of a copy of a complaint on ERCOT's General Counsel.

ERCOT's comment was unopposed and does not appear to impose any undue hardship on an entity. Therefore, ERCOT's proposed language is included in the new rule.

§22.251(e) Notice

ERCOT commented that it is standard practice, and the new rule should therefore expressly allow notice to be provided to Qualified Scheduling Entities (QSEs) and ERCOT committees and subcommittees through electronic and website posting. ERCOT also suggested that the rule allow it to use electronic email attachments to serve a copy of the complaint on interested entities, as ERCOT is required to do. ERCOT also proposed that the requirement that the docket number be included in the notice be modified to apply only if a docket number has been assigned to the complaint.

The commission agrees that notice to QSEs and ERCOT committees and subcommittees through electronic and website posting is standard practice for ERCOT market participants. The language of the proposed rule was intended to authorize this practice. ERCOT's proposed change to more explicitly authorize such notice does not seem necessary. Regarding ERCOT's proposed clarification that the copy of the complaint ERCOT is required to provide may be an electronic copy, the commission had contemplated that the copy would be an attached electronic copy, and ERCOT's proposed clarification is consistent with the commission's intent and is therefore adopted. Finally, the requirement that the docket number be provided is retained in the rule. This is an important piece of information for entities who wish to participate in a proceeding and is normally available shortly after a complaint is filed.

§22.251(f) Response to complaint

ERCOT proposed that the response to a complaint be due in 20 days, instead of the 28 days allowed for in the proposed rule.

As is noted above, the rule retains essentially the same procedural timeline as was included in the proposed rule, to allow entities adequate time to prepare information to present their position to the commission.

§22.251(g) Comments by commission staff and motions to intervene

ERCOT proposed that comments by commission staff representing the public interest and motions to intervene be due in 30 days, instead of the 42 days allowed for in the proposed rule.

As is noted above, the rule retains essentially the same procedural timeline as was included in the proposed rule, to allow entities adequate time to prepare information to present their position to the commission.

§22.251(h) Reply

ERCOT commented that the new rule should require that a reply, if any, be filed within 40 days, instead of the 52 days allowed for in the proposed rule.

As is noted above, the rule retains essentially the same procedural timeline as was included in the proposed rule, to allow entities adequate time to prepare information to present their position to the commission.

§22.251(i) Suspension of enforcement

AEP, TXU, CenterPoint, and Consumers commented that the Administrative Procedure Act (APA), Texas Government Code Annotated §2003.049(b), requires that the utility division of the State Office of Administrative Hearings (SOAH) conduct hearings related to contested cases before the commission, unless a hearing is conducted by one or more commissioners. These commenters quoted §2001.003(1) of the APA for the proposition that a "contested case" is "a proceeding . . . in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing." Therefore, according to these commenters, a commission administrative law judge (ALJ) cannot conduct a hearing to determine whether to grant a request for suspension of enforcement. AEP commented that a determination cannot be made regarding a request for suspension of enforcement until after a hearing is held by either a SOAH ALJ or one or more of the commissioners.

ERCOT commented that the commission should favor prospective relief unless the commissioners find good cause exists for suspending enforcement. ERCOT commented that good cause should be found only in the most extraordinary of instances, such as where an entity's financial stability is threatened. ERCOT also commented that the APA does not prohibit, and ERCOT does not oppose, a commission ALJ conducting an evidentiary proceeding for the limited purpose of developing an evidentiary record to aid the commissioners in deciding whether to grant a requested suspension of enforcement.

The commission agrees with AEP, TXU, CenterPoint, and Consumers that the commission ALJ may not conduct a hearing in a contested case proceeding. Therefore, the new rule omits proposed §22.251(i)(1) that would have allowed a commission ALJ to convene a hearing to adduce evidence as to whether to suspend enforcement of the ERCOT action or decision that is the source of a complaint. The commission does not agree with AEP, however, that a hearing must always be held before a decision can made as to whether to grant a request to suspend enforcement. The new rule establishes a good cause standard for granting a request for suspension of enforcement and places the burden of proof on the complainant. The description of the good cause standard has been modified to correspond more closely to the standard that courts apply in deciding whether to grant an injunction. The commission also agrees that relief should generally be prospective.

§22.251(l) Standard for review

ERCOT commented that the commission should avoid directly ordering specific changes to the ERCOT protocols and ERCOT systems and proposed instead that, when the commission finds merit to a complaint, the commission instead issue only orders providing guidance to ERCOT for further action, including developing and implementing protocol revisions. CenterPoint commented that, because §22.251(l) would give deference only to ERCOT decisions made under procedures equivalent to those required under the APA, and because ERCOT does not employ such procedures, the commission would review virtually all complaints on a *de novo* basis. CenterPoint commented that this would be a cumbersome process that would cause uncertainty as to the effect and enforceability of ERCOT decisions and delay implementation of market corrections.

The commission agrees that it will generally be preferable for the commission to direct ERCOT to make necessary changes. However, there may be instances in which other relief is more appropriate. Consequently, the new rule includes language similar to that proposed by ERCOT, but reserves to the commission the discretion to order such relief as the commission deems appropriate. The provision concerning the granting of relief has been moved from subsection (l), which establishes the standard for review, to new subsection (o).

The commission disagrees with CenterPoint's characterization of the new rule, ERCOT's current processes, and the likely effect of the new rule. First, the new rule does not contemplate a *de novo* review of virtually all ERCOT actions or decisions. Indeed, §22.251(l) specifically refers to ERCOT ADR procedures that include processes in which a neutral arbiter makes findings of fact and due process guarantees are observed. The use of such a procedure in the ERCOT ADR proceeding would result in the application of a substantial evidence, arbitrary and capricious standard at the commission. Complaints requiring *de novo* resolution by the commission will be limited to those in which parties have not been afforded adequate process, or necessary factual determinations have not yet been made.

§22.251(n) Availability of alternative dispute resolution

In response to question number 2 posed by the commission, AEP commented that the APA does not prohibit a commission ALJ from conducting mini-trials and moderated settlement conferences, provided such proceedings are either non-binding or by agreement of the parties. TXU and ERCOT commented that the proceedings described in §22.251(n) may be conducted by a commission ALJ, provided the parties participate voluntarily. City Utilities, Consumers, and CPPDR commented that the language of §22.251(n) varies slightly from the language of Civil Remedies and Practices Code Chapter 154 (which authorizes the use of ADR procedures), particularly with respect to the proposed use of binding mini-trials.

The Texas Government Code provides that "it is the policy of this state that disputes before governmental bodies be resolved as fairly and expeditiously as possible and that each governmental body support this policy by developing and using alternative dispute resolution (ADR) procedures in appropriate aspects of the governmental body's operations and programs." Texas Government Code Annotated §2009.002. ADR processes include both the procedures described by Chapter 154, Civil Practice and Remedies Code, and combinations of the procedures described by Chapter 154. Texas Government Code Annotated §2009.003(1).

Chapter 154 of the Civil Practices and Remedies Code lists the following ADR procedures: mediations, mini-trials, moderated settlement conferences, summary jury trials, and arbitrations. Texas Civil Practices and Remedies Code Annotated §§154.023-154.027. Parties may agree in advance that an award issued in an arbitration will be binding and enforceable. Texas Civil Practices and Remedies Code Annotated §154.027(b). Therefore, the commission concludes that a binding mini- trial, if agreed to by the parties in advance, is a combination of procedures described by Chapter 154 of the Texas Civil Practices and Remedies Code. Moreover, the use of a binding mini-trial, where agreed to by the parties, may provide expeditious resolution of certain disputes and is therefore appropriate under Texas Government Code Annotated §2009.002.

However, the commission agrees that the rule can adequately embrace the range of permitted ADR processes by referring to the relevant statutes and omitting examples of available ADR processes and combinations. Accordingly, the new rule omits the list of examples included in the proposed rule.

All comments, including any not specifically discussed herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying the rule.

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998, Supplement 2003) (PURA), which provide the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure; and specifically, PURA §39.151, which grants the commission authority to establish the terms and conditions for the exercise of ERCOT's authority.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 14.052 and 39.151.

§22.251. Review of Electric Reliability Council of Texas (ERCOT) Conduct.

(a) Purpose. This section prescribes the procedure by which an entity, including the commission staff and the Office of Public Utility Counsel, may appeal a decision made by ERCOT or any successor in interest to ERCOT.

(b) Scope of complaints. Any affected entity may complain to the commission in writing, setting forth any conduct that is in violation or claimed violation of any law that the commission has jurisdiction to administer, of any order or rule of the commission, or of any protocol or procedure adopted by ERCOT pursuant to any law that the commission has jurisdiction to administer. For the purpose of this section, the term "conduct" includes a decision or an act done or omitted to be done. The scope of permitted complaints includes ERCOT's performance as an independent organization under the PURA including, but not limited to, ERCOT's promulgation and enforcement of procedures relating to reliability, transmission access, customer registration, and accounting for the production and delivery of electricity among generators and other market participants.

(c) Requirement of compliance with ERCOT Protocols. An entity must use Section 20 of the ERCOT Protocols (Alternative Dispute Resolution Procedures, or ADR), or Section 21 of the Protocols (Process for Protocol Revision), or other Applicable ERCOT Procedures, before presenting a complaint to the commission. For the purpose of this section, the term "Applicable ERCOT Procedures" refers to Sections 20 and 21 of the ERCOT Protocols and other applicable sections of the ERCOT protocols that are available to challenge or modify ERCOT conduct, including participation in the protocol revision process. If a complainant fails to use the Applicable ERCOT Procedures, the presiding official may dismiss the complaint or abate it to give the complainant an opportunity to use the Applicable ERCOT Procedures.

(1) A complainant may present a formal complaint to the commission, without first using the Applicable ERCOT Procedures, if:

(A) the complainant is the commission staff or the Office of Public Utility Counsel;

(B) the complainant is not required to comply with the Applicable ERCOT Procedures; or

(C) the complainant seeks emergency relief necessary to resolve health or safety issues or where compliance with the Applicable ERCOT Procedures would inhibit the ability of the affected entity to provide continuous and adequate service.

(2) For any complaint that is not addressed by paragraph (1) of this subsection, the complainant may submit to the commission a written request for waiver of the requirement for using the Applicable ERCOT Procedures. The complainant shall clearly state the reasons why the Applicable ERCOT Procedures are not appropriate. The commission may grant the request for good cause.

(3) For complaints for which ADR proceedings have not been conducted at ERCOT, the presiding officer may require informal dispute resolution.

(d) Formal complaint. A formal complaint shall be filed within 35 days of the ERCOT conduct complained of, except as otherwise provided in this subsection. When an ERCOT ADR procedure has been timely commenced, a complaint concerning the conduct or decision that is the subject of the ADR procedure shall be filed no later than 35 days after the completion of the ERCOT ADR procedure. The presiding officer may extend the deadline, upon a showing of good cause, including the parties' agreement to extend the deadline to accommodate ongoing efforts to resolve the matter informally, and the complainant's failure to timely discover through reasonable efforts the injury giving rise to the complaint.

(1) The complaint shall include the following information:

(A) a complete list of all complainants and the entities against whom the complainant seeks relief and the addresses, and facsimile transmission numbers and e-mail addresses, if available, of the parties' counsel or other representatives;

(B) a statement of the case that ordinarily should not exceed two pages and should not discuss the facts. The statement must contain the following:

(i) a concise description of any underlying proceeding or any prior or pending related proceedings;

(ii) the identity of all entities or classes of entities who would be directly affected by the commission's decision, to the extent such entities or classes of entities can reasonably be identified;

(iii) a concise description of the conduct from which the complainant seeks relief;

(iv) a statement of the ERCOT procedures, protocols, by-laws, articles of incorporation, or law applicable to resolution of the dispute and whether the complainant has used the Applicable ERCOT Procedures for challenging or modifying the complained of ERCOT conduct or decision (as described in subsection (c) of this section) and, if not, the provision of subsection (c) of this section upon which the complainant relies to excuse its failure to use the Applicable ERCOT Procedures;

(v) a statement of whether the complainant seeks a suspension of the conduct or implementation of the decision complained of; and

(vi) a statement without argument of the basis of the commission's jurisdiction.

(C) a detailed and specific statement of all issues or points presented for commission review;

(D) a concise statement without argument of the pertinent facts. Each fact shall be supported by references to the record, if any;

(E) a clear and concise argument for the contentions made, with appropriate citation to authorities and to the record, if any;

(F) a statement of all questions of fact, if any, that the complainant contends require an evidentiary hearing;

(G) a short conclusion that states the nature of the relief sought; and

(H) a record consisting of a certified or sworn copy of any document constituting or evidencing the matter complained of. The record may also contain any other item pertinent to the issues or points presented for review, including affidavits or other evidence on which the complainant relies.

(2) If the complainant seeks to suspend the conduct or the implementation of the decision complained of while the complaint is pending and all entities against whom the complainant seeks relief do not agree to the suspension, the complaint shall include a statement of the harm that is likely to result to the complainant if enforcement is not suspended. Harm may include deprivation of an entity's ability to obtain meaningful or timely relief if a suspension is not entered. A request for suspension of the conduct or enforcement of a decision shall be reviewed in accordance with subsection (i) of this section.

(3) All factual statements in the complaint shall be verified by affidavit made on personal knowledge by an affiant who is competent to testify to the matters stated.

(4) A complainant shall file the required number of copies of the formal complaint, pursuant to §22.71 of this title (relating to Filing of Pleadings, Documents, and Other Materials). A complainant shall serve copies of the complaint and other documents, in accordance with §22.74 of this title (relating to Service of Pleadings and Documents), and in particular shall serve a copy of the complaint on ERCOT's General Counsel, every other entity from whom relief is sought, the Office of Public Utility Counsel, and any other party.

(e) Notice. Within 14 days of receipt of the complaint, ERCOT shall provide notice of the complaint by email to all qualified scheduling entities and, at ERCOT's discretion, all relevant ERCOT committees and subcommittees. Notice shall consist of an attached electronic copy of the complaint, including the docket number, but may exclude the record required by subsection (d)(1)(H) of this section.

(f) Response to complaint. A response to a complaint shall be due within 28 days after receipt of the complaint and shall conform to the requirements for the complaint set forth in subsection (d) of this section except that:

(1) the list of parties and counsel is not required unless necessary to supplement or correct the list contained in the complaint;

(2) the response need not include a statement of the case, a statement of the issues or points presented for commission review, or a statement of the facts, unless the respondent contests that portion of the complaint;

(3) a statement of jurisdiction should be omitted unless the complaint fails to assert valid grounds for jurisdiction, in which case the reasons why the commission lacks jurisdiction shall be concisely stated;

(4) the argument shall be confined to the issues or points raised in the complaint;

(5) the record need not include any item already contained in a record filed by another party; and

(6) if the complainant seeks a suspension of the conduct or implementation of the decision complained of, the response shall state whether the respondent opposes the suspension and, if so, the basis for the opposition, specifically stating the harm likely to result if a suspension is ordered.

(g) Comments by commission staff and motions to intervene. Commission staff representing the public interest shall file comments within 45 days after the date on which the complaint was filed. In addition, any party desiring to intervene pursuant to §22.103 of this title (relating to Standing to Intervene) shall file a motion to intervene within 45 days after the date on which the complaint was filed. A motion to intervene shall be accompanied by a response to the complaint.

(h) Reply. The complainant may file a reply addressing any matter in a party's response or commission staff's comments. A reply, if any, must be filed within 55 days after the date on which the complaint was filed. However, the commission may consider and decide the matter before a reply is filed.

(i) Suspension of enforcement. The ERCOT conduct complained of shall remain in effect until and unless the presiding officer or the commission issues an order suspending the conduct or decision. If the complainant seeks to suspend the conduct or implementation of the decision complained of while the complaint is pending and all entities against whom the complainant seeks relief do not agree to the suspension, the complainant must demonstrate that there is good cause for suspension. The good cause determination required by this subsection shall be based on an assessment of the harm that is likely to result to the complainant if a suspension is not ordered, the harm that is likely to result to others if a suspension is ordered, the likelihood of the complainant's success on the merits of the complaint, and any other relevant factors as determined by the commission or the presiding officer.

(1) The presiding officer may issue an order, for good cause, on such terms as may be reasonable to preserve the rights and protect the interests of the parties during the processing of the complaint, including requiring the complainant to provide reasonable security, assurances, or to take certain actions, as a condition for granting the requested suspension.

(2) A party may appeal a decision of a presiding officer granting or denying a request for a suspension, pursuant to §22.123 of this title (relating to Appeal of an Interim Order and Motions for Reconsideration of Interim Orders Issued by the Commission).

(j) Oral argument. If the facts are such that the commission may decide the matter without an evidentiary hearing on the merits, a party desiring oral argument shall comply with the procedures set forth in §22.262(d) of this title (relating to Commission Action After a Proposal for Decision). In its discretion, the commission may decide a case without oral argument if the argument would not significantly aid the commission in determining the legal and factual issues presented in the complaint.

(k) Extension or shortening of time limits. The time limits established by this section are intended to facilitate the expeditious resolution of complaints brought pursuant to this section.

(1) The presiding officer may grant a request to extend or shorten the time periods established by this rule for good cause shown. Any request or motion to extend or shorten the schedule must be filed prior to the date on which any affected filing would otherwise be due. A request to modify the schedule shall include a representation of whether all other parties agree with the request, and a proposed schedule.

(2) For cases to be determined after the making of factual determinations or through commission ADR as provided for in subsection (n) of this section, the presiding officer shall issue a procedural schedule.

(l) Standard for review. If the factual determinations supporting the conduct complained of have not been made in a manner that meets the procedural standards specified in this subsection, or if factual determinations necessary to the resolution of the matter have not been made, the commission will resolve any factual issues on a *de novo* basis. If the factual determinations supporting the conduct complained have been made in a manner that meets the procedural standards specified in this subsection, the commission will reverse a factual finding only if it is not supported by substantial evidence or is arbitrary and capricious. The procedural standards in this subsection require that facts be determined:

(1) In a proceeding to which the parties have voluntarily agreed to participate; and

(2) By an impartial third party under circumstances that are consistent with the guarantees of due process inherent in the procedures described in the Texas Government Code Chapter 2001 (Administrative Procedure Act).

(m) Referral to the State Office of Administrative Hearings. If resolution of a complaint does not require determination of any factual issues, the commission may decide the issues raised by the complaint on the basis of the complaint and the comments and responses. If factual determinations must be made to resolve a complaint brought under this section, and the parties do not agree to the making of all such determinations pursuant to a procedure described in subsection (n) of this section, the matter may be referred to the State Office of Administrative Hearings for the making of all necessary factual determinations and the preparation of a proposal for decision, including findings of fact and conclusions of law, unless the commission or a commissioner serves as the finder of facts.

(n) Availability of alternative dispute resolution. Pursuant to Texas Government Code Chapter 2009 (Governmental Dispute Resolution Act), the commission shall make available to the parties alternative dispute resolution procedures described by Civil Practices and Remedies Code Chapter 154, as well as combinations of those procedures. The use of these procedures before the commission for complaints brought under this section shall be by agreement of the parties only.

(o) Granting of relief. Where the commission finds merit in a complaint and that corrective action is required by ERCOT, the commission shall issue an order granting the relief the commission deems appropriate, including, but not limited to:

(1) Entering an order suspending the conduct or implementation of the decision complained of;

(2) Ordering that appropriate protocol revisions be developed;

(3) Providing guidance to ERCOT for further action, including guidance on the development and implementation of protocol revisions; and

(4) Ordering ERCOT to promptly develop protocols revisions for commission approval.

(p) Notice of proceedings affecting ERCOT. Within seven days of ERCOT receiving a pleading instituting a lawsuit against it concerning ERCOT's conduct as described in subsection (b) of this section, ERCOT shall notify the commission of the lawsuit by filing with the commission, in the commission project number designated by the commission for such filings, a copy of the pleading instituting the lawsuit. In addition, within seven days of receiving notice of a proceeding at the Federal Energy Regulatory Commission in which relief is sought against ERCOT, ERCOT shall notify the commission by filing with the commission, in the commission project number designated by the commission for such filings, a copy of the notice received by ERCOT.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER O. UNBUNDLING AND MARKET POWER

DIVISION 2. INDEPENDENT ORGANIZATIONS

16 TAC §25.361, §25.362

The Public Utility Commission of Texas (commission) adopts an amendment to §25.361, relating to Electric Reliability Council of Texas (ERCOT), and new §25.362, relating to Electric Reliability Council of Texas (ERCOT) Governance, with changes to the proposed text as published in the October 11, 2002 *Texas Register* (27 TexReg 9528). The amendment and new rule establish standards for the operation of an independent organization in the competitive electric market in Texas.

An independent organization performs special functions in the market that are prescribed by statute, involving the development and implementation of rules and operating systems to manage the reliability of the electric network and facilitate retail competition in the sale of electricity. It operates in an environment in which many companies may buy and sell electricity at wholesale, schedule electricity for transmission to customers, and deliver electricity to serve the needs of retail customers, and in which retail customers have the ability to switch retail providers. The new rules establish standards for the governance of the independent organization operating in Texas to ensure that, in carrying out its duties, it considers the interests and solicits the views of persons who are interested in the electric market, to further the efficient operation of the wholesale and retail markets and the reliable operation of the electric network. The rules also require that an independent organization allow access to meetings and information concerning its operations. Finally, the rules establish requirements related to reporting to the commission and compliance with commission rules. A companion rule, new §22.251 of this title (relating to Review of Electric Reliability Council of Texas (ERCOT) Conduct), was proposed at the same time as this amendment and new rule and is being adopted in a companion order. These rules are adopted under Project Number 25959.

A public hearing on the amendment and new rule was held at commission offices on December 3, 2002, at 9:30 a.m. A representative from the Electric Reliability Council of Texas (ERCOT) attended the hearing and provided comments. To the extent that these oral comments differ from the written comments, such comments are summarized herein.

The commission received comments on the proposed amendment on November 12, 2002 from Constellation New Energy, Inc., Green Mountain Energy Co., and Strategic Energy Co., through the Alliance for Retail Marketers (ARM); American Electric Power (AEP); the City of Austin, doing business as Austin Energy, and the City of San Antonio, acting by and through the San Antonio City Public Service Board (City Utilities); CenterPoint Energy, Inc. (CenterPoint); a coalition of consumer groups consisting of Texas Ratepayers' Organization to Save Energy, Texas Legal Services Center, Consumers Union Southwest Regional Office, and Public Citizen Texas Office (Consumers); ERCOT, the Lower Colorado River Authority (LCRA); Reliant Resources, Inc. (Reliant); and TXU Energy Trading Company, TXU Energy Retail Company, L.P, and Oncor Electric Delivery Co. (collectively, TXU). Reply comments were received from ERCOT and TXU on November 25, 2002.

The commission posed three questions in the preamble to the proposed rule. Because the questions relate to specific subsections of the proposed new rule, the comments filed in response to these questions are summarized together with the comments on the relevant subsections.

1. How should proposed §25.362(g) be changed to accommodate ERCOT's transition from a stakeholder board to a hybrid stakeholder/independent board?

2. Is the requirement in proposed §25.362(i)(3) for a third-party auditor consistent with the Non-unanimous Settlement in Docket Number 23320, *Petition of the Electric Reliability Council of Texas for Approval of the ERCOT Administrative Fee*, Item No. 10, which requires ERCOT to retain an internal auditor?

3. Should proposed §25.362 include a requirement that ERCOT adopt a mechanism for allocating administrative penalty liabilities, such as applying it to line-items in the ERCOT budget or assessing it to members? If "yes," to whom, and/or to what ERCOT budget items, should such a mechanism apply? Do other ISO's have such mechanisms?

§25.361, Electric Reliability Council of Texas (ERCOT)

TXU commented that assessing creditworthiness and ensuring necessary and adequate security for market participants relative to their role and responsibility in the market, and administering settlement and billing functions and systems, should be added to §25.361(c), as they are key functions of ERCOT.

The commission agrees with TXU that ensuring necessary and adequate security and administering settlement and billing functions and systems are key functions of ERCOT and has inserted a new §25.361(c)(2) to include the recommended functions. The responsibility for assessing creditworthiness would apply to obligations in markets operated by ERCOT.

Consumers recommended that §25.361(c)(9) be amended to better describe the process for registration of market participants, and specifically to include a requirement that ERCOT test the systems of every company in the Texas market to assure that they are able to fully communicate with the ERCOT system. In reply comments, TXU stated that while it agrees that the testing of certain systems should be and is an ERCOT function, ERCOT does not test the systems of every company it registers, and not all registered market participants are required to fully communicate with the ERCOT system. TXU argued that the requirements for system communication between ERCOT and market participants vary with the type of market participant. TXU recommended that the commission not adopt Consumers' recommendation relating to testing of market participant communication systems.

ERCOT filed reply comments stating that the Consumers' recommendations in §25.361(c) would add unnecessary detail to the list of ERCOT functions set forth in the commission rules. ERCOT stated that it supports the more general language used by the commission in the proposed rules, as they allow the commission greater flexibility in its oversight of ERCOT.

The proposed rule requires ERCOT to "administer procedures for the registration of market participants" and "administer the customer registration system." The commission concludes that the additional detail suggested by Consumers is not necessary, because administering these systems implies that ERCOT will conduct testing to ensure that they operate properly. Consumers' recommendation has not been incorporated into the rule.

Consumers noted that proposed §25.361(c)(10) would direct ERCOT to "administer the customer registration system." Consumers stated that ERCOT's responsibilities are broader than "administering" and therefore recommended that the rule be amended to require that ERCOT "design, develop, manage, and operate the customer registration system."

The commission agrees with Consumers that ERCOT's responsibilities in regard to the registration system are broader than simple administration. The relevant provision is now §25.361(c)(11) and has been modified to reflect ERCOT's broader responsibility.

ERCOT noted that proposed §25.361(c)(13) would require ERCOT to "disseminate information … in accordance with the ERCOT protocols." ERCOT then noted that §25.361(c)(15) would require ERCOT to "perform any additional duties required under the ERCOT protocols." ERCOT expressed the view that these provisions are redundant and recommended that (c)(13) be deleted.

The commission declines to make the change recommended by ERCOT. While technically, proposed §25.361(c)(15) encompassed proposed §25.361(c)(13), the same can be said for other listed functions as well. The commission sees no harm in separately listing the requirement for ERCOT to disseminate information, as it is a specific function of particular importance. In addition, the protocols could be changed at some time in the future to eliminate or modify this duty, while §25.361 is intended to be a broader, but more durable statement of ERCOT's responsibilities. The third sentence of §25.361(g) also refers to the provision of information and is largely duplicative of the requirement in §25.362(e). Accordingly, this sentence is being modified to refer to §25.362(e).

Consumers recommended that Critical Transmission Projects be defined in the context of §25.361(c)(14), as ERCOT is required to submit a report to the commission identifying existing and potential transmission and distribution constraints and system needs within ERCOT with emphasis on critical transmission projects. Currently, however, critical transmission projects are not defined within §25.361. Consumers proposed that critical transmission projects be defined as projects needed to meet areas of growth in demand or potential areas where generation is concentrated. They also proposed that the commission annually review ERCOT's report, develop a five year plan for transmission updates, and pre-approve needed construction.

The commission agrees that there are important issues relating to the transmission planning process that warrant commission attention. It does not believe that these issues have been adequately explored in this rulemaking project, so as to amend this rule now. Rather, it is the commission's intention to consider changes in the transmission planning process and possible changes in the rules relating to transmission planning and licensing later in 2003. No changes have been made to the language of the rule to reflect this recommendation.

CenterPoint proposed to modify a portion of §25.361(g) to require ERCOT to maintain the confidentiality of Critical Infrastructure Information, as specified in §25.362 of this title (relating to Electric Reliability Council of Texas (ERCOT) Governance).

The commission agrees with CenterPoint's concern. The confidentiality protection in §25.362 is broader than the protection in §25.361, which relates only to competitively sensitive information. Section 25.361(g) has been modified to refer to the confidentiality provision in §25.362. Changes to §25.362(e) are discussed below.

§25.362, Electric Reliability Council of Texas (ERCOT) Governance

§25.362(c), Adoption of rules by ERCOT and commission review

CenterPoint contended that the proposed rule's efforts at creating an "open government" approach at ERCOT will impede ERCOT's ability to act quickly and decisively when market conditions warrant. Specifically, CenterPoint noted that the provisions of §25.362(c), in effect, subject ERCOT to the same rules and restrictions as a government administrative agency. The unintended result would be a slow-down in ERCOT's decision-making process. TXU expressed a similar view that the requirement for ERCOT to evaluate the cost and benefits to the organization, market participants, and retail customers as part of the process for revising protocols and procedures would impede timely action by ERCOT. TXU noted that the cost/benefit requirement could be interpreted to apply to practically every statement that ERCOT makes.

ERCOT suggested that references to ERCOT "rules" could lead to confusion about whether the matter referred to was a commission rule or an ERCOT protocol or procedure, noting that the commission rules are different and are a higher source of authority than ERCOT protocols or procedures. ERCOT stated that to eliminate this potential for confusion, this rule should consistently refer to "Commission Rules" and "ERCOT procedures."

The proposed rule was based on the recognition that ERCOT has an important function in developing market and reliability rules, which are set forth in ERCOT protocols and procedures. Prior to the publication of the proposed rule, a number of parties expressed frustration with the process by which the protocols and procedures are developed. They said that it was difficult to learn about proposed changes in the protocols and difficult to present information and argument concerning proposed protocol changes that would have impact on their development. The provisions on public notice and analysis of the cost and benefits when ERCOT intends to change a protocol would ensure that interested persons have the opportunity to participate in this process and that ERCOT evaluates the changes adequately. In addition, in §22.251, which is being adopted in a companion order, the commission sets out how it will review ERCOT actions, including protocol revisions. These rules should facilitate participation in the protocol development process by interested persons and clarify how the commission will conduct its oversight of ERCOT. The commission believes that they will not unduly impede ERCOT's decision-making process. The commission recognizes that not all ERCOT pronouncements should require a cost/benefit analysis, and has revised the rule to narrow the

scope of this requirement. The commission agrees with ERCOT that commission rules are not the same as ERCOT protocols or procedures. In order to eliminate any potential confusion, changes have been made to the language of the rule to consistently refer to ERCOT "protocols" or "procedures." These are the terms commonly used to refer to the ERCOT market and reliability rules.

§25.362(d), Access to meetings

Similar to its comments concerning §25.362(c), CenterPoint argued that the "open government" approach at ERCOT would impede ERCOT's ability to act quickly and decisively when market conditions warrant. Specifically, CenterPoint noted that the provisions of §25.362(d), in effect, would subject ERCOT to the same rules and restrictions as a government administrative agency. The unintended result would be a slow-down in ERCOT's decision-making process. TXU recommended that access to meetings be more narrowly defined to those meetings wherein a formal vote would be taken. TXU argued that under the proposed rule, as written, any meeting or discussion at ERCOT by two or more staff members would be subject to this provision.

ERCOT recommended that the rule allow notice of meetings to be posted on the website and by email. ERCOT also recommended that permanent retention of meeting records be limited to the Board of Directors, and that the records for other meetings (such as standing committees and subcommittees) be limited to a five-year retention period.

The commission recognizes the concern expressed by CenterPoint and TXU relating to the provision in the proposed rule on open meetings. The rule directs ERCOT to establish a policy on opening meetings to the public. If there are categories of meetings that are not appropriate for opening to the public, the policy adopted by ERCOT can specify which meetings those are. The commission does not believe that a modification of the proposed rule is needed to address these concerns and believes that the rule gives ERCOT discretion to address this matter. The commission concurs that website and email posting of meetings are appropriate and believes that the rule gives ERCOT discretion to address appropriate notice mechanisms. Additionally, the commission agrees with ERCOT that the provision on record keeping should be modified; it is appropriate that board records be retained permanently and that ERCOT establish reasonable retention periods of not less than five years for all other meeting records.

§25.362(e), Access to information

ARM recommended that the rule be modified to require ERCOT to provide non-confidential information on a timely basis, because much of the information that is of interest is time- sensitive. ARM identified the ten-day requirement of the Texas Public Information Act (TPIA) as a standard to use. In reply, ERCOT argued that a ten-day delivery requirement is not appropriate, because of the large volume of information processed by ERCOT.

The commission agrees with ARM that non-confidential materials should be provided on a timely basis and believes that the ten-day standard is appropriate. While ERCOT processes a large volume of information, it is not clear that the volume of requests for information would present significant problems for it. In addition, as ARM has pointed out, much of the information that is likely to be requested is time-sensitive, so that prompt delivery is important to the person requesting the information. The commission has also modified the provisions of subsection (e) concerning the provision of information to the commission to require that this information be provided promptly.

Confidentiality

ERCOT, Consumers, and ARM generally agreed with the approach taken in the proposed rule with respect to the treatment of confidential information. ARM noted that the Public Utility Regulatory Act (PURA) requires the commission to maintain the confidentiality of competitively sensitive information, and said that the rule appears to do so.

LCRA, Reliant and TXU commented that subsection (e) impermissibly places the commission in the role of determining what information is or is not subject to an exception to the TPIA, a responsibility that the TPIA reserves to the attorney general. TXU said that absent an agreement concerning the disclosure of protected information, the commission should commit to seeking an Attorney General opinion. LCRA added that the process and timetable set forth in subsection (e)(8) would allow the commission to substitute its judgment about whether information may be withheld for that of the Attorney General, under a process that differs from that in the TPIA and which irrevocably prejudices the owner of the information. Specifically, LCRA noted that while the proposed rule requires commission notification to parties within ten days of the receipt of a request for release, the TPIA requires the commission to request an Attorney General opinion within ten days of the request. LCRA said that if the commission were to agree that the information is protected, it would be too late to follow the procedures set forth in the TPIA and the ability to withhold the information would be lost. TXU suggested extending the proposed rule's 72-hour notice of the commission's intention to disclose protected information so that weekends would be excluded.

Reliant argued that the rule contained no indication of what standard the commission would employ in determining whether information designated as confidential or "protected" would be disclosed. The company said further that information deemed confidential under the protocols will have already been reviewed and approved by the commission, and that there is no basis for the commission to revisit decisions related to confidentiality. According to Reliant, if the commission were to establish a procedure to second-guess ERCOT's determination of confidentiality, ERCOT would be hampered in performing its job.

The City Utilities argued the proposed rule also conflicts with portions of the TPIA that apply to municipally owned utilities. They said that under §552.133 of the TPIA, with respect to "competitive matter" information designated by a municipally owned utility, only the governing body of the utility and the attorney general are authorized to make determinations regarding protection and release of information. The two cities said the rule should expressly recognize the presumption that Protected Information is confidential information under the TPIA. They also called for reversing the meaning of subsection (e)(3) so that the commission would have discretion to disclose information only if the ERCOT protocols do not designate the information as protected.

ERCOT, however, supported the commission's approach regarding public access to information. The proposed rule would require ERCOT to develop procedures to provide information, and ERCOT noted that it has already adopted such procedures.

Centerpoint said that critical infrastructure information, including maps, should also be withheld from public disclosure, in the interest of guarding against terrorist attacks or other threats to the physical security of the electric grid.

The commission has extensively reorganized subsection (e) to make it clearer. In particular, the subsection has been divided into two paragraphs, the first of which deals with information in ERCOT's possession and the second of which deals with information in the commission's possession.

The commission agrees with Reliant that there is no need to revisit decisions on confidentiality as a routine matter, and the commission does not believe that the adoption of this rule would result in routine re-examination of decisions made by ERCOT. The purpose of the provision concerning commission review of ERCOT's decisions on confidentiality, now subsection (e)(1)(B), is to provide the commission with flexibility to deal with extraordinary situations in which there is a significant public interest in disclosing information that otherwise would be protected. As a part of its oversight responsibility, the commission should resolve whether disclosure of information is in the public interest. There are a number of instances in which the broad availability of information fosters the development of competitive markets. The commission has, for example, conducted a customer education campaign to provide customers basic information concerning the opportunities they have to shop for power in a competitive retail electric market. It has also helped distribute information about the prices that retail electric providers are offering in the market. These efforts are based on the idea that better-informed consumers will result in a more vibrant competitive market and, hence, greater benefits from competition.

Dissemination of information about the operation of the wholesale market might also foster more vibrant competition. For example, if the commission were to learn that market participants were gaming market rules under a cloak of confidentiality, thereby artificially driving power prices higher (as was done in California), the commission would have a procedure by which it could determine whether the information is in fact competitively sensitive or should instead be made public. Conversely, the commission needs the tools in extraordinary circumstances to protect information that would ordinarily be disclosed under the protocols. It is equally necessary that a market participant have a procedure by which it can demonstrate to the commission that the release of certain information would cause it substantial competitive harm. Moreover, unforeseen events relating to the security of essential electric facilities may also require confidentiality measures not anticipated in the protocols. Accordingly, the new rule provides a mechanism by which the commission can make a determination as to whether information that is deemed confidential under the ERCOT protocols should be released and whether information that is not protected from disclosure should be protected. In all cases where this provision would be applied, affected parties would have reasonable notice and opportunity to present their positions prior to commission action.

With respect to the contention that the commission is required to refer all questions of confidentiality to the attorney general, the commission has modified the rule to make it clear that should a TPIA request be made and not resolved through informal dispute resolution efforts, the matter would be referred to the Attorney General in accordance with the TPIA. *See* §25.362(e)(2)(B). The commission concludes that the commenters are correct that where a third party has requested information that is in the commission's possession or available to it and the commission concludes that the information should not be released, the TPIA requires the commission to refer the matter to the Attorney General to resolve the question of whether the information must be released. Under the TPIA and Attorney General opinions interpreting this Act, a governmental body may, but is not required to, resolve disputed issues of fact regarding whether information that has been requested comes within an exception to public disclosure when a third party's property or privacy rights are at issue. The rule as adopted preserves the commission's ability to exercise this option.

The rule would, however, allow the commission to remove the protected status of information in ERCOT's or the commission's possession in the absence of a request under the TPIA. PURA gives the commission the power to collect information from market participants and the responsibility to determine whether the information should be protected from disclosure to third parties, in certain circumstances. For example, PURA §39.155 requires persons who own electric generation facilities in the state to report information concerning the capacity of such facilities and the volume of sales. This section also directs the commission to prescribe reporting requirements that ensure the confidentiality of competitively sensitive information. This statute provides the commission, rather than the Attorney General, authority to determine whether information provided under §39.155 should be disclosed to the public. In the event that the commission seeks to remove the protected status of information that any party deems confidential, that party would have an opportunity to present information concerning the nature of the information and whether it is entitled to continued protection. Furthermore, the subsection is intended to provide adequate time for an affected party to seek a court injunction if it disagrees with the commission's determination.

LCRA's concern about the timing of notice has been addressed by establishing a three-day notice requirement. If the commission receives a request for access to protected information it would make a good faith effort, within three business days of receipt of the request, to notify the person who has provided the information that a request has been received. *See* §25.362(e)(2)(B). Thus, the person who has provided the information would receive notice of the request, before or at the same time that the commission submits the matter to the Attorney General for a determination on whether the information is excepted from disclosure under the TPIA. The TPIA requires the agency to notify the information owner of its intent to request an attorney general opinion (TPIA §552.305) "*within a reasonable time* but not later than the tenth business day after the date of receiving the written request." (Emphasis added.) The modifications to the proposed rule are consistent with the TPIA and should provide parties adequate notice in order that they may protect their interests by presenting arguments and evidence concerning a request for information to the Attorney General.

The commission does not believe that the rule, as modified, is inconsistent with the City Utilities' rights under TPIA §552.133. To the extent that the commission receives a request for the disclosure of information owned by a municipal utility, the utility will have an opportunity to present information to the Attorney General supporting its contention that the information is protected from disclosure under that provision. If the Attorney General decides that the information is not protected under the TPIA, the commission would be required to give advance notice to the utility of the decision to release the information. If the utility disagrees with the determination, it should have time to seek an injunction to prevent the release of the information. If the commission seeks to release information that is owned by a governmental body in the absence of a request for the information, the governmental body will have an opportunity to present evidence

to the commission on the issue of the statutory exception to public disclosure created by TPIA §552.133.

The commission agrees with TXU's suggestion that the 72-hour notice discussed in proposed subsection (e)(7) should exclude weekends. The notice period has been changed to three business days. *See* §25.362(e)(2)(B), (E).

Finally, under the new rule ERCOT is required to protect information that it has designated as protected from disclosure. This subsection gives ERCOT latitude in determining the information that should be protected, and it would have the discretion to adopt protocols or procedures to protect information if its release might imperil the security of critical electric facilities. In the commission's view, this accommodates CenterPoint's concern, and it is not necessary that the rule require ERCOT to withhold critical infrastructure information from public disclosure.

Preamble question 1 and §25.362(g), Qualifications for membership on governing board

Preamble question 1 asked how proposed §25.362(g) should be changed to accommodate ERCOT's transition from a stakeholder board to a hybrid stakeholder/independent board. AEP recommended that ERCOT not reserve seats on the board for individuals with experience in specific disciplines. AEP stated that the members should have a background in finance, accounting or law or, preferably, a combination of these disciplines. ARM recommended that the rule be changed to provide separate membership requirements for the independent board members. Specifically, independent board members should have absolutely no connection to market participants or to any other ERCOT non-commercial member (such as the commission or a consumer group). ARM further stated that the criteria should not rule out individuals with experience in the electric industry or a similar field, such as a former electric industry employee or a former commissioner or commission employee.

ARM also recommended that the rule establish restrictions on the board members similar to those applicable to sitting commissioners, including a one-year post-employment prohibition. ARM recommended that the board qualifications not include a requirement for level of activity in the ERCOT market, as this would make it difficult for smaller and newer market participants to gain board representation. Consumers recommended adding a subsection establishing a revolving door policy, disqualifying for a seat as an independent board member a person who has recently been employed by a market participant. Consumers supported standards for "good standing" for ERCOT board members. TXU agreed with the need for a revolving door policy, but expressed the view that this is an area that should be addressed by an ERCOT policy rather than in a commission rule. In reply comments, ERCOT asserted that Consumers' recommendations in this regard are overly proscriptive and punitive.

Reliant did not believe that any changes were necessary in the proposed rule. TXU stated that a revision to the proposed rule is not necessary to address a hybrid board consisting of stakeholder and independent directors, because ERCOT's by-laws, which are subject to review and approval by the commission, contain the details of the board structure. TXU also stated that the proposed rule, as written, provides adequate qualification requirements for board membership. Additionally, TXU pointed out that Docket 26861, *Petition of the Electric Reliability Council of Texas (ERCOT) for Approval of Governance Changes*, has been initiated to consider the proposed ERCOT by-law changes that implement a blended board. CenterPoint expressed the view that proposed §25.362(g) is not necessary, because ERCOT's by-laws provide sufficient detail and are subject to commission review and approval.

The commission concurs with Reliant and TXU that a change to proposed §25.362(g) is not necessary. The Final Order in Docket Number 26861 (Dec. 9, 2002) approved the hybrid board and its structure. The ERCOT by-laws (Article 34) provide a sufficient definition and independence criteria for the independent directors. ARM's suggestion of changing the rule is not necessary, because changes in the by-laws relating to the membership of the board require commission review, to determine that the resulting board structure will ensure the organization's independence.

The commission agrees with ERCOT that the guidelines for board membership, as set out in the proposed rule, §25.362(g)(1), are adequate and appropriate. The approach that was taken in this rule was to establish a number of policies that ERCOT must adhere to, but give it broad discretion in how to implement these policies. Among the broad policies addressed in the proposed rule are conflicts of interest. This provision would require ERCOT to consider whether it is appropriate to address such matters as qualifications and post-employment restrictions for independent board members. The commission also concludes that the "levels of participation" requirement is appropriate. This requirement is intended to ensure that board members that represent a sector of the market have some specific connection with the ERCOT market and the sector they would represent; it is not intended to preclude new market entrants or small market participants from serving on the board of directors.

§25.362(i), Compliance with rules or orders, and Preamble questions 2 and 3

Preamble question 2 asked whether the requirement in proposed §25.362(i)(3) for a third- party auditor was consistent with the non-unanimous Settlement in Docket Number 23320, *Petition of the Electric Reliability Council of Texas for Approval of the ERCOT Administrative Fee*, Item No. 10, which requires ERCOT to retain an internal auditor. AEP and Reliant commented that the proposed rule requirement is not consistent with the settlement. AEP noted that the non-unanimous Settlement in Docket Number 23220 states, "The ERCOT Board agrees to employ an internal auditor to independently review fiscal matters, staffing, and expenses for ERCOT activities beginning no later than July 31, 2003. The internal auditor will report through quarterly written reports to the ERCOT Board." AEP argued that the requirement in the proposed rule should not be adopted. Reliant commented that the settlement identified specific circumstances in which ERCOT would hire an independent auditor, and to the extent that the proposed rule creates an additional situation in which ERCOT would be required to employ a third-party auditor, it is inconsistent with that settlement.

ARM, CenterPoint, and Consumers commented that the rule requirement is consistent with the settlement. ARM noted that the commission's authority to require ERCOT to submit to an audit stems from PURA and not from the parties' settlement. ARM argued that PURA grants the commission authority to oversee and review an independent organization's procedures relating to the reliability of the regional electric network and accounting

for the production and delivery of electricity. In ARM's view, ERCOT's accounting for the costs incurred in rendering such services would constitute procedures related to reliability and accounting for production and delivery of electricity. ARM contended that the commission's rules should not defer to a settlement of parties, primarily because those same parties could by agreement modify their settlement or choose not to seek its enforcement. ARM also pointed to prior instances when the commission ruled on issues initially in a contested case and subsequently revisited those issues in a rulemaking of general applicability. CenterPoint commented that the audit requirement in the settlement exists to assure ERCOT fee-payers that ERCOT's expenses and fees are reasonable and verifiable on an ongoing basis, while the audit requirement in the proposed rule exists as a remedy or enforcement tool after ERCOT has failed to comply with PURA, the commission's substantive rules, or a commission order. CenterPoint argued that the two requirements serve different purposes, and are not necessarily inconsistent. Consumers commented that the rule provision would allow greater scrutiny by a truly independent third party (not an ERCOT employee) in instances of rule violations. Consumers noted that the commission may need to require audits of a specialized nature depending on the circumstances, and the draft rule would provide greater flexibility but would not substitute for the existing requirement that ERCOT hire an individual to perform routine internal audit functions.

The commission agrees with ARM, CenterPoint, and Consumers. PURA authorizes the commission to oversee an independent organization, which implies that the commission has the power to adopt special investigative and reporting requirements to ensure compliance with its rules. The flexibility of the requirement for a third-party auditor in the proposed rule is an appropriate enforcement tool for the commission's oversight of ERCOT. This auditor also has a different purpose, and the rule provisions relating to it are separate and independent from, the auditor addressed in the settlement. Therefore, the commission retains the requirement for a third-party auditor in §25.361(i)(3).

Preamble question 3 asked whether proposed §25.362 should include a requirement that ERCOT adopt a mechanism for allocating administrative penalty liabilities, such as applying it to line-items in the ERCOT budget or assessing it to members. It also asked how such a mechanism should be applied and whether other ISOs have such mechanisms. AEP, Reliant, CenterPoint, and TXU stated that monetary penalties are inappropriate, because penalties fail to provide an incentive for good performance, and, in addition, such fines could ultimately be paid by market participants who are undeserving of the penalty. ERCOT and Reliant observed that penalties do not work well as an incentive for ERCOT, because ERCOT does not have shareholders and must pass on the penalties either in the form of fees or reduced services. Reliant recommended that if the commission does adopt a rule that allows for administrative penalties applicable to ERCOT, it should avoid a "one-size-fits-all" approach by adopting an allocation method as well.

TXU agreed that the commission's oversight authority should include a mechanism to ensure ERCOT compliance. Remedies such as revocation of the independent organization certificate, as well as reporting and auditing requirements, are appropriate methods of enforcement. However, TXU strongly disagreed with the provisions of the proposed rule that authorize administrative penalties against ERCOT as an enforcement tool. TXU recommended the deletion of proposed subsection §25.362(i)(4).

ARM commented that the rationale for assessing a penalty to market participants, through the administrative fee or otherwise, is that the market participants ultimately supervise ERCOT through the board structure. However, the introduction of independent board members dilutes this rationale. ARM recommended that the rule require that any market participant harmed by the conduct for which the penalty is being imposed be exempt from the assessment of the penalty. ARM further proposed that the rule prohibit ERCOT from passing on to market participants penalties for conduct outside the authorized parameters for ERCOT operations (e.g., an individual staff member violates the protocols). Such penalties should be paid from the ERCOT personnel and training budget.

ERCOT recommended that the commission focus its enforcement efforts on compliance reporting and the suspension or revocation of ERCOT's Independent Organization certification. ERCOT noted, however, that if the commission does deem penalties appropriate, it should consider whether it has the authority to require all market participants to become ERCOT members so that ERCOT can pass through penalties to members rather than through its fees, which are charged to market participants. Further, ERCOT noted that it may need to address the possibility of penalties in its member agreements.

Consumers recommended that mandatory fines be imposed upon ERCOT and its members for non-compliance, provided that such fines are not passed on to consumers in any way. Consumers recommended that the commission require the ERCOT board to assess administrative penalties and legal fees associated with those penalties directly to all for-profit members of ERCOT. Consumers asserted that since the retail market opened on January 1, 2002, complaints filed by residential consumers against electric companies have increased, because oversight and enforcement are inadequate. Consumers expressed the view that complaints will continue to increase because there are no adverse consequences for rule violations. Consumers recommended setting uniform penalties for failure of ERCOT, REPs, and TDUs to comply with commission rules and orders. Consumers proposed that penalties should be payable to the retail customer as a credit on the next electric bill. They added that residential consumers should have access to the performance measures of individual REPs. TXU disagreed with the Consumers' recommendation to remove the commission's enforcement discretion concerning the administrative penalties listed in §25.362(i). TXU asserted that this recommendation is unreasonable and would likely result in many cases of unwarranted enforcement.

While the commission agrees that administrative penalties are not the first step that should be taken in an instance of non-compliance by ERCOT, there may, in fact, be times at which such penalties are appropriate. Further, PURA §15.023 authorizes the commission to impose administrative penalties. The commission could assess a penalty under §15.023, regardless of whether this authorization is reiterated in the rule. The commission certainly views imposition of administrative penalties as less severe than the suspension or revocation of ERCOT's Independent Organization certification. The commission recognizes that there may be a degree of unfairness in assessing penalties against ERCOT that are then passed on to its members or to market participants through its administrative fee, as a number of commenters pointed out. The commission would consider the impact of a penalty in deciding whether to assess it and how to do so. It believes that in assessing a penalty, it would have to consider all of the circumstances and tailor the penalty to the fact

situation. The preamble to the proposed rule posed the question whether the commission could assess a penalty directly against specific line items in ERCOT's budget. While this remedy is not explicitly included in the rule, the commission concludes that penalties may appropriately be assessed against line items in the ERCOT budget, if the facts and circumstances warrant.

Many of the Consumers' recommendations merit further discussion, but are beyond the scope of this rule and did not receive adequate discussion in this rulemaking. The commission has reorganized its enforcement organization and is devoting more resources to the enforcement of rules than in the past. The commission also opened a rulemaking proceeding to review the customer protection rules, Project Number 27084, *Rulemaking to Revise Customer Protection Rules*. That project is a more appropriate forum for the discussion of these ideas. Therefore, no changes to the proposed rule are required. The other issues raised by ARM need not be addressed in this rule, but could be resolved in connection with a future proceeding in which an administrative penalty is proposed.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting these sections, the commission makes other minor modifications for the purpose of clarifying the rules.

This amendment and new section are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2003) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, §39.151, which authorizes the commission to certify an independent organization or organizations to perform prescribed functions, to oversee the procedures adopted by an independent organization relating to the reliability of the regional electrical network and accounting for the production and delivery of electricity among market participants, to establish and oversee transaction settlement procedures, and to establish terms and conditions for the ERCOT independent system operator's oversight of utility dispatch functions.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 39.151 and 39.155.

§25.361. Electric Reliability Council of Texas (ERCOT).

(a) Applicability. This section applies to the Electric Reliability Council of Texas (ERCOT). It also applies to transmission service providers (TSPs) and transmission service customers, as defined in §25.5 of this title (relating to Definitions), with respect to interactions with ERCOT.

(b) Purpose. ERCOT shall perform the functions of an independent organization under the Public Utility Regulatory Act (PURA) §39.151 to ensure access to the transmission and distribution systems for all buyers and sellers of electricity on nondiscriminatory terms; ensure the reliability and adequacy of the regional electrical network; ensure that information relating to a customer's choice of retail electric provider is conveyed in a timely manner to the persons who need that information; and ensure that electricity production and delivery are accurately accounted for among the generators and wholesale buyers and sellers in the region. In addition, ERCOT may, on the introduction of customer choice in the ERCOT power region, acquire generation-related ancillary services on a nondiscriminatory basis on behalf of entities selling electricity at retail in accordance with PURA §35.004(e).

(c) Functions. ERCOT shall operate an integrated electronic transmission information network and carry out the other functions prescribed by this section. ERCOT shall:

(1) administer, on a daily basis, the operational and market functions of the ERCOT system, including scheduling of resources and loads, and transmission congestion management, as set forth in the ERCOT protocols;

(2) administer settlement and billing for services provided by ERCOT, including assessing creditworthiness of market participants and establishing and enforcing reasonable security requirements in relation to their responsibilities in ERCOT- operated markets;

(3) serve as the single point of contact for the initiation of transmission transactions;

(4) maintain the reliability and security of the ERCOT region's electrical network, including the instantaneous balancing of ERCOT generation and load and monitoring the adequacy of resources to meet demand;

(5) direct the curtailment and redispatch of ERCOT generation and transmission transactions on a non-discriminatory basis, consistent with ERCOT protocols;

(6) accept and supervise the processing of all requests for interconnection to the ERCOT transmission system from owners of new generating facilities;

(7) coordinate and schedule planned transmission facility outages;

(8) perform system screening security studies, with the assistance of affected TSPs;

(9) plan the ERCOT transmission system, in accordance with subsection (f) of this section;

(10) administer procedures for the registration of market participants;

(11) develop, manage, and operate the customer registration system;

(12) administer the renewable energy program;

(13) monitor generation planned outages;

(14) disseminate information relating to market operations, market prices, and the availability of services, in accordance with the ERCOT protocols;

(15) submit an annual report to the commission identifying existing and potential transmission and distribution constraints and system needs within ERCOT, with emphasis on critical transmission projects, alternatives for meeting system needs, and recommendations for meeting system needs, pursuant to PURA §39.155 (relating to Commission Assessment of Market Power); and

(16) perform any additional duties required under the ERCOT protocols.

(d) Commercial functions. ERCOT shall dispatch generation facilities only in accordance with the provisions of the ERCOT protocols. This responsibility includes authority to redispatch generation resources, in accordance with §25.200 of this title (relating to Load Shedding, Curtailments, and Redispatch) and the ERCOT protocols, and to determine and purchase the amount of ancillary services required to maintain and ensure the reliability of the network. All commercial functions required to ensure reliability and adequacy of the transmission network are to be conducted in accordance with the ERCOT protocols.

(e) Liability. ERCOT shall not be liable in damages for any act or event that is beyond its control and which could not be reasonably

anticipated and prevented through the use of reasonable measures, including, but not limited to, an act of God, act of the public enemy, war, insurrection, riot, fire, explosion, labor disturbance or strike, wildlife, unavoidable accident, equipment or material shortage, breakdown or accident to machinery or equipment, or good faith compliance with a then valid curtailment, order, regulation or restriction imposed by governmental, military, or lawfully established civilian authorities.

(f) Planning. ERCOT shall conduct transmission system planning and exercise comprehensive authority over the planning of bulk transmission projects that affect the transfer capability of the ERCOT transmission system. ERCOT shall supervise and coordinate the other planning activities of TSPs.

(1) ERCOT shall evaluate and make a recommendation to the commission as to the need for any transmission facility over which it has comprehensive transmission planning authority.

(2) A TSP shall coordinate its transmission planning efforts with those of other TSPs, insofar as its transmission plans affect other TSPs.

(3) ERCOT shall submit to the commission any revisions or additions to the planning guidelines and procedures prior to adoption. ERCOT may seek input from the commission as to the content and implementation of its guidelines and procedures as it deems necessary.

(g) Information and coordination. Transmission service providers and transmission service customers shall provide such information as may be required by ERCOT to carry out the functions prescribed by this section and the ERCOT protocols. ERCOT shall maintain the confidentiality of competitively sensitive information and other protected information, as specified in §25.362 of this title (relating to Electric Reliability Council of Texas (ERCOT) Governance). Providers of transmission and ancillary services shall also maintain the confidentiality of competitively sensitive information entrusted to them by ERCOT or a transmission service customer.

(h) Interconnection standards. In performing its functions related to the reliability and security of the ERCOT electrical network, ERCOT may prescribe reliability and security standards for the interconnection of generating facilities that use the ERCOT transmission network. Such standards shall not adversely affect or impede manufacturing or other internal process operations associated with such generating facilities, except to the minimum extent necessary to assure reliability of the ERCOT transmission network.

(i) ERCOT administrative fee. ERCOT shall charge an administrative fee for transmission service in accordance with ERCOT protocols. Changes in the fee or application of new fees are subject to commission approval.

(j) Reports. Each TSP and transmission service customer in the ERCOT region shall on an annual basis provide historical information concerning peak loads and resources connected to the TSP's system. ERCOT shall periodically file with the commission reports concerning its governance, operations and budget, the reliability region of the ERCOT electrical network, and ERCOT's transmission planning efforts, including a list of any transmission projects that it recommends.

(k) Anti-trust laws. The existence of ERCOT is not intended to affect the application of any state or federal anti-trust laws.

§25.362. Electric Reliability Council of Texas (ERCOT) Governance.

(a) Purpose. This section provides standards for the operation of an independent organization within the ERCOT region.

(b) Application. This section applies to ERCOT or any other organization within the ERCOT region that qualifies as an independent organization under the Public Utility Regulatory Act (PURA) §39.151.

(c) Adoption of rules by ERCOT and commission review. ERCOT shall adopt and comply with procedures concerning the adoption and revision of protocols and procedures that constitute statements of general policy and that have an impact on the governance of the organization or on reliability, settlement, customer registration, or access to the transmission system.

(1) The procedures shall provide for advance notice to interested persons, an opportunity to file written comments or participate in public discussions, and, in the case of new protocols or revisions to protocols, an evaluation by ERCOT of the costs and benefits to the organization and the operation of electricity markets.

(2) The commission shall process requests for review of ERCOT protocols, procedures, and decisions in accordance with §22.251 of this title (relating to Review of Electric Reliability Council of Texas (ERCOT) Conduct).

(d) Access to meetings. ERCOT shall adopt and comply with procedures for providing access to its meetings to market participants and the general public. These procedures shall include provisions on advance notice of the time, place, and topics to be discussed during open and closed portions of the meetings, and making and retaining a record of the meetings. Records of meetings of the board of directors shall be retained permanently, and ERCOT shall establish reasonable retention periods, but not less than five years, for records of other meetings.

(e) Access to information. This subsection governs access to information held by ERCOT and access to information held by the commission that it receives from ERCOT.

(1) ERCOT shall adopt and comply with procedures that allow persons to request and obtain access to records that ERCOT has or has access to relating to the governance and budget of the organization, market operation, reliability, settlement, customer registration, and access to the transmission system. ERCOT shall make these procedures publicly available. Information that is available for public disclosure pursuant to ERCOT procedures shall normally be provided within ten business days of the receipt of a request for the information. If a response requires more than ten business days, ERCOT will notify the requester of the expected delay and the anticipated date that the documents may be available. ERCOT's procedures regarding access to records shall be consistent with this section.

(A) Information submitted to or collected by ERCOT pursuant to requirements of the protocols or operating guides shall be protected from public disclosure only if it is designated as Protected Information pursuant to the Protocols, except as otherwise provided in this subsection.

(B) On its own motion or the petition of an affected party, including commission staff, the commission may, after providing reasonable notice to affected parties and an opportunity to be heard, amend the definition of "Protected Information" or the designation of "Items Not Considered Protected Information" under the ERCOT Protocols. In considering such an amendment, the commission may review the specific information under consideration or a general description of such information.

(C) The procedures adopted by ERCOT under this subsection shall include provisions for promptly responding to a request from the commission or commission staff for information that ERCOT collects, creates or maintains in order to provide the commission access to information that the commission or commission staff determines is

necessary to assess market power and the development and operation of competitive wholesale and retail markets; to evaluate possible violations of laws, rules, protocols, or codes of conduct; or to carry out the commission's responsibilities for oversight of ERCOT.

(2) Commission employees, consultants, agents, and attorneys who have access to Protected Information pursuant to this section shall not disclose such information except as provided in this subsection and in accordance with the provisions of the Texas Public Information Act (TPIA).

(A) If the commission receives from a member of the Texas Legislature a request for information that the commission has or has access to that is designated as "Protected Information" under the ERCOT Protocols, the commission shall provide the information to the requestor pursuant to the provisions of Texas Government Code Annotated §552.008. If permitted by the requesting member of the Texas Legislature the commission shall notify ERCOT, and, if applicable, the entity that provided the information to ERCOT, of the existence of the request, the identity of the requestor, and the substance of the request.

(B) If the commission receives a request for information that the commission has or has access to that has been designated as Protected Information under the Protocols the commission shall make a good faith effort to provide notice of the request to the affected market participant and ERCOT within three business days of receipt of the request. If the third-party provider of the information objects to the release of the information, the commission shall offer to facilitate an informal resolution between the requestor and the third party. If informal resolution of an information request is not possible, the commission will process the request in accordance with the TPIA.

(C) In the absence of a request for information, if the commission staff seeks to release information that the commission has or has access to that has been designated as Protected Information under the Protocols, the commission may determine the validity of the asserted claim of confidentiality through a contested-case proceeding. In a contested case proceeding conducted by the commission pursuant to this subsection, the staff, the entity that provided the information to the commission, and ERCOT will have an opportunity to present information or comment to the commission on whether the information is subject to protection from disclosure under the TPIA.

(D) In connection with any challenge to the confidentiality of information under subparagraph (C) of this paragraph, any person who asserts a claim of confidentiality with respect to the information must, at a minimum, state in writing the specific reasons why the information is subject to protection from public disclosure and provide legal authority in support of such assertion.

(E) Except as otherwise provided in subparagraph (A) of this paragraph, if either the commission or the attorney general determines that the disclosure of information designated as Protected Information under the ERCOT Protocols is appropriate, the commission shall provide notice to the entity that provided the information and to ERCOT at least three business days prior to the disclosure of the Protected Information (or, in the case of a valid and enforceable order of a state or federal court of competent jurisdiction specifically requiring disclosure of Protected Information earlier than within three business days, prior to such disclosure).

(f) Conflicts of interest. ERCOT shall adopt policies to ensure that its operations are not affected by conflicts of interests relating to its employees' outside employment and financial interests and its contractors' relationships with other businesses. These policies shall include an obligation to protect confidential information obtained by virtue of employment or a business relationship with ERCOT.

(g) Qualifications for membership on governing board. ERCOT shall establish and implement criteria for an individual to serve as a member of its governing board, procedures to determine whether an individual meets these criteria, and procedures for removal of an individual from service if the individual ceases to meet the criteria.

(1) The qualification criteria shall include:

(A) Definitions of the market sectors;

(B) Levels of activity in the electricity business in the ERCOT region that an organization in a market sector must meet, in order for a representative of the organization to serve as a member of the governing board;

(C) Standards of good standing that an organization must meet, in order for a representative of the organization to serve as a member of the governing board; and

(D) Standards of good standing that an individual must meet, in order for the individual to serve as a member of the governing board.

(2) The procedures for removal of a member from service on the governing board shall include:

(A) Procedures for determining whether an organization or individual meets the criteria adopted under paragraph (1) of this subsection; and

(B) Procedures for the removal of an individual from the governing board if the individual or the organization that the individual represents no longer meets the criteria adopted under paragraph (1) of this subsection.

(3) The procedures adopted under paragraph (2) of this subsection shall:

(A) Permit any interested party to present information that relates to whether an individual or organization meets the criteria specified in paragraph (1) of this subsection; and

(B) Specify how decisions concerning the qualification of an individual will be made.

(4) A decision concerning an individual or organization's qualification is subject to review by the commission.

(h) Required reports. Beginning with the 2002 calendar year, ERCOT shall file an annual report with the commission, not later than 120 days after the end of the year.

(1) The annual report shall include:

(A) An independent audit of ERCOT's financial statements for the report year;

(B) A schedule comparing actual revenues and costs to budgeted revenues and costs for the report year and a schedule showing the variance between actual and budgeted revenues and costs;

(C) An independent audit of ERCOT's market operation for the report year; and

(D) The annual board-approved budget.

(2) ERCOT shall file quarterly reports no later than 45 days after the end of each quarter, which shall include:

(A) All internal audit reports that were produced during the reporting quarter; and

(B) A report on performance measures, as prescribed by the commission.

(i) Compliance with rules or orders. ERCOT shall inform the commission with as much advance notice as is practical if ERCOT realizes that it will not be able to comply with PURA, the commission's substantive rules, or a commission order. If ERCOT fails to comply with PURA, the commission's substantive rules, or a commission order, the commission may, after notice and opportunity for hearing, adopt the measures specified in this subsection or such other measures as it determines are appropriate.

(1) The commission may require ERCOT to submit, for commission approval, a proposal that details the actions ERCOT will undertake to remedy the non-compliance.

(2) The commission may require ERCOT to begin submitting reports, in a form and at a frequency determined by the commission, that demonstrate ERCOT's current performance in the areas of non-compliance.

(3) The commission may require ERCOT to undergo an audit performed by an appropriate independent third party.

(4) The commission may assess administrative penalties under PURA Chapter 15, Subchapter B.

(5) The commission may suspend or revoke ERCOT's certification under PURA §39.151(c) or deny a request for change in the terms associated with such certification.

(6) The imposition of one penalty under this section does not preclude the imposition of other penalties as appropriate for the instance of non-compliance or related instances of non-compliance.

(7) In assessing penalties, the commission shall consider the following factors:

(A) Any prior history of non-compliance;

(B) Any efforts to comply with and to enforce the commission's rules;

(C) The nature and degree of economic benefit or harm to any market participant or electric customer;

(D) The damages or potential damages resulting from the instance of non- compliance or related instances of non-compliance;

(E) The likelihood that the penalty will deter future non-compliance; and

(F) Such other factors deemed appropriate and material to the particular circumstances of the instance of non-compliance or related instances of non-compliance.

(8) The commission may initiate a compliance proceeding or other enforcement proceeding upon its own initiative or after a complaint has been filed with the commission that alleges that the ERCOT has failed to comply with PURA, the commission's substantive rules, or a commission order.

(9) Nothing in this section shall preclude any form of civil relief that may be available under federal or state law.

(j) Priority of commission rules. This section supersedes any protocols or procedures adopted by ERCOT that conflict with the provisions of this section. The adoption of this section does not affect the validity of any rule or procedure adopted or any action taken by ERCOT prior to the adoption of this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

SUBCHAPTER R. PROVISIONS RELATING TO MUNICIPAL REGULATION AND RIGHTS-OF-WAY MANAGEMENT

16 TAC §26.465

The Public Utility Commission of Texas (commission) adopts an amendment to §26.465, relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers with changes to the proposed text as published in the September 27, 2002 *Texas Register* (27 TexReg 9069). The amendment clarifies the definition of "transmission path," eliminates the reference to the Tel-Assistance program, and deletes certain reporting requirements in this section. The reporting requirements are consolidated with the reporting requirements in §26.467 of this title (relating to Rates, Allocation, Compensation, Adjustments and Reporting). This amendment is adopted under Project Number 26412.

A public hearing on the amendment was held at commission offices on December 4, 2002. Representatives from Allegiance Telecom, Inc., Global Crossing Telemanagement, Inc., Qwest Communications Corp., and Time Warner Telecom of Texas, L.P. (CLEC Coalition of Cities), the Cities of Addison, Austin, Bedford, Colleyville, Denton, El Paso, Farmers Branch, Grapevine, Hurst, Keller, Missouri City, North Richland Hills, Pasadena, Round Rock, Tyler, Westlake, West University Place, and Wharton (Coalition of Cities), the City of Houston (Houston), the City of Dallas (Dallas), Texas Statewide Telephone Cooperative, Inc. (TSTCI), John Staurulakis, Inc. (JSI), the City of Plano (Plano), AT&T Communications of Texas, L.P., TCG Dallas, and Teleport Communications Houston, Inc. (AT&T), GTE Southwest Incorporated, doing business as Verizon Southwest (Verizon), Southwestern Bell Telephone, L.P., doing business as Southwestern Bell Telephone Company (SWBT), Valor Telecommunications, LLC (Valor), the Texas Telephone Association (TTA), and Fox, Smollen, and Associates (FSA) attended the hearing and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

The commission received written comments on the proposed amendment by October 28, 2002 from the City of Garland (Garland), Coalition of Cities, the Texas Coalition of Cities for Utility Issues (TCCFUI), Plano, Houston, Dallas, and Verizon. Reply comments were received by November 12, 2002 from Houston, AT&T, Coalition of Cities, SWBT, Verizon, and the State of Texas (State).

Transmission Path

The State asserted that an access line has been defined by statute in Texas Local Government Code (LGC), §283.002(1) in such a way as to exclude Digital Subscriber Line (DSL) services, and that no change should be made to §26.465(c)(2) which could be interpreted to include DSL services as access lines.

SWBT argued that definitions in the Public Utility Regulatory Act (PURA) and Texas Local Government Code, Chapter 283 (Chapter 283) explicitly exclude DSL data services from access lines. SWBT contended that counting DSL data services as access lines would cause significant harm to all certificated telecommunications providers (CTPs) that provide DSL services in competition with, among others, cable modem services that are excluded from the definition. SWBT argued that the current statutory and commission definitions of "access line" and the categories established thereunder do not encompass DSL, and no changes were made as a result of Project Number 25450, *Rulemaking to Address the Redefinition of Access Line and Other Related Outstanding Access Line Implementation Issues,* that would permit such a conclusion.

SWBT argued that DSL is not an access line, as it fits none of the three definitions in LGC §283.002(1). SWBT contended that DSL services are not PBX-type services. SWBT asserted that point-to-point lines provide private access only between points established and designated by a customer, but that DSL services are typically interstate, broadband Internet access products, and therefore do not terminate at end points selected by the customer. SWBT further maintained that a transmission path must allow the delivery of local exchange telephone services, and the PURA definition expressly excludes DSL services from a categorization of "local exchange telephone service." SWBT maintained that the definitions in PURA of "local exchange telephone services" and "basic local telecommunications service" clearly exclude DSL services from the definition of an "access line" because DSL service is non-voice data transmission that is offered as a separate service over a physical facility on which an access line fee is typically already assessed.

SWBT maintained that if a virtual switched service does not provide local exchange telephone services, then it is not an access line, but if a virtual switched service does provide local exchange telephone services, then it is already included as an access line. SWBT contended that DSL services compete directly with cable modem service for the provision of high-speed Internet connections. SWBT argued that the Federal Communications Commission (FCC) recently reclassified cable modem service as an "information service" with a telecommunications component. SWBT asserted that cable modem service is not a telecommunications service subject to municipal fees or a cable service subject to franchise fees, and if the commission imposes municipal fees on typical DSL services, the result would be discriminatory against CTPs and DSL providers in direct contravention of the statutory purpose of Chapter 283 that the scheme be competitively neutral. SWBT contended that the revenue generated by CTPs on any particular service is not relevant, in any way, to an analysis of whether DSL services should be considered separate access lines.

Verizon stated that a basic tenet of LGC §283.002(1)(B) is to assure there are no duplicate or multiple assessments of the municipal fee on a single access line. Verizon added that in both line splitting and line sharing there is still just one line within the public right-of-way (ROW). Verizon asserted that in both line splitting and line sharing, the entity providing the voice services should be accountable for reporting this access line to the commission and compensating the appropriate municipalities the municipal fee. Verizon pointed out that the commission, in Project Number 25450, addressed whether changes in the definition of access line, including DSL service, were needed and that the commission concluded that no amendment was justified. Verizon argued that another duplicative review of this same matter so soon after a comprehensive review is unwarranted.

Verizon added that assessing multiple fees on a single line would also increase the cost of DSL and would discourage new competition and investment by the telecommunications industry, deter a citizen's ability to afford high speed access, and unduly and discriminatorily penalize CTPs when other providers of broadband service, such as cable providers, will not be required to pay multiple municipal fees when they serve the same customer.

Verizon argued that Chapter 283 did not use access lines as a proxy for the former gross receipts franchise fees, and that fees should not grow as new services are provided to customers. Verizon stated that many cities, during the 1980s and 1990s entered into flat fee or fee per access line agreements for ROW use, and that these agreements were not designed to be the equivalent of gross receipts. Verizon added that even under the old percentage of revenue agreements, interstate services, such as DSL, would have been excluded. Verizon concluded that the argument that municipal fees should grow as services that do not generate additional access lines grow is not an accurate picture of city fee agreements prior to Chapter 283, and such an argument should not be given merit.

AT&T argued that there must be more work on the concept of "voice grade equivalents," which some cities have proposed for reporting and payment purposes where voice service is provided in a packet-switched environment. AT&T stated that it currently does not provide local exchange service through Voice over Internet Protocol (VoIP) or packet switching technology and cannot say it is possible to apply the rule's channelization requirements for "switched" services to VoIP or other packet switched voice services. AT&T asserted that it would be premature to expand the definition of a "transmission path" to include all "switching" technologies, other than circuit switching, used for voice until it is clear how such other "switched" transmission paths can and should be counted. AT&T also stated that it continues to oppose any further expansion of the channelization concept.

AT&T agreed that the switching technology used to route local exchange service should not be the deciding factor in whether such basic voice service is included as an access line for ROW compensation purposes. AT&T argued, however, that there are still too many discrepancies between the Texas statutory and regulatory approach towards compensation for use of ROW and the compensation requirements of the Federal Telecommunications Act (FTA) to justify modifying the current definitions of "access line" so as to expand the fee-base for ROW compensation in a way that further deviates from the concept of cost-causation.

AT&T argued that both the Coalition of Cities and Plano ignore the basic requirement in LGC §283.003(1)(A) and §26.465(c)(2) that the new access line regime was intended to assess switched lines used for local exchange service. AT&T stated that the commission recognized this when it originally rejected inclusion of DSL lines from access line counts in Project Number 20935, *Implementation of HB 1777,* and the commission also observed in its Order Adopting §26.465, Project Number 20935 (December 20, 1999) (20935 Order) that the Plain Old Telephone Service (POTS) line over which DSL is provided is clearly distinguishable from the other principle statutorily defined access line,

the point-to-point line. AT&T asserted that in that regard, DSL seems more like a vertical service, and therefore should not be counted as a separate access line. AT&T asserted that the commission may need to clarify what it means by "DSL service", though it would probably be agreed that a DSL-capable line permits high-speed data transmission over the same analog line that can provide basic voice service, and it would therefore be appropriate for the voice service over the DSL-capable POTS line to be counted, but not the data service. Otherwise, AT&T argued, the logical extension of the cities' arguments would be that dial-up Internet access provided by a POTS line would constitute a separate service that should also be counted as a separate access line.

AT&T argued that the commission adopted the concept of services as a proxy for facilities or access lines because of the difficulty of counting actual transmission facilities. AT&T further contended that, while the commission has stated that the fee-per-access line compensation methodology and the fees paid are a proxy for the compensation formerly received by a city under the franchise regime, the new regime was not intended to continually raise the compensation for cities as the number of services grows. AT&T disagreed with the argument that growth in services should mean growth in ROW fees because under the previous gross receipts scheme, increases in services meant increases in fees. AT&T argued that new services do not automatically translate into additional revenues and if the access line approach was meant to be a complete proxy for the previous gross receipts approach, there would have been little sense in the Legislature adopting the access line approach in the first place.

The Coalition of Cities asserted that VoIP is virtually the same as a conventional switched line and should count virtually the same. Coalition of Cities added that if the packet switched VoIP telephonic lines are deemed no more than private lines with individual termination points, the revenues to cities would dramatically decrease while the revenues generated over those lines to CTPs will stay the same and perhaps increase, which was not the intent of Chapter 283. Coalition of Cities asserted this does not allow consistent compensation to cities, as required by Chapter 283 and that this decrease in city revenue is the opposite of what would have occurred under a gross receipts franchise fee base.

The Coalition of Cities supported the deletion of "circuit" switch, but added that the definition should refer to a "virtual" switch or to any other technology which is effectively and functionally the equivalent to a switched service. Coalition of Cities stated that it agrees with the commission's analogy that services are a proxy for access line. Coalition of Cities stated access lines were used in Chapter 283 as a proxy for the former gross receipts franchise fee, and that to ensure consistent compensation to municipalities as required by LGC §283.003(b), as services grow, access line fee payments to cities should also grow, and that the only way to address this in a comprehensive manner is to include new services as proxies for access lines.

The Coalition of Cities disagreed with the 20935 Order by asserting that DSL service is being used for the purpose of providing point-to-point access, and should be counted as access lines. Coalition of Cities stated that in the Revised Arbitration Award for P.U.C. Docket Number 22469, *Petition of Rhythms Lengths, Inc. against Southwestern Bell Telephone Company for Post-Interconnection Dispute Resolution and Arbitration under the Telecommunication Act of 1996 regarding rates, Terms, Conditions and Related Arrangements for Line Sharing* (September 21, 2001) (Line Sharing Order), the commission suggested that DSL may count as an access line in a line sharing situation, because the splitter provides access to the same functionality of the loop in both line-splitting and line-sharing contexts. Coalition of Cities argued that when there are separate services being provided over the same line by the same or different CTPs, be it by line sharing or by line splitting, each service provided should count as an access line. Coalition of Cities argued that this is consistent with the proxy notion that services equate to access lines which the commission previously articulated.

The Coalition of Cities stated that the appropriate compensation would depend on the service provided, as voice grade switched service would be a category 1 or 2 access line, while a data service would be a category 3 access line. Coalition of Cities argued that DSL would have been part of the gross receipts franchise fee base. Coalition of Cities contended that, because DSL as a service is a proxy for access lines, DSL should now be included as an access line either as a point-to-point service or a category 1 or 2 access line.

The Coalition of Cities argued that the statute refers to no duplication of fees on a single service rather than on a single access line. Coalition of Cities asserted that a single access line would be equivalent to a single service, rather than a single physical line. Coalition of Cities argued that to ensure consistent compensation to cities as required by LGC §283.003(b), as services grow, access line fee payments should also grow. Coalition of Cities added that otherwise, as new services are provided over the same physical facilities, access line fee compensation will diminish. Coalition of Cities argued that, in a line-sharing or splitting situation, all entities provided services should compensate the city.

Houston stated that every service must be recognized as a switched transmission path, consistent with the agreed premise that services are a proxy for access lines under the uniform compensation scheme of Chapter 283, and asserted that the "Virtual Switched Service" definition proposed by the Coalition of Cities achieves this goal. Houston stated that applying the "functionally equivalent" test, VoIP and DSL would be counted as access lines, and added that the same reasoning applies in both line splitting and line sharing situations. Houston added that counting all services as access lines avoids treating either reselling or underlying CTPs and municipalities differently based on the technology used and therefore implements Chapter 283 on a technologically neutral basis.

Plano stated that the commission's proposed revisions to subsection (c)(2)(A) clearly concur with Plano's assertion that DSL service delivered over the same physical path as switched, voice-grade, local exchange service constitutes a separate transmission path, and thus a separate access line. Plano argued that the compensation scheme established in Chapter 283 is a blend of physical facilities and telecommunications services; the definition of access line in §283.002(1) supports this contention because it refers to transmission path and transmission media -- clearly relating to both services and facilities. Plano remarked that the commission clearly understood that transmission paths were associated with services and that transmission media were associated with physical facilities when it adopted the original §26.465(c)(2). Plano asserted that the commission should never have originally excluded DSL service, and that DSL does and always has fallen within the original definition of transmission path in §26.465(c)(2).

Plano argued that DSL is a circuit-switched service which requires the use of a DSL circuit, where the service is provisioned by a CTP and a Digital Subscriber line Access Multiplexer (DSLAM), which serves as the switch, in order to provide the service over a voice-grade line. Therefore, Plano contended that, under the original §26.465, DSL service should have been counted as an access line. Plano stated that proposed subsection (c)(2)(A) would provide that each individual switched service would constitute a single, and therefore separate transmission path. Plano and Garland asserted that since DSL is a switched service, it would still constitute a separate transmission path and therefore a separate access line separate from the switched voice-grade local exchange service that should be counted by CTPs.

Garland stated that once the proposed amendments to §26.465(c)(2)(A) are adopted, the revision will implicitly capture DSL as a separate transmission path, as there would be no reason not to consider DSL as a separate transmission path and therefore a separate access line. Garland asserted that if the commission determines that the revision is not sufficiently clear on this point, it could revise the section to specifically include DSL as a separate service and path.

Dallas expressed support for the commission's efforts to move away from technology-based distinctions and towards distinctions based on the function of services to determine what is and is not an access line, which will allow the market to make the technology choices rather than artificially influencing choices through regulation. Dallas asserted that DSL service delivered over the same path as switched voice-grade local exchange service constitutes a separate transmission path, and therefore a separate access line, and that this is evident from the commission's proposed revision to §26.465(c)(2)(A).

Commission response

The commission's amendment to the definition of transmission path does not alter the requirement that an access line must be switched, but rather removes the limitation that the switch used must be a circuit-switch. In practice, a switch is a relatively simple concept. A switch creates a pathway between end-users. This pathway is not necessarily a dedicated circuit, but routes information between these end-users. Functionality, rather than technology, is the threshold.

By eliminating the requirement that a switched access line must be circuit-based, the commission lifts the restraint on technologies used in switching, thus allowing for the recognition of existing and future switching technologies, such as packet switches. The commission's amendment to the definition of transmission path does not alter the requirement delineated in the definition of access line in LGC §283.002(1) that the switched access line must allow the delivery of local exchange telephone service (LETS).

According to PURA §51.002(5), LETS is telecommunications service provided within an exchange to establish connections between customer premises within the exchange, including connections between a customer premise and a long distance provider serving the exchange. LETS includes tone dialing service, service connection charges, and directory assistance services offered in connection with basic local telecommunications service (BLTS) and interconnection with other service providers. LETS specifically does not include non-voice data transmission service offered as a separate service and not as a component of basic local telecommunications service, whether offered on an intraexchange or interexchange basis.

According to PURA §51.002(1), BLTS consists of eight components, which are: (A) flat rate residential and business local exchange telephone service; (B) tone dialing service; (C) access to operator services; (D) access to directory assistance services; (E) access to 911 service provided by a local authority or dual party relay service; (F) the ability to report service problems seven days a week; (G) lifeline services; (H) and any other service determined by the commission after due process to be BLTS.

In order to qualify as LETS, the switched voice service, whether circuit-switched, packet-switched, or switched by other means, must have the capability to meet all eight requirements of BLTS offered in connection with tone dialing service, service connection charges, directory assistance services, and interconnection with other service providers.

The definition of "access line" in LGC §283.002(1) holds that a switched service must "allow the delivery of LETS" to be an access line. "Allow" is the operative word in the phrase "allow the delivery of LETS." The commission interprets the phrase "allows the delivery of LETS" in this context to mean that, using the most current technology as deployed in the network at any given time, the switched service would enable the possibility of provisioning LETS.

With circuit-switched lines, the equipment as currently deployed would allow the provisioning of LETS. PURA §51.002(5) states that non-voice data transmission service, when offered as a separate service and not as a component of BLTS, is not LETS. However, to the extent that such lines allow the delivery of LETS, i.e. enable the possibility of provisioning LETS as deployed in the network at any given time, they would be classified as access lines under Chapter 283.

On the other hand, however, lines switched by packet switches may need to be modified in the way they are deployed in the network at any given time in order for the facility to allow the delivery of LETS. A packet-switched line that connects directly to the Asynchronous Transfer Mode (ATM) network will not meet all of the requirements for BLTS without some special equipment or process in place to ensure that, for instance, access to 911 service provided by a local authority is available. Therefore, voice-based packet-switched services, such as Voice over Internet Protocol (VoIP), may be access lines, but only if they include all eight components of BLTS offered in connection with tone dialing service, service connection charges, directory assistance services, and interconnection with other service providers. This means that those VoIP offerings that do not meet the eight requirements of BLTS in attempting to allow the delivery of LETS are not truly LETS offerings and, therefore, not access lines in the context of Chapter 283. The technology used by the CTP to offer the packet-switched line is irrelevant to its designation as an access line. Once again, functionality, rather than technology, is the threshold. Any concern about compliance with this rule should not be an issue because CTPs involved in making the packet-switched line LETS-compliant should have no difficulty in classifying the packet-switched service as an access line and counting it appropriately.

Several parties proposed to include voice-grade equivalence into the definition of transmission path. However, the commission finds that the concept of voice-grade equivalence has not been sufficiently explored in this context and appears to add little, if

anything, to the definition as proposed. Therefore, the commission declines to add such language.

The commission specifically requested comments regarding the delivery of DSL service over the same physical path as switched voice-grade local exchange service. Some parties commented on stand-alone DSL, as well. In the 20935 Order, the commission refrained from a premature determination on whether and how DSL service should be classified in the access line count. The commission found at that time that DSL, by bypassing the circuit-switch and by potentially being classified as non-voice data transmission service, could not be a switched transmission path, but was also not a point-to-point line.

In the above discussion regarding which circuit-switched and packet-switched services are access lines, the commission addresses many of the concerns about DSL that arose in the 1999 Order. The commission finds that, unless the DSL service has been modified to allow the delivery of LETS, DSL is non-voice data transmission service offered as a separate service, whether provisioned on a stand-alone basis or through a line-splitting or line-sharing arrangement in conjunction with POTS. Only when DSL service is being provisioned to allow LETS-compliant voice service would it qualify as an access line for the purposes of Chapter 283.

So, to clarify its previous decisions, the commission finds that POTS lines are access lines, because regulation ensures that POTS meets the eight requirements of BLTS offered in connection with tone dialing service, service connection charges, directory assistance services, and interconnection with other service providers. Therefore, POTS lines allow the delivery of LETS and meet all of the requirements of access lines under Chapter 283.

The commission also finds that any voice or data services switched by a circuit-switch may be access lines if the equipment enables the possibility of meeting the eight requirements of BLTS offered in connection with tone dialing service, service connection charges, directory assistance services, and interconnection with other service providers. Therefore, even circuit-switched non-voice data transmission paths of the transmission media may qualify as access lines in LGC §283.002(1), provided that they allow the delivery of LETS. An example of a data transmission service that would meet this definition is ISDN service, while an example of a data transmission service that would *not* meet this definition is switched 56 kbps service. The former may allow the delivery of LETS because it allows the provisioning of 911 service, whereas the latter would not allow the delivery of 911 service without modification of the equipment or lines as deployed in the network at any given time.

Further, the commission finds that *only those* packet-switched voice services that have been modified to meet the eight requirements of BLTS offered in connection with tone dialing service, service connection charges, directory assistance services, and interconnection with other service providers can be found to allow the delivery of LETS. Thus, only such packet-switched voice services are access lines under Chapter 283. This assessment includes DSL service. When DSL service is being offered in conjunction with POTS through a line-splitting or line-sharing arrangement, the POTS line is the only access line unless the DSL service has been modified to allow LETS-compliant voice service, in which case it would be a separate category one or category two access line, as applicable. Similarly, when DSL service is being offered on a stand-alone basis, it is only an access line if it has been modified to allow LETS-compliant voice service, in which case it would be classified as a category one or category two access line, as applicable.

Amendments to Reporting Requirements

Plano and Garland suggested the reference to "Subsection (g)(2)(B) of this section" be changed to "Rule 26.467(k)(3)." Plano and Garland suggested that since the commission intends to remove all reporting requirements to §26.467, that subsections §26.465(i), (k), and (l) be likewise moved to §26.467.

Commission response

The commission agrees with parties that any specific references to the language in subsection §26.465(g) should be changed to refer to §26.467 of this title, and modifies the language in subsections §26.465(h) and (l) accordingly. The commission declines to move subsections §26.465(i), (k), and (l) at this time, as they are not specific reporting requirements.

Reporting procedures and requirements

The commission declines at this time to delete the initial reporting procedures as proposed because leaving the language intact provides a historical record for CTPs and the commission. All other language regarding subsequent reporting requirements is deleted from §26.465 and moved, as relevant, to §26.467, as proposed in Project Number 25433, *Rulemaking to Address Municipal Authorized Review of Access Line Reporting.* The commission may choose to revisit this language in the future.

No comments were received regarding the elimination of the reference to the Tel-Assistance program.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2003) (PURA), which provides the Public Utility commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, House Bill 2156, 77th Legislature, which repealed the Tel-Assistance program, and Texas Local Government Code, §283.058, which grants the commission the jurisdiction over municipalities and CTPs necessary to enforce the whole of Chapter 283 and to ensure that all other legal requirements are enforced in a competitively neutral, non-discriminatory, and reasonable manner.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §55.015 and Texas Local Government Code, §283.058.

§26.465. Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers.

(a) Purpose. This section establishes a uniform method for counting access lines within a municipality by category as provided by §26.461 of this title (relating to Access Line Categories), sets forth relevant reporting requirements, and sets forth certain reseller obligations under the Local Government Code, Chapter 283.

(b) Application. This section applies to all certificated telecommunications providers (CTPs) in the State of Texas.

(c) Definitions. The following words and terms when used in this section, shall have the following meaning, unless the context clearly indicates otherwise.

(1) Customer--The retail end-use customer.

(2) Transmission path--A path within the transmission media that allows the delivery of switched local exchange service.

(A) Each individual switched service shall constitute a single transmission path.

(B) Where services are offered as part of a bundled group of services, each switched service in that bundled group of services shall constitute a single transmission path.

(C) Services that constitute vertical features of a switched service, such as call waiting, caller-ID, etc., that do not require a separate switched path, do not constitute a transmission path.

(D) Where a service or technology is channelized by the CTP and results in a separate switched path for each channel, each such channel shall constitute a single transmission path.

(3) Wireless provider--A provider of commercial mobile service as defined by §332(d), Communications Act of 1934 (47 U.S.C. §151 *et seq.)*, Federal Communications Commission rules, and the Omnibus Budget Reconciliation Act of 1993 (Public Law 103-66).

(d) Methodology for counting access lines. A CTP's access line count shall be the sum of all lines counted pursuant to paragraphs (1), (2), and (3) of this subsection, and shall be consistent with subsections (e), (f) and (g) of this section.

(1) Switched transmission paths and services.

(A) The CTP shall determine the total number of switched transmission paths, and shall take into account the number of switched services provided and the number of channels used where a service or technology is channelized.

(B) All switched services shall be counted in the same manner regardless of the type of transmission media used to provide the service.

(C) If the transmission path crosses more than one municipality, the line shall be counted in, and attributed to, the municipality where the end-use customer is located. Pursuant to Local Government Code §283.056(f), the per-access-line franchise fee paid by CTPs constitutes full compensation to a municipality for all of a CTP's facilities located within a public right-of-way, including interoffice transport and other transmission media that do not terminate at an end-use customer's premises, even though those types of lines are not used in the calculation of the compensation.

(2) Nonswitched telecommunications services or private lines.

(A) Each circuit used to provide nonswitched telecommunications services or private lines to an end-use customer, shall be considered to have two termination points, one on each customer location identified by the customer and served by the circuit.

(B) The CTP shall count nonswitched telecommunications services or private lines by totaling the number of terminating points within a municipality.

(C) A nonswitched telecommunications service shall be counted in the same manner regardless of the type of transmission media used to provide that service.

(D) A terminating point shall be counted in, and attributed to, the municipality where that point is located. In the event a CTP is not able to identify the physical location of the terminating point, that point shall be attributed to the municipality identified by the CTP's billing systems.

(E) Where dark (unlit) fiber is provided to an end-use customer who then lights it, the line shall be counted as a private line, by default, unless it is evident that it is used for providing switched services.

(3) Central office based PBX-type services. The CTP shall count one access line for every ten stations served.

(e) Lines to be counted. A CTP shall count the following access lines:

(1) all access lines provided to a retail end-use customer;

(2) all access lines provided as a retail service to other CTPs and resellers for their own end-use;

(3) all access lines provided as a retail service to wireless telecommunication providers and interexchange carriers (IXCs) for their own end-use;

(4) all access lines a CTP provides as employee concession lines and other similar types of lines;

(5) all access lines provided as a retail service to a CTP's wireless and IXC affiliates for their own end-use, and all access lines provided as a retail service to any other affiliate for their own end-use;

(6) dark fiber, to the extent it is provided as a service or is resold by a CTP and shall exclude lines sold and resold by non-CTPs;

(7) any other lines meeting the definition of access line as set forth in §26.461 of this title; and

(8) Lifeline lines.

(f) Lines not to be counted. A CTP shall not count the following lines:

(1) all lines that do not terminate at an end-use customer's premises;

(2) lines used by providers who are not end-use customers such as CTP, wireless provider, or IXC for interoffice transport, or back-haul facilities used to connect such providers' telecommunications equipment;

(3) lines used by a CTP's wireless and IXC affiliates who are not end-use customers, for interoffice transport, or back-haul facilities used to connect such affiliates' telecommunications equipment;

(4) lines used by any other affiliate of a CTP for interoffice transport; and

(5) any other lines that do not meet the definition of access line as set forth in §26.461 of this title.

(g) Reporting procedures and requirements.

(1) Who shall file. The record keeping, reporting and filing requirements listed in this section or in §26.467 of this title (relating to Rates, Allocation, Compensation, Adjustments and Reporting) shall apply to all CTPs in the State of Texas.

(2) Initial reporting requirements.

(A) No later than January 24, 2000, a CTP shall file its access line count using the commission-approved *Form for Counting Access Line or Program for Counting Access Lines* with the commission. The CTP shall report the access line count as of December 31, 1998, except as provided in subparagraph (C) of this paragraph.

(B) A CTP shall not include in its initial report any access lines that are resold, leased, or otherwise provided to a CTP, unless it has agreed to a request from another CTP to include resold or leased lines as part of its access line report.

(C) A CTP that cannot file access line count as of December 31, 1998 shall file request for good cause exemption and shall file the most recent access line count available for December, 1999.

(D) A CTP shall not make a distinction between facilities and capacity leased or resold in reporting its access line count.

(h) Exemption. Any CTP that does not terminate a franchise agreement or obligation under an existing ordinance shall be exempted from subsequent reporting pursuant to §26.467 of this title unless and until the franchise agreement is terminated or expires on its own terms. Any CTP that fails to provide notice to the commission and the affected municipality by December 1, 1999 that it elects to terminate its franchise agreement or obligation under an existing ordinance, shall be deemed to continue under the terms of the existing ordinance. Upon expiration or termination of the existing franchise agreement or ordinance by its own terms, a CTP is subject to the terms of this section.

(i) Maintenance and location of records. A CTP shall maintain all records, books, accounts, or memoranda relating to access lines deployed in a municipality in a manner which allows for easy identification and review by the commission and, as appropriate, by the relevant municipality. The books and records for each access line count shall be maintained for a period of no less than three years.

(j) Proprietary or confidential information.

(1) The CTP shall file with the commission the information required by this section regardless of whether this information is confidential. For information that the CTP alleges is confidential and/or proprietary under law, the CTP shall file a complete list of the information that the CTP alleges is confidential. For each document or portion thereof claimed to be confidential, the CTP shall cite the specific provision(s) of the Texas Government Code, Chapter 552, that the CTP relies to assert that the information is exempt from public disclosure. The commission shall treat as confidential the specific information identified by the CTP as confidential until such time as a determination is made by the commission, the Attorney General, or a court of competent jurisdiction that the information is not entitled to confidential treatment.

(2) The commission shall maintain the confidentiality of the information provided by CTPs, in accordance with the Public Utility Regulatory Act (PURA) §52.207.

(3) If the CTP does not claim confidential treatment for a document or portions thereof, then the information will be treated as public information. A claim of confidentiality by a CTP does not bind the commission to find that any information is proprietary and/or confidential under law, or alter the burden of proof on that issue.

(4) Information provided to municipalities under the Local Government Code, Chapter 283, shall be governed by existing confidentiality procedures which have been established by the commission in compliance with PURA §52.207.

(5) The commission shall notify a CTP that claims its filing as confidential of any request for such information.

(k) Report attestation. All filings with the commission pursuant to this section shall be in accordance with §22.71 of this title (relating to Filing of Pleadings, Documents and Other Materials) and §22.72 of this title (relating to Formal Requisites of Pleadings and Documents to Be Filed With the Commission). The filings shall be attested to by an officer or authorized representative of the CTP under whose direction the report is prepared or other official in responsible charge of the entity in accordance with §26.71(d) of this title (relating to General Procedures, Requirements and Penalties). The filings shall include a certified statement from an authorized officer or duly authorized representative of the CTP stating that the information contained in the report is true and correct to the best of the officer's or representative's knowledge and belief after inquiry.

(l) Reporting of access lines that have been provided by means of resold services or unbundled facilities to another CTP. This subsection applies only to a CTP reporting access lines under §26.467 of this title, that are provided by means of resold services or unbundled facilities to another CTP who is not an end-use customer. Nothing in this subsection shall prevent a CTP reporting another CTP's access line count from charging an appropriate, tariffed administrative fee for such service.

(m) Commission review of the definition of access line.

(1) Pursuant to the Local Government Code §283.003, not later than September 1, 2002, the commission shall determine whether changes in technology, facilities, or competitive or market conditions justify a modification of the adoption of the definition of "access line" provided by §26.461 of this title. The commission may not begin a review authorized by this subsection before March 1, 2002.

(2) As part of the proceeding described by paragraph (1) of this subsection, and as necessary after that proceeding, the commission by rule may modify the definition of "access line" as necessary to ensure competitive neutrality and nondiscriminatory application and to maintain consistent levels of compensation, as annually increased by growth in access lines within the municipalities.

(3) After September 1, 2002, the commission, on its own motion, shall make the determination required by this subsection at least once every three years.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 6, 2003.

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For further information, please call: (512) 936-7308

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16 TAC §26.467

The Public Utility Commission of Texas (commission) adopts an amendment to §26.467, relating to Rates, Allocation, Compensation, Adjustments and Reporting, with changes to the proposed text as published in the September 27, 2002 *Texas Register* (27 TexReg 9071). The proposed amendment clarifies some of the procedures related to the quarterly reporting of municipal access lines and consolidates the reporting requirements from §26.465 of this title (relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers) into one section. This amendment is adopted under Project Number 25433.

The commission does not adopt new §26.469, as proposed in the September 27, 2002 *Texas Register* (27 TexReg 9071), at this time. Based on written comments and comments from the public hearing, the commission concludes that the rule would need to undergo extensive changes. Therefore, the commission

withdraws this section. The commission will hold further workshops before making a decision to republish this section in the future.

A public hearing was held at commission offices on December 4, 2002, at 10:00 a.m. Representatives from Allegiance Telecom, Inc., Global Crossing Telemanagement, Inc., Qwest Communications Corp., and Time Warner Telecom of Texas, L.P. (CLEC Coalition), the Cities of Addison, Austin, Bedford, Colleyville, Denton, El Paso, Farmers Branch, Grapevine, Hurst, Keller, Missouri City, North Richland Hills, Pasadena, Round Rock, Tyler, Westlake, West University Place, and Wharton (Coalition of Cities), the City of Houston (Houston), the City of Dallas (Dallas), Texas Statewide Telephone Cooperative, Inc. (TSTCI), John Staurulakis, Inc. (JSI), the City of Plano (Plano), AT&T Communications of Texas, L.P., TCG Dallas, and Teleport Communications Houston, Inc. (AT&T), GTE Southwest Incorporated, doing business as Verizon Southwest (Verizon), Southwestern Bell Telephone, L.P., doing business as Southwestern Bell Telephone Company (SWBT), Valor Telecommunications, LLC (Valor), the Texas Telephone Association (TTA), and Fox, Smollen, and Associates (FSA) attended the hearing and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

On October 28, 2002, the commission received written comments on the proposed new section §26.469 and amendment to §26.467 from the City of Garland (Garland), Coalition of Cities, the Texas Coalition of Cities for Utility Issues (TCCFUI), Houston, Plano, Dallas, AT&T, Verizon, TTA, SWBT, and CLEC Coalition. The commission received reply comments by November 12, 2002 from Dallas, Verizon, SWBT, TTA, and AT&T.

§26.467(k)(2) - Development of billing systems

Plano and Houston asserted that the commission should set a time period within which certificated telecommunications providers (CTPs) must have their billing systems in compliance with Texas Local Government Code, Chapter 283 (Chapter 283), and suggested that it be no longer than 90 days after obtaining certification from the commission.

SWBT and TTA contended that an arbitrary deadline for CTPs to revise their billing systems is unreasonable because of the time required to develop, implement and test the mechanisms involved. SWBT argued that any deadline should follow agreement from all parties regarding how to correctly classify all access lines.

Commission Response

The commission adds language to §26.467(k)(2) to clarify that a CTP's records must be sufficient to show compliance with the reporting requirements of this section, and that the CTP has an ongoing obligation to maintain a compliant billing system. The commission finds that no additional deadline is necessary for implementation of the billing system. The commission previously established a deadline for the reporting of access lines in subsection (k)(3). Arguably, this deadline would already apply to the billing system because the billing system is necessary to properly implement access line rates, by category, as established by the commission. The billing system is merely a tool to provide the records necessary to meet the quarterly access line reporting deadline.

§26.467(k)(3) - Quarterly compensation and reporting (excluding §26.467(k)(3)(A)(iii))

Plano suggested the reference to §26.465 be removed since all substantive reporting requirements are slated for removal in the amendment to §26.465 proposed under Project Number 26412, *Rulemaking to Amend P.U.C. Substantive Rule 26.465*.

AT&T argued that the 30-day deadline to respond for request for information from the commission in subsection (k)(3)(A)(vi) is not unreasonable on its face, but the scope of the data request can affect the reasonableness of the 30-day deadline. AT&T contended that while it is probably not necessary to codify in this rule the ability of a party to seek an exception to the 30- day deadline for good cause, such ability should be recognized by the commission, with exceptions granted on a case by case basis.

Garland argued that the commission should require every CTP to file a quarterly report with every municipality whether or not the municipality requests this data. Verizon, on the other hand, recommended deleting the section requiring CTPs to make a copy of the report available to municipalities as a redundant administrative burden because the MARS makes the same information already available to the municipalities. Verizon further recommended changing the MARS to disallow any changes after the deadline without filing an amended type report.

Houston suggested that the commission add a statement to the Municipal Access Line Reporting System (MARS) to remind CTPs that submission constitutes certification under §26.467(k)(3)(A)(iv). SWBT proposed changing the rule language to reflect current filing requirements through the MARS.

Houston recommended that the issue of wire transfers for payments be addressed in the rule. Houston proposed that payments received later than 50 days following the close of the preceding quarter should be considered delinquent. Houston argued that each amended report should stand on its own and be treated as a new quarterly report. Houston recommended that CTPs should notify each affected municipality when an access line report is filed or amended.

Verizon argued that wire transfers should not be a mandated process, and contended that while a normal quarterly filing should not require notification to each and every city, a CTP should do so when a CTP amends a previous filing. TTA contended that Houston's suggestion regarding allowing review of amended reports is unnecessary because the language would trigger a new review period for each municipality and could open all previous reporting periods for municipal review. TTA further argued that ILECs acting in good faith to accurately reflect access line counts should not be penalized in the form of an authorized review.

Commission response

The commission keeps the reference to §26.465 in subsection (k) because some subsections of §26.465 affect the reporting requirements in §26.467.

The commission sees no need to include a good-cause exception to the 30-day deadline for a CTP to respond to a request for information from the commission in new subsection (k)(3)(A)(vi) because the commission will address requests for good-cause exceptions on a case- by-case basis, as needed.

The commission declines to delete subsection (k)(3)(A)(viii) mandating that each CTP shall provide copies of the access line reports to municipalities. The MARS, for the most part, satisfies this requirement for CTPs by providing a copy of the access line count report to all municipalities that can access the system. The provision should remain intact to ensure that those

municipalities unable to access the MARS may obtain a copy of the report. The commission will consider other expansions and updates to the MARS when necessary.

The method of payment between CTPs and municipalities is beyond the scope of this project. Parties are free to negotiate methods of payment among themselves. Therefore, the commission declines to address the issue of method of payment in rule language.

The commission maintains that any amendment to an access line count report filing is tantamount to re-filing the entire access line count report. The amendment could be only a single line or every count in every category. Any change to an access line report past the deadline creates an entirely new access line count report, and is therefore subject to enforcement action pursuant to §26.468, relating to Procedures for Standardized Access Line Reports and Enforcement Relating to Quarterly Reporting. In keeping with this position, any amendment to an access line count report filing would re-start the window for any requests for data, whether from the commission or a municipality.

In the interest of clarity and simplicity, the commission, on its own initiative, modifies and adopts §26.467(k)(3)(A)(v) to identify a specific witness who has personal knowledge of the facts contained in a legally sufficient affidavit. A legally sufficient affidavit must positively, and without qualifications, represent the facts as disclosed in it to be true and within the affiant's personal knowledge. An affidavit that states that it is based on "personal knowledge and/or knowledge acquired upon inquiry" does not unequivocally show that it is based on personal knowledge. Despite this, the language, "to the best of my knowledge and belief" does not necessarily deprive an affidavit of evidentiary value. Whether or not acknowledged, any witness who testifies that facts are true and correct can do so only to "the best of his knowledge and belief." The language is simply superfluous, and the commission duly removes it.

§26.467 (k)(3)(A)(iii) (proposed as §26.467(k)(4) - Reconciliation Report)

Verizon proposed modifying the MARS to incorporate write-off information. Verizon recommended including an option of only requiring "net" uncollectible information, with detail of deductions and add back recoveries pursuant to authorized municipal reviews. Verizon stated that its billing system already produces the "net" amount and the rule should not require anything other than this type of system. Verizon noted that this type of information should provide the cities with all necessary information. Verizon further suggested an update for the MARS to allow providers to upload data into the system instead of rekeying information, which could increase errors.

Plano asserted that the reconciliation report should also include the number of access lines, by category and month, to which the deducted amounts are linked. Plano argued that such information would allow cities to determine if the documentation provided during a review supports the original summary totals for the line counts and dollars provided in the reconciliation report. Plano noted that it does not seek to deny CTPs the ability to deduct amounts related to uncollectible accounts, but contended that the burden of proof should lie with the CTPs to provide supporting documentation that such amounts relate back to access lines. Plano supported Verizon's suggestion that uncollectible data be incorporated into the MARS. However, Plano opposed Verizon's suggestion that CTPs be given an option of providing "net uncollectible information" with further detail regarding the add-backs and deduction detail to be provided within the boundaries of an authorized review. Plano opined that if CTPs provided this information from the start, authorized reviews would not be needed.

SWBT argued that the commission should be the central point of information for all required reports, and that the MARS could be expanded to permit entry of uncollectibles information, both in the aggregate, as currently provided, and, to the extent technology allows, in a separated format, showing the total deduction and total payments received each month. SWBT contended that storing this information with the commission is the only way to ensure the requirement is applied in a non-discriminatory, competitively neutral manner. SWBT contended that Plano's request for specific numbers of lines by category and month is not possible because uncollectibles are credited back to accounts in the aggregate, and that municipal rights to review under Texas Local Government Code (LGC) §283.056(c)(3) do not constitute a right to demand new design and creation of new reports. SWBT argued that the law did not require CTPs to establish particular types of billing systems or to otherwise dictate business practices of CTPs.

Verizon supported a requirement to provide detail of amount deducted from the payments on an account-by-account basis, but disagreed with the proposal that reconciliation reports include the number of access lines, by category and month to which amounts were originally billed. Verizon commented the amount of the uncollectible should be included in the MARS.

Houston agreed with the comments filed by SWBT making write-off information readily accessible to municipalities via the MARS. Houston argued that a timely uniform reporting schedule reconciling this action with the previous reports and remittance to cities is also important.

The Coalition of Cities argued that because the City of Grapevine (Grapevine) is subject to Texas Transportation Code, Chapter 22, §22.089, which provides that Grapevine remit a portion of revenue generated in the Dallas-Fort Worth airport terminal (DFW) to other municipalities, a separate access line report and/or reconciliation report for that specific geographic area should be provided to Grapevine with each quarterly payment. Coalition of Cities stated that Verizon is the principle provider of access lines in the DFW airport revenue sharing area, and that Verizon has informally indicated that it would not oppose such a provision in the rule. Coalition of Cities also held that a competitive local exchange carrier (CLEC) representative has also indicated that it would not oppose this filing requirement. Coalition of Cities stated that it did not oppose filing of the report with the commission as long as the cities could obtain a copy.

Verizon concurred with comments filed on behalf of Grapevine that recommended a separate designation for DFW for access line reporting and municipal fee compensation purposes.

AT&T opposed the Coalition of Cities' proposal requiring CTPs to provide additional access line reports specific to a designated geographic area within a city when that city has some statutory obligation to report revenue for that geographic area. AT&T contended that Chapter 283 has no provision supporting such a regulatory requirement and that such reporting is unnecessary to implement the purposes of Chapter 283. AT&T further argued that the commission has no authority under the Texas Transportation Code, §22.089 which is applicable to Grapevine in this situation, or any other statute outside of Chapter 283 and perhaps the Public Utility Regulatory Act (PURA) that would permit

the commission to impose such a regulation. AT&T opined that CTPs, including itself, may be willing, if they are able, to accommodate a city's need for specific right-of-way (ROW) compensation data, but there is no legal basis to require reporting of such data.

Commission response

For the sake of clarity, the commission modifies and moves this section, which was proposed as §26.467(k)(4) to §26.467(k)(3)(A)(iii). The modifications show that the reconciliation report is to be filed with the commission as part of the quarterly access line count report.

The commission finds that information about CTP uncollectibles should be readily accessible to municipalities via the MARS. The commission finds that Verizon's proposal to provide net uncollectible information is unlikely to provide useful information to municipalities. The commission further finds that Plano's proposal to delineate uncollectible information by category and month would be unduly burdensome on CTPs. The most reasonable solution would be to have CTPs provide current-period uncollectibles and prior-period write-offs as separate line items in the report, which would allow municipalities to monitor this figure and permit CTPs to collect reasonable supporting documentation. The commission will consider other expansions and updates to the MARS when necessary.

The commission declines to address specific geographic areas that are outside the scope of Chapter 283. However, if parties agree to a separate access line report and/or reconciliation report for a specific geographic area, then the CTP may certainly provide additional reports to the municipality with each quarterly payment. However, nothing in this rule changes the requirements that CTPs report access lines to the commission by municipality.

Report of reselling CTP by underlying CTP (proposed as §26.467(k)(5))

SWBT asserted that the proposed requirement that an underlying CTP report the identities of reselling CTPs was problematic as proposed. SWBT argued that if the proposed rule applies when reselling CTPs are the end-use customers, the underlying CTP is prohibited from providing this information under 47 U.S.C. §222, relating to Privacy of Customer Information, (Federal Telecommunications Act) (FTA). SWBT further argued that if the proposed rule applies when reselling CTPs use the access lines or facilities to provide telecommunications services to other end-use customers, then the exchange in which the reselling CTP obtains the facilities may not be related to the location of the end-use customer. Therefore, SWBT contended, the information provided would not necessarily result in useful information for the municipalities and would be unreasonable. SWBT emphasized that placing underlying CTPs in charge of reselling CTPs is unwieldy, ineffective, improper, and unworkable. SWBT maintained that the combination of a reselling CTP report and commission enforcement authority should be sufficient to address municipal concerns.

SWBT expressed concerns about the commission's legal authority to require the disclosure of the identity of reselling CTPs in light of FTA §222(b) and stated that incumbent owners of facilities are not the only underlying providers of access lines to reselling providers. SWBT contended that if any CTP must provide the identity of reselling CTPs, all CTPs should provide this information, thus placing all CTPs on equal footing.

SWBT and AT&T asserted that, for underlying CTPs to provide reports showing reselling CTPs that may be providing access lines in each municipality, it would take time, uniform commission orders to all CTPs, and record support concerning the inapplicability of FTA §222(b). SWBT and AT&T indicated that such "record support" should come in the form of a commission order directing all CTPs to provide such reports. SWBT and AT&T contended that such an order would be advisable in light of its concerns about and interpretations of the confidentiality requirements under FTA §222(b). SWBT and AT&T further indicated that such reports should be directed to the commission pursuant to its order and not at the request of a city or municipality.

SWBT further asserted that CTPs should be compensated for the effort, arguing that such reports would serve no business purpose for the CTPs. SWBT stated that the only information that is relevant or reasonably possible to provide on the reports is the identification of reselling CTPs that may be providing access lines in a city. SWBT, AT&T, and CLEC Coalition argued that it is theoretically possible to list the number of lines that are the product of "resale" under FTA §251(b)(1) or (c)(4), but it is impossible to provide similar information for services provided via unbundled network element (UNE) loops under FTA §251(c)(3).

Verizon contended that the proposed language is in conflict with LGC §283.055(k). According to Verizon, only the commission should request information regarding reselling CTPs, and a CTP is only required to present available information to the commission. Verizon and AT&T stated each CTP should be responsible for reporting its access lines, and an additional administrative burden on behalf of providers that actually provide service to end users should not be unfairly placed on underlying providers.

AT&T and Verizon contended that any report submitted by an underlying carrier could not definitely certify that a reselling carrier was operating within a particular city or municipality or that it was even a CTP. AT&T and Verizon expressed that a disclaimer for each report would be a necessary component in order to reduce claims from the Cities that the information was insufficient or not in compliance with state law and/or commission rules.

CLEC Coalition stated that it does not object to the imposition of the requirement that CTPs report the identities of reselling CTPs in a given municipality and that it believes the provision should greatly assist municipalities in identifying reselling CTPs that are not in compliance with Chapter 283. CLEC Coalition asserted some concerns that the report may identify some companies as CTPs when they are not CTPs.

TTA contended that the identities of reselling CTPs to which the underlying carrier has provided access lines within a municipality's boundaries is proprietary to the reselling CTP. TTA argued that if municipalities have questions related to CTPs providing service within their boundaries, they should contact the CTPs directly rather than placing an unreasonable reporting burden on the underlying CTPs. TTA asserted that forcing an underlying provider to report access lines on proprietary information of the reselling CTP will result in inaccurate access line counts which will unreasonably impact the compensation to municipalities. TTA proposed that all CTPs should provide the commission with an affidavit attesting that they will directly report their access lines to the commission or that they have entered into and filed with the commission a written agreement with either the underlying CTP or a third party to report access lines on their behalf.

Plano urged that additions should be made to this reporting provision to require a 15-day response deadline and argued that

the underlying CTP's report should include the total number of access lines sold to each reselling CTP. Plano stated that a disclaimer as to the accuracy of the information would be acceptable. Plano noted that its main concern was the identification of those reselling CTPs that may be operating within its boundaries. Once the identity is known, Plano stated that it could contact the reselling CTP directly. Moreover, Plano indicated that it would be advantageous to place such information on the MARS for easier access and downloading.

Dallas expressed some problem with a disclaimer as to the accuracy of the information. Dallas noted that if an underlying CTP does not know whether or not the company to which it is providing lines is a CTP, the lines should be reported as the underlying CTPs lines. Dallas further stated that an underlying CTP should not be providing lines to a company without knowing that the reselling CTP is a CTP. Dallas argued that it may not receive ROW fees due to the fact that the underlying CTP is providing access lines to a carrier under the impression that the reselling carrier is a CTP and, thus, paying its own municipal fees. Dallas acknowledged that it was not seeking an exact count of the reselling CTPs to which the underlying CTP has provided lines, but that the underlying CTP should know who the reselling CTPs are and their areas of operation.

Houston argued that the cost should rightfully be borne by the "cost causer."

Commission response

The commission finds that information regarding the identities of CTPs operating in a particular municipality is available to that municipality through the MARS. Municipalities requested this report of reselling CTPs by underlying CTPs to alleviate some concerns they have about accurate reporting. The commission finds that municipalities have recourse to the commission's complaint process and to LGC §283.056(c)(3), which references a municipal authorized review of the provider to ensure compliance with the access line reporting requirements of Chapter 283. Therefore, the commission withdraws proposed subsection (k)(5) and thus declines to establish a requirement for underlying CTPs to report the identities of reselling CTPs by municipality.

The commission disagrees with those commenters contending that such a reporting requirement is counter to federal confidentiality limitations as expressed in FTA §222. The commission finds that requiring underlying CTPs to identify reselling CTPs by a suitable geographic unit that can be correlated to a given municipality is consistent with its directives from Chapter 283 to ensure compliance with access line reporting requirements. The commission concludes that FTA §222(c)(1), which relates to the privacy requirements for telecommunication carriers, allows for the disclosure to the commission of otherwise proprietary information for limited purposes when "required by law." Chapter 283, specifically §§283.001(a), 283.055(j) and (k), 283.056(c)(3), and 283.058, provide the commission sufficient authority to require disclosure to the commission of the identities of reselling CTPs by the underlying CTPs.

However, the commission does not resolve the issue of confidentiality concerns between municipalities and CTPs or the issue of suitable geographic units that can be correlated to a given municipality. In the light of these concerns, the ongoing commission processes to address accurate access line count reporting, and the other avenues available to municipalities, the commission declines to require the underlying CTPs to report the identities of the reselling CTPs by municipality at this time.

§26.467(k)(4) - Adequate proof of reporting and compensation responsibilities (proposed as §26.467(k)(6))

SWBT contended that its interconnection agreements include "municipal fees" in a list of taxes that a reselling CTP must pay, which addresses the reselling CTP's obligations under Chapter 283. SWBT argued that, the commission's approval of these interconnection agreements, along with the CLEC's signature on the agreement, should constitute "adequate proof."

SWBT asserted that the commission has tools available to ensure compliance that are unquestionably more effective than whatever notice might be given through a separate adequate proof document or any action for breach of the adequate proof agreement or the underlying interconnection agreement. SWBT argued that, if a reselling CTP is not willing to enter an adequate proof agreement, it is questionable whether the reselling CTP would be willing to adequately compensate the underlying CTP for this activity. SWBT further argued that the proposed rule would also greatly benefit the position of a municipality, and adversely affect an underlying CTP who made payments on behalf of a reselling CTP, when each are creditors in the bankruptcy of a reselling CTP.

As an alternative, SWBT proposed that the commission require all CTPs to file affidavits indicating their knowledge of the existence of Chapter 283 of the Texas Local Government Code, and commission rules promulgated thereunder, and stating one of the following intentions: (1) the CTP will directly report its access lines to the commission and remit payment to the municipalities; or (2) the CTP has entered a written agreement with an underlying CTP or other third party (as identified in the affidavit) to report and remit on behalf of the CTP. SWBT provided alternative language for the subsection, including a conversion of the requirement that the underlying CTP obtain adequate proof in the form of a written agreement to a provision for reselling CTPs to fulfill their reporting and compensation requirements through their underlying CTPs with a written agreement in accordance with subsection (l).

The CLEC Coalition stated that its only objection to the proposed rules is with the adequate proof provision. The CLEC Coalition asserted that this proposed paragraph constitutes a shift in reporting and payment burdens from reselling CTPs to underlying CTPs and, therefore, departs significantly from current rule and conflicts with proposed §26.467(k)(3)(A)(iii) (renumbered as (k)(3)(A)(iv)). The CLEC Coalition argued that reselling CTPs are not required to enter into a written agreement with an underlying CTP, and that an underlying CTP has no leverage to require that reselling CTPs sign such agreements. Further, the CLEC Coalition argued that underlying CTPs have no means to ensure that a reselling CTP will comply with the reporting and payment requirements imposed by Chapter 283. The CLEC Coalition contended that leaving the underlying CTP on the hook for remitting access line fees for a reselling CTP who will not sign the written agreement is contrary to the anti-discrimination and competitive neutrality provisions of Chapter 283 and is inconsistent with the compensation scheme contemplated by current rules. The CLEC Coalition contended that the proposed subsection (k)(6) (renumbered as (k)(4)), dealing with adequate proof provisions, is not a viable solution. CLEC Coalition suggested that the proposed subsection (k)(5), requiring identification of reselling CTPs, should significantly alleviate the problems the adequate proof subsection addresses and, if not, the issues should be revisited at a later date.

AT&T argued that the proposed rule unreasonably and unfairly shifts the burden of compliance from the reselling CTP to the underlying CTP. AT&T contended that the proposed rule should provide for prompt repayment by a reselling CTP to the underlying CTP, reimbursement by cities for double payments and the right to charge an administrative fee. AT&T asserted that the current rule should remain in effect with, perhaps, an affirmative obligation for the reselling CTP to provide the underlying CTP with adequate proof. AT&T maintained that the underlying CTP has no leverage to require agreement from the reselling CTP to ensure compliance, other than enforcement by the commission. AT&T asserted that the proposed rule creates a "black hole" by requiring first that an underlying CTP needs an agreement from a reselling CTP when the reselling CTP will do its own reporting and remittance, and secondly governs any agreement between a CTP and a third party who will do the reporting and remitting for the CTP, but, third, makes no provisions governing that third party relationship when there is no agreement. AT&T argued that current billing systems do not have the operational capabilities to selectively exempt one reselling CTP from a single surcharge, and that such a change would cost millions of dollars to implement. AT&T opposed the proposal by Coalition of Cities and Plano that would require a reselling CTP to provide a sworn affidavit.

Verizon complained that this rule is unduly burdensome. Verizon argued that the underlying CTP cannot accurately count lines without the reselling CTP cooperation because it is not privy to information from a reselling CTP regarding which jurisdiction the end-use customer resides or the number of access lines ultimately being provided. Moreover, Verizon contended that existing law, LGC §283.055(k), and commission rules place the responsibility of reporting access lines on each CTP. Verizon proposed alternative language that, while recognizing the responsibility of each CTP to report its access lines, allows for agreements between the underlying carrier and a reselling CTP that provides for reporting and payment of municipal fees for the reselling CTP by the underlying carrier.

Verizon proposed that if a written agreement is used, the reselling CTP should be required to file a copy of the agreement with the commission to enhance credibility of the process. Verizon agreed with SWBT that commission oversight, using its enforcement authority to assure compliance by CTPs, would be the most efficient and practicable approach for all parties.

The Coalition of Cities requested that the "adequate proof" written agreement include a sworn affirmation, be filed at the commission, and provided to municipalities upon request. Disagreeing with SWBT, Coalition of Cities supported separate "adequate proof" documentation. Coalition of Cities cited previous failures of CTPs to file reports for many reselling CTPs as basis for drawing attention to CTP responsibility for access line reports and payments. Further, Coalition of Cities argued that the interconnection agreements between the underlying carrier and the reselling CTP are inadequate for enforcement purposes by third parties. Coalition of Cities opined that the multiple use of the "adequate proof" term in Chapter 283 requires specificity beyond a general requirement in interconnection agreements to obey all laws and rules.

Plano cited the report attestation requirements found in existing §26.465(g)(2)(B)(iv) and argued that notarization of the written agreements provides only a minimum amount of accountability to ensure that the agreement is understood by both the underlying and reselling CTPs. Plano requested that the commission adopt the §26.467(k)(6)(B) language offered by Coalition of Cities or, alternatively, to require that the written agreement be notarized as required by existing §26.465(g)(2)(B)(iv). Plano requested that the commission require underlying CTPs to file with the commission any written agreements with reselling CTPs, and that cities be allowed to request copies of such agreements, as proposed by the Coalition of Cities. Plano argued that, if no filing is required of the agreements, then there would be no way to ensure compliance.

Plano noted that LGC §283.055(k) places the responsibility for reporting reselling CTP counts on the underlying CTPs until the underlying CTP received "adequate proof" that the reselling CTP would be filing its own reports and payments to the cities. Plano supported Verizon's proposed revised language to this provision but provided additional changes to address a time frame within which the affidavit should be filed, whether a municipality may have access to that affidavit, and the identification of the names of the municipalities to which the reselling CTP would report access line counts.

Houston contended that the underlying CTP must provide the executed written agreement to the affected municipality. Houston argued that the written agreement should state that the reselling CTP will directly report all leased or resold access lines and remit related payments to the affected municipality. Houston agreed in concept with the language proposed by SWBT for proposed subsection (k)(6)(A) and (B) but with Houston's suggested modifications.

In its reply comments, SWBT stated that it agreed with other CTPs that the commission should not delegate to underlying CTPs the policing of access line reporting for reselling CTPs. SWBT said the comments of some municipalities express a lack of confidence in the integrity of any CTP and, therefore, there is a need for commission oversight throughout the process of an authorized review. SWBT urged the commission to be actively involved in the enforcement of CTP reporting by using its ability to revoke the certificates of CTPs that fail to comply with Chapter 283 and related rules. SWBT suggested that, if CTPs provide written confirmation to the commission that they will file their own reports, and underlying CTPs provide lists of potential reselling CTPs to the commission, then municipalities will have access to the information needed to pursue non-complying CTPs.

Prompted by staff questions at the public hearing, parties discussed varying interpretations of LGC §283.055 with regard to the obligations it places on all CTPs, the exceptions carved out for those CTPs with "adequate proof" in place, and the extent to which a default burden is imposed on underlying CTPs when no "adequate proof" is in place. The CLEC Coalition proposed that when "CTP" is used in LGC §283.055(i) it references reselling CTPs, rather than all CTPs, based on the history prompting the legislation.

Dallas and Coalition of Cities disagreed that the proposed rule constituted any shift in burden. Dallas argued that it was merely a positive rewording of a statutory requirement that is written in the negative; and that the statute clearly puts the burden on underlying carriers because it says they have to report it unless they have adequate proof. Coalition of Cities noted that this interpretation was supported by the fact that each statutory mention of adequate proof is stated in the direction of it flowing from the reselling CTP to the underlying carrier, and inferred that an informational letter from an underlying carrier is not sufficient.

Dallas and Coalition of Cities emphasized that the underlying CTP should be obligated to know that the reselling CTP has acknowledged its responsibility to report, and articulated a need for an executed agreement or some signed acknowledgement that the reselling CTP understands its obligations. Coalition of Cities observed that the legislature, like municipalities, did not know where the access lines terminate, so they appropriately put the burden on underlying CTPs to get the CLEC to acknowledge that it will report and pay the fees.

Coalition of Cities said it should be a matter of good business practice for an underlying carrier to obtain a reselling CTP's certificate number, and that if interconnection agreements contained the certificate numbers of the parties involved, the difficulty in locating the reselling CTPs would be reduced. CLEC Coalition explained that an arrangement between an underlying CTP and a reselling CTP does not necessarily entail an interconnection agreement, such as when a CLEC sells capacity to another CLEC, and said it is common in such agreements to articulate that the CLEC providing capacity will not undertake any obligation to comply with Chapter 283.

Coalition of Cities agreed that it would be a very difficult task for underlying carriers to count access lines without cooperation from the reselling CTP, but said that fact was known when the statute was written and likely was part of the reason the statute provided for the use of an adequate proof agreement, given the phrasing of the statute.

JSI expressed concern about the potential burdens of adequate proof requirements, explaining that the agreements it enters into with reselling CTPs are binding contracts, leaving both sides with obligations. JSI emphasized that enforcement should reside with the commission since its resale agreements specify that both parties will abide by commission rules.

SWBT stressed that it cannot accurately count the reselling CTPs' lines if the reselling CTP refuses to cooperate by entering into an adequate proof agreement. SWBT emphasized that it also wants to hold reselling CTPs accountable, like cities do, because it is in a less competitive position in the market for a given service when it covers the payments of reselling CTP competitors that escape costs when they escape their Chapter 283 obligations. SWBT argued that a sufficient and practical solution would be that underlying CTPs provide simple notification to reselling CTPs of Chapter 283 obligations, backed by adequate filings from reselling CTPs with the commission and the commission's enforcement abilities. SWBT concluded that the main point of contention here is whether an agreement between underlying CTP and reselling CTP is necessary to effectuate adequate proof.

SWBT and Coalition of Cities deliberated during the hearing and jointly proposed that concerns surrounding adequate proof would be best and most conveniently addressed on a going forward basis by incorporating into the certificate application process a sworn statement of intentions regarding the reporting of access lines and payment of municipal fees. They proposed that the applicant would select from one of three commitments: (1) directly make its own reports; (2) show evidence of a written agreement with an underlying carrier to meet its obligations; or (3) provide evidence of an agreement with a third party to meet its responsibilities. They also stressed that the commission will post all certifications on its website.

Commission response

Pursuant to the commission's decision regarding the report of reselling CTPs by underlying CTPs, as proposed in subsection (k)(5), the commission finds that it is unnecessary to add language to new subsection (k)(4) requiring information on reselling CTPs to a municipality and deletes such language, as originally proposed. The commission carries forward the definition of "underlying CTP" and "reselling CTP" from proposed subsection (k)(5).

In new subsection (k)(4), the commission establishes the minimum elements that comprise "adequate proof," requires that the business relationship between underlying and reselling CTPs must include an agreement containing the adequate proof elements, allows adequate proof provisions to be part of interconnection or other business agreements among the parties, and adds an explicit requirement that reselling CTPs must provide adequate proof to operate in conjunction with the statutory obligation that underlying CTP's must obtain adequate proof.

The commission finds that the overall reporting and compensation process and results would be enhanced if the "adequate proof" referenced in Chapter 283 were a written, rather than oral, agreement. These concepts are incorporated into new §26.467(k)(4)(B), which defines "adequate proof" as a written agreement that specifically cites, and assigns responsibility for compliance with, Chapter 283.

Similarly, the commission agrees that the reporting process must specifically designate the CTP that will bear the responsibility for meeting the reporting and compensation requirements of Chapter 283. It should be noted that a general provision in an agreement that the reselling CTP will "obey all applicable laws and rules" is insufficient. However, the commission finds that "adequate proof" can be part of a more comprehensive business agreement between the underlying and reselling CTPs. The commission acknowledges such in new subsection (k)(4)(F), which holds that the underlying CTP must acquire this adequate proof within 90 days of the effective date of this section, at the time of the signing of an initial interconnection agreement, or at the time of signing its agreement for the provision of services if the parties do not have an interconnection agreement.

Likewise, since "adequate proof" is a fundamental mechanism for holding CTPs responsible for their reporting obligations, the commission finds the "adequate proof" agreements should be available to the commission and municipalities. The commission assigns that responsibility to all CTPs in the new subsection (k)(4)(H), which holds that a CTP, whether an underlying CTP or reselling CTP, shall make its adequate proof agreements available for review by municipalities and the commission upon request.

The commission disagrees with parties that contended that proposed new subsection (k)(6)(C) shifts a burden from the reselling CTP to the underlying CTP. Proposed new subsection (k)(6)(C) holds that underlying CTPs and their reselling CTPs shall, as part of their business relationship, enter into an agreement that meets the adequate proof standard to ensure that each CTP reports and compensates municipalities for those lines that it uses to serve end-use customers. With regard to this issue, the commission interprets the provisions of LGC §283.055 as follows. LGC §286.055(j) requires all CTPs to file a quarterly report of access line counts. LGC §283.055(k) excepts some CTPs from the requirements of LGC §286.055(j), namely those underlying CTPs that obtain "adequate proof" from a reselling CTP that the reselling CTP will separately and directly report the access lines it provides to end-use customers. Similarly, LGC §283.055(f)

requires that all CTPs must make payments to municipalities based on the calculations reported pursuant to LGC §286.055(j). In parallel fashion, LGC §283.055(i) then excepts one group of CTPs from making those payments. Again, this group would be the underlying CTPs that have been furnished with "adequate proof" from the reselling CTP that the reselling CTP will be directly remitting the fees based on the access lines reported pursuant to LGC §286.055(j).

The commission agrees that reselling CTPs have a direct statutory obligation under LGC §283.055(f) and (j), to ensure that access lines are reported and the appropriate fees are paid to the municipalities. Therefore, the commission makes several revisions to specify the reselling CTP's responsibility to provide adequate proof. First, in the new subsection (k)(4)(C), the commission requires both underlying and reselling CTPs to enter into an agreement containing adequate proof provisions. Secondly, new subsection (k)(4)(D) states the underlying CTP's responsibility to obtain adequate proof. New subsection (k)(4)(E) then requires the reselling CTP to supply the adequate proof upon request. New subsection (k)(4)(G) requires the underlying CTP, in the event of its failure to obtain adequate proof from the reselling CTP, to include the reselling CTP's lines in its access line count report and to likewise compensate municipalities.

The commission understands that underlying CTPs who fail to obtain adequate proof from a reselling CTP may be unable to provide accurate access line count reports and related remittances without the cooperation of the reselling CTP. However, the commission does not see that the statute allows any latitude on this matter. Further, because underlying CTPs provide reselling CTPs with services essential to the reselling CTP conducting business, the commission disagrees with the argument that underlying CTPs do not have sufficient leverage to obtain adequate proof.

The commission acknowledges that it may take some time to get adequate proof agreements in place for CTPs that already have interconnection agreements or other business agreements in place but do not have any provisions therein or separately that meet the adequate proof requirements in this section. Therefore, in new subsection (k)(4)(F), the commission allows 90 days to make such arrangements.

The commission notes that some parties were confused about the distinction between the adequate proof agreement and the written agreement arranging for the underlying CTP to serve as the designated reporting party reporting on behalf of a reselling CTP in new §26.467(l). The adequate proof agreement is a required agreement between all underlying and reselling CTPs that shows that the underlying CTP informed the reselling CTPs of their obligations under Chapter 283. However, the designated reporting arrangement is an optional arrangement in which the designated reporting party agrees to file quarterly access line count reports on a disaggregated basis *as directly related to the CTP for which it is reporting*. If that designated reporting party is the underlying CTP, then the underlying CTP would be reporting the lines of the reselling CTP on the reselling CTP's behalf only with its express permission. Therefore, while these written agreements may serve the same function and, indeed, may be the same document, the commission does not require that they be the same document.

§26.467(l) - Alternate reporting and compensation arrangements

Coalition of Cities, Plano, and Verizon opposed deletion of the existing §26.467(l)(1)-(3), on the ground that these provisions clarify that all CTPs are to report and compensate municipalities. Coalition of Cities, Plano, and Verizon argued that these subsections clarify that CTPs that "own" facilities in the rights-of-way compensate cities directly and that CTPs that "do not own" facilities in the rights-of-way have an option of either compensating cities directly or compensating cities indirectly through the underlying CTP, so long as they have reached a written agreement with the underlying CTP. Coalition of Cities, Plano, and Verizon held that this written agreement is the same as referred to in proposed subsection (k)(6) (renumbered as (k)(4)), addressing adequate proof. Coalition of Cities, Plano, and Verizon asserted that the paragraphs proposed for deletion explain the necessity of a written agreement as evidence of adequate proof of the CTP responsible for access line reporting and compensation. Coalition of Cities, Plano, and Verizon contended that existing §26.467(l)(1)-(3) should either be re- designated as subsection (k)(6)(A) or included in new proposed §26.469.

Houston proposed a minor change to clarify that the designated party may charge a reasonable administrative fee to the CTP for reporting and compensating a municipality on its behalf. Garland argued that the administrative fee should be charged to the CTP, and should not reduce the fee paid to the municipality.

While agreeing with permitting CTPs to file access line counts on behalf of affiliates on an aggregated basis, SWBT argued that the rule should specifically provide that payments may also be made on an aggregated basis, and that the commission should maintain the affiliate information. SWBT asserted that CTPs should be permitted to voluntarily enter alternate reporting and compensation agreements, as proposed by §26.467(l), but that reporting access line counts and remitting payments on behalf of another CTP should only arise out of an agreement between providers to do so, not by default, as proposed in subsection (k)(6) (renumbered as (k)(4)). SWBT maintained that to do otherwise would allow the reselling CTP to shift to the underlying CTP the burden of reporting and remitting accurate access line reports and fees by refusing to sign adequate proof agreements. SWBT further argued that in many instances, the underlying CTP has no way to determine the number of access lines a reselling CTP is providing to end-use customers.

Verizon recommended modification of the MARS to allow a CTP to include all certificate numbers in its filings.

Commission response

The commission notes that it did not carry its definitions of "underlying CTP" and "reselling CTP" forward from subsection (k). The commission modifies subsection (l) to include defining language by adding new subsection (1)(1) to reference subsection (k).

The commission finds that §26.467(l)(1) and (2), as proposed for deletion, merely repeat the provisions of subsection (k) of this section, related to the need for all CTPs to report their own quarterly access line count report and to compensate municipalities accordingly. These provisions are clearly extraneous, and the commission declines to retain them. Existing §26.467(l)(3), as proposed for deletion, held that reselling CTPs may seek to have the underlying CTP report for them with a written agreement. Proposed §26.467(l)(1) allows for the same arrangement. Therefore, the commission declines to retain existing §26.467(l)(1) - (3) , as proposed for deletion.

The commission notes that some parties were confused about the distinction between the adequate proof agreement and the written agreement arranging for the underlying CTP to serve as

the designated reporting party reporting on behalf of a reselling CTP in new §26.467(l). The adequate proof agreement is a required agreement between all underlying and reselling CTPs that shows that the underlying CTP informed the reselling CTPs of their obligations under Chapter 283. However, the designated reporting arrangement is an optional arrangement in which the designated reporting party agrees to file quarterly access line count reports on a disaggregated basis *as directly related to the CTP for which it is reporting*. If that designated reporting party is the underlying CTP, then the underlying CTP would be reporting the lines of the reselling CTP on the reselling CTP's behalf only with its express permission. Therefore, while these written agreements may serve the same function and, indeed, may be the same document, the commission does not require that they be the same document.

The commission declines to adopt language regarding the fee that the designated reporting party may charge a CTP, but stipulates that any such fee may not affect the municipal compensation. The commission finds that in affiliate relationships, payments, like reports, may be made on an aggregate basis. Verizon suggested modifying the MARS to include all certificate numbers in an aggregate filing. The commission notes that the "Consolidated CTP" function allows CTPs to inform the commission when filing for more than one CTP on an aggregated basis, and orders CTPs to use this function when necessary, but only when necessary. Therefore, the commission adopts proposed §26.467(l)(2) as §26.467(l)(3) with minor clarifying changes.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2003) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. This amendment is also adopted under the Texas Local Government Code, §283.056(c)(3) and §283.058, which grant the commission the jurisdiction over municipalities and certificated telecommunications providers necessary to enforce the whole of Chapter 283 and to ensure that all other legal requirements are enforced in a competitively neutral, non-discriminatory, and reasonable manner.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and Texas Local Government Code §283.056 and §283.058.

§26.467. Rates, Allocation, Compensation, Adjustments and Reporting.

(a) Purpose. This section establishes the following:

(1) rates for categories of access lines;

(2) default allocation for municipalities;

(3) adjustments to the base amount and allocation;

(4) municipal compensation; and

(5) associated reporting requirements.

(b) Application. The provisions of this section apply to certificated telecommunication providers (CTPs) and municipalities in the State of Texas, unless specified otherwise in this section.

(c) Rate determination. The sum of the amounts derived from multiplying the rate for each category of access line by the total number of access lines in that category in a municipality shall be equal to the base amount. The rate for each of the access line categories established pursuant to §26.461 of this title (relating to Access Line Categories) shall be calculated using a 1998 access line count in general accordance with the following formula:
Figure: 16 TAC §26.467(c) (No change.)

(d) Estimating a 1998 access line count. If a CTP does not provide an actual 1998 access line count, the commission shall use the CTP's 1999 access line count, reported pursuant to §26.465 of this title (relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers), to derive an estimated 1998 access line count.

(1) Estimating access line count for category 1 (residential) access lines. The estimated statewide growth rate for category 1 access lines in 1999 is 4.5%. This percentage is determined using the statewide growth rate for residential access lines as reported to the Texas Legislature in the 1997 and 1999 reports entitled "Scope of Competition in Telecommunications Markets." The commission shall estimate a municipality's 1998 access line count for category 1 by discounting 4.5% from the 1999 line count for category 1 lines reported by a CTP.

(2) Estimating access line count for category 2 (non-residential) and category 3 (point-to-point) access lines. The estimated statewide growth rate for category 2 and category 3 access lines in 1999 is 7.0%. This percentage is determined using the statewide growth rate for business access lines as reported to the Texas Legislature in the 1997 and 1999 reports entitled "Scope of Competition in Telecommunications Markets." The commission shall estimate a municipality's 1998 access line count for category 2 and category 3 by discounting 7.0% from the 1999 line count for category 2 and category 3 lines reported by a CTP.

(3) Municipal request for exception.

(A) No later than March 15, 2000, a municipality may request the use of a municipality-specific growth rate(s), by category, for estimating its 1998 access line count, instead of using the estimated statewide growth rates determined under paragraphs (1) and (2) of this subsection. The municipality's request shall include its proposed growth rates(s), along with proof and methodology for deriving the growth rate(s), from public and verifiable sources.

(B) No later than March 15, 2000, a municipality that requests to use a municipality-specific growth rate(s) shall provide a copy of its filing to all CTPs that have filed access line counts for the municipality.

(C) No later than March 31, 2000, any CTP that has filed access line counts for that municipality may file objections to the municipality's proposed growth rate(s), if any. In order to be considered, an objection must include actual 1998 line count data for that municipality.

(D) Until resolution of the request approval process, the estimated statewide growth rate(s) determined under paragraphs (1) and (2) of this subsection shall be used to determine the municipality's 1998 access line count. Upon resolution of any objections to the request approval process, the commission shall develop a new access line count for 1998 incorporating the new growth rate(s), by category, as appropriate.

(e) Default allocation. The commission's default allocation shall be a ratio of 1:2.3:3.5 for access line categories 1, 2, and 3 respectively. This default allocation represents an average of all allocation ratios filed by municipalities with the commission pursuant to §26.463 of this title (relating to Calculation and Reporting of a Municipality's Base Amount).

(1) The commission shall establish access line rates for municipalities using the default allocation unless a municipality has filed its own allocation pursuant to §26.463 of this title.

(2) The access line rates established by the commission for municipalities using the default allocation shall remain in effect until a municipality updates its initial allocation pursuant to subsection (g) of this section or revises its allocation pursuant to subsection (h) of this section.

(f) Initial rates. No later than March 1, 2000, the commission shall establish rates for each category of access line in a municipality. These rates shall be considered to be initial rates. The initial rates shall be implemented no later than 90 days from the date the commission establishes the rates. These initial rates shall remain in effect until the rates are updated pursuant to subsection (g) of this section or revised pursuant to subsection (h) of this section.

(g) Updated rates. No later than April 14, 2000, the commission shall establish updated rates for each category of access line in a requesting municipality. The initial rates established under subsection (f) of this section shall be updated to incorporate municipal filings pursuant to paragraph (1) of this subsection and/or CTP filings pursuant to paragraph (2) of this subsection, as appropriate. Subject to approval by the commission, the updated municipal and CTP information shall be used to establish updated access line rates. The updated rates shall be in effect until revised pursuant to subsection (h) of this subsection.

(1) Updates to municipal base amount filings. No later than March 31, 2000, a municipality may update its base amount and allocation filed with the commission pursuant to §26.463 of this title. No later than March 31, 2000, a municipality that filed a request to update its base amount and/or allocation shall forward a copy of its filing to all CTPs who have filed access line counts for the municipality.

(A) Updates to base amount. A municipal filing for updates to base amount shall use a methodology for calculating the base amount that is consistent with §26.463 of this title, and shall include appropriate justification for the update. Appropriate justification may include:

(i) receipt of late payments from CTPs attributable to 1998 usage of rights- of-way;

(ii) reduction to judgment of disputed payments attributable to 1998 usage of rights-of-way;

(iii) settlement of disputed payments attributable to 1998 usage of rights- of-way;

(iv) eligibility under effective agreements or ordinances to receive a known and measurable amount due to specifically prescribed fee rate escalations provisions for the period between January 1, 2000 and March 1, 2000; and

(v) an inadvertent base amount computational error.

(B) Updates to allocation. A municipality that has filed with the commission its own allocation pursuant to §26.463 of this title may file an updated allocation no later than March 31, 2000.

(2) Updates to CTP access line counts. No later than March 15, 2000, a CTP may request to update its access line count filed with the commission pursuant to §26.465 of this title. A CTP's request for updates to access line count shall use a methodology for counting access lines that is consistent with §26.465 of this title, and shall include appropriate justification for the update. Appropriate justification may include, but is not limited to:

(A) an inadvertent access line count computational error;

(B) reconciliation of reported retail and resold access line lines; and

(C) access line counting issues associated with merger, sale, or transfer of CTPs.

(3) Choosing lower than maximum rate(s). The rates obtained by applying the allocation to the base amount and dividing the amounts allocated to each category by the appropriate number of access lines in that category in a municipality shall be considered to be maximum rates for a municipality. No later than March 31, 2000, a municipality that wishes to choose lower access line rate(s) than the maximum initial rates established under subsection (f) of this section, shall notify the commission and all CTPs that filed access line counts for that municipality of the lower access line rate(s) it chooses. If a municipality's request to choose lower initial rate(s) is higher than its updated rates, the updated rates shall remain in effect until revised pursuant to subsection (h) of this section.

(h) Revised rates. No later than October 15 of each calendar year, upon request from a municipality pursuant to paragraphs (l) and (2) of this subsection, the commission shall establish revised access line rates for each category of access line in a municipality, as applicable. A CTP shall apply the revised rates to access lines in a municipality in January of the next calendar year and compensate a municipality pursuant to the revised rates.

(1) Adjustments within established rates. No later than September 1 of each calendar year, a municipality may change its rates within the maximum rates by notifying the commission and all CTPs in that municipality that its wishes to revise its access line rate for the next calendar year. In its notification to the commission and the CTPs, the municipality shall indicate the rates that it wishes to have the commission apply in the next calendar year. Upon such notification, the commission shall revise the rates accordingly.

(2) Revising allocation formula. No later than September 1 of each calendar year, and not more than once every 24 months, a municipality may petition a modification of the default allocation or its own allocation by notifying the commission and all affected CTPs in the municipality. In its notification to the commission and the CTPs, the municipality shall designate the allocation that it wishes to have the commission apply in the next calendar year.

(i) Resolution of municipal allocations.

(1) The commission shall implement a municipality's allocation unless, the commission determines that the allocation is not just and reasonable, is not competitively neutral, or is discriminatory.

(2) No later than March 15, 2000 any affected CTP may complain regarding a municipality's initial allocation filed pursuant to §26.463 of this title. No later than April 7, 2000 any affected CTP may complain regarding a municipality's updated allocation filed pursuant to subsection (g)(1)(B) of this section. No later than September 15 of any calendar year any affected CTP may complain regarding a municipality's revised allocation filed pursuant to subsection (h)(2) of this section.

(3) Where the market price of a telecommunications service is less than or equal to the amount derived from multiplying the access line rates with the number of access lines used to provide that service, the allocation used to develop the access line rate shall be presumed to be discriminatory, not just and reasonable and not competitively neutral.

(j) Consumer price index (CPI) adjustment to commission-established rates. Beginning 24 months after the commission establishes access line rates, the commission shall annually adjust the rates per

access line by category for each municipality by an amount equal to one-half the annual change, if any, in the most recent consumer price index (CPI), as determined by the Federal Bureau of Labor Statistics.

(k) CTP implementation of commission-established rates. The requirements listed in this subsection shall apply to all CTPs in the State of Texas, except those exempted pursuant to §26.465 of this title.

(1) Interim compensation. CTPs shall continue to compensate municipalities at the rates required under the terms of the expired or terminated agreements or ordinances until the CTP implements the commission-established rates. A CTP not subject to an existing franchise agreement or ordinance that wants to construct facilities to offer telecommunications services in the municipality shall pay fees that are competitively neutral and non-discriminatory, consistent with the charges of the most recent agreement or ordinance between the municipality and the CTP serving the largest number of access lines within the municipality until the right- of-way fees established by the commission take effect.

(2) Billing systems. A CTP shall develop and maintain billing systems as necessary to implement access line rates, by category, as established by the commission. These systems must be sufficient to substantiate compliance with the access line reporting requirements in this section.

(3) Quarterly compensation and reporting. All CTPs are responsible for reporting to the commission their own quarterly access line count report and compensating each municipality, absent a reporting arrangement as described in subsection (l) of this section. All CTPs shall implement commission-established rates for each quarter. Unless otherwise specified, periodic reporting shall be consistent with this subsection and §26.465 of this title.

(A) Quarterly access line count report.

(i) No later than 45 days from the end of the preceding calendar quarter, a CTP shall file a quarterly access line count report for the preceding calendar quarter with the commission.

(ii) The quarterly access line count report shall include a count of the number of access lines, by category, by municipality, for the end of each month of the preceding quarter.

(iii) If a CTP deducts or includes a direct write-off pursuant to subsection (m)(2) of this section, the CTP shall complete a reconciliation report, showing a monthly delineation of the amount added to the total payment due to previously uncollectible direct write-offs, and the amount deducted from the total payment due to direct write- offs. This report shall be part of the quarterly access line count report filing.

(iv) The report shall exclude lines that are resold, leased or otherwise provided to other CTPs unless the CTP is reporting on behalf of another CTP pursuant to subsection (l) of this section.

(v) The CTP contact person listed in the Municipal Access Line Reporting System (MARS) at the time that the quarterly access line counts are entered for each quarter shall be the duly authorized representative of the CTP who certifies that the information contained in the report is based upon personal knowledge and is true and correct.

(vi) The CTP shall respond to any request for additional information from the commission within 30 days from receipt of the request.

(vii) Reports required under this subsection may be used by the commission only to verify the number of access lines that serve customer premises within a municipality.

(viii) On request and subject to the confidentiality protections of the Local Government Code, §283.005, each CTP shall provide each affected municipality with a copy of the report required by this subsection.

(B) Compensation.

(i) All CTPs shall apply the most recent commission-established rates to access lines in a municipality.

(ii) The municipal compensation shall be an amount equal to the rate per category of access line multiplied by the number of access lines in that category in that municipality at the end of each month in a calendar quarter as reflected in reports filed pursuant to subparagraph (A) of this paragraph.

(iii) All payments for calendar quarters shall be made no later than 45 days from the end of that quarter.

(4) Adequate proof of reporting and compensation responsibilities.

(A) Definition of "underlying CTP" and "reselling CTP."

(i) An underlying CTP is a CTP that owns facilities or provides facilities or capacity to another CTP in the rights-of-way of municipalities.

(ii) A reselling CTP is a CTP to whom an underlying CTP resold, leased or otherwise provided access lines that extend to the end-use customer's premises.

(B) For the purposes of this paragraph, "adequate proof" shall consist of a written agreement that specifically cites, and assigns responsibility for compliance with, the Texas Local Government Code, Chapter 283, and the reporting and compensation requirements of this subchapter.

(C) To ensure that each CTP reports and compensates municipalities for those lines that it uses to serve end-use customers, underlying CTPs and their reselling CTPs shall, as part of their business relationship, enter into an agreement that meets the adequate proof standard of this paragraph.

(D) An underlying CTP shall obtain adequate proof that the reselling CTP will directly report its lines and remit the related payments to municipalities.

(E) A reselling CTP must provide adequate proof to the underlying CTP upon request.

(F) The underlying CTP must acquire this adequate proof within 90 days of the effective date of this section, at the time of the signing of an initial interconnection agreement, or at the time of signing its agreement for the provision of services if the parties do not have an interconnection agreement

(G) If the underlying CTP fails to obtain adequate proof that the reselling CTP will include the access line in its monthly count and remit payment on those access lines to the municipality, the underlying CTP must include such lines in its monthly count of access lines and remit a right-of-way fee to the municipality.

(H) A CTP, whether an underlying CTP or reselling CTP, shall make its adequate proof agreements available for review by municipalities and the commission upon request.

(l) Alternate reporting and compensation arrangements. Notwithstanding any other subsection, a CTP shall be subject to the following terms when making alternate reporting and compensation arrangements.

(1) For the purposes of this subsection, "underlying CTP" and "reselling CTP" shall have the same meanings as assigned in subsection (k) of this section.

(2) Designated reporting party. A CTP may reach a written agreement separate from any other agreement, including the adequate proof agreement, to have a designated reporting party fulfill the reporting and compensation requirements of this section on its behalf. If the CTP is a reselling CTP, the designated reporting party may be the underlying CTP.

(A) If such an agreement is reached, the designated reporting party shall file the quarterly access line count report in each municipality, by category, on behalf of the CTP, and also compensate the municipality for those lines.

(B) The designated reporting party shall file the quarterly access line count report for each municipality, by category, with the commission on a disaggregated basis by CTP.

(C) Nothing in this subsection shall prevent a designated reporting party from charging a reasonable administrative fee for reporting and compensating a municipality on behalf of a CTP.

(D) Nothing in this subsection shifts the liability from a CTP, reselling or otherwise, for non-payment of municipal compensation and failure to report pursuant to this section.

(3) Affiliates. A CTP may file access line reports and remit payments for itself and its affiliates that are CTPs on an aggregated basis. If the CTP does so, the CTP shall include a list of the affiliates and their certification numbers in its quarterly access line count report.

(m) Pass-through. A CTP recovering its municipal compensation from its customers within the boundaries of a municipality shall not recover a total amount greater than the sum of the amounts derived from the multiplication of access line rates by the number of lines, per category, for that municipality. Pass-through of the commission's rates established under this chapter shall be considered to be a pro rata charge to customers.

(1) Where a CTP chooses to pass through the municipal fee to its customers such CTP shall not pass through any costs associated with its administration of municipal fees. The pass-through amount shall not exceed the access line rate, by category, established by the commission for that municipality.

(2) A CTP shall be allowed to deduct from its current payment any amounts that are direct write-offs as a result of its collection efforts. Any amounts subsequently recovered from the customer after the direct write-offs shall be included in the amounts payable to each affected municipality in the month(s) received. There shall be no reduction in payment for any estimated uncollectible allowances reported for financial purposes by the CTP.

(3) Beginning January 1, 2001, on request from the commission, a CTP shall report the amounts collected in municipal fees from customers and the municipal fees paid to municipalities for a period determined by the commission. This report shall be filed with the commission by the CTP no later than 60 days from the date the CTP receives this request.

(n) Compensation from customers of lifeline or other low-income assistance programs. A municipality may choose to forgo municipal compensation from access lines serving Lifeline customers or customers of other similar low-income assistance programs. A municipality electing this option shall notify all CTPs in the municipality of this decision before September 1 on any given year. Upon receipt of such notification, CTPs shall exclude such end-use customers from their quarterly access line count, not pass through a municipal fee to such end-use customers for the next calendar year, and shall be relieved of any obligation to pay fees on such access lines to the municipality.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 6, 2003.

TRD-200301586
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: March 26, 2003
Proposal publication date: September 27, 2002
For further information, please call: (512) 936-7308

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TITLE 22. EXAMINING BOARDS

PART 12. BOARD OF VOCATIONAL NURSE EXAMINERS

CHAPTER 235. LICENSING

SUBCHAPTER D. ISSUANCE OF LICENSES

22 TAC §235.48

The Board of Vocational Nurse Examiners adopts an amendment to §235.48, relating to reactivation of a license without changes to the text as published in the January 31, 2003, issue of the *Texas Register* (28 TexReg 817) and will not be republished.

The amendment will change subsection (e) from five to ten years.

No comments were received relative to the adoption of this rule.

The amendment is adopted under Chapter 302, Texas Occupations Code, Subchapter D, Section 302.151 (b), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purpose of the law.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 5, 2003.

TRD-200301552
Terrie Hairston, RN, CHE
Executive Director
Board of Vocational Nurse Examiners
Effective date: March 25, 2003
Proposal publication date: January 31, 2003
For further information, please call: (512) 305-7653

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TITLE 25. HEALTH SERVICES

PART 1. TEXAS DEPARTMENT OF HEALTH

CHAPTER 33. EARLY AND PERIODIC SCREENING, DIAGNOSIS, AND TREATMENT

25 TAC §33.310, §33.311

The Government Code, §531.021(b), transferred rulemaking authority for Medicaid provider reimbursement rates to the Texas Health and Human Services Commission. In accordance with that statute, we are transferring 25 TAC §33.310 and §33.311, which concern dental services under the Early and Periodic Screening, Diagnosis, and Treatment Program. The rules are being renumbered as 1 TAC §355.8443 and §355.8445 under Title 1, Part 15, Chapter 355, Subchapter J, Division 23 of the *Texas Administrative Code.* The transfer became effective September 1, 1997.

A complete conversion chart is published in the Tables and Graphics section of this issue.

Figure: 1 TAC Chapter 355

Filed with the Office of the Secretary of State on March 4, 2003.

TRD-200301728

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CHAPTER 38. CHILDREN WITH SPECIAL HEALTH CARE NEEDS SERVICES PROGRAM

25 TAC §§38.2 - 38.4, 38.10, 38.12, 38.13, 38.15, 38.16

The Texas Department of Health (department) adopts amendments to §§38.2-38.4, 38.10, 38.12, 38.13, 38.15 and new §38.16, concerning the Children with Special Health Care Needs Services Program (CSHCN). Sections 38.2, 38.3, 38.4, 38.10, 38.13, 38.15 and 38.16 are adopted with changes to the proposed text as published in the September 20, 2002, issue of the *Texas Register* (27 TexReg 8873). Section 38.12 is adopted without changes and will not be republished.

Specifically, amendments to §38.2 clarify certain definitions, add definitions of "new client," "ongoing client," "waiting list client," "health care benefits," and "urgent need for health care benefits", and delete the definition of "usual and customary." Amendments to §38.3 clarify certain language, move information related to the waiting list to new §38.16, and delete information related to a separate waiting list for family support services. Amendments to §38.4 clarify diagnosis and evaluation services and certain other language, add coverage of renal transplants if cost effective for the program, delete language reflecting a separate waiting list for family support services and the language regarding "Social Security Income (SSI) purchase of service" which is no longer applicable, state that the program may limit reimbursements and/or prior authorizations for certain services for the purpose of budget alignment as stipulated in §38.16, delete a subsection concerning budgetary limitations more fully addressed in new §38.16, and add language to clarify authorization request submission deadlines and denial, reconsideration, and appeal of service authorizations. Amendments to §38.10 clarify some claims submission requirements, add language to clarify denial, reconsideration, and appeal of claims, add coverage and payment strategy for renal transplants, and delete information related to budget alignment that is addressed in new §38.16. An amendment to §38.12 provides for client notification if the client must be placed on a waiting list for program services. Amendments to §38.13 clarify the family, provider, and applicant/client appeal processes.

The department has amended §38.15 concerning the operation of the Children with Special Health Care Needs Advisory Committee. Specifically, the committee has been continued until January 1, 2007; the membership of the committee has been decreased from 18 to 15 and membership categories have been combined; two alternate members have been added; the process for filling vacancies in the offices of presiding officer and assistant presiding officer has been changed; standards of conduct for members have been established; and the components that the committee must include in an annual report to the board have been clarified.

New §38.16 defines the detailed process by which the CSHCN program shall align its budget annually. In 1999, the 76th Legislature amended Health and Safety Code, Chapter 35, significantly changing CSHCN's eligibility criteria and covered services, and authorizing CSHCN to establish a waiting list for services to enable it to align anticipated expenditures with its appropriated budget. In September 2001, CSHCN projected significant budget constraints and instituted a waiting list for rehabilitation (medical) services effective October 5, 2001. New §38.16 addresses the management of the waiting list and also establishes criteria and the protocol to be utilized by CSHCN to determine "urgent need for health care benefits."

Changes made to the proposed text result from comments received during the comment period. The details of the changes are described in the summary of comments that follow. Other minor changes were made due to staff comments to clarify the intent and improve the accuracy of the sections.

Comment: Concerning the rules in general, one commenter stated that the basic problem with the proposed rules was the message that the department is willing to make cuts to the program. The commenter added that the legislature could target the program for cuts if the department appears willing to accept cuts.

Response: The department appreciates this comment, but the CSHCN program's expenditures may not exceed its appropriation. No change was made as a result of this comment.

Comment: Concerning the rules in general, one commenter stated that the program must ensure that administrative changes and requirements do not become burdensome to providers, especially physicians.

Response: The department agrees that the continuing participation of providers is essential to the program's capacity to serve clients, and therefore the department will consider the needs and recommendations of providers during the policy revision process. No change was made as a result of this comment.

Comment: Concerning the rules in general, one commenter requested that procedures for prior approval of diagnosis and evaluation and family support services be developed with provider input and not create an obstacle to payment.

Response: The department appreciates the comment and will consider the needs and recommendations of providers during the policy revision process. No changes were made as a result of this comment.

Comment: Concerning the rules in general, one commenter requested that family supports not take second place to health benefits.

Response: Family support services are included in the array of services offered by the CSHCN program. However, for the purpose of budget alignment as stipulated in §38.16, the department may allow only limited prior authorized family support services. No changes were made as a result of this comment.

Comment: Concerning the rules in general, several commenters stated that provider reimbursement should not be limited or decreased.

Response: In order to retain flexibility to ensure that anticipated costs do not exceed appropriations, the department maintains rule language to allow the program to reduce/ limit reimbursements to contractual service providers and reduce/ limit prior authorization for certain services for the purpose of budget alignment as stipulated in §38.16. However, the sections of the proposed rules that specify reductions in reimbursements to fee-for-service providers for budget alignment (§§38.10, 38.10(3), 38.16(b)(2)(F), 38.16(c)(3), and 38.16(d)(4)(C)) are removed as a result of this comment.

Comment: Concerning the rules in general, several commenters requested board approval before any limitations in reimbursements or prior authorization requirements are implemented.

Response: In order to retain flexibility to ensure that anticipated costs do not exceed appropriations, the department maintains rule language to allow the program to reduce/ limit reimbursements to contractual service providers and reduce/ limit prior authorization for certain services for the purpose of budget alignment as stipulated in §38.16. However, the sections of the proposed rules that specify reductions in reimbursements to fee-for-service providers for budget alignment (§§38.10, 38.10(3), 38.16(b)(2)(F), 38.16(c)(3), and 38.16(d)(4)(C)) are removed as a result of this comment. Any future changes in reimbursements to fee-for-service providers must occur through the rule change process.

Comment: Concerning the rules in general, several commenters stated that the rules should include a notification period prior to implementation of any changes in health care benefits or reimbursements. The commenters suggested several notice periods, including 30 days, 45-60 days, and 60-days. Several commenters stated that a 30-day notice was not sufficient.

Response: The department will provide notice of changes in health care benefits or reimbursement due to budget alignment at the time that the action is taken and as provided in the rules. Any future changes in reimbursements to fee-for-service providers must occur through the rule change process.

Comment: Concerning the rules in general, several commenters stated that the reduction or limitation of reimbursement in order to address budget shortfalls or help fund services for children on the waiting list should be instituted only on a temporary basis with a 60-day notice.

Response: In order to retain flexibility to ensure that anticipated costs do not exceed appropriations, the department maintains rule language to allow the program to reduce/limit reimbursements to contractual service providers and reduce/ limit prior authorization for certain services for the purpose of budget alignment as stipulated in §38.16. The program may consider removing reimbursement reductions if and when the program's anticipated expenditures no longer are expected to exceed its appropriation. However, as a result of these and other comments, the sections of the proposed rules that specify reductions in reimbursements to fee-for-service providers for budget alignment (§§38.10, 38.10(3), 38.16(b)(2)(F), 38.16(c)(3), and 38.16(d)(4)(C)) are removed and any future changes in reimbursements to fee-for-service providers must occur through the rule change process.

Comment: Concerning the rules in general, several commenters requested that notification of the right to appeal accompany any notice of changes in health care benefits or reimbursement, including changes due to a budget shortfall.

Response: The department believes it must retain maximum flexibility to ensure that anticipated costs do not exceed appropriations. Thus, changes in reimbursement or changes in health care benefits due to budget alignment will not be subject to appeal. Applicants/clients and/or providers will retain the right to appeal program decisions that adversely affect their individual eligibility/services/reimbursement, but not decisions necessary for budget alignment which affect all members of a group of applicants/clients or providers. Changes have been made to §38.12 and §38.13 to clarify language regarding notice to applicants/clients and providers and the appeal process.

Comment: Concerning the rules in general, one commenter requested that the Board of Health authorize any changes in program benefits.

Response: The department agrees. The board authorizes changes in program benefits through the rulemaking process. No changes have been made as a result of this comment.

Comment: Concerning §38.2(8)(A)-(C) and §38.3(a)(4), several commenters supported no change to the eligibility requirements with regard to age. Several other commenters did not support the continuation of services to individuals 21 years of age and older.

Response: Health and Safety Code §35.003(a)(3) directs the CSHCN Program to provide rehabilitation services to children with special health care needs, and §35.0022(a) of the Act defines a child with special health care needs as a person younger than 21 years of age and who has a chronic physical or developmental condition or has cystic fibrosis regardless of age. The department may not change statutory eligibility criteria by rule. No changes were made as a result of these comments.

Comment: Concerning §38.2(13), several commenters stated that the language was confusing and recommended that the word "client" only be used to refer to an individual currently enrolled in the CSHCN program.

Response: The department has amended §38.2(13) as proposed to clarify that a client is a person who is determined eligible for any CSHCN program services. However, no changes were made as a result of these comments.

Comment: Concerning §38.2(13) and §38.2(13)(A)(ii) and with regard to the definition of a "new client", one commenter recommended a change in the definition so that an individual who left the program due to remission of an illness would be given priority should he or she need to return to the program within 12 months.

Response: The department has amended §38.16(d)(1)(A)(i)-(vi) to establish priorities for taking clients off the waiting list.

Comment: Regarding §§38.2(22), 38.4(2), and 38.16(b)(2)(C)(ii), several commenters supported the provision of diagnostic and evaluation services to determine "urgent need".

Response: The department has added §38.16(e)(5), which states that information obtained from diagnosis and evaluation services will be used to determine "urgent need".

Comment: Regarding §38.2(30) and §38.2(46), several commenters supported the integration of family supports into the array of CSHCN benefits.

Response: The department agrees, and deleted §38.3(9) concerning separate waiting lists for rehabilitation services and family support services from the rules as proposed. No additional changes were made as a result of these comments.

Comment: Concerning §38.2(56), one commenter recommended that §38.2(56)(A) be altered to read "the customary charge, which is the unweighted average of the provider's charges on the same procedure over a twelve month period conducted on the date of service of the charge in question" and that section (B) be revised to read "the prevailing charge, which shall be the unweighted average of the customary charges for the same procedure performed by all providers with the same medical specialty in the county where the service was provided and every county in the state of Texas contiguous thereto".

Response: Review of the rules indicates that since the term "usual and customary" is not used in the chapter, the definition at §38.2(56) is unnecessary and has been deleted.

Comment: Concerning §38.3(a), one commenter asked that the department consider the needs of clients who have been in the program for years, and whose families still have no other sources of assistance. Another commenter stated that if adopted, the proposed rules will disqualify her child by changing the meaning, specifications, and qualifications, especially for financial eligibility requirements.

Response: Program eligibility criteria have not changed. The department may move ongoing clients to the waiting list to reduce the amount of funds expended by the program. The department believes that it must retain maximum flexibility to ensure that anticipated program costs do not exceed appropriations. No changes have been made as a result of these comments.

Comment: Concerning §38.3(a)(1), one commenter stated that a person with an incurable disease should be covered permanently and not have to worry about whether he or she will have insurance from year to year. Another commenter questioned the necessity of filling out paperwork each year when a diagnosis will not change.

Response: Eligibility for CSHCN health care benefits is based on medical, financial, and other criteria, and annual re-certification is necessary to verify all eligibility information. No changes were made as a result of these comments.

Comment: Regarding §38.3(a)(1), several commenters supported the provision of up to 60 days of diagnosis and evaluation services.

Response: The section as proposed authorizes up to 60 days of program coverage for diagnosis and evaluation services. No changes were made as a result of the comments.

Comment: Concerning §38.3(a)(1)-(2) and §38.3(a)(8), several commenters supported the requirement for annual re-certification for CSHCN program health care benefits.

Response: The department agrees that annual re-certification is necessary to assure that all clients continue to meet all eligibility criteria. No changes were made as a result of the comments.

Comment: Concerning §38.3(a)(3), one commenter supported the requirement that clients must utilize available insurance coverage and apply for other possible programs to cover expenses.

Response: The department agrees that requiring applicants/clients to utilize available third party coverage is necessary to assure that program resources are available to as many applicants/clients as possible. The department proposed no changes to this section, and no changes were made as a result of this comment.

Comment: Concerning §38.3(a)(8), one commenter recommended amending the paragraph by adding the following: "i.e., within 365 days from the first day of the client's current eligibility period, or within 366 days during a leap year".

Response: The department agrees and has amended the section accordingly.

Comment: Concerning §38.3(a)(8), several commenters supported giving priority to children who leave the program due to remission but who return with an urgent need for services, rather than treating them as new clients.

Response: The department has amended §38.16(d)(1)(A)(i)-(vi) to establish priorities for taking clients off the waiting list.

Comment: Concerning §38.3(b), one commenter recommended that the last sentence of the proposed rules be changed and a sentence be added to read as follows: "However, the program may offer, provide, or seek reimbursement for case management to individuals (and their families) who are neither eligible nor seeking eligibility for the program's health care benefits. Reimbursements received for case management services will be utilized to benefit the CSHCN program."

Response: The department has clarified §38.3(b) and §38.4(b)(4)(B) to address this comment. The component of the comment related to reimbursement will be taken into consideration by the department and handled as appropriate through policy.

Comment: Concerning §38.3(b) and §38.4(b)(4), several commenters supported the provision of case management services for children receiving CSHCN health care benefits and for children on the waiting list for CSHCN when other case management resources are not available as well as other children not eligible for or seeking program health care benefits.

Response: The sections as proposed authorize these case management services. No changes were made as a result of these comments.

Comment: Concerning §38.3(b) and 38.4(b)(4)(B), one commenter requested clarification of whether individuals on the waiting list were eligible for case management.

Response: Section 38.3(b) and §38.4(b)(4)(B) have been amended to clarify that individuals on the waiting list are eligible for CSHCN case management services. Section 38.16(f)(4) as proposed also addresses the provision of case management to clients on the waiting list.

Comment: Concerning §38.4(b)(2), one commenter noted that there was no other way to pay for diagnostic and evaluation services and urged the department to pay for these services even if the child was going on the waiting list. Concerning §38.16(b)(2)(C)(ii), two other commenters recommended that diagnostic and evaluation services continue to be covered during a budget shortfall.

Response: The department believes that it must retain maximum flexibility to ensure that anticipated costs do not exceed appropriations. However, §§38.4(b)(2), 38.16(b)(2)(C)(iii), and 38.16(e)(5) have been amended to clarify further that the CSHCN Program may provide diagnosis and evaluation services on a short-term basis, if needed to assess whether clients on the waiting list have urgent need, with prior authorization and approval by the Medical Director or other designated medical staff.

Comment: Concerning §38.4(b)(2), one commenter stated that the language regarding coverage of diagnosis and evaluation services for applicants for health care benefits should be clarified because such applicants have at that time not been determined eligible for program services.

Response: The department agrees, and has amended §§38.3(a)(1), 38.4(b)(2), 38.16(b)(2)(C)(ii), and 38.16(d)(1)(D)(ii) accordingly.

Comment: Concerning §38.4(b)(2) and §38.16(e), several commenters stated that the medical director and assisting physicians rather than other CSHCN program staff should decide which applicants/clients have urgent needs and which have special health care needs. Several other comments questioned who would determine what is an urgent need.

Response: The department has added clarification language to §38.4(b)(2) and §38.16(e) to address these comments.

Comment: Concerning §38.4(b)(3)(E)(v) and §38.10(3)(R)(ii), several commenters supported the addition of renal transplants to the array of services.

Response: Both sections as proposed authorize renal transplants if the projected cost of the transplant and follow-up care is less than the cost of continuing dialysis. No changes were made as a result of these comments.

Comment: Concerning §38.4(b)(5)(B)(iii)-(iv) and §38.16(b)(2)(C)(i), several commenters supported the preauthorization of family support services and giving priority to medical services over family support services during budget shortfall situations.

Response: The department appreciates these supportive comments. No changes were made to the current proposed rule language as a result of these comments.

Comment: Concerning §38.4(b)(5)(D), one commenter recommended working with the Texas Workforce Commission regarding daycare for children with special needs.

Response: The department believes that this suggestion may be implemented through program policy without the need for a rule change. No changes were made as a result of this comment.

Comment: Concerning §38.4(d)(3), one commenter supported limitations on services and coverage to address budget shortfalls.

Response: Limitations on both services and coverage are among the options the department will consider for budget alignment. No changes were made as a result of this comment.

Comment: Concerning §38.10, one commenter recommended instituting a sliding scale for procedure/item per occurrence.

Response: Health and Safety Code §35.0034 allows cost sharing. However, after an analysis of the projected expenditure savings and the projected cost of administering cost sharing, the department determined that implementing cost sharing at this time would not be cost effective. No changes were made as a result of this comment.

Comment: Concerning §38.10(1)(A), one commenter recommended adding the following language: "A claim must be processed and paid before the end of the second state fiscal year following the state fiscal year in which the service was provided to the client".

Response: The department agrees and has amended §38.10(1) accordingly.

Comment: Concerning §38.10(2) and §38.10(2)(A), one commenter supported the proposed time limitations on payment of claims and the process for handling health insurance denial and nonresponse.

Response: The department appreciates this comment. No changes were made to the sections as proposed.

Comment: Concerning §§38.10(3)(H), 38.10(3)(I)(i), 38.10(3)(I)(iii), and 38.10(3)(S)-(T), one commenter stated that following CMS codes should be limited to partial medical issues and procedures because CMS codes are specific to adults, but not the population under age 21.

Response: The CSHCN Program attempts to align program reimbursements with the Texas Medicaid Program reimbursement amounts for similar services, and the CMS reimbursement amounts are the amounts used by the Texas Medicaid Program. No changes were made as a result of this comment.

Comment: Concerning §38.10(6)-(7), several commenters did not support the removal of these sections from the rules and requested that board oversight be maintained.

Response: Section 38.16 replaces §38.10(6)-(7) and describes in detail the program's budget alignment methodology. In order to be implemented, §38.16 must be adopted by the board in rule. Therefore, board oversight is maintained. The sections of the proposed rules that specify reductions in reimbursements to fee-for-service providers for budget alignment (§§38.10, 38.10(3), 38.16(b)(2)(F), 38.16(c)(3), and 38.16(d)(4)(C)) are removed and any future changes in reimbursements to fee-for-service providers must occur through the rule change process.

Comment: Concerning §38.12(a)(10), several commenters did not support the removal of any ongoing clients from the program.

Response: The department may move ongoing clients to the waiting list to reduce the amount of funds expended by the program. The department believes that it must retain maximum flexibility to ensure that anticipated program costs do not exceed appropriations. No changes were made as a result of these comments.

Comment: Concerning §38.13(b)(1), one commenter stated that this section and §38.16(b)(1) should contain similar language concerning a notice of appeal right and the time period for an appeal.

Response: Section 38.16(b)(1) as proposed states that both clients and providers shall receive written notice of reductions or limitations of services, coverage, and/or reimbursement, but does not afford clients or providers an administrative review or a

hearing if the reductions or limitations must be imposed for budget alignment. Section 38.13(b)(1) has been amended to assure that applicants/clients will receive written notice, including the right to an administrative review and access to a hearing, if the program proposes to deny, modify, suspend, or terminate eligibility and/or health care benefits, unless the program's actions are authorized by §38.16 for budget alignment.

Comment: Concerning §38.15, several commenters supported the continuation of the Children with Special Health Care Needs Advisory Committee.

Response: The department agrees that the Children with Special Health Care Needs Advisory Committee provides valuable guidance to the department and should be continued. Section 38.15(e) as proposed extends the committee's existence until January 1, 2007.

Comment: Concerning §38.15(f)(1), several commenters requested that two alternate members be appointed.

Response: The department agrees and has amended §38.15(f) accordingly.

Comment: Concerning §38.15(f)(1), several commenters requested that family representatives be allowed to have alternates with proxy to vote and that family representatives constitute a majority of the total voting membership.

Response: The department has amended §38.15(f)(1) to include one consumer and one non-consumer as alternate members. The alternate members may vote in accordance with language added in §38.15(f)(1)(C).

Comment: Concerning §38.15(f)(1)(A), one commenter stated that family members should be able to name a person to represent them and to vote by proxy when they are unable to participate.

Response: The department has amended §38.15(f) to include alternates and to stipulate when they may vote. The board will appoint alternates as well as other committee members.

Comment: Concerning §38.15(i)(5), one commenter stated that the rules should require a quorum of eight members for the conduct of committee business.

Response: The department agrees, and §38.15(i)(5) defines a quorum as eight committee members. No changes were made as a result of the comment.

Comment: Concerning §38.15(n)(3), several commenters requested clarification of the meaning of the word "impropriety".

Response: The department has amended §38.15(n)(3) to eliminate the word "impropriety" and has added paragraphs §38.15(n)(4)-(6) to clarify further the standards of behavior for all committee members, and to define the phrase "personal or private interest".

Comment: Concerning §38.15(n)(3), one commenter proposed substituting the phrase "conflict of interest" for "impropriety".

Response: The department has amended §38.15(n)(3) to eliminate the word "impropriety" and has added paragraphs §38.15(n)(4)-(6) to clarify further the standards of behavior for all committee members, and to define the phrase "personal or private interest" rather than "conflict of interest".

Comment: Concerning section §38.16 as a whole, one commenter recommended further investigation and development of plans to provide services to children on the CSHCN health benefits program by "buy-in" into an insurance program such as CHIP; and hiring of an ombudsman to facilitate cost-sharing between the CSHCN Program and third party payers as options for achieving cost reductions.

Response: The department appreciates and will consider these suggestions. However, since current rules allow these initiatives, no changes were made as a result of the comment.

Comment: Concerning §38.16(b)(2)(A), several commenters supported the implementation of administrative efficiencies.

Response: In the last year, the department has implemented many "administrative efficiencies" affecting program operations that did not require rule changes, and will consider any other specific suggestions. No changes were made as a result of these comments.

Comment: Concerning §38.16(b)(2)(A)-(F), several commenters requested that the department reconsider the prioritization of changes to address the shortfall and reduce reimbursement levels for providers or types of services covered before implementing a waiting list. The commenters stated that cuts for provider reimbursement and for types of services should occur before a waiting list is implemented.

Response: By rule, effective October 11, 2001, the department reduced reimbursements to certain providers, acknowledging that the CSHCN Program must balance the need to retain providers while paying for needed services covered by the CSHCN health care benefits program. No changes were made as a result of these comments.

Comment: Concerning §38.16(b)(2)(B), several commenters supported services for all eligible children and clients and opposed a waiting list. Several commenters requested that children with urgent need on the waiting list receive services. One commenter urged that the program be adequately funded in order to serve all eligible clients.

Response: The department believes that it must retain maximum flexibility to ensure that anticipated costs to do exceed appropriations, including the option of utilizing a waiting list. No changes were made as a result of these comments.

Comment: Concerning §38.16(b)(2)(B), one commenter supported the return of coverage based on diagnosis so that clients with serious illness could receive care for their conditions.

Response: Health and Safety Code §35.005(b)(1) specifically states that the board by rule "may not establish an exclusive list of coverable medical conditions;". No changes were made as a result of this comment.

Comment: Concerning §38.16(b)(2)(B), one commenter requested ongoing monitoring and reporting of the status of children on the waiting list.

Response: Monitoring and reporting of the status of children on the waiting list are conducted according to program policy. Case management services are available to individuals on the waiting list. No changes were made as a result of this comment.

Comment: Concerning §38.16(b)(2)(B), one commenter recommended an interest list rather than a waiting list.

Response: Health and Safety Code §35.003(c) states that a waiting list composed of eligible persons, rather than those who have only expressed an interest in program coverage/services,

may be established if necessary to remain within budgetary limitations. No changes were made as a result of this comment.

Comment: Concerning §38.16(b)(2)(C)(i), one commenter supported the utilization of family support services to prevent out-of-home placements.

Response: Section 38.16(b)(2)(C)(i) as proposed authorizes family support services to prevent out-of-home placements. The department appreciates this supportive comment. No changes were made as a result of the comment.

Comment: Concerning §38.16(b)(2)(D), several commenters supported giving priority to children who leave the program due to remission but who return with an urgent need for services, rather than treating them as new clients.

Response: The department has amended §38.16(d)(1)(A)(i)-(vi) to establish priorities for taking clients off the waiting list.

Comment: Concerning §38.16(b)(2)(D), §38.16(b)(2)(G)(i)-(iv), and §38.16(d), one commenter recommended structuring the waiting list, and removing clients from the waiting list, as follows rather than by order of eligibility (date):

1. Children and Youth (less than 21 years of age): those with urgent need, ordered by date of application receipt; those without urgent need, but previously served by the Program, ordered by date of application receipt; or all others, ordered by date of application receipt.

2. Adults (21 or more years of age): those with urgent need, ordered by date of application receipt; those without urgent need, but previously serviced by the Program, ordered by date of application receipt; or all others, ordered by date of application receipt.

Several other comments supported the removal of children with urgent need from the waiting list prior to other children.

Response: Based on input during the comment period, the department has amended §38.16(d)(1)(A)(i)-(vi) to take clients off the waiting list according to the original date/time that starts the client's latest uninterrupted sequence of eligibility and in the following group order.

1. Children and youth less than 21 years of age with urgent need for health care benefits.

2. Adults (21 years of age and older) with urgent need for health care benefits.

3. Children and youth less than 21 years of age who do not have an urgent need for health care benefits and who were placed on the waiting list when they were ongoing clients and who have had no lapse in eligibility while on the waiting list or who are new clients who are re-applicants for health care benefits and who have had a lapse in eligibility for no longer than the 12 months prior to the date/time that starts their latest uninterrupted sequence of eligibility.

4. Adults (21 years of age and older) who do not have an urgent need for health care benefits and who were placed on the waiting list when they were ongoing clients and who have had no lapse in eligibility while on the waiting list or who are new clients who are re-applicants for health care benefits and who have had a lapse in eligibility for no longer than the 12 months prior to the date/time that starts their latest uninterrupted sequence of eligibility.

5. All other children and youth less than 21 years of age who do not have an urgent need for health care benefits.

6. All other adults (21 years of age and older) who do not have an urgent need for health care benefits.

Comment: Concerning §38.16(b)(2)(F) and §38.16(c)(3), several commenters recommended capping benefits at $100,000 per child as a means of addressing budget shortfalls.

Response: At the present time, imposing an annual cap on services provided to individual children is not feasible due to limitations in current resources and available technology. The department is also concerned that implementation of such a cap would place an undue burden on providers and might result in loss of providers. Finally, implementation of a cap would require extensive enhancements to the claims administrator contract. No changes were made as a result of these comments.

Comment: Concerning §38.16(b)(2)(F) and §38.16(c)(3), one commenter recommended an annual cap on total expenses per program recipient as a last resort. The cap, if necessary, should be established annually by the Board of Health.

Response: At the present time, imposing an annual cap on services provided to individual children is not feasible due to limitations in current resources and available technology. The department is also concerned that implementation of such a cap would place an undue burden on providers and might result in loss of providers. Finally, implementation of a cap would require extensive enhancements to the claims administrator contract. No changes were made as a result of these comments.

Comment: Concerning §38.16(b)(2)(F)-(G) and §38.16(d)(2)(A), one commenter requested that reductions in provider reimbursement not be built into the program's budget base and continue into perpetuity. Reductions in provider reimbursement should not be used to meet the full range of service needs identified by the program, but should be reserved for the most critical problems as a stopgap measure. Under the proposed rules, it appears that the department can continue to cut provider reimbursement as long as any waiting list exists. Another commenter stated that using reimbursement reductions to serve children on the waiting list with urgent need should be time-limited.

Response: In order to retain flexibility to ensure that anticipated costs do not exceed appropriations, the department maintains rule language to allow the program to reduce/ limit reimbursements to contractual service providers and reduce/ limit prior authorization for certain services for the purpose of budget alignment as stipulated in §38.16. However, the sections of the proposed rules that specify reductions in reimbursements to fee-for-service providers for budget alignment (§§38.10, 38.10(3), 38.16(b)(2)(F), 38.16(c)(3), and 38.16(d)(4)(C)) are removed as a result of this comment. Any future changes in reimbursements to fee-for-service providers must occur through the rule change process.

Comment: Concerning §38.16(b)(2)(F), one commenter recommended that this expense reduction mechanism should be utilized only to provide care to children with urgent need.

Response: The sections of the proposed rules that specify reductions in reimbursements to fee-for-service providers for budget alignment (§§38.10, 38.10(3), 38.16(b)(2)(F), 38.16(c)(3), and 38.16(d)(4)(C)) are removed as a result of this comment. Any future changes in reimbursements to fee-for-service providers must occur through the rule change process.

Comment: Concerning §38.16(b)(2)(G), several commenters did not support removing ongoing clients from the program, and one commenter urged the department to delete any rule

language that removes ongoing clients from the program as a way to accommodate the budget shortfall. Other commenters urged the department to determine a more patient-centered approach to the current budget shortfall that will enable all clients to continue receiving services and not risk the health of some by placing them on a waiting list. Another commenter had reservations about placing ongoing clients on the waiting list. Still another commenter stated that the general idea of moving ongoing clients to the waiting list seemed to comply with the "letter of the law" but perhaps not the intention of the law.

Response: The department may move ongoing clients to the waiting list to reduce the amount of funds expended by the program. The department believes that it must retain maximum flexibility to ensure that anticipated program costs do not exceed appropriations. Health and Safety Code §35.003 directs the board by rule to establish a system of priorities and includes the establishment of a waiting list of eligible persons as a means of remaining within budgetary limitations. No changes were made as a result of these comments.

Comment: Concerning §38.16(b)(2)(G), several commenters asked that clients without any other resources not be moved to the waiting list, and several commenters did not support moving any current clients under age 21 to the waiting list. One commenter disagreed with moving individuals over the age of 17 to the waiting list because they were not eligible for CHIP.

Response: The department may move ongoing clients to the waiting list to reduce the amount of funds expended by the program. The department believes that it must retain maximum flexibility to ensure that anticipated program costs do not exceed appropriations. No changes were made as a result of these comments.

Comment: Concerning §38.16(b)(2)(G)(i)-(iv), several commenters stated that proposals to discontinue coverage for adults with cystic fibrosis (CF), as well as limiting coverage for services for people of all ages with CF, such as medication and inpatient healthcare, will have a significant negative impact on the lives of people of all ages with CF. The commenters stated that these dramatic cuts cannot be enacted without alternatives to provide care for clients with CF. Another commenter stated that moving clients to the waiting list based on other resources was a good idea except that her son's one resource, Medicare, does not cover prescription drugs. This commenter noted that if the source of coverage held by the client fails to cover prescription drugs, the client would be denied drugs at the point of declaring him ineligible or placing him on a waiting list. The commenter also stated that the age progression provision must be coupled with "and based on medically urgent need". This age group progression could be a fair system of service allocation, but in practice moving adults with CF to the waiting list would likely be a direct cause of early death. Several commenters who are themselves adults with CF stated that CSHCN is their only resource or their lifeline and requested that they not be moved to the waiting list. An additional commenter noted that the loss of CSHCN would leave some adults without any coverage.

Response: The department may move ongoing clients to the waiting list to reduce the amount of funds expended by the program. The department believes that it must retain maximum flexibility to ensure that anticipated program costs do not exceed appropriations. The order of movement of ongoing clients to the waiting list is based on consideration of health care resources followed by age. Section 38.16(b)(2)(F)(i) has been amended to state that other health resources to be considered when moving ongoing clients to the waiting list will be those comparable to Medicaid or CHIP.

Comment: Concerning §38.16(b)(2)(G)(iii), several commenters supported moving clients currently receiving services who are 21 years of age and older to the waiting list. One commenter stated that if there is no additional funding, the first step to moving children with urgent need from the program waiting list to active service was moving adults presently being served to the waiting list.

Response: The department may move ongoing clients to the waiting list to reduce the amount of funds expended by the program. The department believes that it must retain maximum flexibility to ensure that anticipated program costs do not exceed appropriations. The order of movement of ongoing clients to the waiting list is based on consideration of health care resources followed by age.

Comment: Concerning §38.16(b)(2)(G)(iii), several commenters stated that the use of a waiting list for individuals with CF 21 years of age or older will serve to accomplish by administrative action the elimination of services to adults with CF. Several other commenters opposed provisions to move the individuals with CF to a waiting list, as this would redefine eligibility to exclude these individuals or to discontinue critical life-giving service. The commenters also opposed placing clients age 18 or older on the waiting list. The commenters also stated that if the waiting list is continued, individuals over 18 should be placed on the waiting list not by virtue of their age, but using other criteria such as access to additional health insurance options.

Response: The department may move ongoing clients to the waiting list to reduce the amount of funds expended by the program. The department believes that it must retain maximum flexibility to ensure that anticipated program costs do not exceed appropriations. The order of movement of ongoing clients to the waiting list is based on consideration of health care resources followed by age and does not affect the client's eligibility for CSHCN services. No changes were made as a result of these comments.

Comment: Concerning §38.16(d), two commenters stated that the term "budget excess" should be defined so that there is a clear understanding of when the waiting list will be downsized or eliminated.

Response: The term "budget excess" has been removed from §38.16(a)(2) and §38.16(d) and clarifying language has been provided.

Comment: Concerning §38.16(d), two commenters stated that the provisions outlining the return of individuals from the waiting list to the program do not specifically state that this rule applies to those individuals who were placed on the waiting list due to age, and that this result should be clarified.

Response: Based on input during the comment period, the department has revised §38.16(d)(1)(A)(i)-(vi) to take clients off the waiting list according to the original date/time that starts the client's latest uninterrupted sequence of eligibility and in the following group order.

1. Children and youth less than 21 years of age with urgent need for health care benefits.

2. Adults (21 years of age and older) with urgent need for health care benefits.

3. Children and youth less than 21 years of age who do not have an urgent need for health care benefits and who were placed on the waiting list when they were ongoing clients and who have had no lapse in eligibility while on the waiting list or who are new clients who are re-applicants for health care benefits and who have had a lapse in eligibility for no longer than the 12 months prior to the date/time that starts their latest uninterrupted sequence of eligibility.

4. Adults (21 years of age and older) who do not have an urgent need for health care benefits and who were placed on the waiting list when they were ongoing clients and who have had no lapse in eligibility while on the waiting list or who are new clients who are re-applicants for health care benefits and who have had a lapse in eligibility for no longer than the 12 months prior to the date/time that starts their latest uninterrupted sequence of eligibility.

5. All other children and youth less than 21 years of age who do not have urgent need for health care benefits.

6. All other adults (21 years of age and older) who do not have an urgent need for health care benefits.

This order for taking clients off the waiting list applies to all clients.

Comment: Concerning §38.16(d), one commenter requested that when decisions regarding priority for urgent need are made, the department should consider that families with funding may have needs but they are not totally without resources.

Response: The department agrees, and §38.16(e) addresses this comment. No changes were made as a result of this comment.

Comment: Concerning §38.16(d)(2), one commenter stated that in the absence of urgent need, the priority for re-entry into the program for children whose eligibility has lapsed should be limited to a 12-month lapse. The commenter recommended that clients without an urgent need for health benefits and without prior program eligibility for health care benefits and clients whose program eligibility has lapsed for more than 12 months be considered equally on the basis of date and time of application and reapplication.

Response: The department agrees. Section 38.16(d)(1)(A)(i)-(vi) has been amended to establish priorities for taking clients off the waiting list.

Comment: Concerning §38.16(d)(2), one commenter stated that for budget alignment purposes, the program may not have enough "budget excess" to take clients off the waiting list and provide them continuing services. The rules should allow the program to pay for limited services to clients who may remain on the waiting list.

Response: The department agrees. Section 38.16(d)(1)(C) has been added to address this comment.

Comment: Concerning §38.16(d)(3)(B), one commenter did not support paying bills for the previous year.

Response: The department believes that it must retain maximum flexibility to achieve budget alignment. The department wants to assure that as much funding as possible can be used to support client services. No changes were made as a result of this comment.

Comment: Concerning §38.16(e), one commenter questioned whether a client with a terminal condition would be considered a top priority. Another commenter questioned whether being eligible for SSI would automatically equate to "urgent need", and a third commenter stated that those who are critically ill should have first priority.

Response: The criteria for determining "urgent need" are listed in §38.16(e). No changes were made as a result of these comments.

Comment: Concerning §38.16(e), several commenters stated that in the event of budget limitations, children with urgent need should never be excluded.

Response: The department supports the goal of a CSHCN program budget that will allow all children with urgent need to be served. However, the CSHCN program must operate within its appropriation. Section 38.16(c) has been amended to allow the program to serve as many clients on the waiting list who have an urgent need for health care benefits as possible.

Comment: Concerning §38.16(e), several commenters addressed concerns regarding clients who are not returned to the program from the waiting list due to being considered to have less urgent needs. The commenters stated that these individuals would either be without services when they experienced emergencies or would become more ill with more extensive and costly medical needs. Another commenter requested that no child with medical needs, urgent or not, be left without services.

Response: The department agrees that children with medical needs whose families have no resources present a serious problem. However, the CSHCN program must operate within its appropriation and must have rules which enable it to do so with maximum flexibility. No changes were made to the section as a result of these comments.

Comment: Concerning §38.16(e)(2), one commenter supported the proposed section which will result in children on Medicaid being accorded a lower priority, but cautioned that there could be a problem for parents who lose Medicaid in the months with an extra pay period.

Response: The department acknowledges that application of this criterion under these circumstances merits further consideration in program policy. No changes were made as a result of this comment.

Comment: Concerning §38.16(e)(2), one commenter requested clarification as to whether a complete absence of funding resources will be a priority for determining urgent need, adding that even families with third-party resources such as Medicaid, CHIP, and private insurance often have needs.

Response: The criteria for determining "urgent need" are listed §38.16(e). No changes were made as a result of this comment.

The comments on the proposed rules received by the department during the comment period were submitted by Any Baby Can, Inc., Baylor University Medical Center at Dallas, Cameron County Health Department, Children with Special Health Care Needs Advisory Committee, Children's Hospital Association of Texas (CHAT), Committee on Children with Disabilities of the Texas Pediatric Society, Cystic Fibrosis Care Center at Baylor College of Medicine, Cystic Fibrosis Center at CHRISTUS Santa Rosa Health Care, Cystic Fibrosis Foundation, Disability Policy Consortium, El Paso First HMO, El Paso Independent School System, El Paso Rehabilitation Center, Harris County Hospital District, Rehab Medical Specialties, South Texas Radiology Group, P.A., Texas Association for Home Care, Texas Hospital Association, Texas Pediatric Society, Texas Tech Health Science Center at El Paso, United Cerebral Palsy, Parent Case

Management at West Texas Rehabilitation Center, family members of children on the CSHCN Program or waiting list, clients of the CSHCN Program, and an independent advocate. The comments generally were in favor of the rules but some did not support specific aspects of the proposed language; the comments raised questions, offered comments for clarification purposes, and suggested clarifying language concerning certain provisions in the rules.

The amendments and new section are adopted under Health and Safety Code, §§35.003-35.006, 35.009, and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of each duty proposed by law on the board, the department, or the commissioner of health.

§38.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Children with Special Health Care Needs Services Act, Health and Safety Code, Chapter 35.

(2) Advanced practice nurse--A registered nurse approved by the Texas Board of Nurse Examiners to practice as an advanced practice nurse, including but not limited to a nurse practitioner, nurse anesthetist, or clinical nurse specialist.

(3) Advisory committee--Those persons appointed by the Texas Board of Health to serve in an advisory capacity to the Children with Special Health Care Needs (CSHCN) Program staff.

(4) Applicant--A person making application for CSHCN program services, but who has not been determined eligible.

(5) Board--The Texas Board of Health.

(6) Bona fide resident--A person who:

(A) is physically present within the geographic boundaries of the state;

(B) has an intent to remain within the state;

(C) maintains an abode within the state (i.e., house or apartment, not merely a post office box);

(D) has not come to Texas from another country for the purpose of obtaining medical care, with the intent to return to the person's native country;

(E) does not claim residency in any other state or country; and

(i) is a minor child residing in Texas whose parent(s), managing conservator, guardian of the child's person, or caretaker (with whom the child consistently resides and plans to continue to reside) is a bona fide resident;

(ii) is a person residing in Texas who is the legally dependent spouse of a bona fide resident; or

(iii) is an adult residing in Texas, including an adult whose parent(s), managing conservator, guardian of the adult's person, or caretaker (with whom the adult consistently resides and plans to continue to reside) is a bona fide resident or who is his/her own guardian.

(7) Case management services--Case management services include, but are not limited to:

(A) planning, accessing, and coordinating needed health care and related services for children with special health care needs and their families. Case management services are performed in partnership with the child, the child's family, providers, and others involved in the care of the child and are performed as needed to help improve the well-being of the child and the child's family; and

(B) counseling for the child and the child's family about measures to prevent the transmission of AIDS or HIV and the availability in the geographic area of any appropriate health care services, such as mental health care, psychological health care, and social and support services.

(8) Child with special health care needs--A person who:

(A) is younger than 21 years of age and who has a chronic physical or developmental condition; or

(B) has cystic fibrosis, regardless of the person's age; and

(C) may have a behavioral or emotional condition that accompanies the person's physical or developmental condition. The term does not include a person who has behavioral or emotional condition without having an accompanying physical or developmental condition.

(9) CHIP--The Children's Health Insurance Program administered by the Texas Health and Human Services Commission under Title XXI of the Social Security Act.

(10) Chronic developmental condition--A disability manifested during the developmental period for a child with special health care needs which results in impaired intellectual functioning or deficiencies in essential skills, which is expected to continue for a period longer than one year, and which causes a person to need assistance in the major activities of daily living and/or in meeting personal care needs. For the purpose of this chapter, a chronic developmental condition must include physical manifestations and may not be solely a delay in intellectual, mental, behavioral and/or emotional development.

(11) Chronic physical condition--A disease or disabling condition of the body, of a bodily tissue or of an organ which will last or is expected to last for at least 12 months; that results, or without treatment, may result in limits to one or more major life activities; and that requires health and related services of a type or amount beyond those required by children generally. Such a condition may exist with accompanying developmental, mental, behavioral, or emotional conditions, but is not solely a delay in intellectual development or solely a mental, behavioral and/or emotional condition.

(12) Claim form--The CSHCN program-approved document for submitting the unpaid claim for processing and payment.

(13) Client--A person who has applied for program services and who meets all CSHCN program eligibility requirements and is determined to be eligible for program services.

(A) New client:

(i) a person who has applied to the program for the first time and who is determined to be eligible for program services; or

(ii) a person who has re-applied to the program (after a lapse in eligibility) and who is determined to be eligible for program services.

(B) Ongoing client--A client who currently is not on the program's waiting list.

(C) Waiting list client--A client who currently is on the program's waiting list.

(14) Commissioner--The Commissioner of Health.

(15) Co-insurance--A cost-sharing arrangement in which a covered person pays a specified percentage of the charge for a covered

service. The covered person may be responsible for payment at the time the health care service is provided.

(16) Co-pay/Co-payment--A cost-sharing arrangement in which a client pays a specified charge for a specified service. The client is usually responsible for payment at the time the health care service is provided.

(17) CSHCN program--The services program for children with special health care needs described in §38.1 of this title (relating to Purpose and Common Name).

(18) Date of service (DOS)--The date a service is provided.

(19) Deductible--A cost-sharing arrangement in which a client is responsible for paying a specific amount annually for covered services before an insurance carrier or plan begins to pay for covered services.

(20) Dentist--An individual licensed by the State Board of Dental Examiners to practice dentistry in the State of Texas.

(21) Department--The Texas Department of Health.

(22) Diagnosis and evaluation services--The process of performing specialized examinations, tests, and/or procedures to determine whether a CSHCN program applicant for health care benefits has a chronic physical or developmental condition as determined by a physician or dentist participating in the CSHCN program and/or to help determine whether a waiting list client has an "urgent need for health care benefits", according to the criteria and protocol described in §38.16(e) of this title (relating to Procedures to Address CSHCN Program Budget Alignment).

(23) Eligibility date for the CSHCN program health care benefits--The effective date of eligibility for the CSHCN program health care benefits is 15 days prior to the date of receipt of the application, except in the following circumstances.

(A) The effective date of eligibility for newborns who are not born prematurely will be the date of birth. Newborn means a child 30 days old or younger.

(B) The effective date of eligibility following traumatic injury will be the day after the acute phase of treatment ends, but no earlier than 15 days prior to the date of receipt of the application.

(C) The effective date of eligibility for an applicant that is born prematurely will be the day after the applicant has been out of the hospital for 14 consecutive days, but no earlier than 15 days prior to the date of receipt of the application.

(D) The effective date of eligibility for applicants with spenddown is the day after the earliest DOS on which the cumulative bills are sufficient to meet the spenddown amount, but no earlier than 15 days prior to the date of receipt of the application. Only medical bills having a DOS within 12 months from the date of receipt of the application, or a DOS within 12 months after the financial eligibility denial date may be included to satisfy spenddown requirements. Medical bills for any member of the household for which the applicant, parent(s), guardian or managing conservator of the CSHCN applicant is responsible may be included. Medical bills used to meet spenddown cannot be paid by the CSHCN program.

(E) Excluding applications for clients who are known to be ineligible for Medicaid and/or the CHIP due to age, citizenship status or insurance coverage, all applications must include a determination of eligibility from Medicaid and/or the CHIP. If the CSHCN application is received without a Medicaid determination, a CHIP determination, or other data/documents needed to process the application, it will be considered incomplete. The applicant will be notified that the application is incomplete and given 60 days to submit the Medicaid determination, CHIP denial or enrollment, or other missing data/documents to CSHCN. If the application is made complete within the 60-day time limit, the client's eligibility effective date will be established as 15 days prior to the date the CSHCN application was first received. If the application is made complete more than 60 days after initial receipt, the eligibility effective date will be established as 15 days prior to the date the application was made complete.

(24) Emergency--A medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent person with average knowledge of health and medicine could reasonably expect that the absence of immediate medical care could result in:

(A) placing the person's health in serious jeopardy;

(B) serious impairment to bodily functions; or

(C) serious dysfunction of any bodily organ or part.

(25) Emotional or behavioral condition--Behavior which varies significantly from normal, that is chronic and does not quickly disappear, and that is unacceptable because of social or cultural expectations. Emotional or behavioral responses which are so different from those of the generally accepted, age-appropriate norms of people with the same ethnic or cultural background as to result in significant impairment in social relationships, self-care, educational progress, or classroom behavior. Examples include but are not limited to the following:

(A) an inability to build or maintain satisfactory age-appropriate interpersonal relationships with peers or adults;

(B) dangerously aggressive, self-destructive, severely withdrawn, or noncommunicative behaviors;

(C) a pervasive mood of unhappiness or depression; or

(D) evidence of excessive anxiety or fears.

(26) Facility--A hospital, psychiatric hospital, rehabilitation hospital or center, ambulatory surgical center, renal dialysis center, specialty center and/or outpatient clinic.

(27) Family--For the purpose of this chapter, the family includes the following persons who live in the same residence:

(A) the applicant;

(B) those related to the applicant as a parent, step-parent or spouse who have a legal responsibility to support the applicant or guardians/managing conservators who have a duty to provide food, shelter, education, and medical care for the applicant;

(C) children of the applicant; and

(D) children of a parent, step-parent or spouse.

(28) Family support services--Disability-related support, resources, or other assistance provided to the family of a child with special health care needs. The term may include services described by Part A of the Individuals with Disabilities Education Act (20 U.S.C. Section 1400 *et seq.*), as amended, and permanency planning, as that term is defined by Government Code, §531.151.

(29) Financial independence--A person who currently files his or her own personal U.S. income tax return and is not claimed as a dependent by any other person on his or her U.S. income tax return.

(30) Health care benefits--Program benefits consisting of diagnosis and evaluation services, rehabilitation services, medical

home care management services, family support services, transportation related services, and insurance premium payment services.

(31) Health insurance/health benefits plan--A policy or plan, either individual, group, or government-sponsored, that an individual purchases or in which an individual participates that provides benefits when medical and/or dental costs are or would be incurred. Sources of health insurance include, but are not limited to, health insurance policies, health maintenance organizations, preferred provider organizations, employee health welfare plans, union health welfare plans, medical expense reimbursement plans, the Civilian Health and Medical Program of the Uniformed Services/Veterans Administration (CHAMPUS, CHAMPVA) or their successor plans, Medicaid, the Children's Health Insurance Program (CHIP), and Medicare. Benefits may be in any form, including, but not limited to, reimbursement based upon cost, cash payment based upon a schedule, or access without charge or at minimal charge to providers of medical and/or dental care. Benefits from a municipal or county hospital, joint municipal-county hospital, county hospital authority, hospital district, county indigent health care programs, or the facilities of a medical school shall not constitute health insurance for purposes of this chapter.

(32) Household--The living unit in which the applicant resides and which also may include one or more of the following:

(A) mother;

(B) father;

(C) stepparent;

(D) spouse;

(E) foster parent(s), managing conservator, or guardian;

(F) grandparent(s);

(G) sibling(s);

(H) stepbrother(s); or

(I) stepsister(s).

(33) Medical home--A source of ongoing routine health care in the community in which providers and families work as partners to meet the needs of children and families. The medical home assists in early identification of special health care needs; provides ongoing primary care; and coordinates with a broad range of other specialty, ancillary, and related services.

(34) Natural home--The home in which the eligible person lives that is either the residence of his/her parent(s), foster parent(s) or guardian(s), or extended family member(s), or the home in the community where the person has chosen to live, alone or with other persons. A natural home may utilize natural support systems such as family, friends, co-workers, and services available to the general population as they are available.

(35) Newborn screening--The process required by law through which newborn children are screened for congenital anomalies, including but not limited to hearing impairment, congenital adrenal hyperplasia, congenital hypothyroidism, galactosemia, phenylketonuria, and hemoglobinopathies, such as sickle cell disease.

(36) Other benefit--A benefit, other than a benefit provided under this chapter, to which a person is entitled for payment of the costs of services provided under the CSHCN program including benefits available from:

(A) an insurance policy, group health plan, health maintenance organization, or prepaid medical or dental care plan;

(B) Title XVIII, Title XIX, or Title XXI of the Social Security Act (42 U.S.C. Sections 1395 *et seq.*, 1396 *et seq.*, and 1397aa *et seq.*), as amended;

(C) the Department of Veterans Affairs;

(D) the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS);

(E) workers' compensation or any other compulsory employers' insurance program;

(F) a public program created by federal or state law or under the authority of a municipality or other political subdivision of the state, excluding benefits created by the establishment of a municipal or county hospital, a joint municipal-county hospital, a county hospital authority, a hospital district, or the facilities of a publicly supported medical school; or

(G) a cause of action for the cost of care, including medical care, dental care, facility care, and medical supplies, required for a person applying for or receiving services from the department, or a settlement or judgment based on the cause of action, if the expenses are related to the need for services provided under this chapter.

(37) Permanency planning--A planning process undertaken for children with chronic illness or developmental disabilities who reside in institutions or are at risk of institutional placement, with the explicit goal of securing a permanent living arrangement that enhances the child's growth and development, which is based on the philosophy that all children belong in families and need permanent family relationships. Permanency planning is directed toward securing: a consistent, nurturing environment; an enduring, positive adult relationship(s); and a specific person who will be an advocate for the child throughout the child's life. Permanency planning provides supports to enable families to nurture their children; to reunite with their children when they have been placed outside the home; and to place their children in family environments.

(38) Person--An individual, corporation, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity.

(39) Physician--A person licensed by the Texas State Board of Medical Examiners to practice medicine in this state.

(40) Prematurity/born prematurely--A child born at less than 36 weeks gestational age and hospitalized since birth.

(41) Program--The services program for Children with Special Health Care Needs (CSHCN).

(42) Provider--A person and/or facility as defined in §38.6 of this title (relating to Providers) that delivers services purchased by the CSHCN program for the purpose of implementing the Act.

(43) Rehabilitation services--The process of the physical restoration, improvement, or maintenance of a body function destroyed or impaired by congenital defect, disease, or injury which includes the following acute and chronic/rehabilitative services:

(A) facility care, medical and dental care, and occupational, speech, and physical therapies;

(B) the provision of medications, braces, orthotic and prosthetic devices, durable medical equipment, and other medical supplies; and

(C) other services specified in this chapter.

(44) Respite care--A service provided on a short-term basis for the purpose of relief to the primary care giver in providing care to

individuals with disabilities. Respite services can be provided in either in-home or out-of-home settings on a planned basis or in response to a crisis in the family where a temporary care giver is needed.

(45) Routine child care--Child care for a child who needs supervision while the parent/guardian is at work, in school, or in job training.

(46) Services--The care, activities, and supplies provided under the Act, including but not limited to both acute and chronic/rehabilitative medical care, dental care, facility care, medications, durable medical equipment, medical supplies, occupational, physical, and speech therapies, family support services, case management services, and other care specified by program rules.

(47) Social service organization--For purposes of this chapter, a for-profit or nonprofit corporation or other entity, not including individual persons, that provides funds for travel, meal, lodging, and family supports expenses in advance to enable CSHCN clients to obtain program services.

(48) Specialty center--A facility and staff that meets the CSHCN program minimum standards established in this chapter and are designated for CSHCN program use as part of the comprehensive services for a specific medical condition.

(49) Spenddown--Financial eligibility achieved when household income exceeds 200% of the federal poverty level, if the applicant's family can document its responsibility for household medical bills that are equal to or greater than the amount in excess of the 200% level.

(50) State--The State of Texas.

(51) Supplemental Security Income Program (SSI)--Title XVI of the Social Security Act which provides for payments to individuals (including children under age 18) who are disabled and have limited income and resources.

(52) Support--The contribution of money or services necessary for a person's maintenance, including, but not limited to, food, clothing, shelter, transportation, and health care.

(53) Treatment plan--The plan of care for the client (time and treatment specific) as certified by and implemented under the supervision of a physician or other practitioner participating in the CSHCN program.

(54) United States Public Health Service (USPHS) price--The average manufacturer price for a drug in the preceding calendar quarter under Title XIX of the Social Security Act, reduced by the rebate percentage, as authorized by the Veterans Health Care Act of 1992 (P.L. 102-585, November 4, 1992).

(55) Urgent need for health care benefits--A client need that fits the criteria and protocol described in §38.16(e) of this title.

§38.3. Eligibility for CSHCN Program Services.

(a) Eligibility for health care benefits. In order to be determined eligible for CSHCN program health care benefits, applicants must meet the medical, financial, and other criteria in this section.

(1) Medical criteria. A physician or dentist must certify annually that the person meets the definition of "child with special health care needs" as defined by §38.2(8) of this title (relating to Definitions). The CSHCN program must receive a medical diagnosis code from the International Classification of Diseases, Ninth Revision, Clinical Modification (ICD-9-CM), or its successor, on each condition for statistical and referral purposes. If a physician or dentist requests coverage of diagnosis and evaluation services to determine if the child/applicant meets the definition of a "child with special health care needs", and the applicant meets all other eligibility criteria for health care benefits, then the applicant may be given up to 60 days of program coverage for diagnosis and evaluation services only.

(2) Financial criteria. Financial criteria are determined annually and are based upon the same determinations of income, family size, and disregards as the CHIP. The CHIP net income is the family's gross income minus disregards. For applicants who are not eligible for CHIP, premiums paid for health insurance may be included as an additional disregard. All families must verify their income and disregards.

(A) The income level for eligibility is 200% of the federal poverty level. If the family income exceeds this level, and the applicant's family can document its responsibility for household medical bills incurred within 12 months of the application date or within 12 months after the financial eligibility denial date that are equal to or greater than the amount in excess of the 200% level, the applicant may be determined financially eligible for a period of 12 months beginning on the eligibility date.

(B) Applications to Medicaid and the Supplemental Security Income (SSI) programs.

(i) If actual or projected CSHCN program expenditures for a client exceed $2,000 per year, the client whose age, medical condition, or citizenship status do not exceed Medicaid eligibility criteria shall be required to apply for Medicaid, specifically including the Medically Needy program and, if eligible, to participate in those programs in order to remain eligible for further CSHCN program benefits. Within 60 days of the date of the notification letter, the client must submit to the CSHCN program documentation of an eligibility determination from Medicaid. During this 60-day period, CSHCN program coverage will continue. If the client does not provide documentation of an eligibility determination from Medicaid within the 60-day time limit, CSHCN program coverage shall be terminated and may not be reinstated unless an eligibility determination is received. The program may grant the client a 30-day extension to obtain the determination.

(ii) The CSHCN program also may require a client for whom actual or projected expenditures exceed $2,000 per year to apply for the SSI program, and, if eligible, to participate in that program in order to remain eligible for further CSHCN program benefits. Within 60 days of the date of the notification letter, the client must submit to the CSHCN program verification of a timely and complete application to SSI. During this 60-day period, CSHCN program coverage will continue. If the client does not provide this verification within the 60-day time limit, CSHCN program coverage may be terminated. With verification of an application to SSI, the program may continue coverage, pending receipt of an SSI eligibility determination.

(3) Health insurance.

(A) All health insurance coverage insuring the applicant and/or family must be listed on the application. If insurance coverage was effective prior to CSHCN program eligibility, such coverage must be kept in force. Noncompliance with this requirement may result in the termination of CSHCN program benefits. If insurance cannot be maintained, the applicant or parent/guardian/managing conservator must, upon request, provide to the CSHCN program proof of:

(i) cancellation from the insurer or plan sponsor;

(ii) discontinuation of the insurance plan by the insurer or plan sponsor;

(iii) exhaustion of the right to continue group insurance coverage as provided under federal and/or state law; or

(iv) financial inability to continue paying the cost of any health insurance except CHIP.

(B) If the applicant/client does not have health insurance at the time of application or eligibility renewal, but coverage may be available, including coverage under CHIP, the applicant/client that is not ineligible for such coverage by reason of age, citizenship, or residency status must apply for coverage and receive an eligibility determination within 60 days of the date of notification. With verification of an application to an available health insurance plan, the program may extend this deadline and/or continue CSHCN program coverage, pending receipt of an insurance eligibility determination. If the applicant/client is eligible for CHIP, the applicant/client must be enrolled in CHIP. Such insurance must be kept in force as though it were effective prior to CSHCN program eligibility.

(C) The CSHCN program will assist in determining possible eligibility for insurance and may provide CSHCN program benefits during insurance application, enrollment, and/or limited or excluded coverage periods. A family support services plan for an applicant may not be implemented until the determination of program eligibility, including eligibility for available insurance plans is complete.

(D) Before canceling, terminating, or discontinuing existing health insurance, or electing not to enroll a client in available health insurance, including canceling, terminating, discontinuing, or not enrolling in CHIP, the parent/guardian/managing conservator must notify the CSHCN program 30 days prior to cancellation, termination, discontinuance, or end of the enrollment period. When the CSHCN program provides assistance in keeping or acquiring health insurance, the parent/guardian/managing conservator must maintain or enroll in the health insurance.

(4) Age. The applicant, other than one with cystic fibrosis, must be under the age of 21.

(5) Residency. The applicant must be a bona fide resident of the State of Texas.

(6) Application.

(A) Applications are available to anyone seeking assistance from the CSHCN program. To be considered by the CSHCN program, the application must be made on forms currently in use.

(B) A person is considered to be an applicant from the time that the CSHCN program receives an application. The CSHCN program will respond in writing regarding eligibility status within 30 working days after the completed application is received. Applications will be considered:

(i) denied, if eligibility requirements are not met;

(ii) incomplete, if required information that includes a CHIP, Medicaid, or SSI determination or any other data/document needed to process the application is not provided, or if an outdated form is submitted; or

(iii) approved, if all criteria are met.

(C) The denial of any application submitted to the CSHCN program shall be in writing and shall include the reason(s) for such denial. The applicant has the right of administrative review and a fair hearing as set out in §38.13 of this title (relating to Right of Appeal).

(D) Any person has the right to reapply for CSHCN program coverage at any time or whenever the person's situation or condition changes.

(7) Verification of information.

(A) The CSHCN program shall make the final determination on a person's eligibility using the information provided with the application. The CSHCN program may request verification of any information provided by the applicant to establish eligibility.

(B) The CSHCN program shall verify selected information on the application. Documentation of date of birth, residency, income, and income disregards shall be required. The CSHCN program shall notify the applicant/family in writing when specific documentation is required. It is the applicant's/family's responsibility to provide the required information.

(C) Those applicants/clients financially eligible for CHIP, Medicaid, or other programs with similar income guidelines who also meet the age and residency requirements of the CSHCN program will be considered financially eligible. The applicant/client/family must notify the CSHCN program, if the applicant/client is no longer eligible for such programs.

(8) Determination of continuing eligibility for health care benefits. Medical and financial criteria for eligibility for health care benefits must be re-established at least annually (i.e., within 365 days from the first day of the client's current eligibility period, or within 366 days during a leap year). Ongoing clients for health care benefits will be notified of program deadlines for annual re-establishment of eligibility. If an ongoing client for health care benefits does not meet program deadlines for submitting information required for the annual determination of continuing eligibility, the client's eligibility for health care benefits will end. If the then former client re-applies to the program after such lapse in eligibility and is determined eligible for health care benefits, the former client will be considered a new client. If the program has a waiting list for health care benefits, the new client will be placed on the waiting list in order according to the date/time the client is determined eligible for the program health care benefits.

(b) Eligibility for case management services. The CSHCN program may provide and/or reimburse for case management services to persons in need of such services who are bona fide residents and who are determined not to have another primary provider and/or funding source for such services. The program's case management services are focused on individuals (and their families) who are eligible, seeking eligibility, or potentially seeking eligibility for the program's health care benefits (includes clients who are on the waiting list for health care benefits). However, the program may offer and provide case management services to individuals (and their families) who are neither eligible nor seeking eligibility for the program's health care benefits.

§38.4. Covered Services.

(a) Introduction. The CSHCN program provides no direct medical services, but reimburses for services rendered by CSHCN program participating providers and/or contractors. Clients must receive services as close to their home communities as possible unless CSHCN program contracts or policies require treatment at specific facilities or specialty centers and/or the clients' conditions require specific specialty care.

(b) Types of service.

(1) Early identification. The CSHCN program may conduct outreach activities to identify children for program enrollment, increase their access to care, and help them use services appropriately. Outreach services may include, but are not limited to:

(A) CSHCN program promotion to the general public, or targeted to potential clients and providers;

(B) development and distribution of educational materials to assist applicants and clients in the access and use of program services;

(C) development and distribution of population-based educational materials concerning children with special health care needs;

(D) integration with programs which screen for or provide treatment of newborn congenital anomalies and/or other specialty care; and

(E) links with community, regional, and/or school-based clinics to identify, assess needs, and provide appropriate resources for children with special health care needs.

(2) Diagnosis and evaluation services. May be covered for the purpose of determining whether a CSHCN program applicant for health care benefits meets the CSHCN program definition of a child with special health care needs. Diagnosis and evaluation services must be prior authorized and coverage is limited in duration. If a physician or dentist requests coverage of diagnosis and evaluation services to determine if the child/applicant meets the definition of a "child with special health care needs", and the applicant meets all other eligibility criteria, then the applicant may be given up to 60 days of program coverage for diagnosis and evaluation services only. The program medical director or other designated medical staff may prior authorize limited coverage of diagnosis and evaluation services for waiting list clients if needed to help determine "urgent need for health care benefits" as described in §38.16(e) of this title (relating to Procedures to Address CSHCN Program Budget Alignment). Only CSHCN program participating providers may be reimbursed for diagnosis and evaluation services.

(3) Rehabilitation services. Rehabilitation services means a process of physical restoration, improvement, or maintenance of a body function destroyed or impaired by congenital defect, disease, or injury which includes the following acute and chronic/rehabilitative services: facility care, medical and dental care, occupational, speech, and physical therapies, the provision of medications, braces, orthotic and prosthetic devices, durable medical equipment, other medical supplies, and other services specified in this chapter. To be eligible for CSHCN program reimbursement, treatment must be for a client with a chronic physical or developmental condition as specified in §38.3(a)(1) of this title (relating to Eligibility for CSHCN Program Services), and must have been prescribed by a provider in compliance with all applicable laws and regulations of the State of Texas. Services may be limited, and the availability of certain services described in the following subparagraphs is contingent upon implementation of automation procedures and systems.

(A) Medical assessment and treatment. Medical assessment and treatment services, including medically necessary laboratory and radiology studies, must be provided by physicians and other practitioners licensed by the State of Texas, enrolled as participating providers in the CSHCN program, and within the scope of their respective licenses or registrations.

(B) Outpatient mental health services. Outpatient mental health services are limited to no more than 30 encounters by all professionals licensed to provide mental/behavioral health services, including psychiatrists, psychologists, licensed master social worker-advanced clinical practitioners, licensed marriage and family therapists, and licensed professional counselors, per eligible client per calendar year. Coverage includes, but is not limited to psychological or neuropsychological testing, psychotherapy, psychoanalysis, counseling, and narcosynthesis.

(C) Preventive and therapeutic dental services (including oral/maxillofacial surgery). Preventive and therapeutic dental services must be provided by licensed dentists enrolled to participate in the CSHCN program. Coverage for therapeutic dental services, including prosthetics and oral/maxillofacial surgery, follows the Texas Medicaid program guidelines. Orthodontic care may be provided only for CSHCN eligible clients with diagnoses of cleft/craniofacial abnormalities and/or late effects of fractures of the skull and face bones.

(D) Podiatric services. Podiatric services must be provided by licensed podiatrists enrolled to participate in the CSHCN program. Coverage is limited to the medically necessary treatment of foot and ankle conditions and follows the Texas Medicaid program guidelines. Supportive devices, such as molds, inlays, shoes, or supports, must comply with coverage limitations for foot orthoses.

(E) Treatment in CSHCN program participating facilities. Non-emergency hospital care must be provided in facilities which are enrolled as CSHCN program participating providers. The length of stay is limited according to diagnosis, procedures required, and the client's condition.

(i) Inpatient hospital care and inpatient psychiatric care.

(I) Inpatient hospital care. Coverage is limited to 60 days per calendar year for medically necessary care, and excludes the following:

(-a-) maternity care, newborn care, infertility treatment, or other reproductive services unless directly related to a covered chronic physical or developmental condition;

(-b-) personal comfort items, such as television or newspaper delivery; and

(-c-) private duty nursing/attendant care.

(II) Inpatient psychiatric care. Coverage is limited to inpatient assessment and crisis stabilization and is to be followed by referral to the Texas Department of Mental Health and Mental Retardation programs or other appropriate mental health program. Admission must be prior authorized and is limited to five days. Services include those medically necessary and furnished by a Medicaid psychiatric hospital/facility under the direction of a psychiatrist.

(ii) Inpatient rehabilitation care. Medically necessary inpatient rehabilitation care is limited to an initial admission not to exceed 30 days, based on the functional status and potential of the client as certified by a physician participating in the CSHCN program. Services beyond the initial 30 days may be approved by the CSHCN program based upon the client's medical condition, plan of treatment, and progress. Payment for inpatient rehabilitation care is limited to 90 days during a calendar year.

(iii) Ambulatory surgical care. Ambulatory surgical care is limited to the medically necessary treatment of a client and may be performed only in CSHCN program approved ambulatory surgical centers as defined in §38.7 of this title (relating to Ambulatory Surgical Care Facilities).

(iv) Emergency care. Care including, but not limited to hospital emergency departments, ancillary, and physician services, is limited to medical conditions manifested by acute symptoms of sufficient severity (including severe pain) such that a prudent person with average knowledge of health and medicine could reasonably expect that the absence of immediate medical care could result in placing the client's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. If a client is admitted to a non-participating CSHCN program hospital provider following care in that provider's emergency room, and the admitting facility declines to enroll or does not qualify as a CSHCN program provider, the client must be discharged or transferred to a participating

CSHCN program provider as soon as the client's medical condition permits. All providers must enroll in order to receive reimbursement.

(v) Care for renal disease. Renal dialysis is limited to the treatment of acute renal disease or chronic (end stage) renal disease through a renal dialysis facility and includes, but is not limited to dialysis, laboratory services, drugs and supplies, declotting shunts, on-site physician services, and appropriate access surgery. Renal transplants may be covered in approved renal transplant centers if the projected cost of the transplant and follow-up care is less than that of continuing renal dialysis. Renal transplants must be prior authorized.

(F) Orthotic and prosthetic devices. Orthotic and prosthetic devices must be prescribed by a practitioner licensed to do so and supplied by an orthotist or prosthetist licensed by the State of Texas.

(G) Medications. Outpatient medications available through pharmacy providers, including over-the-counter products, must be prescribed by practitioners licensed to do so. Payment shall be made only after delivery of the medications.

(H) Nutrition services and nutritional products, excluding hyperalimentation/total parenteral nutrition (TPN).

(i) Nutrition services. Nutrition services must be prescribed by a practitioner licensed to do so.

(ii) Nutritional products. Nutritional products, including over-the-counter products, are limited to those covered by the CSHCN program and prescribed by a practitioner licensed to do so, for the treatment of an identified metabolic disorder or other medical condition and serving as a medically necessary therapeutic agent for life and health, or when part or all nutritional intake is through a tube.

(I) Hyperalimentation/Total Parenteral Nutrition (TPN). A package of medically necessary services provided on a daily basis when oral intake cannot maintain adequate nutrition. TPN services include, but are not limited to solutions and additives, supplies and equipment, customary and routine laboratory work, enteral supplies, and nursing visits. Covered services must be reasonable, medically necessary, appropriate and prescribed by a practitioner licensed to do so.

(J) Durable medical equipment. All equipment must be prescribed by a practitioner licensed to do so. Some equipment may be supplied on a contract basis, and therefore, shall be ordered from a specific supplier.

(K) Medical supplies. Supplies must be medically necessary for the treatment of an eligible client.

(L) Professional vision services. Vision services medically necessary for the treatment of a client include, but are not limited to:

(i) medically necessary eye examinations with refraction for diagnoses of refractive error, aphakia, diseases of the eye, or eye surgery;

(ii) one eye examination with refraction for the purpose of obtaining eyewear during the state fiscal year; and

(iii) one pair of non-prosthetic eye wear per year prescribed by a practitioner licensed to do so.

(M) Speech-language pathology/audiology. Speech-language pathology and audiology services medically necessary for the treatment of a client must be prescribed by a practitioner licensed to do so and provided by a speech-language pathologist or audiologist licensed by the State of Texas. CSHCN program coverage of speech-language pathology and audiology services may be limited to certain conditions, by type of service, by age, by the client's medical status, and whether the client is eligible for services for which a school district is legally responsible.

(N) Audiological testing, hearing exams, and amplification devices. Services for clients under 21 years of age are coordinated through the Program for Amplification for Children of Texas (PACT). For clients 21 years of age and older and those ineligible for the PACT, covered services are the same as those available through the PACT.

(O) Occupational and physical therapy. Occupational and physical therapy medically necessary for the treatment of a client must be prescribed by a practitioner licensed to do so and provided by a therapist licensed by the State of Texas. CSHCN program coverage of physical and occupational therapy may be limited to certain conditions, by type of service, by age, by the client's medical status, and whether the child is eligible for services for which a school district is legally responsible.

(P) Certified respiratory care practitioner services. Respiratory therapy medically necessary for the treatment of a client must be prescribed by a practitioner licensed to do so and provided by a certified respiratory care practitioner. CSHCN program coverage of respiratory therapy may be limited to certain conditions, by type of service, by age, by the client's medical status, and whether the child is eligible for services for which a school district is legally responsible.

(Q) Home health nursing services. Home health nursing services must be medically necessary, be prescribed by a physician, and be provided only by a licensed and certified home and community support services agency participating in the CSHCN program. Home health nursing services are limited to 200 hours per client per year. Up to 200 additional hours of service per client per year may be approved with documented justification of need and cost effectiveness.

(R) Hospice care. Hospice care includes palliative care for clients with a presumed life expectancy of six months or less during the last weeks and months before death. Services apply to care for the hospice terminal diagnosis condition or illnesses. Treatment for conditions unrelated to the terminal condition or illnesses is unaffected. Hospice care must be prescribed by a practitioner licensed to do so who also is enrolled as a CSHCN provider.

(4) Care management.

(A) Medical home. Each CSHCN program client should receive care in the context of a medical home.

(i) Comprehensive coordinated health care of infants, children, and adolescents should encompass the following services:

(I) provision of preventive care, including but not limited to, immunizations; growth and development assessments; appropriate screening health care supervision; client and parental counseling about health care supervision; and client and parental counseling about health and psychological issues;

(II) assurance of ambulatory and inpatient care for acute illness, 24 hours a day, seven days a week (including after hours and weekends);

(III) provision of care over an extended period of time to enhance continuity;

(IV) identification of the need for sub-specialty consultation and referrals, provision of medical information about the

client to the consultant, evaluation of the consultant's recommendations, implementation of recommendations that are indicated and appropriate, and interpretation of the consultant's recommendations for the family;

(V) interaction with school and community agencies to assure that the special health needs of the client are addressed; and

(VI) maintenance of a central record and data base containing all pertinent medical information about the client, including information about hospitalizations.

(ii) The CSHCN program may require periodic reports from the medical home.

(B) Case management. Case management services may be made available to program clients through public health regional offices or other resources to assist clients and their families in obtaining adequate and appropriate services to meet the client's health and related services needs. The program will make available case management as needed/ desired to all clients who are eligible for health care benefits (includes clients who are on the waiting list for health care benefits). The program also may make available case management services to clients who are not eligible for the program's health care benefits.

(5) Family support services. Family support services include disability-related support, resources, or other assistance and may be provided to the family of a client with special health care needs.

(A) Eligibility. A client is eligible to receive family support services if:

(i) the client is fully eligible for the CSHCN program health care benefits;

(ii) the client is not receiving services from a Medicaid home and community-based waiver program, and the requested service does not duplicate services received from other family support programs, such as the In-Home and Family Support program at the Texas Department of Human Services or the Texas Department of Mental Health and Mental Retardation; and

(iii) the client's family collaborates with the assigned case manager to identify and pursue other sources of support and to develop a family support services plan.

(B) Processing and evaluation of requests.

(i) Families indicate their need for family support services in writing at the time of their application or renewal for the CSHCN program, or at any time during their eligibility period for the CSHCN program.

(ii) In each public health region or other designated subdivision of the state, requests for family support services are processed in chronological order by the date of the request.

(iii) All requests for family support services must be prior authorized (approved by the CSHCN program prior to delivery).

(iv) While there is a waiting list for health care benefits, limitations in reimbursement and/or prior authorization may be instituted as provided in §38.16 of this title.

(v) Some services or items may require a written statement from a physician, physical therapist, occupational therapist, and/or other healthcare professional to establish the disability-related nature of the request.

(vi) Some services or items may require written bids.

(vii) Persons requesting assistance are responsible for collaborating with their case managers as necessary so that an accurate determination can be made in a timely manner.

(viii) Families shall be notified in writing of the outcome of their requests.

(ix) Families have the right to appeal a decision as described in §38.13 of this title (relating to Right of Appeal).

(C) Service plan and cost allowances.

(i) In order to obtain prior authorization for family support services, the case manager and the client/family must develop a written family support services plan.

(ii) The CSHCN program may establish annual cost allowances based upon the client's/family's level of assessed need for family support services, not to exceed:

(I) one-time assistance of up to $3,600 per eligible client for minor home remodeling; and

(II) assistance of up to $3,600 per year per eligible client to purchase other allowable services. This limit may increase to no more than $7,200 for the purchase of vehicle lifts and modifications;

(iii) Service plan cost allowances may be prorated for plans that cover less than one year.

(iv) Disbursement of assistance:

(I) may be in a lump sum or on a periodic basis;

(II) may be made to the family or to the vendor; and

(III) may be reduced by the amount of a cost-sharing requirement, if applicable.

(v) Reimbursement rates for providers are established by the client/family and the selected provider in collaboration with the case manager.

(vi) The annual service plan may be amended at any time, but will be reevaluated by the client/family and case manager at least annually to coincide with the client's reapplication for the CSHCN program.

(D) Allowable services.

(i) Family support services for CSHCN clients and their families include those allowable services and items that:

(I) are above and beyond the scope of usual needs (i.e., basic clothing, food, shelter, medical care, and education);

(II) are necessitated by the client's medical condition or disability; and

(III) directly support the client's living in his/her natural home and participating in family life and community activities.

(ii) Family support services may not be used to supplant services available through other public or private programs, but may be used to supplement services provided by other programs.

(iii) Allowable services include:

(I) respite care;

(II) specialized child care costs for a client in excess of the prevailing rate for routine child care, including specialized training for the child care provider;

(III) counseling or training programs or services that assist the client/family, including parent or family stipends to attend education or training conferences;

(IV) minor home remodeling, limited to the purchase and installation of ramps, widening of doorways, the modification of bathroom facilities, kitchen modifications, and other modifications to increase accessibility and safety;

(V) vehicle lifts and modifications consistent with those available through the Texas Rehabilitation Commission, limited to lifts, wheelchair tie-downs, occupant restraints, accessories/modifications such as raising roofs or doors if necessary for lift installation or usage, hand controls, and repairs of covered modifications not related to inappropriate handling or misuse of equipment and not covered by other resources;

(VI) specialized equipment, including porch/stair lifts, air purification systems or air conditioners, positioning equipment, bath aids, supplies prescribed by licensed practitioners that are not covered through other systems, and other non-medical disability-related equipment that assists with family activities, promotes the client's self-reliance, or otherwise supports the family;

(VII) other disability-related services that support permanency planning, independence, and/or participation in family life and integrated/inclusive community activities.

(E) Unallowable services. Family support funds may not be used to provide those services that do not relate to the client's disability and do not directly support the client's living in his/her natural home and participating in family life and integrated/inclusive community activities. Examples of unallowable services include, but are not limited to:

(i) items for which a less expensive alternative of comparable quality is available;

(ii) purchase or lease of vehicles, or vehicle maintenance and repair;

(iii) home mortgage or rent expenses, or basic home maintenance and repair;

(iv) income taxes;

(v) medical services;

(vi) services in segregated settings other than respite facilities or camps;

(vii) insurance premiums;

(viii) death benefits, burial policies, and funeral expenses;

(ix) costs for allowable services incurred before the written service plan is approved;

(x) non-medical foods, routine shelter, routine utilities, routine home repairs, routine home appliances, routine furnishings, fences, and yard work;

(xi) medical benefit items or services paid for or reimbursed by private insurance, Medicaid, Medicare, CHIP, the CSHCN program or other health insurance programs for which the client is eligible;

(xii) services, equipment, or supplies that have been denied by Medicaid, CHIP, or the CSHCN program because a claim was received after the filing deadline, insufficient information was submitted, or because an item was considered inappropriate or experimental;

(xiii) over-the-counter or prescription medications;

(xiv) architectural modifications to a public facility;

(xv) school tuition or fees, or equipment/items/services that should be provided through the public school system;

(xvi) items that could endanger the health and safety of the client;

(xvii) routine child care;

(xviii) computers and software, unless for use as an assistive technology device or necessary to perform a critical or essential function such as environmental control, or written or oral communication, which the client is unable to perform without the computer;

(xix) services provided by an individual under the age of 18 years or by the client's parent(s)/guardian(s) or other member of the client's household;

(xx) services exclusively to support the care of siblings or other members of the client's household, but which are not necessary to meet the medical needs of the client;

(F) Reduction/termination of services. Reasons for terminating or reducing family support services may include, but are not limited to:

(i) the client no longer meets the eligibility criteria for the CSHCN program;

(ii) services available through the program are discontinued due to budget restrictions;

(iii) While there is a waiting list for health care benefits, limitations in reimbursement and/or prior authorization may be instituted as provided in §38.16 of this title;

(iv) the client's family indicates that the need for family support services no longer exists;

(v) the client moves out of Texas;

(vi) the client is placed in a nursing facility or other institutional setting for an indefinite period of time;

(vii) the client dies;

(viii) the client's designated case manager is unable to locate the client/family; or

(ix) the family knowingly does not comply with the written family support services plan, in which case the family may also be liable for restitution.

(6) Other types of services. The following services also are available through the CSHCN program.

(A) Ambulance services. Emergency ground, non-emergency ground and air ambulance services are covered for the medically necessary transportation of a client. Non-emergency ambulance transport is covered if the client cannot be transported by any other means without endangering the health or safety of the client, and when there is a scheduled medical appointment for medically necessary care at the nearest appropriate facility. Transportation by air ambulance is limited to instances when the client's pickup point is inaccessible by land, or when great distance interferes with immediate admission to the nearest appropriate medical treatment facility. Transports to out-of-locality providers are covered if a local

facility is not adequately equipped to treat the client. Out-of-locality refers to one-way transfers 50 miles or more from point of pickup to point of destination.

(B) Transportation. The CSHCN program may provide transportation for a client and, if needed, a responsible adult, to the nearest medically appropriate facility. The lowest-cost appropriate conveyance should be used. The CSHCN program shall not assist if transportation is the responsibility of the client's school district or can be obtained through Medicaid.

(C) Meals and lodging. The CSHCN program may provide meals and lodging to enable a parent, guardian, or their designee to obtain inpatient or outpatient care for a client at a facility located away from their home. The reason for the inpatient or outpatient visit must be directly related to medically necessary treatment for the client.

(D) Transportation of deceased. The CSHCN program may provide the following services:

(i) transportation cost for the remains of a client who expires in a CSHCN participating facility while receiving CSHCN program services, if the client was not in the family's city of residence in Texas, and the transportation cost of a parent or other person accompanying the remains;

(ii) embalming of the deceased, if required by law for transportation;

(iii) a coffin meeting minimum requirements, if required by law for transportation; and

(iv) any other necessary expenses directly related to the care and return of the client's remains.

(E) Payment of insurance premiums, coinsurance, co-payments, and/or deductibles. The CSHCN program may pay public or private health insurance premiums to maintain or acquire a health benefit plan or other third party coverage for the client, if the parent/foster parent/guardian/managing conservator is financially unable to do so, and if paying for such health insurance can reasonably be expected to be cost effective for the CSHCN program. The CSHCN program may pay for coinsurance and deductible amounts when the total amount paid to the provider does not exceed the maximum allowed for the covered service. The CSHCN program may reimburse clients for co-payments paid for covered services. The CSHCN program may not pay premiums, deductibles, coinsurance or co-payments for clients enrolled in CHIP.

(c) Services not covered. Services which are not covered by the CSHCN program even though they may be medically necessary for and provided to a client include, but are not limited to:

(1) treatments which are considered experimental or investigational;

(2) chiropractic services;

(3) care for premature infants;

(4) care for alcohol or substance abuse;

(5) pregnancy prevention, except when medically necessary for the specific treatment of a covered condition;

(6) maternity care; and

(7) infertility treatment or other reproductive services, unless directly related to a covered chronic physical or developmental condition.

(d) Service authorization. The CSHCN program may require authorization (including prior authorization) of reimbursement for selected services for clients.

(1) Provider's responsibility. A CSHCN provider must request services in specific terms on department-prepared forms so that an authorization may be issued and sufficient monies encumbered to cover the cost of the service. If a service is authorized, payment may be made to the provider as long as the service is not covered by a third party resource, and all billing requirements are met. Program authorization should not be considered an absolute guarantee of payment. Once a service is delivered and if the service requires authorization for payment, the authorization request for that service must be submitted within 90 days of the date of service.

(2) Required prior authorization for selected services. At the CSHCN program's option, selected services may require authorization prior to the delivery of services in order for payment to be made. Authorization requests must be submitted prior to the date of service.

(3) While there is a waiting list for health care benefits, limitations in reimbursement and/or prior authorization may be instituted as provided in §38.16 of this title.

(4) Use of other benefits. The CSHCN program is the payer of last resort. The Children with Special Health Care Needs Services Act provides that any health insurance or other benefits including, but not limited to commercial health insurance, health maintenance organizations, preferred provider organizations, CHAMPUS/CHAMPVA, Medicaid or Medicaid waiver programs, CHIP, liability insurance, or worker's compensation insurance available to the client must be used prior to payment by the CSHCN program.

(5) Denied authorization requests are authorization requests which are incomplete, submitted on the wrong form, lack necessary documentation, contain inaccurate information, fail to meet authorization request submission deadlines, and/or are for ineligible recipients, services, or providers. Denied authorization requests may be corrected and resubmitted for reconsideration. However, authorization requests must meet authorization request submission deadlines. If the results of the reconsideration process are unsatisfactory, denied authorization requests may be appealed according to §38.13 of this title (relating to Right of Appeal).

(e) Pilot projects. The CSHCN program may initiate and participate in pilot projects to determine the fiscal impact of changes in eligibility criteria and the types of services provided. New projects are possible only if funds are available in the current fiscal year. All pilot projects are limited to no more than 10% of the fiscal year appropriation.

§38.10. Payment of Services.

The CSHCN program reimburses participating providers for covered services for CSHCN clients. Payment may be made only after the delivery of the service, with the exception of meals, transportation, and lodging and insurance premium payments. Excluding allowable insurance or health maintenance organization co-payments, the client or client's family must not be billed for the service or be required to make a preadmission or pretreatment payment or deposit. Providers must agree to accept established fees as payment in full. The program may negotiate reimbursement alternatives to reduce costs through requests for proposals, contract purchases, and/or incentive programs.

(1) Payment or denial of claims without insurance or Medicaid. All payments made on behalf of a client will be for claims received by the CSHCN program or its payment contractor within 90 days of the date of service, 90 days from the date of discharge from inpatient hospital and inpatient rehabilitation facilities, or within the submission

deadlines listed under paragraph (2) of this section. Claims will either be paid or denied within 30 days. The commissioner of health may waive the filing deadlines, if program criteria for good cause and exceptional circumstances have been shown. Waivers must be requested in writing, must identify the operational problem causing the inability to file on time, must state that the problem has been or is being resolved, and must acknowledge that the waiver request is made one-time only for the identified problem. All outstanding claims related to the identified problem must be considered at one time. A claim must be processed and paid before the end of the second state fiscal year following the state fiscal year in which the service was provided to the client.

(A) Claims will be paid if submitted on the CSHCN program-approved claim form (including electronic claims submission systems), and if the required documentation is received with the claim.

(B) Denied claims are claims which are incomplete, submitted on the wrong form, lack necessary documentation, contain inaccurate information, fail to meet the filing deadline, and/or are for ineligible recipients, services, or providers.

(i) Corrected claims must be submitted on the CSHCN program-approved claim form along with required documentation within the filing deadline established in clause (ii) of this subparagraph.

(ii) Denied claims may be corrected and resubmitted within 180 days of denial for reconsideration. If the results of the reconsideration process are unsatisfactory, denied claims may be appealed according to §38.13 of this title (relating to Right of Appeal).

(2) Claims involving health insurance coverage, CHIP or Medicaid. Any health insurance that provides coverage to the client must be utilized before the CSHCN program can pay for services. Providers must file a claim with health insurance, CHIP, or Medicaid prior to submitting any claim to the CSHCN program for payment. Claims with health insurance must be submitted to the CSHCN program within 90 days of the date of disposition by the other third party resource, but no later than 365 days from the date of service. The CSHCN program will consider claims received for the first time after the 365-day deadline if a third party resource recoups a payment made in error; however, the claim must be received by the CSHCN program within 90 days from the third party's disposition.

(A) Health insurance denial or nonresponse. If a claim is denied by health insurance, the provider may bill the CSHCN program, if the letter of denial also is submitted with the claim form. If the denial letter is not available, the provider must include on the claim form the date the claim was filed with the insurance company, the reason for the denial, name and telephone number of the insurance company, the policy number, the name of the policy holder and identification numbers for each policy covering the client, the name of the insurance company employee who provided the information on the denial of benefits, and the date of the contact. If more than 110 days have elapsed from the date a claim was filed with the third party resource and no response has been received, the claim may be submitted to the CSHCN program for consideration of payment. Claims must be submitted with documentation indicating the third party resource has not responded.

(B) Explanation of benefits (EOB). The health insurance EOB must accompany any claim sent to the CSHCN program for payment, if available. If the EOB is unavailable, the provider must include on the claim form the name and telephone number of the insurance company, the amount paid, the policy number, and name of the insured for each policy covering the client.

(C) Late filing. Claims denied by health insurance on the basis of late filing will not be considered for payment by the CSHCN program.

(D) Deductibles and coinsurance. If the client has other third party coverage, the CSHCN program may pay a deductible or coinsurance for the client as long as the total amount paid to the provider does not exceed the maximum allowed for the covered service, and conforms with current CSHCN program policies regarding third party resources, deductible, and coinsurance.

(3) CSHCN program fee schedules. The CSHCN program or its designee shall reimburse claims for covered medical, dental, and other services according to the following fee schedules.

(A) meals, lodging, and transportation:

(i) meals-up to the amount specified in the current State of Texas Travel Allowance Guide as per diem meal expenses;

(ii) lodging:

(I) hotel-the amount as contracted with the Texas Medicaid Medical Transportation Program (MTP), not to exceed the amount specified in the current State of Texas Travel Allowance Guide as per diem lodging expenses plus all applicable hotel occupancy taxes; and

(II) Ronald McDonald House-the amount contracted with the MTP; and

(iii) transportation:

(I) mileage-the distance and amount per mile as specified in the current State of Texas Travel Allowance Guide;

(II) by contract-the amount as negotiated by the MTP with contractors such as intercity buses, vans, cabs, or urban mass transit authorities;

(III) air fare-the ticket price reflecting the state discount if ordered by MTP, or the billed amount, if MTP had no opportunity to coordinate transportation in an emergency; and

(IV) cab fare-the billed amount, if other transportation is unavailable, or the MTP is unable to coordinate transportation;

(B) administrative fee to social service organizations-the percentage of the charge for meals, lodging, and transportation negotiated by the MTP with these entities;

(C) ambulance service-the lower of the billed amount or the maximum charge allowed by the Texas Medicaid Program;

(D) transportation of remains:

(i) first call-$75;

(ii) embalming-$100;

(iii) container-$75;

(iv) mileage billed by funeral home-$1.00 per mile; and

(v) air freight-the billed amount;

(E) nutritional products-the lower of the billed amount or the Average Wholesale Price (AWP) per unit according to the prices in the current edition of the Drug Topics Red Book, published by Medical Economics Company, Inc., Montvale, New Jersey 07645-1742, on file with the CSHCN program. For products not listed in the current edition of the Drug Topics Red Book, reimbursement shall be based on

the same methodology using the AWP supplied by the manufacturer of the product;

(F) nutritional services-the lower of the billed amount or the maximum charge allowed by the Texas Medicaid Program;

(G) out-patient medications:

(i) medications covered by Medicaid when billed by pharmacies-the same drug costs and dispensing fees allowed by the Texas Medicaid Vendor Drug Program;

(ii) medications not covered by Medicaid when billed by pharmacies-the lower of the billed amount or the drug cost available through the database used by the Texas Medicaid Vendor Drug Program plus the same dispensing fees allowed by the Texas Medicaid Vendor Drug Program;

(iii) medications covered by Medicaid when billed by hospitals-(the lower of the billed amount or the drug cost available through the database used by the Texas Medicaid Vendor Drug Program plus $2.28) / 0.970; and

(iv) hemophilia blood factor products-the lower of the billed price or the United States Public Health Service (USPHS) price in effect on the date of service plus a dispensing fee of $.04 per unit of factor;

(H) expendable medical supplies-the lower of the billed amount or the amount allowable by the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), if available, or by the Texas Medicaid Program;

(I) durable medical equipment:

(i) non-customized-the lower of the billed amount or the amount allowable by the CMS, if available, or the Texas Medicaid Program;

(ii) customized:

(I) customized, non-powered equipment-the lower of the billed amount or the manufacturer's suggested retail price (MSRP) less 18%;

(II) power wheelchairs-the lower of the billed amount or the MSRP less 15%; and

(III) other-when no MSRP has been published, the lower of the billed amount or the dealer's cost plus 25%; and

(IV) delayed delivery penalty-a claim submitted for customized durable medical equipment that was delivered to the client more than 75 days after the authorization date shall be reduced by 10%;

(iii) orthotics and prosthetics-the lower of the billed amount or the amount allowed by the CMS, if available, or the Texas Medicaid Program;

(J) total parenteral nutrition/hyperalimentation (including equipment, supplies and related services)-the lower of the billed amount or the maximum amount allowed by the Texas Medicaid Program;

(K) home health nursing services (provided only through CSHCN program participating home and community support service agencies)-reimbursement for a maximum of 200 hours per client per year, with an additional 200 hours per client per year available, if justification of need and cost effectiveness are documented;

(i) services provided by a registered nurse-the lower of the billed amount or $36 per hour;

(ii) services provided by a licensed vocational nurse-the lower of the billed amount or $28 per hour; and

(iii) services provided by a home health aide or home health medication aide (including those legally delegated by a supervising registered nurse)-the lower of the billed amount or $12 per hour;

(L) outpatient physical therapy, occupational therapy, speech-language pathology, and respiratory therapy:

(i) services provided by therapists other than physicians-the lower of the billed amount or the amount allowed by the Texas Medicaid Program; and

(ii) services provided by physicians-the lower of the billed amount or the amount allowed by the Texas Medicaid Program;

(M) audiological testing and amplification devices:

(i) for clients under age 21-payment is made through the Program for Amplification for Children of Texas (PACT); and

(ii) for clients ineligible for PACT and those age 21 and over-the lower of the billed amount or the amount allowed by PACT;

(N) insurance premium payment assistance program-the lowest available premium for a plan which covers the client, if cost-effective;

(O) hospital (inpatient and outpatient care) and inpatient psychiatric care-reimbursed at 80% of the rate authorized by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), which is equivalent to the hospital's Medicaid interim rate;

(P) inpatient rehabilitation care-reimbursed at 80% of TEFRA rates, for a maximum of 90 inpatient days per calendar year;

(Q) hospice services-the lower of the billed amount or the amount allowed by the Texas Medicaid Program;

(R) care for renal disease-

(i) renal dialysis services-the lower of the billed amount or the amount allowed by the Texas Medicaid Program; and/or

(ii) renal transplant services-renal transplants may be covered if the projected cost for the transplant and follow-up care is less than that of continuing renal dialysis. Negotiated coverage and cost are based on prior authorization documentation of cost effectiveness;

(S) freestanding ambulatory surgical centers-the lower of the billed amount or the amount allowed by the Texas Medicaid Program based upon Ambulatory Surgical Code Groupings approved by the CMS and the Texas Department of Health;

(T) hospital ambulatory surgical centers-the lower of the amount billed or the amount allowed by the Texas Medicaid Program based upon Ambulatory Surgical Code Groupings approved by the CMS and the Texas Department of Health;

(U) covered professional services by physicians, podiatrists, advanced practice nurses, psychologists, licensed professional counselors, or other providers that are not otherwise specified-the lower of the billed amount or the amount allowed by the Texas Medicaid Program;

(V) independent laboratory-the lowest of the following:

(i) the amount allowed by the Texas Medicaid Program state fee schedule;

(ii) the amount allowed by the CMS national fee schedule; or

(iii) the billed amount;

(W) radiology services-the lower of the billed amount or the amount allowed by the Texas Medicaid program;

(X) dental services-the lower of the billed amount or the amount allowed by the Texas Medicaid program; and

(Y) vision services-the lower of the billed amount or the amount allowed by the Texas Medicaid Program;

(4) Required documentation. The CSHCN program may require documentation of the delivery of goods and services from the provider.

(5) Overpayments.

(A) Overpayments are payments made by the CSHCN program due to the following:

(i) duplicate billings;

(ii) services paid by public or private insurance or other resources;

(iii) payments made for services not delivered;

(iv) services disallowed by the CSHCN program; and

(v) subrogation.

(B) Overpayments made to providers must be reimbursed to the department by lump sum payment or, at the department's discretion, offset against current claims due to the provider for services to other clients. The department also shall require reimbursement of overpayments from any person or persons who have a legal obligation to support the client and have received payments from a payer of other benefits. Providers, clients, and person(s) responsible for clients may appeal proposed recoupment of overpayments by the department according to §38.13 of this title (relating to Right of Appeal).

§38.13. Right of Appeal.

(a) Appeal procedures for families who request authorization of family support services and/or providers.

(1) Administrative review.

(A) If the CSHCN program intends to deny a family's authorization request for family support services according to §38.4(b)(5)(B)(viii) of this title (relating to Covered Services) and/or a provider's authorization request according to §38.4(d)(5) of this title (relating to Covered Services) and/or a provider's claim that has been corrected and resubmitted for reconsideration according to §38.10(1)(B)(ii) of this title (relating to Payment of Services), the program shall give the family or provider written notice of the denial and the right of the family or provider to request an administrative review of the denial within 30 days.

(B) If the CSHCN program intends to deny, modify, suspend, or terminate an individual provider's participation in the CSHCN program, the CSHCN program shall give the provider written notice of the proposed action and the provider's right to request an administrative review of the proposed action within 30 days.

(C) If the family or provider does not respond in writing within the 30-day period, the family or provider is presumed to have waived the administrative review as well as access to a fair hearing, and the CSHCN program's action is final. If the family or provider so requests, the CSHCN program will conduct an administrative review of the circumstances on which the proposed denial of the authorization request/claim and/or the proposed denial, modification, suspension, or termination of provider program participation is based and give the family or provider written notice of the program decision and the supporting reasons within ten days of receipt of the request for administrative review.

(D) The department establishes provider fee schedules and the program's budget alignment methodology by rule. Families and/or providersmay not request administrative review and may not appeal service authorization decisions and/or provider reimbursement amounts that are in accordance with the fee schedules and budget alignment methodology as stated in program rules.

(2) Fair hearing. If the family and/or provider is dissatisfied with the CSHCN program's decision and supporting reasons following the administrative review, the family and/or provider may request a fair hearing in writing addressed to the Children with Special Health Care Needs Program, Bureau of Children's Health, Texas Department of Health, 1100 W. 49th Street, Austin, Texas 78756 within 20 days of receipt of the administrative review decision notice. If the family and/or provider fails to request a fair hearing within the 20-day period, the family and/or provider is presumed to have waived the request for a fair hearing, and the CSHCN program may take final action. A fair hearing requested by a family and/or provider shall be conducted in accordance with §§1.51-1.55 of this title (relating to Fair Hearing Procedures).

(b) Appeal procedures for applicants/clients.

(1) Administrative review.

(A) If the CSHCN program intends to deny eligibility to a program applicant, the program shall give the applicant written notice of the denial and the applicant's right to request an administrative review of the denial within 30 days.

(B) If the CSHCN program intends to deny, modify, suspend, or terminate an individual client's eligibility for health care benefits and/or health care benefits (unless such program actions are authorized by §38.16 of this title (relating to Procedures to Address CSHCN Program Budget Alignment)), the CSHCN program shall give the client written notice of the proposed action and the client's right to request an administrative review of the proposed action within 30 days.

(C) If the applicant/client does not respond in writing within the 30-day period, the applicant/client is presumed to have waived the administrative review as well as access to a fair hearing, and the CSHCN program's action is final. If the applicant/client so requests in writing, the CSHCN program shall conduct an administrative review concerning the circumstances on which the denial of the applicant's eligibility or the proposed denial, modification, suspension, or termination of the client's eligibility and/or health care benefits is based within ten days after receiving the request and shall give the client written notice of the decision and the supporting reasons.

(2) Fair hearing. If the applicant/client is dissatisfied with the CSHCN program's decision and supporting reasons following the administrative review, the applicant/client may request a fair hearing in writing addressed to the Children with Special Health Care Needs Program, Bureau of Children's Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756 within 20 days of receipt of the administrative review decision notice. If the applicant/client fails to request a fair hearing within the 20-day period, the applicant/client is presumed to have waived the request for a fair hearing, and the CSHCN

program may take final action. A fair hearing requested by the applicant/client shall be conducted in accordance with §§1.51-1.55 of this title (relating to Fair Hearing Procedures).

§38.15. Children With Special Health Care Needs Advisory Committee.

(a) The committee.

(1) The Children with Special Health Care Needs Advisory Committee (committee) shall be appointed under and governed by this section.

(2) The committee is established under the Health and Safety Code, §11.016 which authorizes the board to establish advisory committees.

(b) Applicable law. The committee is subject to the Government Code, Chapter 2110, concerning state agency advisory committees.

(c) Purpose. The purpose of the committee is to provide advice to the board and program staff in developing comprehensive systems of health care for children with special health care needs and their families.

(d) Tasks.

(1) The committee shall advise the board concerning rules relating to the CSHCN program and any other programs administered by the department that provide services to children with special health care needs.

(2) The committee will assist the department and the board to promote the development of systems of care for all children with special health care needs consistent with Title V of the Social Security Act by participating in long-range planning activities including:

(A) discussion of contemporary health care issues affecting children with special health care needs, their families, and service providers; and

(B) as needed:

(i) development of recommendations for rules, policies, needs assessments, and grant project activities;

(ii) review of alternatives for and assistance in the development of program policies including service criteria for program coverage;

(iii) review of and comment on proposed service and quality assurance standards and guidelines for services and providers;

(iv) review of and comment on program quality assurance and utilization review reports; and

(v) review of and comment on program fiscal status reports and cost containment methodologies, including recommendations concerning funding alternatives.

(3) The committee shall carry out any other tasks given to the committee by the board.

(e) Committee abolished. By January 1, 2007, the board will initiate and complete a review of the committee to determine whether the committee should be continued, consolidated with another committee, or abolished. If the committee is not continued or consolidated, the committee shall be abolished on that date.

(f) Composition. The committee shall be composed of 15 full (non-alternate) members and two alternate members.

(1) The composition of the committee shall include seven consumer representatives, eight nonconsumer representatives, and two alternate members (one consumer and one non-consumer).

(A) Consumer members include family members of children with special health care needs receiving services from the CSHCN program, Medicaid, Medicaid waiver programs, CHIP, or other publicly-funded programs for children with special health care needs; adults with disabilities who have received services as children with special health care needs; and representatives of consumer advocacy organizations that represent children with special health care needs.

(B) Nonconsumer members include service providers for children with special health care needs who are enrolled as CSHCN, CHIP or Medicaid providers; representatives of professional associations or representatives from institutions of higher education with expertise in public health and children with special health care needs; and health care professionals who deliver services to children with special health care needs. Nonconsumer members may also be family members of children with special health care needs or adults with disabilities.

(C) Alternate members (one consumer and one nonconsumer) are expected to attend and participate in committee meetings and business. They have all rights, privileges, and expectations of full (non-alternate) committee members, however, they may not vote and may not be reimbursed for expenses, except in the following circumstances. In the absence of any non-alternate committee member of the same category at a meeting, the alternate of that category may serve in the place of the absent non-alternate committee member and is afforded the right to vote, counting towards a quorum, and may be reimbursed for expenses as stipulated in subsection (p) of this section for that meeting only. In the event of a vacancy of a non-alternate member, the alternate in that category will automatically be appointed to fill the unexpired term and will serve as a full (non-alternate) committee member. Persons appointed to alternate positions, whether they subsequently fill unexpired terms or not, will be given special consideration during the next regular committee appointment cycle, but will not be automatically guaranteed a non-alternate committee position.

(2) The members of the committee shall be appointed by the board.

(3) Members of the committee as it existed on December 31, 2002, shall continue to serve until the board appoints members according to this subsection.

(g) Terms of office. The term of office of each member shall be six years (except for alternate members, whose terms shall be for two years). Members shall serve after expiration of their term until a replacement is appointed.

(1) Members shall be appointed for staggered terms so that the terms of six members will expire on December 31 of each even-numbered year.

(2) If a vacancy occurs, a person shall be appointed to serve the unexpired portion of that term.

(h) Officers. The committee shall select from its full (non-alternate) members the presiding officer and an assistant presiding officer to begin serving on January 1 of each odd-numbered year.

(1) Each officer shall serve until December 31 of each even-numbered year. Each officer may holdover until his or her replacement is elected.

(2) The presiding officer shall preside at all committee meetings which he or she attends, call meetings in accordance with

this section, appoint subcommittees of the committee as necessary, and cause proper reports to be made to the board. The presiding officer may serve as an ex-officio member of any subcommittee of the committee.

(3) The assistant presiding officer shall perform the duties of the presiding officer in case of the absence or disability of the presiding officer. If the office of presiding officer becomes vacant, the assistant presiding officer will serve until a successor is appointed to complete the unexpired portion of the term of the office of presiding officer.

(4) If the office of assistant presiding officer becomes vacant, it may be filled by vote of the committee.

(5) A member shall serve no more than two consecutive terms as presiding officer and/or assistant presiding officer.

(6) The committee may reference its officers by other terms, such as chairperson and vice-chairperson.

(i) Meetings. The committee shall meet only as necessary to conduct committee business.

(1) A meeting may be called by agreement of department staff and either the presiding officer or at least three members of the committee.

(2) Meeting arrangements shall be made by department staff. Department staff shall contact committee members to determine availability for a meeting date and place.

(3) The committee is not a "governmental body" as defined in the Open Meetings Act. However, in order to promote public participation, each meeting of the committee shall be announced and conducted in accordance with the Open Meetings Act, Texas Government Code, Chapter 551, with the exception that the provisions allowing executive sessions shall not apply.

(4) Each member of the committee shall be informed of a committee meeting at least five working days before the meeting.

(5) A quorum for the purpose of transacting official business is eight members.

(6) The committee is authorized to transact official business only when in a legally constituted meeting with a quorum present.

(7) The agenda for each committee meeting shall include an opportunity for any person to address the committee on matters relating to committee business. The presiding officer may establish procedures for such public comment, including a time limit on each comment.

(j) Attendance. Members shall attend committee meetings as scheduled. Members shall attend meetings of subcommittees to which the members are assigned.

(1) A member shall notify the presiding officer or appropriate department staff if he or she is unable to attend a scheduled meeting.

(2) It shall be grounds for removal from the committee if a member cannot discharge the member's duties for a substantial part of the term for which the member is appointed because of illness or disability, absence from more than half of the committee and subcommittee meetings during a calendar year, or absence from at least three consecutive committee meetings.

(3) The validity of an action of the committee is not affected by the fact that it is taken when a ground for removal of a member exists.

(k) Staff. Staff support for the committee shall be provided by the department.

(l) Procedures. Roberts Rules of Order, Newly Revised, shall be the basis of parliamentary decisions except where otherwise provided by law or rule.

(1) Any action taken by the committee must be approved by a majority vote of the members present once a quorum is established.

(2) Each member shall have one vote.

(3) A member may not authorize another individual to represent the member by proxy.

(4) The committee shall make decisions in the discharge of its duties without discrimination based on any person's race, creed, gender, religion, national origin, age, physical condition, or economic status.

(5) Minutes of each committee meeting shall be taken by department staff.

(A) A draft of the minutes approved by the presiding officer shall be provided to the board and each member of the committee within 30 days of each meeting.

(B) After approval by the committee, the minutes shall be signed by the presiding officer.

(m) Subcommittees. The committee may establish subcommittees as necessary to assist the committee in carrying out its duties.

(1) The presiding officer shall appoint members of the committee to serve on subcommittees and to act as subcommittee chairpersons. The presiding officer also may appoint nonmembers of the committee to serve on subcommittees.

(2) Subcommittees shall meet when called by the subcommittee chairperson or when so directed by the committee.

(3) A subcommittee chairperson shall make regular reports to the advisory committee at each committee meeting or in interim written reports as needed. The reports shall include an executive summary or minutes of each subcommittee meeting.

(n) Statement by members.

(1) The board, the department, and the committee shall not be bound in any way by any statement or action on the part of any committee member except when a statement or action is in pursuit of specific instructions from the board, department, or committee.

(2) The committee and its members may not participate in legislative activity in the name of the board, the department, or the committee except with approval through the department's legislative process. Committee members are not prohibited from representing themselves or other entities in the legislative process.

(3) A committee member should not accept or solicit any benefit that might reasonably tend to influence the member in the discharge of the member's official duties.

(4) A committee member should not disclose confidential information acquired through his or her committee membership.

(5) A committee member should not knowingly solicit, accept, or agree to accept any benefit for having exercised the member's official powers or duties in favor of or against another person.

(6) A committee member who has a personal or private interest in a matter pending before the committee shall publicly disclose the fact in a committee meeting and may not vote or otherwise participate in the matter. The phrase "personal or private interest" means the

committee member has a direct pecuniary interest in the matter but does not include the committee member's engagement in a profession, trade, or occupation when the member's interest is the same as all others similarly engaged in the profession, trade, or occupation or the committee member's or his or her family's receipt of services from or through the department when the member's interest is the same as all others similarly situated.

(o) Reports to board. The committee shall file an annual written report with the board.

(1) The report shall list the meeting dates of the committee and any subcommittees, the attendance records of its members, a brief description of actions taken by the committee, a description of how the committee has accomplished the tasks given to the committee by the board, the status of any rules which were recommended by the committee to the board, and anticipated activities of the committee for the next year.

(2) The report shall identify the costs related to the committee's existence, including the cost of agency staff time spent in support of the committee's activities and the source of funds used to support the committee's activities.

(3) The report shall cover the meetings and activities in the immediately preceding 12 months and shall be filed with the board each January. The report shall be signed by the presiding officer and appropriate department staff.

(p) Reimbursement for expenses. In accordance with the requirements set forth in the Government Code, Chapter 2110, a committee member may receive reimbursement for the member's expenses incurred for each day the member engages in official committee business if authorized by the General Appropriations Act or the budget execution process.

(1) No compensatory per diem shall be paid to committee members unless required by law.

(2) A committee member who is an employee of a state agency, other than the department, may not receive reimbursement for expenses from the department.

(3) A nonmember of the committee who is appointed to serve on a subcommittee may not receive reimbursement for expenses from the department.

(4) Each member who is to be reimbursed for expenses shall submit to staff the member's receipts for expenses and any required official forms no later than 14 days after each committee meeting.

(5) Requests for reimbursement of expenses shall be made on official state travel vouchers prepared by department staff.

§38.16. Procedures to Address CSHCN Program Budget Alignment.

(a) The department shall analyze actuarial cost projections concerning CSHCN administrative and client services to estimate the amount of funds needed in the fiscal year by the program to serve CSHCN clients and shall monitor such program cost projections and funding analyses at least monthly to determine whether the estimated amount of funds needed by the program will:

(1) exceed the program's appropriated funds and other available resources for the fiscal year; or

(2) be less than the program's appropriated funds and other available resources for the fiscal year.

(b) When the CSHCN program projects that the estimated amount of funds needed in the fiscal year by the program to serve CSHCN clients will exceed the program's appropriated funds and other available resources for the fiscal year, the program shall use the following methodology to reduce/ limit the amount of funds to be expended by the program:

(1) give clients and providers who will be directly affected written notice of any reductions or limitations of services, coverage, and/or reimbursements;

(2) take the following actions in the order listed only until the projected amount of funds to be expended by the program approximately equals, but does not exceed, the program's appropriated funds and other available resources:

(A) implement administrative efficiencies, while avoiding changes which may jeopardize the quality and integrity of CSHCN program service delivery;

(B) establish and administer a waiting list for health care benefits according to the procedures in this section;

(C) at the same time the waiting list is established:

(i) provide only limited prior authorization for family support services for ongoing clients, as determined by the medical director or other designated medical staff, only in order to continue services already being provided at the time the waiting list is established, and/or when the specific services are required to prevent out-of-home placement of the client (as documented by the CSHCN program regional case management staff/ contractors), and/or when the provision of such services is cost effective for the program;

(ii) disallow prior authorization (coverage) of diagnosis and evaluation services for applicants who qualify for up to 60 days of program coverage for diagnosis and evaluation services only and refer such applicants to case management services; and

(iii) allow limited prior authorization of diagnosis and evaluation services on a short-term basis, only when such information is needed to assess whether clients on the waiting list have "urgent need for health care benefits" as described in subsection (e) of this section and only with prior authorization and approval by the medical director or other designated medical staff.

(D) place new applicants or re-applicants with lapsed eligibility who are determined eligible for program health care benefits (new clients for health care benefits) on the waiting list. These clients will be ordered on the waiting list according to the date/time the client is determined eligible for program health care benefits;

(E) reduce/limit reimbursements for contractual service providers, while avoiding changes which may jeopardize the integrity of the contractor base and thereby decrease client access to services;

(F) place clients who are eligible to receive CSHCN program health care benefits and who currently are not on the waiting list (ongoing clients for health care benefits) on the waiting list. These clients will be ordered on the waiting list according to the original date/time that starts the client's latest uninterrupted sequence of eligibility for program health care benefits, and in the following order of movement to the waiting list:

(i) ongoing clients for health care benefits who have one or more sources of substantial health insurance coverage (such as Medicaid/ CHIP/ or other private health insurance similar in scope) in addition to the CSHCN program (not including those ongoing clients for whom the CSHCN program pays the insurance premiums);

(ii) ongoing clients for health care benefits in the following order by age groups: 21 years of age or older; 20 years of age; 19 years of age; 18 years of age; and

(iii) all other ongoing clients for health care benefits who do not have an urgent need for health care benefits;

(G) employ additional measures to reduce/ limit the amount of funds to be expended by the program as the board shall direct by rule.

(c) If the procedures described in subsection (b)(2)(A)-(F) of this section enable the program to project that the estimated amount of funds to be expended by the program in the fiscal year approximately equals, but does not exceed, the program's appropriated funds and other available resources, the program shall take the following additional steps in order to provide health care benefits to as many clients with urgent need for health care benefits as possible who are currently on the waiting list.

(1) generate cost savings by taking the following steps in the order listed:

(A) give clients and providers who will be directly affected written notice of any reductions or limitations of services, coverage, and/or reimbursements;

(B) reduce/limit reimbursements for contractual service providers, while avoiding changes which may jeopardize the integrity of the contractor base and thereby decrease client access to services;

(C) employ additional measures to generate cost savings as the board shall direct by rule.

(2) utilize cost savings generated to remove as many clients with urgent need for health care benefits as possible from the waiting list and provide health care benefits to those clients. Clients with urgent need for health care benefits shall be removed from the waiting list according to the original date/time that starts the client's latest uninterrupted sequence of eligibility for program health care benefits and in the following group order:

(A) clients who are less than 21 years old and who have an urgent need for health care benefits, as described in subsection (e) of this section;

(B) clients who are 21 years of age or older and who have an urgent need for health care benefits, as described in subsection (e) of this section;

(3) provide health care benefits (which may include payment of outstanding bills for health care benefits) for clients with urgent need for health care benefits who are removed from the waiting list;

(A) as long as program cost savings funds are available; and

(B) if the outstanding bills for health care benefits are for dates of service that are within the time period that program cost savings funds are available and provided the client was eligible for program health care benefits at the time of the dates of service;

(4) provide limited health care benefits and/or payment of outstanding bills for health care benefits for clients with urgent need for health care benefits who are on the waiting list and remain on the waiting list. The program's coverage of such health care benefits may be limited in scope, amount, and duration and is not intended to be sustained over time. Clients with urgent need for health care benefits who are on the waiting list will be served in the same order used in paragraph (2) of this subsection to remove clients with urgent need for health care benefits from the waiting list. This coverage may be provided to clients with urgent need on the waiting list prior to or at any point during activities described by paragraphs (2)-(3) of this subsection only:

(A) when projected cost savings funds are projected to be insufficient to remove clients with urgent need for health care benefits (or additional clients with urgent need for health care benefits) from the waiting list and maintain continuous program health care benefits coverage for those clients or when projected cost savings funds may lapse if not expended in this manner;

(B) as long as program cost savings funds are available; and

(C) if the outstanding bills for health care benefits are for dates of service that are within the time period that program cost savings funds are available and provided the client was eligible for program health care benefits at the time of the dates of service.

(d) When the CSHCN program projects that the estimated amount of funds to be expended by the program in the fiscal year is less than the program's appropriated funds and other available resources due to the cost reduction, limitation, or deferral procedures implemented according to subsections (b) or (c) of this section, or the program's receipt of additional funding, or funding analysis as described in subsection (a)(2) of this section, resulting in a projected amount of unobligated funds, the program shall increase the amount of funds to be expended by the program.

(1) In an effort to expend unobligated funds (except for unobligated funds resulting from program actions taken according to subsection (c) of this section) the program shall utilize the following steps in the order listed only until the program projects that the estimated amount of unobligated funds will be expended by the program during the fiscal year:

(A) take clients off the waiting list according to the original date/time that starts the client's latest uninterrupted sequence of eligibility for program health care benefits and in the following group order:

(i) clients who are less than 21 years old and who have an urgent need for health care benefits, as described in subsection (e) of this section;

(ii) clients who are 21 years of age or older and who have an urgent need for health care benefits, as described in subsection (e) of this section;

(iii) clients who are less than 21 years old who do not have an urgent need for health care benefits and who are clients who were placed on the waiting list when they were ongoing clients and who have had no lapse in eligibility while on the waiting list or who are new clients who are re-applicants for health care benefits and who have had a lapse in eligibility for no longer than the 12 months prior to the date/time that starts their latest uninterrupted sequence of eligibility;

(iv) clients who are 21 years of age or older who do not have an urgent need for health care benefits and who are clients who were placed on the waiting list when they were ongoing clients and who have had no lapse in eligibility while on the waiting list or who are new clients who are re-applicants for health care benefits and who have had a lapse in eligibility for no longer than the 12 months prior to the date/time that starts their latest uninterrupted sequence of eligibility;

(v) all other clients who are less than 21 years old who do not have an urgent need for health care benefits; and

(vi) all other clients who are 21 years of age or older who do not have an urgent need for health care benefits.

(B) provide health care benefits (which may include payment of outstanding bills for health care benefits) for clients taken off the waiting list:

(i) as long as program unobligated funds are available; and

(ii) if the outstanding bills for health care benefits are for dates of service that are within the time period that program unobligated funds are available and provided the client was eligible for program health care benefits at the time of the dates of service;

(C) provide limited health care benefits and/or payment of outstanding bills for health care benefits for clients who are on the waiting list and remain on the waiting list. The program's coverage of such health care benefits may be limited in scope, amount, and duration and is not intended to be sustained over time. Clients on the waiting list will be served in the same order used in paragraph (1) of this subsection to take clients off the waiting list. This coverage may be provided to clients on the waiting list prior to or at any point during activities described by paragraphs (1)-(2) of this subsection only:

(i) when projected unobligated funds are projected to be insufficient to take clients (or additional clients) off the waiting list and maintain continuous program health care benefits coverage for those clients or when projected unobligated funds may lapse if not expended in this manner;

(ii) as long as program unobligated funds are available; and

(iii) if the outstanding bills for health care benefits are for dates of service that are within the time period that program unobligated funds are available and provided the client was eligible for program health care benefits at the time of the dates of service;

(D) if the CSHCN program projects that the amount of funds to be expended by the program in the fiscal year will be less than the program's appropriated funds and other available resources after no clients eligible for program health care benefits remain on the waiting list, the program may take the following actions in the following order:

(i) eliminate limitations on prior authorization for family support services;

(ii) provide prior authorized coverage of diagnosis and evaluation services for applicants who qualify for up to 60 days of program coverage for diagnosis and evaluation services only;

(iii) remove any of the additional measures taken to reduce/ limit the amount of funds to be expended by the program as directed by the board by rule;

(iv) remove any reductions/ limitations to contractor reimbursements that have been implemented; and

(v) expand program services.

(2) In an effort to expend unobligated funds resulting from program actions taken according to subsection (c) of this section (unobligated cost savings funds that remain after all clients with urgent need for health care benefits have been removed from the waiting list and provided health care benefits) the program shall utilize the following steps in the order listed only until the program projects that the estimated amount of unobligated funds will be expended by the program during the fiscal year:

(A) take additional clients off the waiting list according to the original date/time that starts the client's latest uninterrupted sequence of eligibility for program health care benefits and in the following group order:

(i) clients who are less than 21 years old who do not have an urgent need for health care benefits and who are clients who were placed on the waiting list when they were ongoing clients and who have had no lapse in eligibility while on the waiting list;

(ii) clients who are 21 years of age or older who do not have an urgent need for health care benefits and who are clients who were placed on the waiting list when they were ongoing clients and who have had no lapse in eligibility while on the waiting list;

(B) provide health care benefits (which may include payment of outstanding bills for health care benefits) as stipulated in subsection (d)(1)(B) of this section for these clients taken off the waiting list;

(C) provide limited health care benefits and/or payment of outstanding bills for health care benefits for clients identified in subsections (d)(2)(A)(i) and (ii) of this section who are on the waiting list and remain on the waiting list. The program's coverage of such health care benefits may be limited in scope, amount, and duration and is not intended to be sustained over time. These clients on the waiting list will be served in the same order used in paragraph (2)(A) of this subsection to take these clients off the waiting list. This coverage may be provided to these clients on the waiting list prior to or at any point during activities described by paragraphs (2)(A) and (2)(B) of this subsection and only as stipulated in subsections (d)(1)(C)(i)-(iii) of this section;

(D) remove any of the additional measures taken to generate cost savings by the board by rule according to subsection (c)(1)(C); and

(E) remove any reductions/ limitations to contractor reimbursements that have been implemented.

(e) The program shall establish a protocol to be used by the medical director or other designated medical staff to determine whether a client has an "urgent need for health care benefits" by considering criteria including, but not limited to, the following:

(1) the physician or dentist who signs the client's application and/or the treating physician/dentist attests and/or documents the physician/dentist's determination that delay in receiving health care benefits could result in loss of life, permanent increase in disability, or intense pain/suffering;

(2) the client/family states that no other source of health insurance coverage is available to the client;

(3) information on the application for health care benefits indicates the complexity of the client's condition and/or need for care;

(4) information received from CSHCN regional case management staff/contractors supports other information gathered and/or indicates that a delay in health care benefits could reasonably be expected to result in an out-of-home placement/ institutionalization of the client because the family cannot continue to care for the client; and

(5) information obtained from diagnosis and evaluation services as prior authorized by the program medical director or other designated medical staff.

(f) The CSHCN program central office may establish and administer the waiting list for health care benefits to address a budget shortfall.

(1) In order to facilitate contacting clients on the waiting list, the CSHCN program shall collect information including, but not limited to the following:

(A) the client's name, address, and telephone number;

(B) the name, address, and telephone number of a contact person other than the client;

(C) the date of the client's earliest application for health care benefits;

(D) the date on which the client became eligible for health care benefits;

(E) the client's functional limitations or needs;

(F) the range of services needed by the client; and

(G) a date on which the client is scheduled for reassessment.

(2) The waiting list is maintained continually from one fiscal year to the next. Clients must maintain eligibility for health care benefits to remain on the waiting list. A lapse of eligibility for health care benefits constitutes loss of position on the waiting list.

(3) The program shall refer clients on the waiting list to other possible sources of services, and shall contact waiting list clients periodically to confirm their continuing need for CSHCN program services.

(4) The program will offer case management services as needed/desired to all clients who are eligible for health care benefits, including those on the waiting list for health care benefits.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 7, 2003.

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458-7236

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CHAPTER 295. OCCUPATIONAL HEALTH
SUBCHAPTER C. TEXAS ASBESTOS HEALTH PROTECTION

25 TAC §§295.31, 295.32, 295.34 - 295.56, 295.58 - 295.62, 295.64, 295.65, 295.69 - 295.72

The Texas Department of Health (department) adopts amendments to §§295.31-295.32, 295.34-295.56, 295.58-295.62, 295.64-295.65 and 295.69-295.72 concerning Texas asbestos health protection definitions, responsibilities of building owners or operators, licensing, work practices, training and enforcement to update the rules to conform with statutory changes. Sections 295.31, 295.32, 295.34, 295.36-295.40, 295.42, 295.43, 295.45-295.48, 295.53-295.56, 295.58-295.62, 295.64, 295.65, 295.69, and 295.70 are adopted with changes to the proposed text as published in the December 6, 2002, issue of the *Texas Register* (27 TexReg 11424). Sections 295.35, 295.41, 295.44, 295.49 - 295.52, 295.71, and 295.72 are adopted without changes and therefore will not be republished.

Government Code, §2001.039 requires that each state agency review and consider for readopting each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 295.21 and 295.31-295.73 were reviewed and the department determined that reasons for adopting the sections continue to exist. However, the rules needed revisions as described in this preamble. Sections 295.21, 295.33, 295.57, 295.63, 295.66-295.68 and 295.73 were not proposed for amendment but were also opened for comments in the proposed preamble, and no changes were made.

The Notice of Intention to Review was published in the *Texas Register* (25 TexReg 4360) on May 12, 2000. The department received no comments on these sections as a result of the publication of the notice.

The purpose of the proposed changes to the rules is to incorporate changes to Article 4477-3a, Vernon's Texas Civil Statutes and Chapter 161 of the Health and Safety Code as amended by House Bill 2085, 76th Legislature, 1999 and Senate Bill 509, House Bill 1279, House Bill 1927 and House Bill 2844, 77th Legislature, 2001. The 1999 changes establish provisional licenses and registrations, establish fees for late renewals, specify the full range of penalties applicable to violations of the rules and establishes the timeframe for notification of examination results. The 2001 changes require municipalities to verify if an asbestos survey is conducted prior to issuance of a renovation/demolition permit, prohibit the installation of asbestos, expand the department's ability to take enforcement action aganst contractors who remove floor covering, and allow entities to test new abatement methods that have been approved by the Environmental Protection Agency (EPA). In addition, these amendments are part of the department's continuing effort to update and clarify its rules.

The following comments from the public were received concerning the proposed sections. Following each comment is the department's response and any resulting change(s).

Comment: Concerning §295.31(b), one commenter suggested the last part of the sentence be stated as, "... activities in public and commercial buildings and facilities as defined by these sections."

Response: The department agrees and has incorporated the appropriate change.

Comment: Concerning §295.32, commenters attending the Asbestos Training Provider Seminar suggested the word "building" be defined.

Response: The department disagrees and believes that the standard definition used in the industry applies. No change was made as a result of this comment.

Comment: Concerning §295.32, several commenters suggested that the rules should define "disturb" or "disturbance."

Response: The department agrees and has added the definition of disturbance based on the definition of disturbance in 29 CFR 1926.1101(a).

Comment: Concerning §295.32(3), one commenter expressed concern with the definition of "adequately wet."

Response: The department agrees and has changed the definition to match the definition of adequately wet in 40 CFR 61.141.

Comment: Concerning §295.32(6), one commenter suggested modifying the definition of "airlock" to allow for the fact that there is no way that air can flow only towards the inside of the enclosure.

Response: The department agrees and has incorporated the appropriate language.

Comment: Concerning the definition of "air monitoring" in §295.32(7), one commenter suggested that air sampling and analysis by the NIOSH 7400 method is used to count all fibers (to include asbestos fibers as defined by the method).

Response: The department agrees. The analysis by phase contrast microscopy by the NIOSH 7400 method counts all fibers meeting a certain aspect ratio which includes all fibers meeting that criteria. The definition was changed so as not to limit the fibers to asbestos, since it is not limited by the microscopy method that the consultant or laboratory may select.

Comment: Concerning proposed §295.32(9), one commenter expressed confusion concerning the definition of "asbestos abatement" as it pertains to operations and maintenance (O&M) activities.

Response: The department clarifies that where O&M activities involve abatement of ACM/ACBM, the rules treat such activity as abatement.

Comment: Concerning proposed §295.32(9), one commenter recommended a grammatical change to the definition of "asbestos abatement."

Response: The department agrees and has added commas before and after the phrase "or that has the effect of" in the definition.

Comment: Concerning §295.32(10), one commenter suggested the following change: "Asbestos abatement activity - Asbestos abatement, or any on-site preparations or clean-up related to the abatement."

Response: The department agrees and has incorporated the appropriate language.

Comment: Concerning §295.32(10), one commenter suggested that the qualification of "preparation that does not disturb asbestos" be added to the definition of "asbestos abatement activity" for additional clarity.

Response: The department believes that incorporating this phrase would not offer any clarity to the rule. No change was made as a result of this comment.

Comment: Concerning §295.32(13), one commenter suggested changing "which" to "that" for clarity.

Response: The department agrees and has incorporated the appropriate language.

Comment: Concerning §295.32(13), two commenters questioned what was meant by "every day of the project."

Response: The department agrees and has changed the language to "to be employed every day of the asbestos abatement activity."

Comment: Concerning §295.32(14), one commenter suggested the addition of the word "interior" to "parts of a public or commercial building."

Response: The department disagrees. This definition comes from 40 CFR Part 763, Subpart E. No change was made as a result of this comment.

Comment: Concerning §295.32(14), one commenter suggested, "ending the sentence with the word 'members' and deleting remainder of the sentence."

Response: The department disagrees. The definition of ACBM comes from 40 CFR Part 763, Subpart E. No change was made as a result of this comment.

Comment: Concerning §295.32(15), one commenter stated a "composite sample should be used for wallboard. Wallboard layers are never separated, and then crushed. They are always crushed or crumbled as a unit."

Response: The department disagrees. Composite samples are not allowed in a public building under §295.32(15) or §295.58(h)(1). The department believes that it is in the best interest of public health to require that joint compound be evaluated no differently than other asbestos-containing material. No change was made as a result of this comment.

Comment: Concerning §295.32(15), one commenter said, "the department has misinterpreted OSHA's intent concerning layered materials, specifically wallboard and joint compound. OSHA regulates all exposure to 'asbestos', regardless of the amount or percentage of asbestos contained in a material. OSHA also regulates and specifies how an employer will control exposure to 'asbestos containing materials otherwise known as ACM.' OSHA defines ACM as materials containing more than one percent asbestos and specifies exposure control methods for OSHA Class I-IV Asbestos Work Activities.... the department's current stance on this issue is overly restrictive, costly to business, and has not been proven to be needed in the state of Texas to control worker exposure. The following definition recommendation is provided for the department's consideration: §295.32(15) Asbestos-containing material (ACM) - Materials or products that contain more than 1.0% of any kind or combination of asbestos, as determined by the Environmental Protection Agency recommended methods as listed in EPA/600/R-93/116, July 1993, 'Method for the Determination of Asbestos in Bulk Building Materials.'"

Response: The department disagrees and believes that public health is better protected with the proposed definition. OSHA regulations are minimum standards for asbestos-related activities for the protection of workers and do require that protection be afforded if the joint compound contains more than one percent asbestos. It only makes sense that both workers and the public be afforded at least the same protection in a public building. No change was made as a result of this comment.

Comment: Concerning §295.32(18), two commenters expressed confusion about the term "every day" in the definition of "asbestos project design."

Response: The department agrees and has changed the language to "to be employed every day of the asbestos abatement activity."

Comment: Concerning §295.32(19), one commenter stated the following: "The addition of 'preparation of plans and specifications' to this paragraph is redundant and included in the definition (18) above. It should be deleted from this paragraph."

Response: The department agrees and has incorporated the appropriate change.

Comment: Concerning §295.32(23), two commenters recommended that "building owner" be changed to "public building owner."

Response: The department removed the word "public" from this definition in the proposed rules since it may apply to all buildings.

Comment: Concerning §295.32(23) and §§295.34(b)(5) and (6) and the rules in general, one commenter expressed the following: "First, we support strongly the department's decision last year to rescind Asbestos Regulatory Clarification 15 concerning the contracting ability of public building owners and are pleased that the reconsidered policy will now be reflected in TAHPR. Specifically, we support the amendments reflected in §§295.32(23) and 295.34(b)(5) and (6). We would encourage the department to continue to analyze amendments to TAHPR with a similar performance-based philosophy and with an emphasis on whether or not regulatory requirements enhance protection of public health by realistically decreasing exposure to asbestos fibers."

Response: The department appreciates the commenter's remarks concerning the rules. No change was made as a result of this comment.

Comment: Concerning §295.32(29), two commenters suggested restoring the following sentence to the definition of "commercial building": "Interior space includes exterior hallways connecting buildings, porticos, and mechanical systems used to condition interior space."

Response: The department agrees and has made the appropriate language change.

Comment: Concerning §295.32(29), one commenter stated the following: "The enabling legislation from which these rules arise clearly includes multi-family residential structures as public buildings."

Response: The department disagrees. The enabling legislation is the Texas Asbestos Health Protection Act (TAHPA), article 4477-3a, Tx. Civ. Stat. Ann. The TAHPA defines a public building to exclude an apartment building with no more than four dwelling units. No change was made as a result of this comment.

Comment: Concerning proposed §§295.32(29), (41), (49), (51) and (78), one commenter stated the following: "The definitions of, and distinctions among, 'public,' 'commercial' and 'industrial' buildings, a 'facility' and an 'installation' remain as vague and confusing as ever."

Response: The department derives the definitions of public building and commercial building from 40 CFR Part 763, Subpart E, Appendix C. In a commercial building, which includes an industrial building, asbestos-related activities must be performed by accredited persons. In a public building, asbestos-related activities must be performed by licensed persons. The department derives the definition of facility from 40 CFR §61.141 (Asbestos NESHAP). In a facility that is not a public or commercial building, a person who has been trained in the provisions of 40 CFR Part 61, Subpart M, must be present to strip, remove, or otherwise handle or disturb Regulated Asbestos Containing Material (RACM) at a facility. An installation is included in the definition of facility and is defined in this regulation to correspond with the definition in 40 CFR Part 61, Subpart M. All of these various definitions are required to determine when certain licenses, accreditations, or training is required of the persons responsible for the asbestos activity or when certain notifications of demolition or renovation are to be sent to the department. No change was made as a result of this comment.

Comment: Concerning §295.32(30), several commenters identified an incorrect citation within the definition of "competent person."

Response: The department agrees and has corrected the citation to reflect 29 CFR §1926.1101. The definition has also been reworded to indicate that a NESHAP-competent person needs NESHAP training.

Comment: Concerning §295.32(31), one commenter suggested the following change for clarity: "with high-efficiency particulate air-filter filtered negative air machines."

Response: The department has reworded the definition for clarity.

Comment: Concerning §295.32(31), one commenter suggested the following change to the definition of "containment": "The portion of the regulated area that is sealed and placed under negative pressure with negative air machines equipped with primary, secondary and high efficiency particulate air filters."

Response: The department believes that the use of primary and secondary filters is at the contractor's discretion. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(31) and (38), one commenter expressed that the definition of "containment" should be replaced with the definition of "enclosure."

Response: The department disagrees. Enclosure is a method of asbestos abatement involving the construction of a permanent barrier that surrounds the ACBM. A containment is a temporary structure that isolates areas being abated and facilitates safe entry of abatement workers to the work area while restricting it from public access. These definitions need to remain as stated in order to preserve the distinction between the two words. No change was made as a result of this comment.

Comment: Concerning §295.32(32), one commenter stated, "Consultants, Laboratories, etc. do business 'under contract' and appear to be half included in this definition."

Response: The department believes that such businesses are contractors and are fully included in this definition. No change was made as a result of this comment.

Comment: Concerning §295.32(35), one commenter recommended "retaining the acronym 'AHERA' that is proposed for deletion."

Response: The department disagrees. The proper citation of the applicable federal regulation is 40 CFR Part 763, Subpart E and has therefore deleted "Asbestos Hazard Emergency Response Act."

Comment: Concerning proposed §295.32(37), one commenter suggested that the use of encapsulation as a finishing procedure, in the asbestos abatement process, be included in the definition of "encapsulation."

Response: The department disagrees. Encapsulation is one of three abatement methods and not part of the process of finishing the abatement project. Final cleaning, such as wet wiping and vacuuming, is not an abatement method. Encapsulation involves wetting the ACM to penetrate or cover the material to control the release of fibers from the ACM. Encapsulation is not defined to mean the covering/coating of asbestos fibers that have settled onto surfaces. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(41), two commenters identified a typographical error in the definition of "facility."

Response: The department has corrected the error by separating the words "condominiums" and "or."

Comment: Concerning proposed §295.32(41), one commenter suggested adding the word "institution" to the definition of "facility."

Response: The department disagrees. This definition is from the NESHAP. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(41), one commenter suggested including "any active or inactive disposal site" in the definition of "facility."

Response: The department disagrees. The department has a Memorandum of Understanding with the Texas Commission on Environmental Quality (see §295.72) to regulate landfills. No change was made as a result of this comment.

Comment: Concerning §295.32(44), one commenter stated "If a wall unit containing chrysotile asbestos in the sheetrock mud is crumbled, pulverized, or reduced to powder by hand pressure, it becomes non-asbestos containing material. To the best of my knowledge, a sheetrock wall unit cannot be crumbled, pulverized, or reduced to powder by hand pressure in layers. It is a whole wall unit that is reduced to dust, thus taking the asbestos containing material below the limits of asbestos containing material. In other words, the chrysotile asbestos would be well below 1% of the crumbled, pulverized, or reduced to powder sheetrock wall unit."

Response: The rules do not allow for composite sampling in a public building. See §295.58(h)(1). The rules allow for composite sampling of joint compound on NESHAP facilities per EPA direction. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(47), one commenter suggested the definition of "independent third-party air monitor" read, "A person retained to collect baseline, area and clearance air samples to be analyzed for the owner of the building or facility being abated. The person must not be employed by the abatement contractor to analyze any baseline, area and clearance air samples collected during the abatement projects being monitored subject to the provisions of §295.37 of this title (relating to Licensing and Registration: Conflicts of Interests)."

Response: The department disagrees and believes that this suggested change adds no further clarity to the definition. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(50), one commenter suggested the following paragraph be added to the definition of "inspection": "A sample of building material taken by an O&M Supervisor to determine if there is an asbestos content prior to a small-scale, short-duration maintenance procedure."

Response: The department disagrees. The TAHPR do not allow O&M supervisors to collect samples. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(50) and (90), four commenters recognized that the definitions of "inspection" and "survey" are identical.

Response: The department agrees. The definitions are identical to avoid confusion that might come from the use of either term. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(52), one commenter stated: "A sheetrock wall system, consisting of paint, texture, sheetrock mud, and sheetrock does not fit this definition. The paint cannot be readily separated from the texture, nor can the texture be readily separated from the sheetrock mud. The definition of 'readily separated' does not realistically describe what happens when the paint, texture, and mud are separated from the sheetrock. In my experience, the wall unit must be wetted, allowing the water to soak into the wall, and the paint, texture, and mud must be scraped off with something similar to a putty knife. I would not call that method 'readily separated'. Any other method would not 'separate' mud from the sheetrock. There would be bits of mud left on the sheetrock and bits of sheetrock left in the mud, along with all of the texture and paint that is on the wall unit. I believe wall units should be tested as a unit, not in layers.

Response: To aid in clarity, the department has removed the word "readily" to take away any confusion that could be caused by a judgment call from the laboratory technician or the inspector.

Comment: Concerning proposed §295.32(56), one commenter recommended that the acronym "ACBM" be spelled out in the definition of "major fiber release episode."

Response: The department disagrees. The acronym was spelled out previously in the definition of "Asbestos-containing building material." No change was made as a result of this comment.

Comment: Concerning proposed §295.32(58), one commenter recommended that the acronym "ACBM" be spelled out in the definition of "minor fiber release episode."

Response: The department disagrees. The acronym was spelled out previously in the definition of "Asbestos-containing building material." No change was made as a result of this comment.

Comment: Concerning proposed §295.32(65), one commenter stated that there is a conflict between the definition of "operations and maintenance" and the definition of "asbestos abatement."

Response: The department disagrees and believes there is no conflict in the definitions. The department does recognize that there is an inconsistency in the rules and has made changes to §295.43(a) and (b)(1) to differentiate asbestos O&M activity from O&M.

Comment: Concerning proposed §295.32(65), one commenter stated, "This rule should include the authorization to take a sample of the building material to be disturbed to an accredited lab to determine if asbestos containing material will be encountered during the procedure."

Response: The department disagrees. Only licensed inspectors may collect samples. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(66), one commenter recommended the deletion from the definition of "operations and maintenance (O&M) contractor" of work practice and licensing matters, which are already stated under §§295.43 and 295.59.

Response: The department agrees and has modified the definition as suggested.

Comment: Concerning proposed §295.32(66), one commenter identified a capitalization error in the third occurrence of the word "operations" in the definition of "operations and maintenance (O&M) contractor."

Response: The department agrees and has corrected the capitalization error.

Comment: Concerning proposed §295.32(66), one commenter suggested adding a more specific reference in the definition of "operations and maintenance (O&M) contractor" for the EPA "Green Book."

Response: The department has modified this definition and deleted the reference to the EPA "Green Book."

Comment: Concerning proposed §295.32(67), one commenter stated that everything after the first sentence in the definition of "operation and maintenance (O&M) manual" is a record-keeping activity and belongs in §295.62.

Response: The department agrees and has moved this language to §295.62.

Comment: Concerning proposed §295.32(75), two commenters recommended modifying the definition of "plans and specifications" to delete the reference to the regulated area. One commenter said that the regulated area applies more to formally designed abatement project documents but has little relevance to O&M work.

Response: The department disagrees. The definition describes what plans and specifications are. It does not imply anything about when plans and specifications are required. If plans and specifications were required, as under §295.34(g), the location of the regulated area would also be included. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(77), two commenters recommended that the definition of "preparation" be modified such that consultants are not restricted by the unnecessarily detailed activities included in the definition.

Response: Many stakeholders had requested the department to define which activities, performed prior to the start of abatement, required licensed persons in order to avoid non-compliance. This definition was provided to remove any confusion about these activities. The department believes the definition is sufficiently detailed to include typical activities involved in preparation. It is not intended to be directive or limiting in nature. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(77), one commenter recommended that in the definition of "preparation," the word "is" be inserted in the phrase "but not limited to."

Response: The department disagrees and believes that this word would not provide additional clarity to this definition. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(77)(C), one commenter expressed the following: "During activities prior to the existence of a regulated area according to (81), does the abatement contractor have "control" of the space? During this time, may the owner perform work in the space in anticipation of abatement, such as removing uncontaminated items, or for other purposes?"

Response: The department believes that prior to the establishment of the regulated area, the owner may remove uncontaminated items. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(78), two commenters requested that the definition of "public building" read as it did prior to the proposed rule changes.

Response: The department agrees and has restored the language.

Comment: Concerning proposed §295.32(78), one commenter recommended the following modification to the definition of "public building": "The term includes any such interior space during a period of vacancy, including."

Response: The department agrees and has made the appropriate language change.

Comment: Concerning proposed §295.32(78), one commenter requested that the department define the characteristics of buildings that make them "similar" to "schools, hospitals, prisons" for purposes of identifying them as "public buildings."

Response: Schools, hospitals, and prisons provide for public access and are therefore public buildings. Any building that provides public access or occupancy has the characteristics of a public building. Subparagraphs (A) thru (G) are examples of buildings not included. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(80), one commenter suggested that the department use the definition from 40 CFR Part 61 to define "regulated asbestos-containing material."

Response: The department agrees and has modified the definition accordingly.

Comment: Concerning proposed §295.32(82), commenters attending the Asbestos Training Provider Seminar suggested including the word "maintenance" in the definition of "renovation."

Response: The department disagrees. Maintenance is not included in the definition because a survey is required before renovation. Not all maintenance disturbs asbestos. No change was made as a result of this comment.

Comment: Concerning the definition of "response action" in proposed §295.32(83), one commenter suggested adding the word "and" before "operation" and making "operation" plural.

Response: The department agrees and has made the appropriate change.

Comment: Concerning proposed §295.32(84), two commenters expressed confusion regarding the definition of "responsible person." They said that the term responsible person is hard to find mentioned in the regulations. "Secondly, OSHA requires that a 'Competent Person' 29 CFR §1926.1101(b) and 29 CFR §1926.1101(e)(6) supervise abatement activities. However, OSHA applies to the workers of an employer. Consequently, there are at least two 'Competent Persons' on site: the one working for the abatement contractor and the other working for the consultant. According to the TAHPA rule, the only responsible people on the project are those that are licensed and the owner. Their responsibilities are identified in other specific paragraphs of the regulation."

Response: The department clarifies that the "responsible person" may also be the "competent person" if he is appropriately trained and if he is responsible for all business operations and compliance. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(87), one commenter stated, "The sentence 'These (SSSD) tasks in a commercial building do not require accreditation.' should be removed from the definition and added to §295.57 as part of the work requirements in a commercial building."

Response: The department agrees and has deleted the suggested language from the definition.

Comment: Concerning proposed §295.32(87), one commenter recommended that the definition of "small-scale, short-duration activities (SSSD) be modified to allow the O&M supervisor to collect samples."

Response: The department disagrees. Samples may only be collected by licensed asbestos inspectors in accordance with §295.50. No change was made as a result of this comment.

Comment: Concerning proposed §295.32(87), one commenter recommended a grammatical change to the definition of "small-scale, short-duration activities (SSSD)."

Response: The department agrees and has added commas before and after the phrase "but not limited to" in the definition.

Comment: Concerning proposed §295.32(87), one commenter recommended deleting the sentence "These tasks in a commercial building do not require accreditation."

Response: The department agrees and has deleted this sentence.

Comment: Concerning proposed §295.32(89), one commenter pointed out that not all ACBM is removed on many projects and suggested the following revision to the definition of "stop date": "the date that the project asbestos-containing building materials are removed from the."

Response: The department agrees and has made the appropriate change.

Comment: Concerning proposed §295.32(89)(B), one commenter requested clarification as to what was involved to obtain "final clearance."

Response: The department clarifies that final clearance is achieved when all the requirements are met in accordance with §295.58(i)(3). No change was made as the result of this comment.

Comment: Concerning proposed §295.32(91), one commenter recommended that the definition of "TEM" be reworded to parallel the definition of "PLM" by removing the word "the" before detection.

Response: The department agrees and has made the appropriate change.

Comment: Concerning proposed §295.32(92), one commenter recommended that the definition of "transportation of asbestos-containing material (ACM)" be modified to read "Moving asbestos materials from one site to another or from one site to an off-site storage facility or disposal site, but not to temporary storage or a staging area within the same site."

Response: The department agrees and has made appropriate changes to clarify the definition.

Comment: Concerning §295.33(a)(1), commenters attending the Asbestos Training Provider Seminar recommended the reference be changed to the National Emissions Standards for Hazardous Air Pollutants (Standard for Asbestos).

Response: The department disagrees. The reference is accurate and correct as written in this section. No change was made as the result of this comment.

Comment: Concerning §295.34(a), one commenter recommended the addition of a comma within the first paragraph after the word "work", to delineate a parenthetical expression.

Response: The department agrees and inserted a comma after the word "work."

Comment: Concerning §295.34(a), two commenters recommended the following wording: "building owners or operators shall ensure that all friable asbestos-containing material (ACM) inside the area of demolition or renovation or asbestos-containing materials which may become friable (e.g. Category II nonfriable ACM) within the area of demolition or renovation are inspected and abated in accordance with 40 CFR Part 61, Subpart M."

Response: The department believes that §295.34(a)(1) addresses what types of ACM must be removed and where by referencing 40 CFR Part 61, Subpart M. No change was made as the result of this comment.

Comment: Concerning §295.34(a)(2), one commenter suggested the addition of the words "and/or renovation" after the word "demolition" for clarity.

Response: The department agrees and has made the appropriate change.

Comment: Concerning §295.34(b), one commenter suggested that the word "and" be moved from the end of paragraph (4) to the end of (5).

Response: The department agrees and has made the appropriate change.

Comment: Concerning §295.34(b), several commenters suggested the department review the building owner's responsibility for violations.

Response: The department agrees and has added the word "primary" in front of the word "responsibility" and has deleted the phrase "and any violations that may occur" in §295.34(b)(5).

Comment: Concerning §295.34(b)(5)(C), one commenter expressed concern as to whether or not a general contractor would need to be licensed in order to oversee asbestos abatement projects.

Response: The department has tried to clarify this subsection to reflect that only contractors engaged in asbestos abatement activities as described in TAHPR are required to be licensed. A building owner does not need a license to hire or oversee a licensed person, or he would not be hiring them. Since the building owner has the authority to oversee his own projects, and he can delegate that authority to a general contractor, then the contractor would not need a license either. The department added a sentence to clarify that only contractors engaged in asbestos-related activities need to be licensed.

Comment: Concerning §295.34(c), one commenter suggested that the department should specify a report format to be used to document this survey and provide training to city administrators who are required to ensure that the survey conducted is thorough.

Response: The department disagrees and believes that this section is sufficiently specific to address this concern as it is presently written. No change was made as the result of this comment.

Comment: Concerning §295.34(c)(1), one commenter suggested deleting the third and fourth sentences of this paragraph and modifying the fifth sentence to read, "Under no circumstances will less than three samples for each suspect ACBM homogeneous area be collected."

Response: The department disagrees. This section is different from §295.58(h) in that it deals with how to determine homogenous areas and where to collect samples. Section 295.58(h) deals with how to collect samples. No change was made as the result of this comment.

Comment: Concerning §295.34(c)(1), one commenter suggested adding the following: "Under no circumstances, for purposes of rebutting the presence of ACBM, will less than three samples for each homogeneous area be collected. Reason: Addition of parenthetical expression for completeness and for consistency with §295.58(h). Three samples would not be required if the homogeneous area has already been identified as ACBM by positive PLM or TEM analysis of one or more samples of the homogeneous area."

Response: The department agrees and has made appropriate changes.

Comment: Concerning §295.34(c)(1) one commenter recommended changing "During the construction of a public building, a 'licensed inspector' to 'a person appropriately licensed'. Reason: Remains parallel reading to the change shown in the first sentence of the section."

Response: The department agrees and has made appropriate changes.

Comment: Concerning §295.34(c)(1), one commenter suggested rewording this section to say, "Under no circumstances will less than three samples for each suspect homogeneous area be collected."

Response: The department agrees and has made the change.

Comment: Concerning §295.34(c)(2), one commenter suggested adding the following sentence to this paragraph: "This person is not required to be licensed but must have the applicable discipline training under the AHERA Model Accreditation Plan."

Response: The department believes that this change does not add clarification to the paragraph. No change was made as a result of this comment.

Comment: Concerning §295.34(c)(4), one commenter suggested that asbestos surveys conducted prior to 1987 be required to be updated or approved by a licensed consultant, or that a cut-off date for when these surveys would still be acceptable be established.

Response: The department understands the commenter's concerns and believes that if the survey accurately reflects the asbestos condition at the present time, it is sufficient. The department has deleted the phrase "in which a demolition or renovation project occurs" for further clarity.

Comment: Concerning §295.34(c)(4), one commenter suggested that the paragraph be revised to read as follows: "Asbestos surveys remain acceptable to the Department if the asbestos survey..."

Response: The department disagrees and believes that the suggested revision would add no further clarity to this paragraph. No change was made as a result of this comment.

Comment: Concerning §295.34(c)(4), one commenter suggested the following rewording for the survey " Asbestos surveys remain acceptable if the asbestos survey was done in compliance with the Texas Asbestos Health Protection Rules (TAHPR) in effect at the time the asbestos survey was completed, and if the asbestos survey continues to represent accurately the suspect asbestos-containing building materials, location(s) of the materials surveyed, and any asbestos conditions in the building in which a demolition or renovation project occurs."

Response: The department agrees and has made appropriate changes. The department has deleted the phrase "in which a demolition or renovation project occurs" for further clarity.

Comment: Concerning §295.34(h), one commenter recommended adding the words "or consultant" after the words "management planner."

Response: The department agrees and has changed the section to reflect the commenter's suggestion.

Comment: Concerning §295.34(i), one commenter stated that this paragraph appears to be outside of the limitations of the original enabling legislation. The commenter said that in the last session of the legislature, there was a bill passed that forbids the installation of ACBM after 2001, but it clearly did not give enforcement power to the health department and suggested that the paragraph be deleted.

Response: The department disagrees. House Bill 1927, 77th Legislature, 2001, amends the Health and Safety Code, §161.406, which did give the department enforcement authority. No change was made as a result of this comment.

Comment: Concerning §295.34(i), one commenter suggested that the fines collected from House Bill (HB) 1927 should be transferred to the building owner to assist with abatement of newly installed asbestos.

Response: The department disagrees. The department has no authority to create funds for this purpose. No change was made as a result of this comment.

Comment: Concerning §295.34(i) and (j), one commenter stated the following: "These paragraphs could be construed as applying to new construction as well as to renovation. Does the prohibition apply to materials containing more than one percent 'encapsulated asbestos' or more than one percent 'chrysotile' according to the MSDS? Is a label on the container or package acceptable in lieu of an MSDS? These paragraphs apply to 'public buildings,' which by (38) means the 'interior space.' Why, therefore, are cooling towers, roofing shingles/tiles, roofing felts and calking/putties on the list?"

Response: These sections do apply to new construction as well as renovation. The prohibition applies to any building material containing more than one percent asbestos. The definition of asbestos includes chrysotile. A label on the container or package cannot be acceptable in lieu of an MSDS. The department recognizes that other materials may be included. Although most uses of roofing felts and shingles etc are typically on the exterior of the building, the use of those products on the inside of a building would be subject to the same requirements. No change was made as a result of this comment.

Comment: Concerning §295.34(i)(2), one commenter stated the following: "§295.34(i)(2) should consider the overall safety and financial impact of replacement gaskets for boiler doors not made of asbestos. The non-asbestos replacement gaskets are made of fibrous ceramics with questionable health effects, have a considerable cost, and are not proven. The risk of a potential boiler explosion resulting from this regulation change and the potential lives lost would greatly outweigh the risks from reinstalling asbestos gaskets properly. The addition of an exemption for boiler

gaskets is appropriate. A cost benefit analysis for State Agencies and the State of Texas should be performed if DEPARTMENT does not exempt boiler gaskets."

Response: House Bill 1927, 77th Legislature, 2001, requires that a person may not install materials or replacement parts in a public building, if according to the MSDS, the material or parts contain more than 1% asbestos and there are alternative materials or parts. There is no provision for a cost benefit analysis. No change was made as a result of this comment.

Comment: Concerning §295.34(j), one commenter suggested that the department should avoid listing all building materials or replacement parts.

Response: The department was required by HB 1927, 77th Legislature, 2001, to designate materials or replacement parts for which a person must obtain a material safety data sheet before installing the materials or parts in a public building. The list is not all-inclusive. Other materials or parts may also be regulated. No change was made as a result of this comment.

Comment: Concerning §295.34(j), one commenter asked the following questions: 1. Does the Owner collect all the MSDS for a renovation project, then keep these under a separate file in case a department inspector requests them for review? 2. How long is the Owner required to keep these? 3. Will the MSDS take the place of having to perform a future survey if it can be shown that none of the materials contain asbestos in quantities greater than one percent? 4. If a material is used that is not on this list and is not suspected of containing asbestos, does it have to be sampled for asbestos content during an asbestos survey? 5. Do the regs also prohibit the installation of roofing products that contain asbestos, even though roofs are not covered by this regulation?

Response: 1. MSDS documents shall be retained in the same manner as an asbestos survey. 2. The owner must retain the material or replacement parts MSDS to supplement any other surveys of the building. 3. An MSDS for those materials and replacement parts serve the same purpose as an asbestos inspector's survey results. If the owner wishes to dispose of an MSDS, then prior to any renovation or demolition, a survey of all building materials that are suspect would have to be performed. Without the MSDS to prove that the building material did not contain asbestos, the material would be suspect and would require a survey. Unless the building owner wishes to repeat a survey, it is advisable to keep the survey up-to-date by amending it with any operations and maintenance, renovations, or demolitions of the building, affecting the known or presumed areas of asbestos containing material. So, in short, there is no requirement to keep MSDSs or asbestos surveys, except for schools; however, with them the building owner will have to repeat those surveys each time he does any work affecting those materials. 4. The department understands the commenter's concern that the list of materials requiring an MSDS may not be comprehensive and therefore has added the words "including but not limited to" before the list. The licensed inspector, architect or engineer should be familiar with what types of building materials typically contain asbestos and therefore which materials are suspect. The list includes the most common types of materials that have contained asbestos. 5. The regulations would prohibit the installation of roofing products that contain asbestos greater than one percent installed in the interior of a building. Materials installed in areas of the building that don't meet the definition of the public building are exempt. The list is intended to describe and designate the materials for which an MSDS must be obtained. No change was made as a result of this comment.

Comment: Concerning §295.34(j)(3)(X), one commenter identified an error in the spelling of the word.

Response: The department agrees and has corrected the spelling of the word as follows: "caulking."

Comment: Concerning §295.34(j)(3)(Z), one commenter recommended that the item be changed from "wallboard" to "sheetrock or gypsum board."

Response: The department disagrees and believes that the suggested changes provide no further clarity to the item. No change was made as a result of this comment.

Comment: Concerning §295.34(k), a staff member asked how this provision dovetails with variance procedures of §295.60 in which the program may grant a variance and whether the exemption applies only to cities.

Response: The variance/exemption allowed under this section is different from that allowed under §295.60. Under §295.60(a)(2), a Certified Industrial Hygienist or a Professional Engineer may apply to employ an alternative control method that differs from those prescribed in 29 CFR §1926.1101, which is an OSHA regulation. The variance allowed there is a one-time variance from the OSHA requirements applied to abatements in a public building. The variance under §295.34(k) is from the requirements of the National Emission Standard for Hazardous Air Pollutants (NESHAP) in a facility. This section was added to incorporate the requirements of House Bill 2844, 77th Legislature, 2001. The purpose of this legislation was to allow entities to get approval from the board if they had received an exemption from EPA from the provisions of NESHAP in order to test a new method or meet other criteria. This testing procedure is allowed under an EPA program that allows an entity to try new and innovative methods. If the testing procedure is successful under the EPA program, it receives approval such that the method becomes available to everyone to employ without a need for any further variance. However, without the state approval to vary from the requirements in the NESHAP, the entity would not be able to test the new method without being in violation of the Texas regulations concerning asbestos abatement. The original impetus for House Bill 2844 was for the City of Fort Worth to test a demolition method for which they had received a variance from EPA but could not obtain one from the department because there was no allowance for such a variance to be granted under the former law. However, entities other than cities can apply to the department for an exemption. No change was made as a result of this comment.

Comment: One commenter asked if the requirement for municipalities to verify that a survey has been done was included.

Response: The department has added the language verbatim from Senate Bill 509, 77th Legislature, 2001, under §295.34(l).

Comment: Concerning §295.36, one commenter suggested that the department only add the changes, which were required in House Bill 1279, 77th Legislature, 2001 and delete confusing terminology in (a)(1).

Response: The department agrees in part and has deleted §295.36(a)(1). Other changes not inconsistent with HB 1279 have been retained.

Comment: Concerning §295.36(a), one commenter suggested deleting most if not all of the paragraphs under this subsection

because they review the RFCI recommended work practices referenced elsewhere in the rules and have no additive value.

Response: The department disagrees. These paragraphs better clarify when RFCI can be used in accordance with EPA guidance and when the exemption is lost. No change was made as a result of this comment.

Comment: Concerning proposed §295.36(a)(1), one commenter stated that the department should leave in the requirement to analyze because the floor tile should be tested prior to being removed.

Response: The department disagrees. The requirement to analyze has been removed to be consistent with the intent of House Bill 79, 77th Legislature, 2001. No change was made as a result of this comment.

Comment: Concerning proposed §295.36(a)(1), several commenters expressed concern over the wording of this paragraph.

Response: The department has removed this paragraph.

Comment: Concerning proposed §295.36(a)(1)-(7), one commenter inquired as to "What scientific evidence does the department have that shows that these methods meet 29 CFR §1926.1101 standards for the protection of worker and public health?"

Response: The department clarifies that the "Environ studies" commissioned by the Resilient Floor Covering Institute (RFCI) were presented by RFCI to OSHA as evidence that the recommended work practices met the worker permissible exposure limit standard. No change was made as a result of this comment.

Comment: Concerning proposed §295.36(a)(2), one commenter stated the following: "All resilient flooring materials are cut to fit when installed. Many are drilled through and abraded while in use. Therefore, this paragraph means that all installed resilient flooring materials must be abated by licensed persons."

Response: The department has amended (a)(2) and (a)(1) to clarify that the only prohibited cutting would be sawing. No change was made as a result of this comment.

Comment: Concerning proposed §295.36(a)(4), one commenter suggested that this paragraph read as follows: "all those engaged in removal of resilient floor coverings shall have received training in an eight-hour course for workers and twelve-hours for supervisors which covers the elements described in the document titled, 'Recommended Work Practices for the Removal of Resilient Floor Coverings,' published by the RFCI in 1998."

Response: The Texas Asbestos statute does not require the additional four hours of RFCI training for supervisors. No change was made as a result of this comment.

Comment: Concerning proposed §295.36(a)(5), one commenter suggested that this paragraph read as follows: "employees of schools (kindergarten through 12th grade) who elect to use this exempt method must first complete the 16-hour custodial training, as required by federal regulations adopted under authority of the Asbestos Hazard Emergency Response Act of 1986 (AHERA). In addition, the worker will receive 8 hours of RFCI training and the Supervisor will receive 12 hours of RFCI training."

Response: The department agrees and has added "in addition to the training in §295.36(a)(3)" to the beginning of the paragraph to incorporate the training requirement.

Comment: Concerning §295.36(c), two commenters suggested that the language of this paragraph read as it did prior to the proposed rule changes.

Response: The department disagrees. This section was modified in accordance with House Bill 1279, 77th Legislature, 2001. As a result of this modification, the penalties specified in §295.70 apply. No change was made as a result of this comment.

Comment: Concerning §295.36(c), one commenter inquired as to whether it is the department's intent to treat any noncompliance with the §295.36(a)(1)-(6) as Severity Level III violations, or will the department retain the flexibility to assign an appropriate Severity Level in accordance with §295.70?

Response: The department responds that appropriate penalties will be assigned in accordance with §295.70. No change was made as a result of this comment.

Comment: Concerning §295.37, one commenter stated that from its perspective, Errors and Omissions E&O insurance coverage is an absolute necessity to participate in an abatement project.

Response: The department agrees that persons should not be engaged in any asbestos-related activities in which they are neither licensed to perform nor covered by their E&O (Errors and Omissions insurance). No change was made as a result of this comment.

Comment: Concerning §295.37(b), three commenters suggested that language be added to paragraphs (1) and (2) of this subsection to resolve a possible inconsistency in the rules regarding conflict of interest.

Response: The department agrees and has made the appropriate changes to paragraph (1) of this subsection.

Comment: Concerning §295.37(b)(4), one commenter stated that the department should consider the addition of state agencies and the associated cost savings to the state of Texas in this paragraph.

Response: The department disagrees. State agencies are not municipalities. The Texas Asbestos Health Protection Act exempts only municipalities. No change was made as a result of this comment.

Comment: Concerning §295.37(c), one commenter suggested additional language in order to resolve the conflict of interest that arises when staff or payroll employees of the owner conduct these activities rather than independent contract professionals.

Response: The department disagrees and believes that the suggested wording would be more limiting. No change was made as a result of this comment.

Comment: Concerning §295.38, several commenters suggested replacing the new fee amounts with the fee amounts that were in place prior to the proposed rule changes.

Response: The department disagrees. This section was modified due to a revision of the Texas Asbestos Health Protection Act (TAHPA), article 4477-3a, Tx. Civ. Stat. Ann. No change was made as a result of this comment.

Comment: Concerning §295.38(e)(1), one commenter suggested a decrease in the time allowed by the department to notify an applicant of deficiencies and to issue licenses.

Response: The department disagrees. The department is consistently under these timeframes to issue licenses once all information is received or to seek additional information from those applicants with packages lacking information. The department understands the concerns expressed in the comment and that the customer wants the license or the information concerning the deficiencies in the shortest timeframe possible and the department makes every effort to provide the quickest turn around possible. No change was made as a result of this comment.

Comment: Concerning §295.41(e), one commenter suggested a decrease in the time allowed by the department to notify examinees of their test scores.

Response: The department disagrees but understands the commenter's concerns. The time specified within the rules is the maximum time allowed for reporting scores. No change was made as a result of this comment.

Comment: Concerning §295.41(g), one commenter stated that it would be appropriate to allow the training provider to have access to a student's exam failure information to help prepare this student for a re-test and suggested that additional wording be added to the section for this purpose.

Response: The department appreciates the commenter's suggestion. Under the proposed rule in §295.41(g), only the student failing the exam may request the analysis of his performance on the exam. The instructor may obtain the information from the student. No change was made as a result of this comment.

Comment: Concerning §295.41(h), one commenter suggested that a subsection describing the licensure of testing services and the application process to become a testing service should be added to this section.

Response: The department does not currently utilize a testing service for examination scoring or reporting. This section was added due to a revision of the Texas Asbestos Health Protection Act (TAHPA), article 4477-3a, Tx. Civ. Stat. Ann. No change was made as a result of this comment.

Comment: Concerning §295.41(h)(2), one commenter expressed concern regarding a delay in the reporting of exam results if a third-party testing service is used.

Response: The department does not currently utilize a testing service for examination scoring or reporting. This section was modified due to a revision of the Texas Asbestos Health Protection Act (TAHPA), article 4477-3a, Tx. Civ. Stat. Ann. If the department does use a testing service in the future, notification of delay would be made by the 14th day. If notice of the exam results will be delayed longer than 90 days after the examination date, the department shall notify the person of the reason for the delay before the 90th day. No change was made as a result of this comment.

Comment: Concerning §295.42(a), one commenter suggested not changing this subsection.

Response: The department believes that the responsibility for requiring all employees who will be transporting, loading and unloading asbestos belongs to the transporter in accordance with 49 CFR, Parts 171-177. No change was made as a result of this comment.

Comment: Concerning §§295.42(e)(4), 295.43(e)(18), 295.44(d)(4), 295.45(e)(20), 295.46(d)(5), 295.47(f)(5), 295.49(d)(5), 295.50(d)(6), 295.51(e)(5), 295.52(e)(5) and 295.65(f)(4), several commenters expressed concern regarding the department's requirement for a white background on photographs submitted for licensing purposes.

Response: The department is experiencing significant difficulty in scanning photographs with backgrounds other than white. No changes were made as a result of these comments.

Comment: Concerning §§295.46 and 295.49, one commenter stated that licensed asbestos Project Managers and licensed asbestos Abatement Supervisors should be cited in situations where responsibilities to the building owner have not been met, as opposed to the department's citing either the licensed asbestos Consultant/Consulting Agency or licensed asbestos Abatement Contractor for these types of violations.

Response: The department disagrees and believes that agencies are primarily responsible for their employees' actions where responsibilities to the building owner have not been met. While the department reserves the option to cite a supervisor or individual consultant, the department believes that higher quality service will be afforded to the public from companies that have liabilities associated with the quality of work provided by their employees. No change was made as a result of this comment.

Comment: Concerning §§295.47(a)(1) and 295.60(a)(2), one commenter stated the following: "Sections 295.47 and 295.60 address alternative controls that can be designed. The sentence states '...by a Certified Industrial Hygienist (CIH) or a Professional Engineer (PE)...' This should be changed to '...by a Certified Industrial Hygienist (CIH) or a licensed Professional Engineer, licensed in Texas...' The reason for the change is to comply with the provisions of the Texas Engineering Practices Act.".

Response: The department agrees and has modified the sections accordingly.

Comment: Concerning §295.47, two commenters suggested that there is confusion surrounding the responsibilities of those persons hired to manage the abatement project, which may include much more than abatement. The Asbestos Consulting Agency was never considered to be a person but rather an organization. This confusion has created a serious problem in that the department is citing consulting agencies for the transgressions of the individual licensees that they employ rather than the licensees who are on the job. To fix this problem the commenter suggested that the sentence '...building owner or building owner's agent to perform asbestos project management.' be changed to '...building owner or building owner's agent to perform as an Licensed Asbestos Project manager' and 'If performing asbestos project management, the consultant is...' be changed to 'A licensed Asbestos Consultant working on site as a licensed Asbestos Project Manager is responsible to perform the duties assigned to a licensed Asbestos Project Manager '."

Response: The department disagrees and believes that agencies are responsible for their employees' actions as required in §295.48(f). The department believes the use of the words "asbestos project management" applies to the oversight of asbestos related activities of the asbestos contractor to ensure his actions are consistent with the requirements in the contract and in the asbestos laws. No change was made as a result of this comment.

Comment: Concerning §295.47(a)(1), one commenter stated the following: "According to OSHA the said methods above are not even mentioned in the regulations. The OSHA statements

are clear, if any other method except those stated in the regulations for removal of Class I work, then a CIH or PE must sign off on the procedures or plan. The department should follow this rule and mandate that any alternative method from the department and OSHA requirements requires a CIH or PE signature. The PE or CIH could be exempted from the department license, however, he or she should be accredited as an asbestos project designer."

Response: The department understands the commenter's concerns and believes that this section addresses these concerns as it is written. No change was made as a result of this comment.

Comment: Concerning §295.47(a)(1), one commenter stated the following: "The department should define the term 'ensure'. What is the department's intent should the Licensed Asbestos Contractor (LAC), Licensed Asbestos Abatement Supervisor (LAAS), or the Asbestos Abatement Workers (AAW) decide to not follow 'proper procedures'? Does the department require the consultant to physically force the LAC, LAAS and/or the AAW to follow proper procedures? Does the department require the consultant to buy or purchase or otherwise obtain such things as Gucci's if the LAC/LAAS/AAW did not bring them to the asbestos abatement site? If the department requires the consultant to buy or purchase such things as Gucci's, does the department have a requirement specifying how the consultant is to be reimbursed for these items? Lastly, is there a time period in which the consultant is required to act when proper procedures are violated to 'ensure proper procedures' are followed?"

Response: The department expects that the consultant will represent the owner's interests by directing the contractor to correct deficiencies and document deficiencies not corrected. If deficiencies are not corrected, the consultant should report this to the building owner. If the deficiencies are not reconciled by the building owner the consultant is required by §295.35(f) to report the violation to the department. No change was made as a result of this comment.

Comment: Concerning §295.47(a)(1), one commenter suggested modifying the last sentence of this paragraph to read "10 working days."

Response: The department believes that the time limit specified in the rules is appropriate. No change was made as a result of this comment.

Comment: Concerning §295.47(a)(1), one commenter questioned what was meant by "every day of the project" and suggested alternative wording.

Response: The department agrees and has changed the language to "...to be employed at any time during the asbestos abatement activity..."

Comment: Concerning §295.47(a)(1), one commenter stated that a sentence requiring the department to respond to a request for an alternative control method within 30 days should be added to this section.

Response: The department has reworded the section for clarity and to address the commenter's concern.

Comment: Concerning §295.47(a)(1), one commenter stated the following: "It appears from this statement that Alternative Control Methods do not have to be approved by a licensed Asbestos Consultant. The review and approval can come from any CIH or any PE? What type of PE? It does not even say that it has to be by a CIH or PE that has any asbestos experience. I know it also has to be approved by the Chief, but what is the purpose of an Asbestos Consultant providing the design, a CIH or PE reviews and approves, and then going to the Chief. It seems like we could eliminate the CIH and PE and go straight from the Asbestos Consultant to the Chief. If we do not receive department approval or denial within 30 days, what recourse do we have?"

Response: Subsection §295.47(a) requires a licensed asbestos consultant to design the asbestos abatement project to include any alternative methods. Any PE who has the qualifications and experience as required by the Texas Board of Professional Engineers may make the certification. The requirement for a PE or CIH to make the certification must remain. It is a requirement in 29 CFR §1926.1101. If the department requires additional time to determine the viability of an alternative method because additional data is required, the application will be denied pending receipt of the additional data. No change was made as a result of this comment.

Comment: Concerning §§295.32(18) and 295.47(a)(1), one commenter suggested that language requiring the licensed asbestos consultant to be on-site during project start-up be included as part of the building owner's responsibilities under §295.34(b) so there is no question that it is a project requirement.

Response: The department believes that the consultant or project manager must be on-site for preparation as required in §295.49(e). No change was made as a result of this comment.

Comment: Concerning §§295.32(18) and 295.47(a)(1), one commenter stated the following: "The inclusion of the phrase 'every day of the project, from the start through the completion dates' in §§295.47(a)(1) and 295.32(18) is overly burdensome and puts the Licensed Asbestos Consultant (LAC) in an impossible position of having to be on site at all times during the project...If the department feels a LAC must be on site all the time then they should make it a requirement of the building owners so that the competitive economic issues become irrelevant."

Response: The department believes that the consultant is not required to be on the site at all times during the project. However, the consultant's project manager is required to be there as specified in §295.49(e). No change was made as a result of this comment. Comment: Concerning §295.51(e)(8), one commenter suggested that the subsection be reworded as follows: "...for Management Planners who also provide surveying services, a physician's statement of the required physical examination done within the past year as described in §295.42(e)(2) of this...".

Response: The department believes that it is prudent to require physicals for all licensees involved in asbestos abatement activities where there is a potential for exposure to airborne asbestos fibers. No change was made as a result of this comment.

Comment: Concerning §295.52(a), one commenter stated the following: "As it now reads a LAMT has to be employed by an abatement or O&M contractor to take personal samples. Obviously a LAMT working for an ACA should be allowed to take personal samples also. How else is the LAPM or LAC to know if the LAAC is following the specifications and the regulations?"

Response: The department believes the consultant's responsibility for overseeing air monitoring should be focused on baseline, area and clearance sampling. No change was made as a result of this comment.

Comment: Concerning §295.52(e)(7), one commenter recommended the following change to this paragraph: "...proof of performing air monitoring as an apprentice for 30 days 10 working days of work under the direct supervision of a licensed air monitor technician working for a licensed laboratory or contractor or a licensed consultant."

Response: The department disagrees. The department feels that 30 days of experience is the minimum required to become sufficiently familiar with the requirements of the job to be able to perform that work without supervision. No change was made as a result of this comment.

Comment: Concerning §295.55(d)(7)(B), one commenter suggested that "and being in the room but not engaged in the course in the judgment of the instructor" be deleted from the subparagraph.

Response: The department agrees and has deleted this phrase.

Comment: Concerning §295.55(d)(7)(C), one commenter stated the following: "The state licensing exam must be failed three times before the training course must be repeated. The proposed rule revision is clearly a double standard. Examinations and re-examinations and the policies for administering them are best left to the professional trainer. Often the composition of the class, the backgrounds of the students, and the reason the student is in the class impact learning abilities. This manifests itself in the exam at the end of the course. The trainer requires the ability to assess the situation and adjust the training and the testing. The proposed revisions are ill conceived, too restrictive, and inappropriate. All of this paragraph after the first sentence should be struck from the rule."

Response: The department disagrees and believes that the initial examination and two reexaminations are sufficient. No change was made as a result of this comment.

Comment: Concerning §295.55(e)(1), one commenter suggested that the sentence deleted from this paragraph in the proposed rule be restored or revised.

Response: The department agrees that removing the sentence allows for more meetings and has added the following statement to the end of the paragraph: "There will be no more than two such meetings per year."

Comment: Concerning §295.55(e)(2), two commenters expressed concern regarding the 14 working day notice requirement for course schedules.

Response: The department understands the commenters' concerns and has changed "working" days to "calendar" days.

Comment: Concerning §295.55(e)(2), one commenter expressed concern regarding the 72-hour course cancellation policy.

Response: The department understands the commenter's concern; however, the department needs this time to schedule audits of the training courses. No change was made as a result of this comment.

Comment: Concerning §295.55(f), one commenter expressed concern regarding the 15 working days notice of additions and deletions to the instructor roster.

Response: The department disagrees. The proposed language is intended to benefit the training provider by providing additional time for the submission of course instructors and guest speakers for approval. No change was made as a result of this comment.

Comment: Concerning §295.58(b)(3), two commenters expressed concern over the amount of time that the supervisor is required to be in containment.

Response: The department agrees and has made the appropriate changes.

Comment: Concerning §295.58(f), one commenter stated that the subsection reads as though every worker, supervisor and individual on site must have a respiratory program on site.

Response: The department agrees and has made the appropriate changes.

Comment: Concerning §295.58(f), one commenter stated the title of this subsection would be more appropriately titled "Respiratory Protection Program."

Response: The department agrees and has made the appropriate change.

Comment: Concerning §295.58(f), two commenters expressed concern over the respiratory program requirements within this section as they compare to the OSHA requirements.

Response: The department agrees and has deleted the third sentence in this subsection.

Comment: Concerning §295.58(g), two commenters stated that this subsection needs language to require the workers to be responsible for wearing the assigned respirator whenever they are inside a regulated area.

Response: The department addresses this concern in the last sentence of §295.58(f). No change was made as a result of this comment.

Comment: Concerning §295.58(h), two commenters recommended that the subsection read as follows: "Bulk samples taken by a licensed abatement supervisor or through a survey performed by a licensed asbestos inspector....".

Response: The department believes that no change is required. The TAHPR do not allow licensed supervisors to collect samples. No change was made as a result of this comment.

Comment: Concerning §295.58(h), one commenter stated the following: "In §295.34(c)(1), the sampling requirement is an absolute -samples of each homogeneous area. Paragraph (h) above addresses suspect materials, which is a sub-set of homogeneous areas. This is clearly less restrictive than §295.34 and in conflict with that part of the rule. Additionally, §295.34(c)(I) requires absolutely that 3 samples of each material be collected. Subsection (h) requires three samples only if the sampling is for the purpose of refuting the presumption of ACBM and in fact the material is not ACBM. These two conflicts need to be resolved before this rule change is ratified. Suggest that sampling activities and protocols be consolidated into only one location for public buildings. This location is the right location for Public Buildings, and delete any reference to sampling activities from §295.34(c)(I)."

Response: The commenter is correct that three samples must be collected in accordance with §295.34(c)(i). Section 295.58(h) has been reworded to indicate that three samples must be analyzed to refute the presence of ACM.

Comment: Concerning §295.58(h), one commenter suggested that paragraph (3) read as follows to clarify the intent of the rule: "(3) Each sample analyzed by visual PLM as greater than one

percent asbestos is regarded as ACBM, unless that homogenous material sample result is rebutted through additional analysis (i.e. point counting). A minimum of one additional analysis is required."

Response: The requirement to rebut the presence of ACM is meant to determine whether or not suspect building material contains asbestos. The sentence order within subsection (h) has been modified to clearly indicate this intent.

Comment: Concerning §295.58(h), one commenter posed the following questions: "Is an owner allowed to treat a material as ACBM without sampling and analysis? If one sample is sufficient to confirm a material as ACBM, must two more samples still be collected? If so, must they be analyzed?"

Response: An owner may treat building material as ACBM without sampling. One sample analysis that confirms the presence of asbestos in the material that is greater than 1% is sufficient and no further analysis is necessary. The rule requires that three samples of each homogeneous area be collected. No change was made as a result of this comment.

Comment: Concerning §295.58(h)(1), one commenter stated that this "...sentence permits composite analysis of samples from non-public buildings, despite the fact that such a practice is prohibited by OSHA."

Response: Composite analysis of samples from non-public buildings is permitted by EPA in NESHAP and AHERA. No change was made as a result of this comment.

Comment: Concerning §295.58(h)(2), one commenter stated the following: "PLM analysis of non-friable, organically-bound (NOB) materials, such as floor tile and some mastics, produces results that are 'inconclusive' if negative. Time and money can be saved by going directly to TEM/gravimetric analysis. Is PLM analysis still required if samples are going to be analyzed by TEM regardless?"

Response: No, TEM/gravimetric analysis would suffice. The department agrees and has made appropriate changes.

Comment: Concerning §§295.34(g) and 295.58(i), one commenter expressed concern regarding the contradiction between the subsections on project monitoring and mandatory abatement project design as they pertain to threshold amounts.

Response: The department believes these sections are consistent with the state of the practice in the industry. No change was made as a result of this comment.

Comment: Concerning §295.58(i), one commenter suggested the following: "Change last sentence to 'Only one cassette may be placed on a personal sampling pump at a time.' Calibration data that I submitted to the department on December 18, 2001 clearly showed that accurate flow can be maintained through two cassettes placed on a high-volume sampling pump when a critical orifice is used for flow control."

Response: The department recognizes the NIOSH 7400 method, which allows only one cassette per pump. No change was made as a result of this comment.

Comment: Concerning §295.58(i)(2), one commenter suggested adding specific language to delineate ambient monitoring only during work that actually disturbs asbestos-containing materials.

Response: The department agrees and has made appropriate changes.

Comment: Concerning §295.58(k)(1), one commenter was concerned about the department's intent concerning the use of the term "medical exam". The requirement should be that "The licensed asbestos abatement contractor (LAAC) has the responsibility to provide the LAPM a copy of the physician's written opinion and respirator fit-test for each of their employees that intend to enter the Regulated Area. The licensed asbestos program manager (LAPM) shall maintain the same records for those employees employed by the ACA he works for who also intend to enter the Regulated Area. Any other employer who intends to have their employees enter a Regulated Area must provide the same information to the LAPM. The LAPM has the responsibility to notify a person's employer, in writing, any time an unauthorized person enters a Regulated Area."

Response: The department believes that the requirement for the documents to be on-site is sufficient. The requirement for a physical exam has been changed to "Physician's Written Statement."

Comment: Concerning §295.58(i)(3)(D), one commenter suggested that requiring the licensed asbestos consultant (LAC) to conduct clearance visual inspections on all jobs is not required by the current regulations and consequently, not a realistic expectation under the current business conditions and, in many cases, may not be warranted. The commenter also suggested that DEPARTMENT allow the requirement for "writing" to be satisfied if done so in the project specifications or contract documents. There is no need for an extra letter.

Response: The requirement for visual inspection is in §295.58(i)(3)(B). Specifications may include written authorization as the commenter suggests. No change was made as a result of this comment.

Comment: Concerning §295.58(i)(3)(F), one commenter stated the following: "This requirement is totally out of the question. The department has a requirement of each individual to be licensed in each discipline of asbestos and each discipline has their requirement for obtaining each license. Therefore, each individual should be responsible for obtaining and maintaining their individual license requirements. The consultant should not be held responsible for the mistake of someone else."

Response: The subparagraph referred to in the comment does not exist. Furthermore, the department could not find a proposed rule in sections relating to consultants or consultant agencies that matched the commenter's statement and is therefore unable to address the comment. No change was made as a result of this comment.

Comment: Concerning §295.58(k)(1), three commenters expressed concern regarding the requirement to collect samples "every day" of the project and confusion over what ambient samples were.

Response: The department understands the commenter's concerns and has addressed them with new language and samples required per §295.58(i)(2)(A) which requires ambient samples to be collected every day of asbestos abatement activity. Since asbestos abatement activity as defined in §295.32(10) covers teardown, air monitoring is required since there is still a possibility for asbestos to be disturbed if the abatement caused ACM to be deposited in areas outside of the containment. Ambient samples are explained in §295.58(i) and include samples collected outside of the regulated area.

Comment: Concerning §295.58(k)(1), one commenter indicated total disagreement with this requirement of the section. The

commenter stated that the "...requirement is in conflict with §295.31(e), which mandates that anyone engaged in asbestos activities carry their license at all times. The same goes for anyone's driver's license. Therefore, the responsibility for having one's certification on-site should also be the individual licensee responsibility. Moreover, this requirement puts companies at the mercy of the workers who could intentionally forget their paper work or lose their paper work. This section needs to be left off. The responsibility of having proper documentation on one's possession is clearly defined in various sections of the department rules such as §§295.31(e), 295.35(c), 295.35(e), 295.35(f), 295.57(c), 295.58(c), and 295.58(d)."

Response: The department believes that companies must be responsible for the actions of their employees in this area. Companies may develop their own procedure to ensure compliance with this rule. No change was made as a result of this comment.

Comment: Concerning §295.58(k)(1), one commenter suggested that "Original accreditation certificates are most appropriately (and most often) stored in a safe place, not the abatement job site or asbestos inspection site. Only copies are made available on-site - and to the department for licensure. This paragraph should be modified to read (in part), '...registrations, and a copy of current accreditation certificates and current physical ...' Each accredited and licensed person is responsible for himself. The company for which he works is not a baby sitting service, and cannot force any individual employee to follow all of the rules all of the time. The company cannot be held responsible for educated, licensed and knowledgeable adults to be in compliance with rules of which they are annually advised. The individual needs to be held to a standard of accountability and the department should be knowledgeable enough to recognize appropriate accountability. Suggest that the second sentence of (k)(l) above be deleted as it is inappropriate."

Response: The department agrees and has allowed for copies of accreditation certificates, current "Physician's Written Statements" and current respirator fit-test records.

Comment: Concerning §295.59(b)(2), one commenter suggested the following: "Building owners and operators have many advisors and consultants. Paragraph (2) above should include the following wording: '...as determined by the licensed asbestos consultant, or appropriate governmental inspectors are allowed to enter the containment, decontamination, bag-out, and temporary storage areas.'"

Response: The department agrees and has made the appropriate changes to the paragraph.

Comment: Concerning §295.59(b)(8), two commenters expressed confusion regarding the term "asbestos-contaminated waste material."

Response: The department agrees and has changed this term to "asbestos-containing waste material" to add clarity.

Comment: Concerning §295.59(b)(8), one commenter asked, "Should this not read 'clear 6 mil bags' to be consistent with the department regulation §295.60(j)(1)? Is the department going to allow the use to the 2.2 mil disposal bags that meet the dart impact test?"

Response: The department agrees and has clarified that these bags should "meet the dart impact test as specified in §295.60(j)(1)."

Comment: Concerning §295.59(b)(8), one commenter suggested the following change: "'Asbestos shall be double bagged by placing...'"

Response: The department agrees and has made the appropriate change.

Comment: Concerning §295.60, one commenter stated that the department has not mentioned the use of burrito bags even though the term is used in the Asbestos Regulatory Clarifications.

Response: The department does not allow the use of burrito bags for removal of ACBM in public buildings. No change was made as a result of this comment.

Comment: Concerning §295.60(a), two commenters suggested that the regulations do not contain clear language that may prevent the Licensed Asbestos Abatement Contractor (LAAC) from beginning abatement activities without the Licensed Asbestos Consultant (LAC)/Accredited Asbestos Project Manager's (AAPM) approval. The two commenters suggested that the LLAC can force the abatement activities to start before the LAC/AAPM thinks they should and that there is little to prevent this from happening, especially without the owner's support. One commenter suggested the following change: "Abatement activities will not start until the LAC has provided the LAAC written approval to begin."

Response: The department believes that this issue can be resolved by adding provisions regarding the start of asbestos abatement activities to either the project specifications or the contract between the building owner and the contractor. No change was made as a result of this comment.

Comment: Concerning §295.60(a)(2), two commenters suggested that by deleting the PE or CIH from the section, the department would be promoting the violation of the OSHA standard by department-licensed consultants. One commenter stated that "the department should follow this rule and mandate that any alternative method from the department and OSHA requirements requires a CIH or PE signature and seal."

Response: The department believes that the entire paragraph is in agreement with the OSHA requirement and does not promote its violation. No change was made as a result of this comment.

Comment: Concerning §295.60(a)(2), three commenters believed that if the department were to remove this, they would be promoting the violation of the OSHA standard by department licensed consultants. The OSHA statements are clear, if any other method except those stated in the regulations, then a CIH or PE must sign off on the procedures or plan. The department should follow this rule and mandate that any alternative method from the department and OSHA requirements requires a CIH or PE signature and seal. The PE or CIH does not have to be licensed, however, he or she should be accredited as an asbestos project designer. Moreover, the statement in the regulations should also read that if any safety system is disturbed such as fireproofing or fire rated ceiling tiles, it should be designed by a PE. Many a times consultants remove ACM ceiling tiles that were installed to protect students from fire hazards, but nothing is noted to replace tiles with the same type of protection. The department is being less stringent than OSHA if this requirement is removed. The OSHA statements are clear, if any other method except those stated in the regulations for removal of Class I work, then a CIH or PE must sign off on the procedures or plan. The department should follow this rule and

mandate that any alternative method from the department and OSHA requirements requires a CIH or PE signature and seal. The PE or CIH could be exempted from the department license, however he or she should be accredited as an asbestos project designer. Moreover, the statement in the regulations should also read that if any safety system is disturbed such as fireproofing or fire rated ceiling tiles, it should be designed by a PE.

Response: The department believes that the requirement of a consultant to be a P.E. or C.I.H. in order to specify alternative control methods to this rule is too restrictive. 29 CFR §1926.1101(g)(6) delineates additional work practices from those minimum requirements in 295.60(a). By removing this requirement, a broader scope of knowledge is available to determine the viability of the alternative methods to these rules. However, if alternative control methods to those spelled out in 29 CFR §1926.1101(g)(6) are to be used, then the rule still requires that a PE or CIH review and certify them before submitting to the Chief of the Asbestos Programs Branch for approval. As to the suggestion that the PE or CIH be accredited, there is no such requirement in the Model Accreditation Plan (MAP) or in 29 CFR §1926.1101(g)(6) and the department sees no reason to be more restrictive. As to the suggestion that if any safety system is disturbed, it should be designed by a PE, the department feels that this is beyond the scope of the asbestos rules. No change was made as a result of this comment.

Comment: Concerning §295.60(a)(2), one commenter asked, "In as much as the project notification is prepared and submitted by the abatement contractor, how can the asbestos consultant ensure that the department receives sufficient information in the notification to meet the 'burden of proof' imposed on him?"

Response: The department recommends that the consultant review the notification before it is sent. No change was made as a result of this comment.

Comment: Concerning §295.60(a)(2), one commenter suggested the following: "It appears from this statement that Alternative Control Methods do not have to be approved by a licensed Asbestos Consultant. The review and approval can come from any CIH or any PE? What type of PE? It does not even say that it has to be by a CIH or PE that has any asbestos experience. I know it also has to be approved by the Chief, but what is the purpose of an Asbestos Consultant providing the design, a CIH or PE reviews and approves, and then going to the Chief. It seems like we could eliminate the CIH and PE and go straight from the Asbestos Consultant to the Chief. If we do not receive department approval or denial within 30 days, what recourse do we have?"

Response: Section 295.47(a) requires a licensed asbestos consultant to design the asbestos abatement project to include any alternative methods. Any PE who has the qualifications and experience as required by the Texas Board of Professional Engineers may make the certification. The requirement for a PE or CIH to make the certification must remain. It is a requirement in 29 CFR §1926.1101. If the department requires additional time to determine the viability of an alternative method because additional data is required, the application will be denied pending receipt of the additional data. No change was made as a result of this comment.

Comment: Concerning §295.60(a)(4), two commenters stated that neither the enabling legislation nor the regulations provide anyone on an asbestos abatement project with police powers. "A licensed asbestos project manager LAPM has no legal authority to force anyone on the job site to do anything. Unless the department changes the law and regulations to so empower the LAPM and then protect the LAPM from liabilities associated with preventing anyone from entering a Regulated Area, then the department should not require potentially libelous acts on part of the LAPM. This requirement should be struck from the proposed rule in its entirety."

Response: The department believes that the consultant should make reasonable efforts to require compliance with the regulations and specifications and represent the building owner's interest in accordance with §295.47(h). The consultant should report contractor non-compliance to the building owner and/or department as appropriate. No change was made as a result of this comment.

Comment: Concerning §295.60(a)(4), one commenter suggested that on construction projects there are many advisors and consultants. "Paragraph (a)(4) above should include the following wording: '...as determined by the licensed asbestos consultant, or governmental...'".

Response: The department agrees and has changed the paragraph to read "...as determined by the consultant, or appropriate governmental inspectors are allowed to enter the containment, decontamination, bag-out, and temporary storage areas."

Comment: Concerning §295.60(e), one commenter asked, "who is the contractor?" The commenter suggested the section should read, "The Licensed Asbestos Abatement Supervisor shall...".

Response: The department believes that the abatement contractor is responsible for ensuring that all workers properly decontaminate, and the department has made the appropriate changes. The abatement contractor's supervisor is the contractor's on-site representative responsible to his employer to ensure compliance.

Comment: Concerning §295.60(e), one commenter stated the following: "The contractor company can only exercise direct control over the 'competent person' supervisor. The supervisor is responsible for the workers and their safety at the job-site. This paragraph stops short of addressing direct, on-site control and license accountability. It should include the following: 'The contractor's supervisors shall ensure that all of the contractor's employees:'"

Response: The department believes that the supervisor is the abatement contractor's representative; therefore, he acts as directed by the abatement contractor. No change was made as a result of this comment.

Comment: Concerning §295.60(h), one commenter stated that HEPA vacuums need to be on site at all times that the contractor is on-site. "Preparation work may inadvertently disturb ACBM. Tear-down and final clean-up after final air clearance may uncover hidden ACBM." The commenter suggested that the paragraph should be further revised to include: "A working HEPA vacuum shall remain on-site every day of the project, from the start of preparation at the job site and through the final tear-down and removal of all material, ACBM waste and debris of the project, and the unit ...".

Response: The department understands the commenter's concerns and has made the appropriate changes.

Comment: Concerning §295.60(j), one commenter suggested the following: "an additional...section allowing the removal of

ACBM directly to plastic lined roll-off box(es), and or dumpsters under negative pressure should be allowed for major wing or building renovations while no other space within that regulated area remains occupied." The commenter also suggested that a cost and benefit analysis for State Agencies and the State of Texas should be performed by the department if such cost savings while protecting public health is not allowed during these regulation changes.

Response: The department disagrees and believes that the section is appropriately written to protect public health and safety. No change was made as a result of this comment.

Comment: Concerning §295.60(j)(1), one commenter indicated that only the bags or other containers are labeled, not the ACBM. The commenter suggested that the sentence should be modified to read as "... other handling; the bags (or other suitable containers) of ACBM shall be marked per the applicable..." .

Response: The department agrees and has made the appropriate changes.

Comment: Concerning §295.60(j)(1), one commenter suggested the following change "...(NESHAP regulations and double bagged by placing..." in order to correct the spelling.

Response: The department agrees and has replaced the word "doubled" with the word "double."

Comment: Concerning §295.60(j)(1), one commenter asked, "Does the 'double-bagging' requirement apply only to the removed ACBM or does it also apply to contaminated items such as disposable clothing and plastic sheeting used to construct the containment and decon/load-out?"

Response: The department believes that the requirement does apply to these items since they are asbestos-contaminated material. No change was made as a result of this comment.

Comment: Concerning §295.60(j)(1), one commenter indicated that the department did not make any mention as to the use of the term "burrito bag" in the rule changes although the department has used the term in the Asbestos Rules Clarifications.

Response: The department does not allow the use of "burrito bags" for the removal of asbestos-containing building materials in public buildings. No change was made as a result of this comment.

Comment: Concerning §295.60(j)(2), one commenter suggested that requiring a plastic bag to be squeezed to remove the air is an inappropriate direction from the regulating agency. The commenter stated that it certainly allows for increased airborne fiber[s] and allows for the increased potential for damaging to bag and harm to the contractor's employee who follows this direction literally. "The term 'squeezed out', which is used twice in paragraph (j)(2) should be replaced with 'evacuated', as it is taught in the MAP training courses."

Response: The department agrees and has incorporated the appropriate change.

Comment: Concerning §295.60(j)(2)-(6), one commenter stated that his specification requires that these operations be done in a load-out attached to the containment. "The load-out is under negative pressure. Is this permissible, or must they be done inside the containment itself? If these operations must be done inside the containment, how does one place the plastic used to construct the containment and decon/load-out into bags after the containment and decon/load-out are torn down, bearing in mind that the area has passed final clearance sampling by that time?"

Response: The department believes that the bag-out under negative pressure is considered part of containment. No change was made as a result of this comment.

Comment: Concerning §295.60(j)(3), one commenter suggested the following change be made for clarity: "It is a violation of these rules...."

Response: The department agrees and has incorporated this change.

Comment: Concerning §295.60(j)(3), one commenter suggested that "the exterior bag or fiberboard drum shall apply warning and generators labels" be changed to "the exterior bag or fiberboard drum shall have warning and generators labels applied" and that "Labeling of ACBM must be done prior to removal from the containment area" be changed to "Labeling of ACBM must be done prior to removal from the regulated area".

Response: The department agrees and has made the appropriate changes.

Comment: Concerning §295.60(j)(3), one commenter questioned whether or not the department accepts the use of one cubic-yard, plastic-lined, cloth-reinforced "bulk bags" in lieu of fiber drums.

Response: In public buildings, the department only recognizes bags and procedures as outlined in §295.60(j). If by "bulk bags" the commenter means large dumpster linings commonly called "burrito bags," then "bulk bags" are not allowed in public buildings. No change was made as a result of this comment.

Comment: Concerning §295.60(j)(6), one commenter stated, "ACBM is not labeled during the abatement. Labeling of bags of ACBM waste is accomplished in the bag-out room which is attached to, and adjacent to the containment." The commenter suggested "this paragraph should say 'labeling of containers of ACBM waste must be done prior to removal of the container from the bag-out area'".

Response: The department understands the commenter's concerns and has made the appropriate changes.

Comment: Concerning §295.60(j)(7), one commenter suggested that the following change in text should be made: "(and pass visual inspection by the LAAS and the LAPM)."

Response: The department believes that the final visual inspection is the consultant's responsibility. The department is only concerned that the consultant performs his inspection. No change was made as a result of this comment.

Comment: Concerning §295.60(m)(2), two commenters noted, "As written, this paragraph requires that any electrical service entering the regulated and containment areas will be connected through GFCI." Each commenter felt that such a requirement is sensible for portable electric cords but commented that pre-existing electrical services (such as wall-mounted conduits, electrical distribution and control boxes, and fixed lighting equipment) "would typically have been electrically deactivated and sealed off prior to actual removal of ACBM within the containment." One commenter suggested the following substitute language: "Electrical services introduced to the regulated and containment areas for operation of the abatement equipment shall be shock-protected by ground-fault circuit interrupters

(GFCIs)." The other commenter suggested the following wording: "Electrical equipment introduced to the O&M abatement containment areas for operation of the abatement equipment shall be protected by ground-fault circuit interrupters (GFCIs)."

Response: The department agrees with the commenters that the intent of the rule is to require active electrical service lines to be shock-protected. Although pre-existing electrical services might "typically have been electrically deactivated and sealed off" if not in use, however, inadvertent or deliberate negligence could occur. Any active lines, whether pre-existing or temporarily introduced, that are not protected by GFCIs represent potential hazards to persons in the regulated areas. To more accurately reflect the intent of this subsection, the department has changed it to read, "All active electrical service lines within the regulated and containment areas shall be connected through ground-fault circuit interrupter (GFCI) units."

Comment: Concerning §295.61(a), one commenter suggested the following changes for purposes of completeness and clarity: "start and completion dates in compliance with 40 Code of Federal Regulations (CFR) Part 61, Subpart M, §61.145, and this section."

Response: The reference to the Code of Federal Regulations was inadvertently deleted from the proposed rule, and the department agrees that it should be restored. Because §61.145 is by definition part of Subpart M, the department has changed the reference to read "40 CFR §61.145."

Comment: Concerning §295.61(b), two commenters stated that requiring an additional letter is burdensome and serves no real purpose that the other project documents do not. The commenters suggested that this subsection should read, "delegated to the owner's agent, such as a licensed asbestos abatement contractor, ACA, or LAC in writing. Such wording incorporated in the project specifications or contract documents meets the requirement of this paragraph."

Response: The department agrees that specifications or contract documents are acceptable means of documenting the delegation of responsibility. No change was made as a result of this comment.

Comment: Concerning §295.61(f), one commenter said that as written, this subsection seemed to require notification for cleanup of a minor fiber release episode and wondered if that were the intent of the rule.

Response: Section 295.61 requires notification for all abatements of any quantity of ACBM in a public building, and quantities greater than the threshold amounts in NESHAP facilities, except that notification is required for demolition regardless of the amount. Emergency cleanup related to minor fiber release episodes requires notification. An emergency notification number can be obtained by calling the appropriate regional department office. No change was made as a result of this comment.

Comment: Concerning §295.62(b)(3), one commenter considered the examination answer sheet to be a work document and, as such, to be disposable. The commenter felt that the requirement to maintain the examination answer sheets as permanent records is burdensome and should be deleted from the rule. The commenter suggested that the last sentence of the subsection be revised to read "All records required to be maintained under this section shall be available for inspection by the department upon completion of all of the mandatory reporting requirements".

Response: The department disagrees. The answer sheet is the primary indicator of whether a student has successfully completed the course. Records must be available following the examination for department inspection at any time. No change was made as a result of this comment.

Comment: Concerning §295.62(c)(2)(O), one commenter felt that including all personnel "on site" is too broad and unnecessary. The commenter suggested substituting "personnel entering a Regulated Area" for "on-site employees."

Response: Although this subsection was deleted in the proposed rules, the department understands the intent of the commenter and has restored the subsection to the final rules and has made the suggested change.

Comment: Concerning §295.62(e), one commenter indicated that this requirement is very difficult for a licensed asbestos consultant. The commenter wondered how long a consultant is required to keep such files and what a consultant should do when leaving a company. "If we leave a company, we cannot take client files with us. It is more common for the Consultant Agency to keep these types of files and not the Individual Asbestos Consultant. Another commenter asked how long must records be kept? Who gets them when company goes out of business?"

Response: The department agrees that a time limit should be set to keep consultants records. In order to give the opportunity for comment, the department will publish a suggested time limit at a later date. In the meantime, these records should be kept for 30 years. When a consultant is going out of business, the department recommends that the consultant offer the records to the building owner for further retention. No change was made as a result of this comment.

Comment: Concerning §295.64(a)(6), one commenter suggested that the one-hour lunch break should be part of the required eight hours of training. The commenter recommended that the subsection be re-written to state: "One day of training equals 8 hours, including breaks and lunch."

Response: The department agrees and has made the appropriate changes. There must be a minimum of 6.67 hours of training in one day of training.

Comment: Concerning §295.64(a)(6), one commenter thought that "not engaged" is a subjective term and difficult to understand without some sort of definition. The commenter recommended that alternative wording more descriptive of the intent of the department's concern be included or that "and being in the room but not engaged in the course in the judgment of the instructor" be struck from the subsection.

Response: The department agrees.

Comment: Concerning §295.64(e)(15), one commenter felt that the classroom area is appropriate for a field trip site and suggested this subsection be revised to state "field trip, to include at a minimum, a partial building walk-through inspection at a suitable location which may include the classroom as well as sufficient other areas as determined by the trainer."

Response: The United State Environmental Protection Agency (EPA) has provided guidance that the field trip must be outside the classroom. No change was made was made as a result of this comment.

Comment: Concerning §295.65(f)(3), one commenter asked if training providers could use digital photographs for group photographs.

Response: The department understands the concerns of the commenter and for greater efficiency to the training providers, has changed this section to allow digital images for the group photos.

Comment: Concerning §295.65(f)(3), one commenter observed that some students complete the required course exams before the end of the allotted time. According to §295.55(d)(7)(B), a student may miss up to 10% of a course. The commenter noted that it is customary for some instructors to allow the 15 to 30 minutes that a student might "miss" after he has completed the exam, but before the official end of the course, as part of that 10%. If a trainer takes the group photo before the exam (to allow faster students to leave early), the group photo might include a student who failed and did not receive a certificate. That same person may be allowed to re-test at a later date and may pass or may fail, again creating a conflict. There is nothing in the rule to address at least these two permeations -and there may be more. Until such time that the department can address these and all of the other possibilities, which are allowed under the rule in §295.55, suggest that the third sentence be deleted in its entirety.

Response: The department suggests that any student included in the group photograph that did not pass the course be clearly identified. Appropriate changes were made to the rule.

Comment: Concerning §295.65(f)(3), one commenter stated that the standard "Polaroid 600 film image" is a 3-1/2 inches by 4-1/2 inches and recommended that, because the department has been accepting these photographs for the past four years, the last sentence in this subsection be revised to read "no smaller than a standard 3-1/2 inches by 4-1/4 inches print".

Response: The department agrees to change the size of the photograph as suggested.

Comment: Concerning §295.69, several commenters suggested limiting the time between a department site inspection and the issuance of citations. Two commenters recommend that department inspectors be authorized to issue citations on-site at the time of the inspection. The other commenter recommended that the department limit itself to a maximum of 30 days from the date of inspection to notify the violator of the alleged violation and proposed penalty.

Response: The department believes that the complexity of the cases and the need for laboratory results make this suggestion for field citations unfeasible. It also takes time to fairly and accurately review cases recommended for enforcement by a field inspector. The process involves careful review of the evidence presented by the field inspector to determine if all requirements have been met to support a valid case for a notice of violation. The department is always evaluating the process to improve on both the quality of the cases developed and the timeliness of the total process. No change was made as a result of this comment.

Comment: Concerning §295.69(c)(3)-(4), one commenter questioned whether it was the department's intent to suspend or revoke a license if a person violated the rules.

Response: This language reflects the statutory requirement that previously existed in TAHPA § 8(c)(3)-(4) which was expanded by HB 2085 enacted in 1999. HB 2085 requires that the department "shall" reprimand or take other enforcement action for various infractions including failure to comply with these rules or any applicable federal or state standards for licensed asbestos activities. The department interprets "reprimand" to include administrative penalties. While the department expects that most violations will be resolved by administrative penalties, it retains the right to use all enforcment options available to it. No change was made as a result of this comment.

Comment: Concerning §295.69(c)(4), one commenter felt that treating all types of infractions (from "relatively minor" to "severe") similarly is unfair and inappropriate and that this subsection should be deleted.

Response: As noted in the response above, this language is statutorily required; however, the department has established a penalty matrix for different levels of violation. This subsection providing for denial, revocation or suspension is reserved for the most severe violations. No change was made as a result of this comment.

Comment: Concerning §295.69(c)(5), one commenter suggested that losing a record (through oversight) and creating a false record (through fraud) are different issues. The commenter recommended that the subsection be modified to clarify that distinction.

Response: The department understands the commenter's concerns and has made the appropriate changes for clarity.

Comment: Concerning proposed §295.69(c)(7), one commenter said a description or meaning is needed for the term "valid complaints".

Response: The department agrees and has deleted this subsection.

Comment: Concerning §295.69(g), one commenter requested that more explanation or supporting facts to justify its inclusion be provided. "It appears that the department can put a licensee on probation for violation of the department regulations. This is why §295.58 (k)(1) (The department licensed company is responsible for its employees' documents to be on site;) would greatly affect all companies licensed with the department. This section needs to be removed or amended as to what constitutes probation."

Response: Due to a revision of the Texas Asbestos Health Protection Act (TAHPA), article 4477-3a, Tx. Civ. Stat. Ann. by HB 2085, (1999) this section is required as written. It does not change the department's position on how it handles enforcement cases. It may allow a person on suspension additional avenues to work back into activities that require a license. No change was made as a result of this comment.

Comment: Concerning §295.69(g)(1), one commenter felt that this statement is vague and that the reporting requirements need to be defined more clearly.

Response: This language is required by HB 2085 (1999). The reporting requirements if any, will be determined on a case-by-case basis depending on the nature and severity of the violation. No change was made as a result of this comment.

Comment: Concerning §295.69(g)(2), one commenter felt that this statement is vague and that the meaning of "limit the practice" needs to be defined more clearly.

Response: This language is required by HB 2085 enacted in 1999. The practice will be limited as determined on a case-by-case basis by the board depending on the nature and severity of the violation. No change was made as a result of this comment.

Comment: Concerning §295.69(g)(3), one commenter felt that this statement is vague and that the professional education requirements need to be defined more clearly.

Response: This language is required by HB 2085 (1999). The education required will be determined on a case-by-case basis depending on the nature of the violation and the license category of the person. No change was made as a result of this comment.

Comment: One commenter thanked the department for no longer equating failure to pay a notification fee with failure to establish a containment. The commenter believes the notification penalties should be further broken out as follows: §295.70(f)(2)(B) "failure to submit a notification or submitting an improper notification." The commenter also wanted the department to delete §295.70(f)(2)(F) "failure to submit a notification or to pay the required fee" and change §295.70(f)(3)(A) to say "failure to properly complete the notification form or to pay the required fee."

Response: The department considered the issues raised by the commenter. Payment of notification fees is critical to program function, and it is necessary that the notification be submitted to the department. Failure to notify should carry a sufficient fine to encourage compliance. The department reconsidered the proposed change and determined the best avenue to encourage compliance was to put the highest level of enforcement penalty on the case where no notification is submitted. The second level is placed upon not paying the notification fee and the third level placed upon paying the notification fee late. No change was made as a result of this comment.

Comment: One commenter said concerning §295.70, that the description of a Severity Level I violation contains the following: "This category shall include fraud and misrepresentation". "Should there be a 'not' included in that sentence or it is the department's intent to subject fraud and misrepresentation to $l00/day penalties?"

Response: The department agrees. It is not the intent of the department to limit fraud and misrepresentation to $100.00 per day penalties. This section has been modified by removing fraud and misrepresentation from this category. The department feels that fraud and misrepresentation where public health is concerned are of far more concern and deserve corresponding penalties. Fraud such as a training provider submitting a forged or altered training certificate in order to obtain a training provider or other license is subject to a $10,000 per day penalty under §295.70(f)(1)(F).

Comment: Two commenters expressed concern that the rules are becoming more oriented towards punishment and revenue generation than responsibility for human health.

Response: The department has written and enforces the TAPHR with the intent to protect public health and safety as its main objective. The department is very much focused on preventing exposure to the public and has made every effort to develop rules in partnership with the regulated community and general public to meet this end. No change was made as a result of this comment.

Comment: One commenter expressed concern that the rules and the efforts of the department focus disproportionately and detrimentally on licensed individuals and activities rather than on finding "uncontrolled projects."

Response: The asbestos program has a targeting plan that focuses some of its efforts on inspecting non-notified activities. When violations are found on a notified or non-notified activity they are treated in accordance with the rules. No change was made as a result of this comment.

Comment: One commenter asked if there has been any discussion on whether a person with over 10 or 15 years of experience working for an asbestos consulting company should be allowed to qualify for the asbestos consultants license.

Response: Although there has been discussion in the past, the department maintains the position that the educational requirement is in the best interest of providing greater public health protection. No change was made as a result of this comment.

Comment: One commenter indicated that there is no §295.21 in the rules and questioned this. The commenter also commented on the statement in the preamble that a building be certified asbestos-free by an engineer or architect. The commenter said this should be changed to show "licensed professional engineer or registered architect in the state of Texas" to ensure compliance with legal authorities pertaining to the ability to make engineering or architectural decisions according in other Texas laws.

Response: Section 295.21, which covers administrative fees to review asbestos management plans, was not published in the proposed rules because no changes were proposed to it. The rest of the commenter's concern is directed at the preamble; however, the issue has been addressed by making appropriate changes to the rules that require appropriate Texas licensure.

Comment: One commenter suggested that the department consider a complete review of the issue and dramatically revise its rules to incorporate what we have learned over the years rather than engage in tweaking the regulations.

Response: The department may consider this approach in the future. No change was made as a result of this comment.

Comment: One commenter expressed concern that many of the proposed amendments appear to reflect an increased regulatory emphasis by the department on asbestos-containing building materials (ACBM) without regard to whether the regulations are necessary for reducing exposure to asbestos fibers. The commenter felt that the concepts of friability and significant potential for friability seem increasing absent from TAHPR and urged the department to reemphasize safeguarding against potential exposure to asbestos fibers instead of over-regulating ACBM itself if no potential exposure threat really exists.

Response: The department understands the commenter's concerns. The rules attempt to control exposure to asbestos fibers by regulating the activities that have the highest risk for generating exposure. The department constantly reevaluates its enforcement policies and refocuses effort to provide the maximum benefit from its regulatory activities. The department is very much oriented towards preventing exposure to the public and has made every effort to develop rules in partnership with the public to meet this end. No change was made as a result of this comment.

Comment: One commenter said that although the Asbestos Programs Branch's web site indicated that the proposed rule changes were added to the site on December 10, 2002, he was unsuccessful in numerous attempts to open the web site during the holidays.

Response: The department added a link to make it convenient for people to navigate to the *Texas Register*, the official site containing the proposed rules. The site might not have been available due to security threats over the holidays. No change was made as a result of this comment.

Comment: One commenter expressed concern that the changes to the rules will have far-reaching effects but were made hurriedly.

Response: The department sought input from stakeholders before publishing the rules. The rules are a compilation of those stakeholders' input and the rules were published in the *Texas Register* for a 30-day comment period. No change was made as a result of this comment.

Comment: Numerous comments were received by the department about the late mailing of the courtesy letter-notifying stakeholders of the public hearing in Austin and of the 30-day comment period.

Response: The department regrets that stakeholders did not receive the courtesy notice in a timely fashion. The letter did serve the purpose of alerting stakeholders of the published proposed rules and of the opportunity to submit written comments. No change was made as a result of this comment.

The department is making the following changes due to staff comments.

Change: Concerning §295.31 made change to reflect that the United States Occupational Safety and Health Administration asbestos rules are used by reference in some areas of the rules.

Change: Concerning §§295.32(87), 295.34, 295.36(c), 295.38, 295.39(h)(14), 295.40, 295.58(h)(3), and 295.69(c)(3), grammatical changes where made for clarity.

Change: The statement concerning workers' compensation insurance has been removed from the licensing sections because a person applying for a license would not necessarily have a contract with a building owner that required him or her to have workers' compensation insurance.

Change: Where the word "enclosure" was used to describe containment, the department has replaced it with the word "containment" for consistency and clarity.

Change: Concerning §295.34(c)(1), "During the construction of or renovation in" was added in order to fully explain when the MSDS is allowed. "projects" was changed to "products" to correct a typographical error.

Change: Concerning §295.36, the department made changes to §295.36(a)(1) to be consistent with §295.36(a)(2) by explaining what cut means, referenced 29 CFR §1926.1101 to help define the term intact, removed the word "the" from the title of the Resilient Floor Covering Institute (RFCI) work practices in §295.36(a)(3) to reflect accurately the title, and added the date of publication for the RFCI work practices in §295.36(a)(5) to reflect the correct version allowed by the department. The department reworded the last sentence of §295.36(a)(6) to more clearly specify when the RFCI work practices must cease.

Change: Concerning §295.42(f)-(g), proposed deleted subsection (f) ("Responsibilities") was restored. The department discovered that the "Responsibilities" subsection, which was originally published in the October 6, 1992, issue of the *Texas Register*, is missing from the official Texas Administrative Code. Since the time of its publication, no changes have ever been made to this subsection and it was never proposed for deletion, hence no comment is required. The subsection will be inserted in original form except for the reference made to the OSHA regulations which was modified to bring it up to date with how OSHA regulations are currently used in the rules. The current subsection (f) was changed to (g).

Change: Concerning §295.55(d)(7)(C), "questions and answers" was changed to "questions and possible answers."

Change: Concerning §295.55(e)(1), the department holds meetings for the training providers to improve the quality of training courses, and department employees chair these meetings. The word "sponsored" was changed to "held".

Change: Concerning §295.60(a)(2), the department added "as at least as protective of the public health as the standard method described in this section" to be consistent with section 294.47(a)(1).

Change: Concerning §295.60(j)(1), the term "fiberboard drum" was restored since it is still allowed as a method to complete the requirement to double bag under §295.60(j)(3).

Change: Concerning §295.61(j)(4), the department changed the term "notification" to "date of invoice" to add clarity.

Change: Concerning §295.64(a)(2), the department added the word "also" to indicate that the hands-on training was not the only part of the course that was prohibited from combining with other courses, but to emphasize this, since the MAP does not allow it.

Change: Concerning §295.65(f)(3), the department changed "10 days" to "10 working days" to add clarity and give the Training Provider additional time to submit course information.

Change: Concerning §295.69(a), this change is statutorily required by HB 2085 and to be consistent with the changes made to §295.69(c).

Change: Concerning §295.69(e), this section was deleted to be consistent with the new time periods set in §295.69(c).

Change: Concerning §295.69(f), this section was deleted to be consistent with the new time periods set in §295.69(c).

Change: Concerning §295.70(f), the department changed the Severity Levels to the following: a Critical Violation is now Severity Level I and a Significant Violation is now a Severity Level III (Note: Serious Violation - Level II does not change.) This change is to provide consistency with Severity Levels in other department rules. The department also moved the sentence "This category shall include fraud and misrepresentation." under critical violation to be consistent with the examples of critical violations listed in this section.

Change: The order of §295.70(f) has been modified to reflect the order of severity levels in other department rules.

One public hearing was held in Austin, Texas on December 20, 2002. There were three people who attended that meeting and two made comments. A total of 22 persons made written comments including: State Representative Garnet F. Coleman; the University of Texas System Environmental Advisory Committee; The Environmental Consultancy; Baker Botts, L.L.P., for Waste Management, Inc.; the Fort Worth Independent School District; the Resilient Floor Covering Institute; Arias & Associates; Environmental/Occupational Solutions Corp.; Environmental Technologies, Inc.; the Scientific Investigation & Instruction Institute; Environmental Solutions, Inc.; the Texas Department of Mental Health and Mental Retardation; Sun City Analytical,

Inc.; GEBCO Associates, Inc.; Baer Engineering; and the Texas Department of Health. The commenters were neither for nor against the rules in their entirety; however, they raised questions, offered comments for clarification purposes, and suggested clarifying language concerning specific provisions in the rules. A total of 279 comments in 22 letters were received.

The amendments are adopted under Texas Civil Statutes, Article 4477-3a, which provides the Board of Health (board) with the authority to adopt rules regarding asbestos removal, encapsulation or enclosure, including licensing and regulation; Health and Safety Code, §12.001, which provides the board with authority to adopt rules to implement every duty imposed by law on the board, the department, and the commissioner of health; and implements Government Code, §2001.039.

§295.31. General Provisions.

(a) Problem. In more than 25 years of research into the relationship between airborne asbestos fibers and the diseases such exposure can cause, the bodily mechanism by which inhaled asbestos fibers initiate cancer or asbestosis is still not understood, no effective treatment has been found, and the only means of preventing asbestos disease depends entirely on limiting the exposure of the individual to asbestos fibers.

(b) Purpose. The purpose of these sections is to establish the means of control and minimization of public exposure to airborne asbestos fibers, a known carcinogen and dangerous health hazard, by regulating asbestos related activities in public and commercial buildings and facilities as defined by these sections.

(c) Scope.

(1) For the purposes of licensure and procedures in public buildings:

(A) Rules application. These sections apply to all buildings which are subject to public occupancy, or to which the general public has access, and to all persons disturbing, removing, encapsulating, or enclosing any amount of asbestos within public buildings for any purpose, including repair, renovation, dismantling, demolition, installation, or maintenance operations, or any other activity that may involve the disturbance or removal of any amount of asbestos-containing building material (ACBM) whether intentional or unintentional. Also included in these rules are the qualifications for licensure of persons, requirements for compliance with these sections and all applicable standards of the United States Environmental Protection Agency as adopted in §295.33 of this title (relating to Adoption by Reference of Federal and Other Standards) and those of the United States Occupational Safety and Health Administration as adopted and referenced in these rules.

(B) Exclusions. Private residences and apartment buildings with no more than four dwelling units are excluded from coverage by these rules. Except as provided in subsection (c)(2) and (c)(3) of this section, industrial or manufacturing facilities, in which access is controlled and limited principally to employees therein because of processes or functions dangerous to human health and safety, federal buildings and military installations are excluded from coverage by these rules.

(2) For the purposes of Federal National Emission Standards for Hazardous Air Pollutants (NESHAP) enforcement only: §§295.32; 295.34(a), (b)(1)-(3), (c), and (f); 295.61; 295.67-68; 295.70; and 295.71 of this title (relating to Texas Asbestos Health Protection) apply to all facilities. These sections shall apply to the extent necessary to allow the department to adopt and enforce the federal NESHAP. For facilities which are not otherwise subject to this title as public buildings, the department will apply and enforce these sections in a manner consistent with the NESHAP.

(3) For purposes of enforcing the Environmental Protection Agency (EPA) Asbestos Model Accreditation Plan (MAP) in commercial buildings, §§295.31, 295.32, 295.33, 295.34(c), (e) and (g), 295.57, 295.64 (except (f)-(h)), 295.66, 295.67, 295.68 and 295.70 of this title (relating to Texas Asbestos Health Protection) apply. For buildings which are not otherwise subject to this title as public buildings, the department will apply and enforce these sections in a manner consistent with the MAP.

(4) For the purposes of the Asbestos Hazard Emergency Response Act (AHERA) of 1986, U.S.C. 2605, 2607(c), 2643, and 2646, enforcement only: §§295.32 and 295.63 of this title (relating to Definitions and Asbestos Hazard Emergency Response Act (AHERA) Compliance) apply to all LEAs. Sections 295.32 and 295.63 of this title shall apply to the extent necessary to allow the department to adopt and enforce the federal AHERA.

(d) Severability. Should any section or subsection in this chapter be found to be void for any reason, such finding shall not affect all other sections.

(e) License possession requirements. Anyone engaged in asbestos-related activities in a public building must provide proof of a current license to any inspecting official from the Texas Department of Health (department), to an employer, or to a prospective employer upon request. All licensed individuals must have the Identification Card issued by the department on the work site at all times while engaged in any asbestos-related activity. For individuals, this is the only proof of a valid license.

§295.32. Definitions.

The following words and terms, when used with these sections, shall have the following meaning, unless the context clearly indicates otherwise.

(1) Accredited person--A person who has attended and passed, within the last year, the appropriate asbestos course, as described in §295.64 of this title (relating to Training: Required Asbestos Training Courses) offered by an asbestos training provider licensed by the department or one that has been approved by another state, that has the authority from EPA to approve courses, or that has been approved directly by EPA.

(2) Act--The Texas Asbestos Health Protection Act, as amended, Chapter 1954, Texas Occupations Code, effective June 1, 2003, formerly, Texas Civil Statutes, Article 4477-3a.

(3) Adequately wet--Sufficiently mixed or penetrated with liquid to prevent the release of particulates. If visible emissions are observed coming from asbestos-containing material, then that material has not been adequately wetted. However, the absence of visible emissions is not sufficient evidence of being adequately wet.

(4) AHERA--Asbestos Hazard Emergency Response Act of 1986, Public Law 99-519. The act amends the Federal Toxic Substances Control Act, 15 United States Code, §2641, et seq., by requiring an inspection of all school buildings (Grades K-12), all school administrations to develop plans for controlling asbestos in or removing asbestos from school buildings, and providing penalties for non-compliance.

(5) AIHA--The American Industrial Hygiene Association.

(6) Airlock--A system for permitting ingress and egress to and from the containment, consisting of doors and/or curtains that control air-flow patterns in the doorway such that no air escapes to the outside of the containment.

(7) Air monitoring--The collection of airborne samples for analysis of fibers.

(8) Asbestos--The asbestiform varieties of chrysotile, amosite, crocidolite, tremolite, anthophyllite, and actinolite.

(9) Asbestos abatement--The removal, the encapsulation or the enclosure of asbestos for the purpose of, or that has the effect of, reducing or eliminating airborne concentrations of asbestos fibers or amounts of asbestos-containing building material.

(10) Asbestos abatement activity--Asbestos abatement, or any on-site preparations or clean-up related to the abatement.

(11) Asbestos abatement contractor--A person who undertakes to perform asbestos removal, enclosure, or encapsulation for others under contract or other agreement.

(12) Asbestos abatement supervisor--An individual who is in direct charge of and responsible for the personnel, practices, and procedures of an asbestos abatement activity or project.

(13) Asbestos consulting activities--Consulting activities in public buildings include: the designing of asbestos abatement projects; the survey for asbestos-containing building materials; the evaluation and selection of appropriate asbestos abatement methods and project layout; the preparation of plans, specifications and contract documents; the review of environmental controls and abatement procedures for personal protection that are to be employed every day of the asbestos abatement activity, from the start through the completion dates of the project; the design of air monitoring of the project; any survey, management planning, air monitoring, or project management performed by or for the consultant or consulting agency; consultation regarding compliance with various regulations and standards; recommending abatement options; and representing the consultant agency or consultant in obtaining consulting work.

(14) Asbestos-containing building material (ACBM)--Surfacing asbestos-containing material, thermal system insulation asbestos-containing material, or miscellaneous asbestos-containing material that is found in or on interior structural members or other parts of a public or commercial building.

(15) Asbestos-containing material (ACM)--Materials or products, including any single material component of a structure or any layer of a material sample, that contain more than 1.0% of any kind or combination of asbestos, as determined by the Environmental Protection Agency recommended methods as listed in EPA/600/R-93/116, July 1993, "Method for the Determination of Asbestos in Bulk Building Materials".

(16) Asbestos-containing waste material--Includes mill tailings or any waste that contains commercial asbestos and is generated by a source subject to the provisions of 40 CFR Part 61, Subpart M. This term includes filters from control devices, friable asbestos waste material, and bags or other similar packaging contaminated with asbestos. As applied to demolition and renovation operations, this term also includes regulated asbestos-containing materials, and materials contaminated with asbestos including disposable equipment and clothing.

(17) Asbestos exposure--Airborne asbestos fiber concentrations resulting from disturbance or deterioration of asbestos or asbestos-containing building material.

(18) Asbestos project design--Asbestos abatement project design includes the inspection of public buildings for asbestos-containing building material, the evaluation and selection of appropriate asbestos abatement methods, project layout, the preparation of plans, specifications and contract documents, and the review of environmental controls, abatement procedures and personal protection equipment to be employed every day of the asbestos abatement activity, from the start through the completion dates of the project.

(19) Asbestos-related activity--The disturbance (whether intentional or unintentional), removal, encapsulation, or enclosure of asbestos, including preparations or final clearance, the performance of asbestos surveys, the development of management plans and response actions, asbestos project design, the collection or analysis of asbestos samples, monitoring for airborne asbestos, or any other activity required to be licensed under the Texas Asbestos Health Protection Act.

(20) Asbestos removal--Any action that dislodges, strips, or otherwise takes away asbestos-containing building material.

(21) Asbestos reporting unit (ARU)--An asbestos reporting unit is 160 square feet or 260 linear feet or 35 cubic feet of asbestos-containing building material in public buildings or regulated asbestos-containing material in facilities, as defined under National Emissions Standards for Hazardous Air Pollutants.

(22) Board--The Texas Board of Health.

(23) Building owner--The owner of record of any building. A building owner may hire a contractor or other agent such as an architect, engineer, or property manager who may assume certain tasks as outlined in §295.34(b)(5)-(6) of this title (relating to Asbestos Management in Facilities and Public Buildings). (See also the definition of facility owner.)

(24) Category I nonfriable asbestos-containing material (ACM)--Asbestos-containing packings, gaskets, resilient floor covering, and asphalt roofing products containing more than 1.0% asbestos as determined using Polarized Light Microscopy.

(25) Category II nonfriable asbestos-containing material (ACM)--Any material, excluding Category I nonfriable asbestos-containing material, containing more than 1.0% asbestos as determined using Polarized Light Microscopy that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.

(26) CFR--The Code of Federal Regulations.

(27) Commissioner--The Texas Commissioner of Health.

(28) Commercial asbestos--Any material containing asbestos that is extracted from ore and has value because of its asbestos content (National Emissions Standards for Hazardous Air Pollutant definition, 1990).

(29) Commercial Building--The interior space of any industrial, federal-government-owned building, or residential structure, installation or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having four or fewer dwelling units). Interior space includes exterior hallways connecting buildings, porticos, and mechanical systems used to condition interior space.

(30) Competent person--The individual designated as the competent person by the United States Occupational Safety and Health Administration regulations in 29 CFR §1926.1101. For an asbestos National Emissions Standards for Hazardous Air Pollutant (NESHAP) project, this is a person with asbestos NESHAP training.

(31) Containment--A portion of the regulated area that has been sealed and placed under negative air pressure with air machines using high-efficiency particulate air (HEPA) filters.

(32) Contractor--A person who constructs, repairs, or maintains a public building as an independent contractor, or is under contract to perform a service with wage or income reporting and tax responsibility to the state or federal government. The term includes a subcontractor.

(33) Demolition--The wrecking or removal of any load-supporting structural member of a public building or facility or the intentional burning of any public building or facility.

(34) Department--The Texas Department of Health.

(35) Designated person--The individual designated under 40 CFR Part 763 Subpart E to oversee all asbestos activities including compliance with all laws, regulations, and rules.

(36) Disturbance--Activities that disrupt the matrix of ACM, render ACM friable, or generate visible debris from ACM.

(37) Employee--A person who is paid a salary, wage, or remuneration by an entity for services performed and has a relationship with the entity that would result in the entity being liable for that person's acts or judgments.

(38) Encapsulation--A method of control of asbestos fibers in which the surface of asbestos-containing material is penetrated by or covered with a liquid coating prepared for that purpose.

(39) Enclosure--The construction of an airtight, impermeable, permanent barrier surrounding asbestos to prevent the release of asbestos fibers into the air.

(40) Environmental Protection Agency regulations--Regulations found in 40 Code of Federal Regulations at 40 CFR Parts 61-62 and Parts 700-789.

(41) EPA--The United States Environmental Protection Agency.

(42) Facility--Any institutional, commercial, public, industrial or residential structure installation or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having four or fewer dwelling units); any ship; and any active or inactive disposal site. Any structure, installation or building that was previously subject to 40 CFR Part 61, Subpart M is not excluded, regardless of its current use or function.

(43) Facility owner--The owner of record of any facility or any person who exercises control over a facility to the extent that said person contracts for or permits renovation to or demolition of said facility. (See also the definition of building owner.)

(44) Federal-government owned building--Any building, which is not a school building as defined by 40 CFR 763.83, owned by the United States Federal Government.

(45) Friable material--Materials that when dry can be crumbled, pulverized, or reduced to powder by hand pressure, and includes previously nonfriable material after such previously nonfriable material becomes damaged to the extent that, when dry, it may be crumbled, pulverized, or reduced to powder by hand pressure.

(46) HEPA--A high-efficiency particulate air filter, capable of trapping and retaining 99.97% of mono-dispersed airborne particles 0.3 micron or larger in diameter.

(47) HVAC--Heating, ventilation, and air conditioning systems.

(48) Independent third-party air monitor--A person retained to collect area air samples to be analyzed for the owner of the building or facility being abated. The person must not be employed by the abatement contractor to analyze any area samples collected during the abatement projects being monitored or the clearance samples subject to the provisions of §295.37 of this title (relating to Licensing and Registration: Conflicts of Interests).

(49) Individual--A person acting on his or her own behalf.

(50) Industrial building--Any building where industrial or manufacturing operations or processes are conducted and to which access is limited principally to employees and contractors of the facility operator or to invited guests under controlled conditions.

(51) Inspection--An activity undertaken in a school building, public building, or commercial building to determine the quantity, presence or location, or to assess the condition of, friable or non-friable asbestos-containing building material or suspected asbestos-containing building material, whether by visual or physical examination, or by collecting samples of such material. This term includes reinspections of friable and non-friable known or assumed asbestos-containing building material which has been previously identified. The term does not include the following:

(A) periodic surveillance of the type described in 40 CFR §763.92(b) solely for the purpose of recording or reporting a change in the condition of known or assumed asbestos-containing building material;

(B) inspections performed by employees or agents of federal, state, or local government solely for the purpose of determining compliance with applicable statutes or regulations; or

(C) visual inspections of the type described in 40 CFR §763.90(i) solely for the purpose of determining completion of response actions.

(52) Installation--A building or structure, or group of buildings or structures, at a single demolition or renovation site controlled by the same owner or operator (National Emissions Standards for Hazardous Air Pollutant definition, 1990).

(53) Layer--Any constituent of an asbestos bulk sample that exhibits different physical properties such as color or composition and can be separated from the rest of the sample with an instrument such as a modeler's knife.

(54) License--Any license or registration, or any provisional license or registration, issued under this chapter.

(55) Licensee--A person who meets all qualifications and has been issued a license or registration by the Texas Department of Health in accordance with these sections.

(56) Local Education Agency (LEA)--means:

(A) a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools;

(B) the term includes any other public institution or agency having administrative control and direction of a public elementary or secondary school;

(C) the term includes an elementary or secondary school funded by the Bureau of Indian Affairs but only to the extent that such inclusion makes such school eligible for programs for which specific eligibility is not provided to such school in another

provision of law and such school does not have a student population that is smaller than the student population of the local educational agency receiving assistance under this chapter with the smallest student population, except that such school shall not be subject to the jurisdiction of any State educational agency other than the Bureau of Indian Affairs; and

(D) the owner or governing authority of any nonpublic, nonprofit elementary, or secondary school building.

(57) Major Fiber Release Episode--Any uncontrolled or unintentional disturbance of ACBM, resulting in a visible emission, which involves the falling or dislodging of more than 3 square or linear feet of friable asbestos-containing building material.

(58) Management plan--A written plan describing appropriate actions for surveillance and management of asbestos-containing material.

(59) Minor Fiber Release Episode--Any uncontrolled or unintentional disturbance of ACBM, resulting in a visible emission, which involves the falling or dislodging of 3 square or linear feet or less of friable asbestos-containing building material.

(60) Model accreditation plan--A United States Environmental Protection Agency plan which provides standards for initial training, examinations, refresher training courses, applicant qualifications, decertification, and reciprocity, as described in Title 40, CFR, Part 763, Subpart E, Appendix C.

(61) Municipality--A general-law, home-rule or special-law municipality as defined in the Texas Local Government Code §1.005. A legally created body politic providing local government functions in a community.

(62) NESHAP--The United States Environmental Protection Agency National Emissions Standards for Hazardous Air Pollutants, as described in Title 40 CFR, Part 61.

(63) NIOSH--The National Institute for Occupational Safety and Health.

(64) Nonfriable material--Material which, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.

(65) NVLAP--The National Voluntary Laboratory Accreditation Program.

(66) Operations and maintenance (O&M)--Operations and maintenance activities are repairs, maintenance, renovation, installation, replacement, or cleanup of building materials or equipment.

(67) Operations and maintenance (O&M) contractor--A person who holds an Asbestos Operations & Maintenance Contractor (Restricted) license for general asbestos operations and maintenance work in a public building, as a building owner or agent, or as a contractor, if working for others.

(68) Operations and maintenance (O&M) manual--A record of operations and maintenance activities in a public building.

(69) OSHA--The Occupational Safety and Health Administration of the United States Department of Labor.

(70) OSHA Regulations--Regulations found in 29 Code of Federal Regulations, particularly 29 CFR §1926.1101, which governs asbestos in construction.

(71) Owner or operator of a demolition or renovation activity--Any person who owns, leases, operates, controls, or supervises a commercial building or facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation operation or both.

(72) PAT--Proficiency Analytical Testing.

(73) PCM--Phase-contrast microscopy, a method of analysis for overall airborne fiber counts using an optical microscope.

(74) PEL--Permissible Exposure Limit as defined by Occupational Safety and Health Administration regulations (29 CFR §1926.1101).

(75) Person--A person is:

(A) an individual;

(B) an organization such as a corporation, partnership, sole proprietorship, governmental subdivision, or agency; or

(C) any other legal entity recognized by law as having rights and duties.

(76) Plans and specifications--Site-specific asbestos abatement description which includes drawings, floor plans or equivalent of sufficient size and detail, that display the location of asbestos abatement activities, the location of regulated area(s), and a clear and understandable written description of the work to be performed.

(77) PLM--Polarized-light microscopy, a method of analysis for detection of the presence and type of asbestos.

(78) Preparation--preparation for asbestos abatement activity which includes, but not limited to, the following activities:

(A) pre-cleaning; sweeping; wet wiping; high-efficiency particulate air filter vacuuming; sealing penetrations and openings; installing polyethylene; installing isolation barriers (critical barriers, dividing walls, etc.); installing any part of a decontamination system or any part of the water line connections to the showers, drains, and/or filtration; set-up or use of any load-out/bag-out systems, selection, installation, or maintenance of respiratory systems or fiber reduction systems such as misting, spraying, etc., positioning of warning signs; or

(B) installation of engineering controls (local exhaust ventilation equipped with HEPA filter dust collection systems, construction of containments or isolation mechanisms to control processes producing asbestos dust, ventilation of the regulated area to move contaminated air away from the breathing zone of employees and toward a filtration or collection device equipped with a high-efficiency particulate air filter); installation of scaffolding (in an area in which asbestos maybe disturbed during the installation); installation, set-up, and calibration of monitoring devices (including sampling systems and manometers); or

(C) removal of any item from a space within a public building, once an asbestos abatement contractor takes control of that space for the purpose of asbestos abatement. Control occurs when the area has been established by the asbestos abatement contractor as a regulated area.

(79) Public building--The interior space of a building used or to be used for purposes that provide for public access or occupancy, including schools, hospitals, prisons and similar buildings. Interior space includes exterior hallways connecting buildings, porticos, and mechanical systems used to condition interior space. The term includes any such interior space during a period of vacancy, including the period during preparations prior to actual demolition. The term does not include:

(A) an industrial facility to which access is limited principally to employees of the facility because of processes or functions that are hazardous to human safety or health;

(B) a federal building or installation (civilian or military);

(C) a private residence;

(D) an apartment building with no more than four dwelling units;

(E) a manufacturing facility or building that is limited to workers and invited guests under controlled conditions;

(F) a building, facility, or any portion of which, prior to demolition, has been determined to be structurally unsound and in danger of imminent collapse by a professional engineer, registered architect, or a city, county, or state government official; or

(G) the portion of a building which has become structurally unsound due to demolition.

(80) Public school--Any elementary or secondary school operated by publicly elected or appointed school officials in which the program and activities are under the control of these officials and which is supported primarily by public funds.

(81) Regulated area--The demarcated area in which asbestos abatement activity takes place, and in which the possibility of exceeding the permissible exposure limits for the concentrations of airborne asbestos exists.

(82) Regulated asbestos-containing material (RACM)--means:

(A) Friable asbestos material;

(B) Category I nonfriable ACM that has become friable;

(C) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading; or

(D) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of the demolition or renovation operations regulated by 40 CFR Part 61, Subpart M.

(83) Renovation--Additions to or alterations of a building by removal, repairing, and rebuilding.

(84) Response action--A method, including removal, encapsulation, enclosure, repair, and operations and maintenance, that protects human health and the environment from friable asbestos-containing building material.

(85) Responsible person--The individual that is designated by the licensed asbestos abatement contractor, asbestos operations and maintenance contractor, asbestos laboratory, asbestos consultant agency, or asbestos management planner agency, as responsible for their operations and compliance with these rules.

(86) School--Any public or private, non-profit, elementary or secondary (kindergarten through grade 12) school as defined in the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801).

(87) School building--Any structure suitable for use as a classroom, including a school facility such as a laboratory, library, school eating facility, or facility used for the preparation of food. Any gymnasium or other facility which is specially designed for athletic or recreational activities for an academic course in physical education. Any other facility used for the instruction or housing of students or for the administration of educational or research programs. Any maintenance, storage, or utility facility, including any hallway, essential to the operation of any facility described in this definition of "school building." Any portico or covered exterior hallway or walkway. Any exterior portion of a mechanical system used to condition interior space.

(88) Small-scale, short-duration activities (SSSD)--Tasks such as, but not limited to, removal of asbestos-containing insulation on pipes; removal of small quantities of asbestos-containing insulation on beams or above ceilings; replacement of an asbestos-containing gasket on a valve; installation or removal of a small section of drywall; or installation of electrical conduits through or proximate to asbestos-containing materials. Small-scale, short-duration activities can be further defined as the following.

(A) Removal of small quantities of asbestos-containing material only if required in the performance of another maintenance activity not intended as asbestos abatement.

(B) Removal of asbestos-containing thermal system insulation not to exceed amounts greater than those which can be contained in a single glove bag.

(C) Minor repairs to damaged thermal system insulation which do not require removal.

(D) Repairs to a piece of asbestos-containing wallboard.

(E) Repairs, involving encapsulation, enclosure, or removal, to small amounts of friable asbestos-containing building material only if required in the performance of emergency or routine maintenance activity and not intended solely as asbestos abatement. Such work may not exceed amounts greater than those which can be contained in a single prefabricated mini-containment. Such a containment shall conform spatially and geometrically to the localized work areas, in order to perform its intended containment function.

(89) Start date--The dates defined as:

(A) asbestos abatement start date--For the purpose of notification to the department in accordance with §295.61 of this title (relating to Operations: Notifications), the date on which the actual disturbance of asbestos begins. Preparation that does not disturb asbestos is not the asbestos abatement start date;

(B) demolition/renovation start date--The date on which the demolition or renovation process begins.

(90) Stop date--The dates defined as:

(A) asbestos abatement stop date (completion date)--For the purpose of notification to the department in accordance with §295.61 of this title (relating to Operations: Notifications), the date on which air monitoring clearance of asbestos abatement is achieved. For removal of the resilient floor covering material in accordance with §295.36 of this title (relating to Licensing and Registration: Emergency), the date that the asbestos-containing building materials are removed from the substrate and properly containerized as specified for the project. For National Emissions Standards for Hazardous Air Pollutant projects, the date that all regulated asbestos-containing building material is removed from the substrate and properly containerized.

(B) demolition/renovation stop date--For demolition, the last date on which the wrecking and/or removal operations of load-bearing structural components are completed. For renovation, the last date that interior surfaces are altered or final clearance is obtained.

(91) Survey--An activity undertaken in a school building, public building, or commercial building to determine the quantity, presence or location, or to assess the condition of, friable or non-friable asbestos-containing building material or suspected asbestos-containing building material, whether by visual or physical examination, or by collecting samples of such material. This term includes reinspections of friable and non-friable known or assumed asbestos-containing building material which has been previously identified. The term does not include the following:

(A) periodic surveillance of the type described in 40 CFR §763.92(b) solely for the purpose of recording or reporting a change in the condition of known or assumed asbestos-containing building material;

(B) inspections performed by employees or agents of federal, state, or local government solely for the purpose of determining compliance with applicable statutes or regulations; or

(C) visual inspections of the type described in 40 CFR §763.90(i) solely for the purpose of determining completion of response actions.

(92) TEM--Transmission electron microscopy. A method of analysis for detection of the presence and type of asbestos.

(93) Transportation of asbestos-containing material (ACM)--Moving asbestos materials from one site to another or from one site to an off-site storage facility or disposal site, but not to temporary storage or staging area within the same site.

(94) Working days--Monday through Friday including holidays which fall on those days.

§295.34. Asbestos Management in Facilities and Public Buildings.

(a) General. Building owners are required to inform all persons in writing, or document oral communication between the owner (or their authorized representative) and those who perform any type of maintenance, custodial, renovation, or demolition work, of the presence and location of asbestos-containing building materials (ACBM) prior to the start of any asbestos-related activity.

(1) Demolition and/or renovation of a facility or commercial building. Before performing any demolition or renovation activity in a facility or commercial building, building owners or operators shall ensure that all friable asbestos-containing material (ACM) or asbestos-containing materials which may become friable (i.e. Category II nonfriable ACM) are inspected and abated in accordance with 40 CFR Part 61, Subpart M.

(2) Demolition and/or renovation of a public building. Before performing any demolition in a public building, building owners shall ensure that all friable asbestos-containing material (ACM) or ACM which may become friable (i.e. Category II nonfriable ACM) are surveyed and abated in accordance with 40 CFR Part 61, Subpart M. Before performing any renovation in a public building, building owners are required to survey and perform asbestos abatement for all asbestos-containing building material (ACBM) that could foreseeably be disturbed in the area to be renovated in accordance with these rules. The asbestos survey and abatement for the demolition and/or renovation shall be conducted by persons licensed in accordance with these rules, and according to the standards for removal specified in §§295.58 - 295.60 of this title.

(b) Statement of responsibility. The building owner retains the primary responsibility for compliance with these rules for the presence, condition, disturbance, renovation, demolition, and disposal of any asbestos encountered in the construction, operations, maintenance, or furnishing of that building or facility, including:

(1) the responsibility for the periods of vacancy, and for all preparations prior to actual demolition; all regulated asbestos-containing material (RACM) must be removed prior to demolition in accordance with the National Emission Standards for Hazardous Air Pollutants (NESHAP), and in a public building, comply with §295.60 of this title (relating to Operations: Abatement Practices and Procedures);

(2) the obligation to inform those who enter the building or facility for purposes of construction, maintenance, installation, repairs, etc., of the presence and location of asbestos that could be disturbed by those activities, and to arrange for proper handling of any asbestos that would be disturbed or dislodged by such activity;

(3) the responsibility for periods when the building or facility is under management by others;

(4) the responsibility to ensure licensees have in effect workers' compensation insurance issued by a company authorized and licensed to issue workers' compensation insurance in this state and written in this state on the Texas form, or evidence of self-insurance, if workers' compensation insurance is required by the specifications or owner;

(5) the responsibility to hire a contractor at the building owner's discretion to oversee certain tasks. Only a contractor engaged in asbestos-related activities, as described in these sections, must be licensed. The building owner retains primary responsibility for compliance with these rules. The building owner may delegate the following duties to a contractor:

(A) preparing bid documents, which do not include plans and specifications as defined in §295.32(75) of this title (relating to Definitions);

(B) entering into contracts for asbestos-related activities with qualified licensees;

(C) overseeing the work performance of a licensee, as it relates to contractual obligations; and

(D) paying for asbestos related activities on behalf of the owner; and

(6) the responsibility to hire an agent other than a contractor in accordance with the responsibility provisions of paragraph (5) of this subsection subject to the conflict of interest limitations of §295.37 of this title (relating to Licensing and Registration: Conflicts of Interests).

(c) Conditions requiring a mandatory asbestos survey for ACBM. Prior to any renovation or dismantling within a public building, commercial building, or facility, including preparations for partial or complete demolition, as required by 40 CFR, §61.145, owners must have a thorough survey performed. The work area and all immediately surrounding areas which could foreseeably be disturbed by the actions necessary to perform the project must be inspected and sampled as applicable prior to renovations or demolition. A copy of the survey report must be produced upon request by the Texas Department of Health (department). If a survey cannot be performed before demolition or renovation is started due to the building being structurally unsound and unsafe to enter, all material must be presumed to contain asbestos and must be treated as ACBM.

(1) In a public building the inspection must be performed by a person appropriately licensed in accordance with these rules. Criteria to rebut the presence of ACBM in a public building shall be based upon surveys which conform to generally accepted industry standards such as the protocol specified in §763.85, commonly referred to as the "AHERA" rules, which are the required method for schools. Other factors should be taken into consideration when deciding on the best

method to determine the location, extent and condition of the ACBM in a non-school building. Multi-story buildings may require investigation of the systems in the building in order to identify all possible ACBM. Under no circumstances will less than three samples for each suspect homogeneous area be collected for purposes of rebutting the presence of ACBM. During the construction of or renovation in a public building, a person appropriately licensed in accordance with these rules, Texas-registered architect or Texas-licensed professional engineer may compile the information from material safety data sheets (MSDS) of all products used in the construction of the building and, finding no asbestos in any of those products, prepare a signed written certification that he has reviewed the MSDSs for all products used in the construction and that none of those products contain ACBM and; therefore, the building materials do not contain asbestos. This certification, together with copies of the MSDSs and copies of any previous asbestos surveys, may be used as an asbestos survey.

(2) In a commercial building the inspection must be performed by an accredited inspector. This person is not required to be licensed but must have the applicable Model Accreditation Plan training.

(3) In a facility the inspection must conform with 40 CFR §61.145.

(4) Asbestos surveys remain acceptable if the asbestos survey was done in compliance with the Texas Asbestos Health Protection Rules (TAHPR) in effect at the time the asbestos survey was completed, and if the asbestos survey continues to represent accurately the suspect asbestos-containing building materials, location(s) of the materials surveyed, and any asbestos conditions in the building.

(d) Asbestos control and abatement. A public building owner has the following options for managing the asbestos found in his/her buildings.

(1) Building owners may hire a licensed asbestos abatement contractor to conduct asbestos abatement.

(2) Building owners may hire or retain a licensed asbestos abatement contractor or a licensed asbestos Operations and Maintenance (O&M) contractor to conduct small-scale, short-duration work activities or cleanup affecting asbestos. When utility work is to be performed, the building owner shall either have the affected asbestos-containing material removed prior to the work of a utility contractor, or require the utility contractor to be licensed to handle asbestos-containing materials.

(3) Building owners may conduct asbestos O&M activities within public buildings with their own employees for their own account if they obtain an asbestos operations and maintenance contractor (restricted) license, according to §295.43 of this title (relating to Licensure: Asbestos Operations and Maintenance Contractor (Restricted)), have a licensed supervisor according to §295.44 of this title (relating to Licensure: Asbestos Operations & Maintenance Supervisor (Restricted)), and have registered workers according to §295.42 of this title (relating to Registration: Asbestos Abatement Workers).

(4) Building owners may conduct asbestos abatement projects, including asbestos O&M activities, if they obtain an asbestos abatement contractor's license, as set forth in §295.45 of this title (relating to Licensure: Asbestos Abatement Contractor).

(e) Prohibition. The owner of a public building and any other person who contracts with or otherwise permits any person without appropriate valid license, registration, accreditation, or approved exemption to perform any asbestos-related activity is subject to administrative or civil penalty under the Texas Health Protection Act (Act), not to exceed $10,000 a day for each violation, or criminal penalty not to exceed $25,000, confinement in jail for not more than two years, or both.

(f) Mandatory notification. Notification is required in accordance with §295.61 of this title (relating to Operations: Notifications) under the following conditions.

(1) Notification is required for any demolition of a facility or public building, whether or not asbestos has been identified.

(2) In a public building, a notification to abate any amount of asbestos must be submitted to the Texas Department of Health (department) by the public building owner and/or operator. In a facility, a notification to abate amounts described in NESHAP must be submitted to the department by the facility owner and/or operator.

(g) Mandatory abatement project design. A project design, with respect to friable ACBM, must be prepared by either a licensed consultant (for a school or public building) or an accredited project designer (for a commercial building) for all projects which involve any of the following activities:

(1) A response action other than a SSSD activity,

(2) a maintenance activity that disturbs friable ACBM other than a SSSD activity, or

(3) a response action for a major fiber release episode. Abatement projects which have a combined amount of non-friable asbestos exceeding 160 square feet of surface area, or 260 linear feet of pipe length, or 35 cubic feet of material to be removed from a public building shall require that the project be designed by a licensed asbestos consultant. The exception to this requirement is for floor tile removed in accordance with §295.36 of this title (relating to Licensing and Registration: Exemptions; Emergency). In a commercial building, non-friable material does not require a design but must be treated in accordance with 40 CFR Part 61, Subpart M.

(h) Requirement for survey and management plan. If, in the opinion of the department following a site inspection of a public building, there appears to be a danger or potential danger from asbestos-containing building materials in poor condition to the workers or occupants of the building or the general public, the department shall, by written request, require the building owner or authorized representative to complete an immediate survey and asbestos management plan by a licensed asbestos inspector and licensed management planner or licensed consultant. A copy of the management plan shall be submitted for review and approval to the department within 90 days of receipt of the written request. Copies of the plan shall be on file with the owner or management agency, and in the possession of the supervisor in charge of building operations and maintenance.

(i) A person may not install building materials or replacement parts as stated in subsection (j) of this section, in a public building unless:

(1) the person obtains a required MSDS showing that the materials or replacement parts contain 1.0% or less of asbestos; or

(2) the materials or replacement parts, according to the MSDS, contain more than 1.0% asbestos but there is no alternative material or part as demonstrated by the building owner or contractor.

(j) A MSDS shall be obtained for the following building materials or replacement parts including but not limited to:

(1) surfacing materials:

(A) acoustical plaster;

(B) decorative plaster/stucco;

(C) textured paint/coating;

(D) spray applied insulation;

(E) blown-in insulation;

(F) fireproofing insulation;

(G) joint compound; and

(H) spackling compounds.

(2) thermal system insulation:

(A) taping compounds (thermal);

(B) HVAC duct insulation;

(C) boiler insulation;

(D) breaching insulation;

(E) pipe insulation; and

(F) thermal paper products.

(3) miscellaneous material:

(A) cement pipes;

(B) cement wallboard/siding;

(C) asphalt/vinyl floor tile;

(D) vinyl sheet flooring/vinyl wall coverings;

(E) floor backing;

(F) construction mastic;

(G) ceiling tiles/lay-in ceiling panels;

(H) packing materials;

(I) high temperature gaskets;

(J) laboratory hoods/table tops;

(K) fire blankets/curtains;

(L) elevator equipment panels;

(M) elevator brake shoes;

(N) ductwork flexible fabric connections;

(O) cooling towers;

(P) heating and electrical ducts;

(Q) electrical panel partitions;

(R) electrical cloth/electrical wiring insulation;

(S) chalkboards;

(T) roofing shingles/tiles;

(U) roofing felt;

(V) base flashing;

(W) fire doors;

(X) caulking/putties;

(Y) adhesives/mastics; and

(Z) wallboard.

(k) The department may exempt a demolition or renovation project from the TAHPA/NESHAP rules relating to demolition and renovation activities if:

(1) the project has received an exemption from the United States Environmental Protection Agency exempting the project from federal regulations; or

(2) the board determines that:

(A) the project will use methods for the abatement or removal of asbestos that provide protection for the public health and safety at least equivalent to the protection provided by the procedures required under board rule for the abatement or removal of asbestos; and

(B) the project does not violate federal law.

(l) Survey Required.

(1) In this section, "permit" means a license, certificate, approval, registration, consent, permit, or other form of authorization that a person is required by law, rule, regulation, order, or ordinance to obtain to perform an action, or to initiate, continue, or complete a project, for which the authorization is sought.

(2) A municipality that requires a person to obtain a permit before renovating or demolishing a public or commercial building may not issue the permit unless the applicant provides:

(A) evidence acceptable to the municipality that an asbestos survey, as required by this Act, of all parts of the building affected by the planned renovation or demolition has been completed by a person licensed under this Act to perform a survey; or

(B) a certification from a licensed engineer or architect, stating that:

(i) the engineer or architect has reviewed the material safety data sheets for the materials used in the original construction, the subsequent renovations or alterations of all parts of the building affected by the planned renovation or demolition, and any asbestos surveys of the building previously conducted in accordance with this Act; and

(ii) in the engineer's or architect's professional opinion, all parts of the building affected by the planned renovation or demolition do not contain asbestos.

§295.36. Licensing and Registration: Exemptions; Emergency.

(a) Exemption. Those who remove resilient floor covering materials in public buildings are exempt from the licensing and registration requirements of these sections, provided that:

(1) if the floor covering materials and/or adhesives have been sanded, ground, mechanically chipped, drilled, abraded or cut (includes sawing but does not include shearing, slicing or punching) prior to the start of the project, then an appropriately licensed person must be used for the abatement;

(2) upon initiating the RFCI work practices, the flooring material does not become friable, is not made into RACM, remains intact (as defined in 29 CFR 1926.1101), or is not sanded, ground, mechanically chipped, drilled, abraded or cut (includes sawing but does not include shearing, slicing or punching). Failure to stop the project under these circumstances is a violation of this section and §295.34(a) of this title (related to Asbestos Management in Facilities and Public Buildings), and subjects the contractor and the building owner to penalties in accordance §295.70 of this title (relating to Compliance: Administrative Penalty);

(3) all those engaged in removal of resilient floor coverings shall have received training in an eight-hour course which covers the elements described in the document titled, "Recommended Work Practices for Removal of Resilient Floor Coverings," published by the RFCI in 1998;

(4) in addition to the training in §295.36(a)(3), employees of schools (kindergarten through 12th grade) who elect to use this exempt method must first complete the 16-hour custodial training, as required by federal regulations adopted under authority of the Asbestos Hazard Emergency Response Act of 1986 (AHERA). Possession of a valid worker registration or supervisor license eliminates the individual's need for the 16-hour training;

(5) the actual removal of floor coverings and adhesive under this exemption is limited to the exempted methods of removal and must be conducted according to the work practices published for distribution by the RFCI in 1998, or as directed by the commissioner of health; and

(6) the asbestos activity permitted by the exemption is limited to the removal of resilient floor covering and adhesives, and does not apply to any other asbestos-related activity, nor does the training or experience gained from such practices qualify for any other asbestos-related activity. The exemption is strictly limited to flooring materials maintained in a non-friable state. RFCI guidelines are to be used; however, the permissible exposure limit (PEL) may not be exceeded. If the flooring materials become friable or the PEL is exceeded either before or during the removal, then:

(A) the person removing the floor covering is required to be licensed; and

(B) removal under RFCI exempted methods must cease, and abatement activity must conform to the requirements of these sections.

(b) Notification required. The Texas Department of Health shall receive written notification that has been postmarked or hand delivered at least ten working days prior to commencing any removal of floor coverings from public buildings permitted under the terms of this exemption, as required in §295.61 of this title (relating to Operations: Notifications). Telephone facsimile (FAX) is not acceptable.

(c) Failure to comply. Persons who fail to comply with subsection (a)(1)-(6) of this section are subject to an administrative penalty of not more than $10,000 per violation per day. Persons who fail to comply with notification requirements, or other applicable sections of the Texas Asbestos Health Protection Act (Act) or rules, are subject to administrative, civil, or criminal penalties.

(d) Abatement emergency. In an abatement emergency affecting public health or safety that results from a sudden, unexpected event that is not a planned renovation or demolition the department, on notification, may waive the requirement for a license. Call the servicing department regional office, environmental and consumer health division or (512) 834-6600 for consultation about emergencies.

§295.37. Licensing and Registration. Conflict of Interests.

(a) Independent third-party air monitoring. Third-party area monitoring and project clearance monitoring for airborne concentrations of asbestos fibers during an abatement project shall be performed by a person under contract to the public building owner to collect samples by and for the owner of the public building being abated. Such persons must not be employed or subcontracted by the asbestos abatement contractor hired to conduct the asbestos abatement project, except that:

(1) this restriction in no way applies to personal samples taken to evaluate worker exposure, as required by the Occupational Safety and Health Administration (OSHA) regulations; and

(2) an air monitoring technician providing the service for the contractor meeting his/her responsibilities under OSHA regulations must also be licensed to perform that function; and

(3) those who are licensed to perform asbestos abatement for their own account in their buildings shall employ an independent third-party air monitor for the purpose of obtaining area monitoring and final clearance.

(b) Licensee conflict of interest. Any person licensed according to these sections to perform an asbestos-related activity in a public building is subject to the following limitations on the same project in order to avoid a potential conflict of interest. These limitations apply whether the licensee is acting in his or her own capacity or as the agent of the building owner except as noted:

(1) a consultant who performs asbestos inspections or surveys, writes management plans, or designs asbestos abatement projects, may not hire an asbestos abatement contractor to engage in asbestos abatement on a project that the consultant has inspected or designed or in a building for which the consultant has written the management plan;

(2) an abatement contractor who engages in asbestos abatement may not hire a consultant to perform asbestos inspections or surveys, write management plans, or design asbestos abatement projects unless he is a building owner who is also licensed to engage in asbestos abatement and is acting as the abatement contractor in his own buildings in accordance with §295.34(d)(4) and (g) of this title (relating to Asbestos Management in Facilities and Public Buildings) on a project for which he is the abatement contractor;

(3) an abatement contractor who engages in asbestos abatement may not hire an air monitor to perform baseline, ambient or clearance air monitoring unless the exceptions in subsection (a)(1) or (a)(3) of this section apply; and

(4) certain conflict of interest provisions under this subsection do not apply to municipalities as indicated in subsection (c) of this section.

(c) Municipalities exemption. Municipalities are exempt from certain conflict of interest requirements. They may retain a licensed person who may perform asbestos inspections and surveys, write management plans, design abatement projects and abate asbestos in the same building or facility. This exemption does not allow a licensee who engages in these activities to conduct air monitoring or abatement project clearance procedures on the same project, which includes performing visual inspection and air samples for clearance in accordance with §295.58(i)(3) of this title (relating to Operation: General Requirements). Air monitoring activities must be performed by an independent third party who is not an employee of the municipality.

(d) An individual instructor shall not train himself/herself, nor shall an individual give himself/herself a physical examination in order to qualify for a license.

§295.38. Licensing and Registration: Applications and Renewals.

(a) General requirements. Applications for a license or worker registration under these sections must be made on forms provided by the Texas Department of Health (department), shall be signed by the applicant, and must be accompanied by a check or money order for the amount of the license or renewal fee. Only applications which are complete shall be considered by the department.

(b) Inquiries. Potential applicants who wish to discuss or obtain information concerning qualification requirements may call the department's Asbestos Programs Branch at (512) 834-6610 or (800) 572-5548.

(c) Denials. The department may deny an application for licensing to those who fail to meet the standards established by these rules, including, but not limited to the provisions of §295.69(c) of this

title (relating to Compliance: Reprimand, Suspension, Revocation, Probation).

(d) Penalties. In accordance with §§295.69 - 295.70 of this title, penalties such as suspension, revocation or an administrative penalty may be assessed for fraud or misrepresentation in obtaining, attempting to obtain, or renewing a license or registration.

(e) Processing applications and renewals.

(1) Time periods. Applications for licensure shall be processed in accordance with the following time periods: the time from the receipt of a written application to the date of issuance by the department of a written notice of deficiency outlining the reasons why the application is deficient is 30 days; failure of the applicant to submit the required information and/or documentation within 90 days of issuance of a written notice of deficiency from the department will result in the application being denied; and the license will be issued within 60 days of the department receiving all necessary information and documents from the applicant.

(2) Reimbursement of fees. Initial application or renewal fees will be refunded only if the department does not process a completed application in the time period specified in paragraph (1) of this subsection, if fee amounts are paid in excess of the correct fee amount, or if there is a double payment. Otherwise, fees for applications and renewals are not eligible for refund. A $30 administrative fee may be deducted from refunds for double payments or excess fees.

(3) Appeal. If the request for full reimbursement authorized by this section is denied, the applicant may then appeal to the commissioner of health for a resolution of the dispute. The applicant shall give written notice to the commissioner by writing to the administrator, asbestos licensing program, the designated representative of the commissioner, requesting full reimbursement of all filing fees paid because his/her application was not processed within the adopted time period. The program administrator shall submit a written report of the facts related to the processing of the application and good cause for exceeding the established time periods. The commissioner will determine the final action and provide written notification of his/her decision to the applicant and the program administrator.

(4) Contested case hearing. If at any time during the processing of the application, a contested case proceeding arises, a hearing may be requested in writing by the applicant within 30 days of the date on the letter from the department denying the registration or license. The hearing will be conducted in accordance with the Administrative Procedures Act, Texas Government Code Chapter 2001, and the department's formal hearing rules in Chapter 1 of this title (related to the Board of Health).

(f) Renewal notices. At least 30 days before a license expires the department, as a service to the licensee, shall send a renewal notice to the licensee or registrant, by first-class mail to the last known address of the licensee. It remains the responsibility of the licensee to keep the department informed of their current address, or change of address for all license categories, and to take action to renew their certificate whether or not they have received the notification from the department. The renewal notice will state:

(1) the type of license requiring renewal;

(2) the time period allowed for renewal; and

(3) the amount of the renewal fee.

(g) Renewal requirements. No sooner than 60 days before the license or registration expires, it may be renewed for an additional one-year term providing that the licensee or worker:

(1) is qualified to be licensed or registered;

(2) pays to the department the proper amount of the nonrefundable renewal fee;

(3) submits to the department a renewal application on the prescribed form along with all required documentation;

(4) completes successfully the requirements for renewal and examination, if required;

(5) has complied with all final orders resulting from any violations of these sections; and

(6) submits the required current training certificates.

(h) Prohibition. To practice with lapsed licenses and registrations is prohibited. A person whose license has been expired for one year or more may not renew the license. The person may obtain a new license by complying with the requirements and procedures, including the examination requirements, for obtaining an original license. If a license holder makes a timely and sufficient application for the renewal of a license, the current license in his/her possession does not expire until the application has been finally granted or denied by the department.

(1) A person whose license has been expired for 90 days or less may renew the license by meeting all qualifications to renew the license, and paying to the department a renewal fee of 1-1/2 times the basic fee as follows:

(A) asbestos abatement worker - $45;

(B) asbestos operations and maintenance contractor (Restricted) -$180;

(C) asbestos operations and maintenance supervisor (Restricted) - $135;

(D) asbestos abatement contractor - $750;

(E) asbestos abatement supervisor - $450;

(F) individual asbestos consultant - $450;

(G) asbestos consultant agency - $300;

(H) asbestos project manager - $225;

(I) asbestos inspector - $90;

(J) individual asbestos management planner - $180;

(K) air monitoring technician - $75;

(L) asbestos management planner agency - $300;

(M) asbestos laboratory - $300;

(N) asbestos training provider - $750; or

(O) asbestos transporter - $300.

(2) A person whose license has been expired for more than 90 days but less than one year may renew the license by meeting all qualifications to renew the license and paying to the department a renewal fee of two times the basis fee as follows:

(A) asbestos abatement worker - $60;

(B) asbestos operations and maintenance contractor (Restricted) - $240;

(C) asbestos operations and maintenance supervisor (Restricted) - $180

(D) asbestos abatement contractor - $1,000;

(E) asbestos abatement supervisor - $600;

(F) individual asbestos consultant - $600;

(G) asbestos consultant agency - $400;

(H) asbestos project manager - $300;

(I) asbestos inspector - $120;

(J) individual asbestos management planner - $240;

(K) air monitoring technician - $100;

(L) asbestos management planner agency - $400;

(M) asbestos laboratory - $400;

(N) asbestos training provider - $1,000; or

(O) asbestos transporter - $400.

(i) Replacements. A licensee or registrant may obtain a replacement certificate by submitting such request in writing along with the reissuance fee of $20.

(j) Retention of control. The department may, at any time after the filing of any application and before the expiration of any license or registration, require:

(1) additional written information and assurances; and

(2) cooperation with any inspections initiated by the department, or the production of any documentary or other evidence that the department considers necessary to determine whether the license or registration should be granted, delayed, denied, modified, suspended, or revoked.

(k) Provisional Licenses. A holder of a provisional license issued in accordance with §295.39(g) of this title (relating to Licensing and Registration: Out-of-State Applicants and Out-of-State Training) can apply for a license or registration if the applicant has completed a minimum of three hours training given by a department-licensed training provider covering Texas law and regulations as indicated in §295.39(d) of this title, paid the appropriate licensing fee in addition to the non-refundable fee listed in paragraphs (1) - (4) of this section for a provisional license, and met the following requirements:

(1) asbestos abatement worker. Qualifications as stated in §295.42(e) of this title (relating to Registration: Asbestos Abatement Workers) and provisional fee payment of $30;

(2) asbestos inspector. Qualifications as stated in §295.50(d) of this title (relating to Licensure: Asbestos Inspector) and provisional fee payment of $60;

(3) individual asbestos management planner. Qualifications as stated in §295.51(e) of this title (relating to Licensure: Asbestos Management Planner) and provisional fee payment of $120; or

(4) asbestos abatement supervisor. Qualifications as stated in §295.46(d) of this title (relating to Licensure: Asbestos Abatement Supervisor) and provisional fee payment of $300.

§295.39. Licensing and Registration: Out-of-State Applicants and Out-of-State Training.

(a) Terms of reciprocity. Persons may enter the state for purposes of asbestos abatement or other asbestos-related activity under the Texas Asbestos Health Protection Act (Act) provided they are licensed according to the terms of these sections prior to soliciting business or commencing such activities.

(b) Applicant status. All persons residing in other states, applying for any category of license, must comply with all licensing requirements which would be imposed on a Texas resident.

(c) Acceptance of qualifying documents. Out-of-state education, experience, training, and physical examinations can be accepted for the purpose of qualifying for Texas licenses provided that they are valid and are verifiable by the department. The burden of proof in such matters is the responsibility of the applicant; the department must reject unverifiable documentation.

(d) Compulsory training. All out-of-state licensees and registrants or Texas resident applicants who have received all of their training out-of-state must complete a minimum of three hours training given by a department licensed training provider on Texas law and regulations concerning asbestos prior to applying for licenses or commencement of any asbestos-related activity. The Texas law course must be completed within 60 days prior to applying for a department license. Licensee organizations must have at least one officer complete this training.

(e) Required documents. To conduct business in Texas, an out-of-state corporation or other business entity must:

(1) submit a letter or certificate from the Texas secretary of state authorizing the conduct of business in this state;

(2) submit a sales tax account identification number obtained from the Texas Comptroller of Public Accounts;

(3) submit a certificate of insurance for liability coverage written by a Texas-approved carrier if the applicant is an asbestos abatement contractor, asbestos consultant, asbestos inspector, asbestos laboratory, or asbestos transporter performing work for hire as required by §295.40 of this title (relating to Licensing and Registration: Insurance Requirements); and

(4) provide proof of workers' compensation insurance issued by a company authorized and licensed to issue workers' compensation insurance in this state and written in this state on the Texas form, or evidence of self-insurance, if workers' compensation insurance is required by contract specifications or owner; see §295.34(b)(4) of this title (relating to Asbestos Management in Facilities and Public Buildings).

(f) Exemption. An out of state corporation that engages only in interstate commerce and has no documentation described in subsection (e)(1) of this section may qualify as not transacting business in Texas under §8.01 of the Business Corporation Act and may request an exemption from the requirements of subsection (e)(1)-(2) of this section if the corporation submits a sworn affidavit from a corporate officer claiming the exemption.

(g) Provisional License and Registration. A person may request a provisional license for an asbestos inspector, individual asbestos management planner, asbestos abatement supervisor, or asbestos abatement worker registration.

(1) A provisional license or registration is valid until the date the department approves or denies the provisional license or registration holder's application for licensing or registration, or 180 days after the date the provisional license or registration is issued, whichever comes first.

(2) Non-refundable provisional license or registration fees are as follows:

(A) asbestos abatement worker - $30;

(B) asbestos inspector - $60;

(C) individual asbestos management planner - $120; and

(D) asbestos abatement supervisor - $300.

(3) A person may receive a provisional license issued by the department if the following criteria are met:

(A) the person requesting the provisional license or registration has been licensed or registered in good standing in that discipline for at least two years in another state, including a foreign country, that has licensing or registration requirements substantially equivalent to the requirements of these rules;

(B) for the following licenses, the person requesting the provisional license has passed a national or other examination recognized by the department relating to the provisional license requested:

(i) asbestos abatement worker;

(ii) asbestos inspector;

(iii) individual asbestos management planner; and

(iv) asbestos abatement supervisor; and

(C) the person requesting the provisional license or registration is sponsored by a company that meets the insurance requirements of §295.40 of this title (related to Licensing and Registration: Insurance Requirements), with whom the provisional license or registration holder will practice during the time the person holds a provisional license or registration. The department may waive the requirement of sponsorship for an applicant if the department determines that compliance with that subsection would be a hardship to the applicant.

(h) Formerly licensed in Texas. A person who was licensed by the department, moved to another state, and is currently licensed and has been in practice in the other state for the two years preceding the date of application may obtain a new license without reexamination. The person must meet the following standards:

(1) asbestos abatement worker. Qualifications as stated in §295.42(e) of this title (relating to Registration: Asbestos Abatement Workers) and fee payment of $60;

(2) asbestos operations and maintenance contractor (restricted). Qualifications as stated in §295.43(e) of this title (relating to Licensure: Asbestos Operations and Maintenance Contractor (Restricted)) and fee payment of $240;

(3) asbestos operations and maintenance supervisor (restricted). Qualifications as stated in §295.44(d) of this title (relating to Licensure: Asbestos Operations and Maintenance Supervisor (Restricted)) and fee payment of $180;

(4) asbestos abatement contractor. Qualifications as stated in §295.45(e) of this title (relating to Licensure: Asbestos Abatement Contractor) and fee payment of $1,000;

(5) asbestos abatement supervisor. Qualifications as stated in §295.46(b) of this title (relating to Licensure: Asbestos Abatement Supervisor) and fee payment of $600;

(6) individual asbestos consultant. Qualifications as stated in §295.47(f) of this title (relating to Licensure: Individual Asbestos Consultant) and fee payment of $600;

(7) asbestos consultant agency. Qualifications as stated in §295.48(e) of this title (relating to Licensure: Asbestos Consultant Agency) and fee payment of $400;

(8) asbestos project manager. Qualifications as stated in §295.49(d) of this title (relating to Licensure: Asbestos Project Manager) and fee payment of $300;

(9) asbestos inspector. Qualifications as stated in §295.50(d) of this title (relating to Licensure: Asbestos Inspector) and fee payment of $120;

(10) individual asbestos management planner. Qualifications as stated in §295.51(e) of this title (relating to Licensure: Asbestos Management Planner) and fee payment of $240;

(11) air monitoring technician. Qualifications as stated in §295.52(e) of this title (relating to Licensure: Air Monitoring Technician) and fee payment of $100;

(12) asbestos management planner agency. Qualifications as stated in §295.53(f) of this title (relating to Licensure: Asbestos Management Planner Agency) and fee payment of $400;

(13) asbestos laboratory. Qualifications as stated in §295.54(f) of this title (relating to Licensure: Asbestos Laboratory) and fee payment of $400;

(14) asbestos training provider. Qualifications as stated in §295.55(d) of this title (relating to Licensure: Asbestos Training Provider) and fee payment of $1,000; or

(15) asbestos transporter. Qualifications as stated in §295.56(d) of this title (relating to Licensure: Asbestos Transporters) and fee payment of $400.

§295.40. Licensing, Training and Registration: Insurance Requirements.

Persons required to have insurance must obtain policies for required coverage in the amounts specified in these sections. Self-insurance is allowed for governmental agencies and for persons who meet the self-insurance requirements under the insurance laws of Texas and receive written approval from the Texas Department of Insurance or Texas Workers' Compensation Commission. Proof of approval by the appropriate authority as required for non-governmental persons must be submitted with the application. Liability insurance shall include pollution liability for asbestos exposure. Additional requirements are as follows:

(1) Applicants for licenses or renewal of licenses must provide to the department the certificate of insurance required. The policy must be currently in force and must be written by:

(A) an insurance company authorized to do business in Texas;

(B) an eligible Texas surplus lines insurer as defined in the Texas Insurance Code, Article 1.14-2;

(C) a Texas registered risk retention group; or

(D) a Texas registered purchasing group.

(2) The certificate of insurance must be complete, including all applicable coverages and endorsements, and must name the Texas Department of Health, Toxic Substances Control Division, as a certificate holder. Each required policy shall be endorsed to provide the department with at least a ten day notice of cancellation.

(3) In the event of policy cancellation by either the licensee or the insurance company, the licensee shall notify the department not later than 10 days prior to the cancellation effective date.

(4) In the event of policy cancellation or expiration, the policy shall promptly be replaced or renewed without any lapse in coverage. A certificate of the renewal policy must be provided to the department upon receipt by the licensee. In no event shall a licensee fail to have the required coverage at the time of engaging in asbestos activities. Failure to become reinsured when required may result in the imposition of an administrative penalty and/or revocation of the license.

§295.42. Registration: Asbestos Abatement Workers.

(a) Registration requirement. Individuals must be registered as asbestos abatement workers in compliance with these sections to perform asbestos abatement work in a public building, including, but not limited to, performing any maintenance, repair, installation, renovation, or cleaning that dislodges, breaks, cuts, abrades, or impinges on asbestos material. Registrations are valid for a period of one year from the effective date and are renewable.

(b) Fee. The fee for an initial application and for the annual renewal of registration of an asbestos abatement worker shall be $30.

(c) Applications and renewals. Applications shall be submitted as required by §295.38 of this title (relating to Licensing and Registration: Applications and Renewals). Out-of-state applicants must comply with §295.39(a) and (d) of this title (relating to Licensing and Registration: Out-of-State Applicants).

(d) Annual renewal. Annual renewal may be accomplished by submitting the following documentation:

(1) current worker's refresher training certificate;

(2) current physician's written statement on the specified Texas Department of Health (department) form; and

(3) the required license fee.

(e) Qualifications. Applicants for registration as asbestos abatement workers shall provide:

(1) a certificate of training from a training provider approved by or acceptable to the department indicating successful completion within the past 12 months of the approved training course for abatement workers or the annual refresher training course, as described in §295.64(d) of this title (relating to Training: Required Asbestos Training Courses). Evidence of successful completion of the contractor/supervisor course may be substituted for the initial worker course.

(2) an acceptable written opinion of a physical examination of the applicant within the past 12 months that was performed by a physician in accordance with Occupational Safety and Health Administration of the United States Department of Labor (OSHA) regulations in 29 Code of Federal Regulations (CFR), §1926.1101(m), or Environmental Protection Agency (EPA) regulations in 40 CFR, §763.121(m), relating to medical surveillance. This opinion must be submitted on the Texas Department of Health (department) "Physicians Written Statement" form only, must be signed by the doctor and include certification of the following elements:

(A) completion and review of the applicant's standardized medical questionnaire and work history with special emphasis directed to the pulmonary, cardiovascular, and gastrointestinal systems per 40 CFR §1926.1101 Appendix D;

(B) if applicant is employed, the employer must have provided, and a review made of, the description of the employee's duties as they relate to asbestos exposure, the anticipated exposure level, the personal protective and respiratory equipment to be utilized by the employee, and information from previous medical examinations of the affected employee that is not otherwise available to the physician;

(C) a physical examination with emphasis upon the pulmonary, cardiovascular, and gastrointestinal systems;

(D) the pulmonary function tests of forced vital capacity (FVC) and forced expiratory volume at one second (FEV 1) in accordance with NIOSH and ATS standards;

(E) a chest roentgenogram, posterior-anterior, 14x17 inches, or current film on file with interpretation in accordance with 29 CFR §1926.1101 Appendix E. (Note: According to 29 CFR §1926.1101(m)(2)(ii)(C), it is up to the discretion of the physician whether or not a chest x-ray is required); and

(F) the employee was informed by the physician of the results of the exam and of any medical conditions that may result from asbestos exposure, including the increased risk of lung cancer attributable to the combined effect of smoking and asbestos exposure;

(3) a copy of the wallet-size photo-identification card from the training course, as required from all trainers in Texas in accordance with §295.65(f)(2) of this title (relating to Training: Approval of Training Courses). Persons submitting out-of-state training certificates with their applications may obtain the necessary photo-identification when attending the mandatory course on Texas asbestos rules, as required in accordance with §295.64(h) of this title; and

(4) a current one-inch by one-inch photograph of the face. The photograph submitted to the department for licensing purposes must have a white background.

(f) Responsibilities. A registered asbestos abatement worker shall:

(1) comply with standards of operation, including Environmental Protection Agency (EPA) regulations, adopted by reference in §295.33 of this title (relating to Adoption by Reference of Federal and Other Standards) and Occupational Safety and Health Administration (OSHA) regulations as adopted and referenced in certain sections of these rules;

(2) comply with additional work practices, as described in §295.60 of this title (relating to Operations: Abatement Practices and Procedures);

(3) comply with standards and practices for operations and maintenance activities, as described in §295.59 of this title (relating to Operations: Operations and Maintenance (O&M) Requirements); and

(4) cooperate with department personnel in the discharge of their official duties to conduct inspections and investigations, as described in §295.68 of this title (relating to Compliance: Inspections and Investigations).

(g) Prohibitions. The following specific prohibitions apply to registered asbestos abatement workers.

(1) Asbestos abatement workers are prohibited from performing asbestos abatement or O&M activities affecting asbestos except under the direct supervision of a qualified licensed supervisor.

(2) Asbestos abatement workers are prohibited from engaging in any asbestos-related activity as a supervisor or contractor.

§295.43. Licensure: Asbestos Operations and Maintenance Contractor (Restricted)

(a) Licensing requirement. Persons must be licensed as asbestos abatement contractors or as asbestos operations and maintenance (O&M) contractors (restricted) to conduct asbestos O&M activities. Building owners that would have their own employees perform

such activities for their buildings shall be licensed according to this section. Such licenses are valid for one year and shall be renewed on the expiration date.

(b) Restrictions.

(1) Asbestos O&M activities are restricted to small-scale, short-duration work practices and engineering controls for tasks that result in the disturbance, dislodgment, or removal of asbestos in the course of performing repairs, maintenance, renovation, installation, replacement, or cleanup operations, as adopted in §295.33(a) of this title (relating to Adoption of Standards).

(2) Whenever asbestos abatement is the primary or principal purpose of any asbestos activity in a public building it must be performed by an asbestos abatement contractor licensed under these sections.

(3) Those who solicit or conduct asbestos operations and maintenance activities within a public building under contract or other hire agreement must be licensed as asbestos abatement contractors or asbestos O&M contractors.

(4) Employees who perform asbestos O&M activities for asbestos abatement contractors or asbestos O&M contractors must be registered as asbestos abatement workers, and under the supervision of employees who are trained and licensed as asbestos O&M supervisors or asbestos abatement supervisors.

(5) EPA regulatory requirements for small-scale, short duration activities affecting asbestos are explained in detail in 40 CFR, Part 763, Appendix B to Subpart E, as amended. The same regulatory requirements of OSHA for these activities are explained in 29 CFR §1926.1101. The restricted asbestos activities of licensed O&M contractors, O&M supervisors, and asbestos workers shall be confined to the work practices and procedures therein.

(c) Fee. The fee for an initial application or annual renewal shall be $120. Licenses are valid for a period of one year, and shall be renewable, as prescribed in §295.38 of this title (relating to Applications and Renewals).

(d) Applications and renewals. These are subject to the provisions of §295.38 of this title (relating to Licensing and Registration: Applications and Renewals). Out-of-state applicants must comply with §295.39 of this title (relating to Licensing and Registration: Out-of-State Applicants).

(e) Qualifications. Applicants for licensing as asbestos operations and maintenance contractors shall provide:

(1) a certificate of training from a training provider approved by or acceptable to the Texas Department of Health (department), indicating successful completion within the past 12 months of the approved training course for asbestos abatement contractors and supervisors or the annual refresher training, as described in §295.64(c) of this title (relating to Training: Required Asbestos Training Courses). An applicant organization shall designate at least one individual as their responsible person who will comply with this training requirement. This person must be responsible for asbestos operations and compliance with all asbestos rules and regulations;

(2) a State of Texas sales tax account number for the applicant organization;

(3) a written respiratory protection plan to be maintained and adhered to during periods of abatement activity;

(4) a description of the protective clothing and respirators which will be used;

(5) a description of the site decontamination procedures;

(6) a description of the procedures for handling waste containing asbestos;

(7) a description of the removal and encapsulation methods;

(8) a description of the air-monitoring procedures;

(9) a description of final cleanup procedures;

(10) a description of the provisions for recordkeeping;

(11) a list of operations and maintenance projects completed in the past year;

(12) a copy of all disposal manifests for projects completed in the past year;

(13) a list of asbestos inspections performed by other agencies;

(14) copies of all citations issued;

(15) proof of successfully passing the department examination for asbestos abatement contractors and supervisors;

(16) a copy of the wallet-size photo-identification card of the responsible person from the training course, as required from all trainers in Texas in accordance with §295.65(f)(2) of this title (relating to Training: Approval of Training Courses). Persons submitting out-of-state training certificates with their applications shall submit the necessary photo-identification they obtain when attending the mandatory course on Texas asbestos rules, as required in accordance with §295.64(h) of this title; and

(17) a current one-inch by one-inch photograph of the face of the responsible person. The photograph submitted to the department for licensing purposes must have a white background.

(f) Responsibilities. O&M contractors who obtain restricted licenses shall be responsible for:

(1) complying with standards of operation, as described in §295.58 of this title (relating to Operations: General Requirements) and §295.59 of this title (relating to Operations: Operations and Maintenance Requirements) and with the plans and specifications for the asbestos activity being performed;

(2) complying with federal standards of operation, including EPA and OSHA regulations, which are adopted by reference, as follows:

(A) OSHA regulations in 29 CFR, §1926.1101(g)(9), titled "Work Practices and Engineering Controls for Class III Asbestos Work"; or

(B) EPA regulations in 40 CFR, Part 763, Subpart E, Appendix B, titled "Work Practices and Engineering Controls for Small-Scale, Short-Duration Operations, Maintenance and Repair (O&M) Activities Involving ACM";

(3) employment of at least one licensed operations and maintenance (O&M) supervisor (restricted) to supervise or perform operations or maintenance activities. An individual licensed as an asbestos abatement supervisor may be substituted for the O&M supervisor. Employees who are registered asbestos abatement workers shall perform O&M activities only under the direct supervision of either category of supervisors named in this section;

(4) complying with recordkeeping requirements, both the central office and work site locations, as described in §295.62 of this title (relating to Operations: Recordkeeping);

(5) complying with the requirement to notify the department about impending abatement projects, changes requiring re-notification, and emergency notification, as described in §295.61 of this title (relating to Operations: Notification);

(6) complying with the requirement to supply and train employees who perform asbestos-related activities in the use of personal protection equipment, and to maintain the current training status of each employee according to §295.64 of this title (relating to Training: Required Asbestos Training Courses);

(7) acquiring and maintaining in good working condition and free of asbestos contamination the necessary equipment for performing O&M activities, as prescribed by the department;

(8) assisting department personnel in the discharge of their official duties to conduct inspections and investigations, as described in §295.68 of this title (relating to Licensing Operations: Inspection and Investigations); and

(9) providing for the proper temporary storage and for the final disposal of waste asbestos, which must be disposed of within 30 days of project completion or when receiving container is full, whichever is sooner.

(g) Prohibitions. Asbestos O&M licensees shall not engage in any activity for which the primary purpose is asbestos abatement.

§295.45. Licensure: Asbestos Abatement Contractor.

(a) Licensing requirement. Persons must be licensed as asbestos abatement contractors in compliance with these sections to engage in asbestos abatement or removal in a public building. This requirement does not apply to the removal of asbestos samples taken during an inspection or survey by someone licensed to inspect.

(b) Licensee authorization. Asbestos abatement contractor licensees are specifically authorized to employ asbestos abatement supervisors and asbestos abatement workers who are currently licensed under these sections to carry out asbestos abatement or removal procedures. They may employ licensed operations and maintenance (O&M) supervisors for building O&M activities, or as workers. Licensees are cautioned to observe the prohibited acts in §295.37 of this title (relating to Licensing and Registration: Conflict of Interests).

(c) Fee. The fee for an initial application or for an annual renewal of the license for an asbestos abatement contractor shall be $500.

(d) Applications and renewals. Applications shall be submitted as required by §295.38 of this title (relating to Licensing and Registration: Applications and Renewals). Out-of-state applicants must comply with §295.39 of this title (relating to Licensing and Registration: Out-of-State Applicants).

(e) Qualifications. Applicants for licensing as asbestos abatement contractors shall provide:

(1) a certificate of training from a training provider approved by or acceptable to the department, indicating successful completion within the past 12 months of the approved training course for asbestos abatement contractors and project supervisors or the continuing annual refresher training, as described in §295.64(c) of this title (relating to Training: Required Asbestos Training Courses). An applicant shall designate at least one individual for the purpose of complying with this training requirement. This individual must be responsible for asbestos operations and compliance with all asbestos rules and regulations;

(2) if the applicant is situated outside the State of Texas, a certificate of authority issued by the Secretary of State, authorizing the corporation to do business in the state;

(3) a State of Texas sales tax account number for the applicant organization;

(4) evidence of asbestos abatement liability insurance as required in §295.40 of this title (relating to Licensing and Registration: Insurance Requirements), in the amount of $1 million, when doing work for hire;

(5) a written respiratory protection plan to be maintained and adhered to during periods of abatement activity;

(6) a description of the protective clothing and respirators which will be used;

(7) a description of the site decontamination procedures;

(8) a description of the procedures for handling waste containing asbestos;

(9) a description of the removal and encapsulation methods;

(10) a description of the air-monitoring procedures;

(11) a description of final cleanup procedures;

(12) a description of the provisions for recordkeeping;

(13) a list of abatement projects completed in the past year;

(14) a copy of all disposal manifests for projects completed in the past year;

(15) a list of asbestos inspections performed by other agencies;

(16) copies of all citations issued;

(17) proof of successfully passing the department examination for asbestos contractors, if required;

(18) a copy of the wallet-size photo-identification card of the responsible person from the training course, as required from all trainers in Texas in accordance with §295.65(f)(2) of this title (relating to Training: Approval of Training Courses). Persons submitting out-of-state training certificates with their applications shall submit the necessary photo-identification they obtained when attending the mandatory course on Texas asbestos rules, as required in accordance with §295.64(h) of this title; and

(19) a current one-inch by one-inch photograph of the face of the responsible person. The photograph submitted to the department for licensing purposes must have a white background.

(f) Responsibilities. The asbestos abatement contractor shall be responsible for:

(1) standards of operation, including Environmental Protection Agency (EPA) and Occupational Safety and Health Administration of the United States Department of Labor (OSHA) regulations, referenced in §295.33 of this title (relating to Adoption by Reference of Federal Standards);

(2) additional work practices, as described in §295.60 of this title (relating to Operations: Abatement Practices and Procedures);

(3) recordkeeping requirements, at both central office and work site locations, as found in §295.62 of this title (relating to Operations: Recordkeeping);

(4) required notification to the department about impending abatement projects, changes requiring re-notification, and emergency notifications, as described in §295.61 of this title (relating to Operations: Notifications);

(5) the requirement to supply and train employees who perform asbestos-related activities in the use of personal protection equipment, and to supervise their compliance;

(6) maintenance of the current training status of each employee, as described in §295.64 of this title (relating to Training: Required Asbestos Training Courses), and the annual physical examinations;

(7) standards and practices for O&M activities, as conducted by a contractor, as described in §295.59 of this title (relating to Operations: Operations and Maintenance (O&M) Activities);

(8) assisting department personnel in the discharge of their official duties to conduct inspections and investigations, as described in §295.68 of this title (relating to Compliance: Inspections and Investigations);

(9) maintenance of liability insurance, as described in §295.40 of this title (relating to Licensing and Registration: Insurance Requirements);

(10) proof of workers' compensation insurance issued by a company licensed to do business in this state, and written in this state on a Texas form, or evidence of self-insurance, if workers' compensation insurance is required by the specifications or owner; see §295.34(b)(4) of this title; and

(11) providing for the proper temporary storage and for the final disposal of waste asbestos within 30 days of project completion or when receiving container is full, whichever is sooner.

§295.46. Licensure: Asbestos Abatement Supervisor.

(a) Licensing requirement. An individual must be licensed as an asbestos abatement supervisor in compliance with these sections to engage in the supervision of an asbestos abatement project conducted in a public building. Such licenses are valid for a period of one year from the effective date and shall be renewable.

(b) Fee. The fee for an initial application or for an annual renewal of the license for an asbestos abatement supervisor shall be $300.

(c) Applications and renewals. Applications shall be submitted as required by §295.38 of this title (relating to Licensing and Registration: Applications and Renewals). Out-of-state applicants must comply with §295.39 of this title (relating to Licensing and Registration: Out-of-State Applicants).

(d) Qualifications. Applicants for licensing as asbestos abatement supervisors are required to provide:

(1) written documentation of at least 90 days of verifiable work experience as a trained and registered worker performed within the past 24 months. Qualifying experience includes:

(A) project site preparation and establishing the abatement containment for friable asbestos-containing building material (ACBM);

(B) use of respirators and protective equipment, personal hygiene, decontamination procedures, interpretation of air sampling results, and methods to reduce airborne fiber levels;

(C) use of engineering controls, abatement work methods and practices, and final cleanup procedures;

(D) handling of waste asbestos as part of an abatement project;

(E) removal, enclosure, or encapsulation of asbestos;

(F) work performed in an administrative capacity relating to asbestos abatement projects such as project manager, consultant, or designated person may be accepted as qualifying experience;

(G) experience as an asbestos air monitoring technician, which includes personal air sampling, regulated-area airborne asbestos sampling, aggressive sampling for final cleanup, plus on-site project record keeping documenting daily operations, controlling entry and exit from the containment, etc., may be accepted as qualifying experience, subject to time-period limitations, minimum number of abatement projects (five), or work experience. No more than 30 days may be counted as qualifiable experience under this category;

(H) work performed as an asbestos abatement supervisor or worker licensed in another state; and

(I) the burden of proof for all points of the qualifying experience is on the individual applicant. Applicants for abatement supervisor licenses must furnish contacts or sources that can fully verify the documented experience. Descriptions of abatement projects are not acceptable if the personal involvement of the applicant cannot be determined by the reviewer. If, in the opinion of the reviewing staff members, applicant experience cannot be properly and sufficiently verified, such experience must be rejected;

(2) a certificate of training from a training provider approved by or acceptable to the Texas Department of Health (department) indicating successful completion within the past 12 months of the approved course for abatement contractors and supervisors, or the current annual refresher training, as described in §295.64(c) of this title (relating to Training: Required Asbestos Training Courses);

(3) a physician's statement of the required physical examination done within the past year as described in §295.42(e)(2) of this title (relating to Registration: Asbestos Abatement Workers) and submitted on the department "Physician's Written Statement" form only;

(4) a copy of the wallet-size photo-identification card from the training course as required from all trainers in Texas in accordance with §295.65(f)(2) of this title (relating to Training: Approval of Training Courses). Persons submitting out-of-state training certificates with their applications may obtain the necessary photo-identification when attending the mandatory course on Texas asbestos rules, as required in accordance with §295.64(h) of this title;

(5) a current one-inch by one-inch photograph of the face. The photograph submitted to the department for licensing purposes must have a white background; and

(6) proof of successfully passing the department examination for asbestos contractors and supervisors, if required.

(e) Responsibilities. The asbestos abatement supervisor shall:

(1) comply with standards of operation, including Environmental Protection Agency (EPA) and Occupational Safety and Health Administration of the United States Department of Labor (OSHA) regulations, which have been adopted by reference in §295.33 of this title (relating to Adoption by Reference of Federal Standards);

(2) comply with additional work practices, as described in §295.60 of this title (relating to Operations: Abatement Practices and Procedures);

(3) maintain records at both the central office and the work site locations, as described in §295.62 of this title (relating to Operations: Recordkeeping);

(4) supply personal protection equipment and train employees who perform asbestos-related activities in the use of equipment, and to supervise their compliance;

(5) comply with standards and practices for O&M activities, as conducted for hire, according to §295.59 of this title (relating to Operations: Operations and Maintenance (O&M) Activities); and

(6) cooperate with department personnel in the discharge of their official duties to conduct inspections and investigations, as described in §295.68 of this title (relating to Compliance: Inspection and Investigations).

(f) Other duties. Abatement supervisors may also assume the duties of asbestos abatement workers or perform O&M activities affecting asbestos materials.

§295.47. Licensure: Individual Asbestos Consultant.

(a) Licensing requirements. An individual must be licensed as an asbestos consultant to design asbestos abatement projects. A company employing an individual asbestos consultant may not hire an inspector, project manager, air monitoring technician, or another individual asbestos consultant without obtaining an asbestos consultant agency license.

(1) Asbestos abatement project design includes the survey of public buildings for asbestos-containing building material (ACBM); the evaluation and selection of appropriate asbestos abatement methods; project layout; the preparation of plans, specifications and contract documents; and the review of environmental controls, abatement procedures and personal protection equipment to be employed at any time during the asbestos abatement activity, from the start through the completion dates of the project. A consultant may be hired by a building owner or the owner's agent to perform asbestos project management. If performing asbestos project management, the consultant is responsible to ensure proper procedures are used from the time of arrival of the abatement contractor on site through the completion of the removal of the containment and the departure of the contractor from the project site. Alternative control methods as referred to in 29 CFR §1926.1101(g)(6), such as dry removal or no negative air, shall be reviewed and certified in writing as at least as protective of the public health as the standard method described in §296.60 by a Certified Industrial Hygienist (CIH) or a Professional Engineer (PE) licensed in Texas and shall be approved in writing by the Chief of the Asbestos Programs Branch, Toxic Substances Control Division, prior to the start of abatement. The department will respond within 30 days of the department receiving the alternative control method with approval, notification of deficiencies, or denial.

(2) If an asbestos abatement project includes alterations to a building's structure, its electrical, mechanical, safety systems, or their components, a licensed individual consultant in conjunction with or who is a licensed Professional Engineer (PE) in Texas must prepare the appropriate plans and specifications as required by the Texas Engineering Practice Act, Article 3271a and the rules of the Texas State Board for Registration for Professional Engineers in addition to the requirement of paragraph (1) of this subsection.

(b) Scope: Individual licenses. In addition to the design of asbestos abatement projects, individual asbestos consultants are licensed to provide:

(1) asbestos surveys and assessment of the condition of ACBM;

(2) asbestos management planning, including response actions, instructions, and periodic surveillance recommendations for the control of asbestos and the conduct of operations and maintenance (O&M) programs;

(3) the collection of bulk material samples, airborne substance samples, and the planning of sampling strategies;

(4) owner-representative services for asbestos abatement projects or O&M programs, including air monitoring and project management;

(5) consultation regarding compliance with various regulations and standards, recommending abatement options, and preparations for asbestos abatement projects, specifically including technical specifications and contract documents; and

(6) the selection, fit testing, and appropriate use of personal protection equipment, and the development of engineering controls for asbestos-related activities.

(c) Fees. The fee for initial application or for annual renewal of license for asbestos consultant individuals shall be $300.

(d) Applications and renewals. Applications shall be submitted as required by §295.38 of this title (relating to Licensing and Registration: Applications and Renewals). Out-of-state applicants must comply with §295.39 of this title (relating to Licensing and Registration: Out-of-State Applicants).

(e) Eligibility for licensing. Verifiable evidence of current eligibility must be submitted with all applications for licensing as an individual asbestos consultant, which includes any one of the following:

(1) current registration in the State of Texas as an architect or professional engineer; or

(2) current highest full-qualification memberships in a national professional organization devoted to technical proficiency in environmental or occupational health protection, which includes:

(A) a published code of ethics;

(B) administration by an active board of directors; and

(C) admission requirements that specify college courses and other training, a bachelor's or higher degree, at least three years' experience in specified fields, and a qualification examination (examples include the American Academy of Industrial Hygiene and the Board of Certified Safety Professionals); or

(3) possession of a bachelor's degree in architecture, engineering, physical or natural science from an accredited four-year college or university, and including four years' experience in areas affecting environmental or occupational health matters.

(f) Qualifications. To qualify as an individual asbestos consultant, individuals shall provide:

(1) verifiable documentation of their asbestos-related activity in conjunction with at least six asbestos abatement projects covering a period of at least a year within the past seven years. All asbestos work must be documented as having been performed under the applicable licensed or accredited rules or regulations;

(2) a physician's statement of the required physical examination done within the past year as described in §295.42(e)(2) of this title (relating to Registration: Asbestos Abatement Workers) and submitted on the Texas Department of Health (department) "Physician's Written Statement" form only;

(3) proof of having successfully completed the following training courses or the necessary annual refresher training within the past 12 months at an approved training facility:

(A) the approved training course for abatement project designers, or the current annual refresher, according to §295.64(b) of this title (relating to Training: Required Asbestos Training Courses);

(B) a modified three-day training course in sampling techniques and use of monitoring equipment, as required for air monitoring technician, or the current annual refresher training according to §295.64(g) of this title (relating to Training: Required Asbestos Training Courses). The initial course is not required of certified industrial hygienists; however, the refresher is required for license renewal or any subsequent reapplication for this license; and

(C) training in asbestos surveys, as required for both licensed asbestos building inspectors and management planners, or the current annual refresher, according to §295.64(e) and (f) of this title (relating to Training: Required Asbestos Training Courses).

(4) a copy of the wallet-size photo-identification card from the training course as required from all trainers in Texas in accordance with §295.65(f)(2) of this title (relating to Training: Approval of Training Courses). Persons submitting out-of-state training certificates with their applications may obtain the necessary photo-identification when attending the mandatory course on Texas Asbestos rules, as required in accordance with §295.64(h) of this title (relating to Training: Required Asbestos Training Courses);

(5) a current one-inch by one-inch photograph of the face. The photograph submitted to the department for licensing purposes must have a white background; and

(6) proof of successfully passing the department examination for consultant/project designer, if required.

(g) Insurance. A licensed individual asbestos consultant performing work for hire must obtain professional liability coverage in the amount of $1 million for errors and omissions, or be covered under the consultant's employer's policy, as specified in §295.40 of this title (relating to Licensing and Registration: Insurance Requirements).

(h) Responsibilities. The responsibilities of licensed asbestos consultants shall include the following:

(1) preserve public health and diminish or eliminate hazards or potential hazards caused by the presence of ACBM in public buildings;

(2) provide professional services to the building owner or management concerning asbestos building surveys, assessment of conditions of materials, planned operations and maintenance, compliance with work practices and standards;

(3) evaluate possible asbestos abatement projects and prepare plans, specifications, schedules, and contract options for abatement projects;

(4) represent the interests of the building owner during the conduct of an asbestos abatement project, including consultation with the abatement contractor personnel, requiring compliance with regulations and specifications, requiring remedy of infractions, providing monitoring services, maintaining progress records and photographs as necessary, waste disposal, designating in writing a project manager and specifying the manager's responsibilities and authority, and providing written assurance to the building owner or operator of the final clearance of the project; and

(5) advise on the selection and use of appropriate personal protective equipment for all asbestos-related activities.

(i) Signature authority. All asbestos abatement plans and specifications must be signed on every page that addresses the scope of work and all drawings related to the abatement work. The cover page shall also include the consultant's signature, license number and license expiration date. The plans and specifications bearing the consultant's original signature shall be provided to the building owner prior to the start of the asbestos abatement. Plans and specifications that are used by another consultant, or consultant agency, to monitor a project, shall be reviewed, deletions and/or additions made, and signed in the same manner, indicating acknowledgment of their adequacy and the assumption for the responsibility related to the content contained therein.

§295.48. Licensure: Asbestos Consultant Agency.

(a) Scope: Asbestos consultant agency licenses. A company, employing an individual asbestos consultant and one or more additional asbestos consultants, inspectors, project managers, or air monitor technicians must be licensed as an asbestos consultant agency. Consultant organizations desiring to be licensed as asbestos consultant agencies shall designate one or more individuals licensed as asbestos consultants as their responsible persons, who shall be either principals or employees, and who shall have responsibility for the organization's asbestos activity.

(b) Authorization and conditions. A licensed asbestos consultant agency is specifically authorized to employ asbestos consultants, asbestos project managers, asbestos inspectors and management planners, and air monitoring technicians who are currently licensed under these rules to assist in the conduct and fulfillment of the agency's asbestos consultation activity, as necessary. As a condition of licensure, an asbestos consultant agency must notify the department in writing of the addition or deletion of the designated individual asbestos consultant within 10 days of any changes.

(c) Fee. The fee for an initial application or for an annual renewal of license for an asbestos consultant agency is $200.

(d) Applications and renewals. Applications and renewals shall be submitted as required by §295.38 of this title (relating to Licensing and Registration: Applications and Renewals). Out-of-state applicants must comply with §295.39 of this title (relating to Licensing and Registration: Out-of-State Applicants).

(e) Qualifications. Applicants for licensing as an asbestos consultant agency shall submit as applicable:

(1) professional liability insurance coverage for errors and omissions in the amount of $1 million to cover the asbestos consultants and inspectors in its employ; and

(2) if the applicant is situated outside the State of Texas, a certificate of authority issued by the Texas Secretary of State, authorizing the corporation to do business in the state.

(f) Responsibilities. A licensed asbestos consultant agency shall be responsible for:

(1) employing generally accepted principles and practices in designing asbestos abatement projects;

(2) monitoring and observing asbestos abatement projects for general compliance with the contract documents, specifications, and relevant regulations;

(3) reviewing asbestos disposal documentation to account for and confirm adequate waste disposal; and

(4) complying with the responsibilities for the individual license as listed in §295.47(h) of this title (relating to Licensure: Individual Asbestos Consultant).

§295.53. Licensure: Asbestos Management Planner Agency.

(a) Licensing. A company, employing an individual management planner and one or more additional management planners or inspectors must be licensed as an asbestos management planner agency.

An applicant desiring to be an asbestos management planner agency shall designate one or more individuals licensed as asbestos management planners as their responsible persons, who shall have responsibility for the asbestos activity.

(b) Scope. The agency may perform all responsibilities allowed an individual management planner and may also perform surveys if the appropriate individuals are licensed to do so.

(c) Authorization and conditions. A licensed management planner agency is specifically authorized to employ asbestos management planners and asbestos inspectors who are currently licensed under these sections to assist in the conduct and fulfillment of the agency's asbestos management planning activity, as necessary. As a condition of licensure, an asbestos management planner agency must comply with the following:

(1) any office, established within the state, that conducts asbestos management planning activities must have at least one licensed asbestos management planner in residence who is responsible for such activities. Offices that do not conduct asbestos management planning activities and do not advertise such services are exempt from this requirement;

(2) notify the department in writing of any additions or deletions of responsible individual asbestos management planners within 10 days of such occurrences;

(3) refrain entirely from asbestos management planning activity at any office during any period without the active employment of at least one responsible individual licensed as an asbestos management planner at that location; and

(4) refrain entirely from creating a conflict of interest by not performing as an asbestos abatement contractor doing asbestos abatement or operations and maintenance activities and acting as a management planner preparing the survey or management plans for the same public building project.

(d) Fee. The initial and renewal fee for a management planner agency is $200.

(e) Applications and renewals. Applications and renewals shall be submitted as required by §295.38 of this title (relating to Licensing and Registration: Applications and Renewals). Out-of-state applicants must comply with §295.39 of this title (relating to Licensing and Registration: Out-of-State Applicants).

(f) Qualification for licensing. Applicants for licensing as an asbestos management planner agency shall submit the following:

(1) professional liability insurance coverage for errors and omissions in the amount of $1 million to cover the asbestos management planners and inspectors in its employ; and

(2) if the applicant is situated outside the State of Texas, a certificate of authority issued by the Texas Secretary of State, authorizing the corporation to do business in this state.

(g) Responsibilities. A licensed asbestos management planner agency shall be responsible for:

(1) employing generally accepted principles and practices in performing asbestos surveys and producing asbestos management plans;

(2) complying with standards of operation, as described in §295.58 of this title (relating to Operations: General Requirements); and

(3) complying with the responsibilities for the individual licenses as listed in §295.50 of this title (relating to Licensure: Asbestos Inspector) and §295.51 of this title (relating to Licensure: Individual Asbestos Management Planner).

§295.54. Licensure: Asbestos Laboratory.

(a) Licensing requirement. A person must be licensed in compliance with the provisions of this section to provide polarized-light microscopy (PLM), phase contrast microscopy (PCM), or transmission electron microscopy (TEM) analysis of bulk or air samples collected in public buildings. Branch offices, which perform laboratory analysis, must fulfill the same equipment and operational standards as the main office which has been licensed, and must be separately licensed and accredited in accordance with subsection (d) of this section for the type of analysis they will be performing. The license may not be transferred to another company which has bought the licensed laboratory. A new license must be applied for within 60 days of change of ownership. Laboratories which change their name must notify the department within 60 days of the change, send a processing fee of $20 and a name change application. An applicant desiring to be an asbestos laboratory shall designate one or more individuals as their responsible persons, who shall have responsibility for the asbestos activity.

(b) Fee. The fee for an initial application or for an annual renewal of the license for an asbestos laboratory shall be $200.

(c) Applications and renewals. Applications shall be submitted as required by §295.38 of this title (relating to Licensing and Registrations: Applications and Renewals). Out-of-state applicants must comply with §295.39 of this title (relating to Licensing and Registration: Out-of-State Applicants).

(d) Laboratory accreditation and proficiency. To be eligible for licensure, applicants must submit evidences of accreditation or proficiency of at least one of the following:

(1) accreditation by the National Voluntary Laboratory Accreditation Program (NVLAP) for bulk analysis by polarized-light microscopy;

(2) accreditation by the NVLAP for analysis of airborne asbestos by transmission electron microscopy;

(3) accreditation as an industrial hygiene laboratory by the American Industrial Hygiene Association (AIHA) and participation in the Proficiency Analytical Testing (PAT) program for analysis of airborne fibers by phase-contrast microscopy (PCM);

(4) proficiency according to the standards of the AIHA PAT Program, which includes quarterly proficiency testing for airborne fibers by PCM and a quality assurance/quality control program as required by the NIOSH method 7400, issue 2, August 1994; or

(5) accreditation of the individual laboratory analysts through the AIHA Asbestos Analyst Registry (AAR) and a quality assurance/quality control program as required by the NIOSH method 7400, issue 2, August 1994.

(e) Limitations. Limits which are placed on the type of services that an asbestos laboratory can perform are as follows.

(1) A laboratory may analyze bulk samples only if so accredited by NVLAP.

(2) A laboratory may analyze samples by transmission electron microscopy (TEM) only if accredited by NVLAP.

(3) A laboratory enrolled in the AIHA PAT program may perform phase-contrast microscopy analysis under controlled laboratory conditions or under field conditions, if quality-control analysis is performed on at least 10% of the samples analyzed. Records must be kept in the laboratory indicating which samples were used to meet this

10% quality-control analysis. All phase-contrast analysis shall be performed by an analyst who has received National Institute for Occupational Safety and Health (NIOSH) 582 or NIOSH 582 equivalent training. The laboratory must maintain individual records for each analyst as required by NIOSH 7400 to document the individual analyst's coefficient of variation. These records must be available on site for review by the department.

(f) Qualifications. Applicants for licensing as an asbestos laboratory shall submit as applicable:

(1) evidence of laboratory accreditation and most recently available results of PAT rounds for PCM and/or most recently available results of NVLAP sponsored proficiency tests for TEM and/or PLM in accordance with subsection (d) of this section;

(2) if the applicant is situated outside the State of Texas, a certificate of authority issued by the Texas Secretary of State, authorizing the corporation to do business in the state; and

(3) evidence of professional liability insurance for errors and omissions in the amount of at least $1 million when doing work for hire as required by §295.40 of this title (relating to Licensing and Registration: Insurance Requirements).

§295.55. Licensure: Asbestos Training Provider.

(a) Licensing requirement. A person must be licensed as an asbestos training provider in accordance with these sections to offer and to conduct asbestos training for fulfillment of specific training requirements that are prerequisite to licensing or registration by the Texas Department of Health (department).

(b) Fee. The fee for an initial application or for annual renewal of the asbestos training provider license shall be $500.

(c) Applications and renewals. Applications shall be submitted as required by §295.38 of this title (relating to Licensing and Registrations: Applications and Renewals). Out-of-state applicants must comply with §295.39 of this title (relating to Licensing and Registration: Out-of-State Applicants).

(d) Qualification. To qualify for a license, an applicant must demonstrate to the department that they meet the applicable requirements. Documentation required of applicants for licensing as asbestos training providers is as follows.

(1) Organization. There shall be a clear written description of the organization, including the address of its central office and the names and addresses of its principals, and a statement of intent concerning the courses and services to be offered. If the organization is affiliated with or the subsidiary of another, a complete description of this arrangement is also required. The organization shall designate a staff member as director in charge of asbestos training.

(2) Equipment. There shall be a description of the items of instructional equipment and accessories available for the conduct of courses. The provider shall furnish adequate equipment in good working order for each training session.

(3) Advertising. Printed bulletins, brochures, or other promotional literature must specify course prerequisites for admission, the content of the course, and requirements for successful completion.

(4) Refund and cancellation policy. Each training provider must have a written policy concerning refunds and cancellations in both Spanish and English that is made available to applicants prior to acceptance of fees for enrollment, and shall include the procedure for notification by the trainee desiring to cancel.

(5) Information requirements. The training provider shall discuss and inform each prospective trainee of the requirements for the category of license being sought, and of necessary qualifications he/she must have. The training provider shall refund any course-related fees a prospective trainee may have incurred due to a failure to provide this information to the student. Necessary qualifications include the following.

(A) Individuals not eligible for employment in the United States will not be licensed.

(B) Eligibility for refresher training courses is dependent on the effective date of the initial training.

(C) Certain asbestos training courses require the successful completion of other training courses as a condition for admission.

(6) Maximum trainee-instructor ratio. The maximum number of trainees in a lecture session shall be 40. Hands-on training groups shall have no more than 15 trainees and must be so arranged that each trainee is given individual attention.

(7) Attendance and course completion standards. Attendance and course completion standards are as follows.

(A) Attendance records in asbestos training courses shall be taken at the beginning of each four-hour segment of course instruction. Control of exits and entrances shall be maintained. A master attendance record shall be maintained for each session.

(B) A trainee is not eligible to complete a given course if more than 10% of the session has been missed, and the qualifying exam shall not be offered in such instances. The 10% includes being absent from the course at times other than allotted break periods. The records of that session shall be marked by the instructor to this effect.

(C) A training provider must certify each examination taken by a trainee as to whether a minimum score of 70% correctly answered questions was achieved. The training provider shall have a written policy concerning the administration of written examinations including allowing only one written re-examination per student for each course. The use of the same questions for both the original and re-examination is not allowed. Oral examinations are not allowed although the written examination questions and possible answers may be read to a student who must mark his answer on an answer sheet. If a student fails the written re-examination the student will have to repeat the course and pass the new examination.

(8) Training facilities. Training facilities used will be those commonly used and accepted as classrooms or conference rooms. Classrooms must have restrooms available for the students. Unacceptable classrooms are rooms which by their arrangement or contents would readily distract students, or rooms open to the general public.

(9) Training requirements. A training provider must provide each course as a separate entity, as follows.

(A) Initial training courses shall not be combined with refresher courses.

(B) Courses shall be conducted in only one language and not combined with courses taught in another language, i.e., English or Spanish. All courses shall be taught in English, except the worker course. The worker course may be taught in another language, provided the instructor is fluent in the language, and books, training materials, and examinations are in the same language.

(C) Basic or refresher courses shall be conducted in only one discipline and not be combined with courses of other disciplines, i.e., an abatement worker course and a contractor/supervisor course cannot be taught as a combined course. This prohibition against

combined training applies to hands-on training sessions as well as other aspects of the course.

(10) Methods of instruction. Standard methods of instruction are as follows.

(A) At least 50% of the classroom instruction and 100% of the hands-on instruction will be conducted with instructors presenting the material.

(B) Training films and video tapes may be used to enhance understanding, but they may not be used as a substitute for the formal class conducted by a certified instructor or the Model Accreditation Program required hands-on training. Any of these materials must support and convey the understanding of the subject to the student.

(11) Hours of operation. Classes will be conducted during scheduled hours as noted in subsection (e)(2) of this section. More than eight hours of training in a calendar day shall not be authorized.

(12) The applicant must submit the following with the application:

(A) publications listed in §295.65(d)(3) of this title (relating to Training: Approval of Training Courses); and

(B) if the applicant is a resident outside the State of Texas, a certificate of authority issued by the Texas Secretary of State authorizing the corporation to do business in the state.

(e) Conditions of issuance. The following conditions and agreements shall apply to issuance of licenses under this section.

(1) There shall be an agreement to send at least one course instructor to any meeting held by the department for the purpose of ensuring quality training courses in asbestos abatement and related topics. There will be no more than two such meetings per year.

(2) Course schedules shall be provided to the department 14 calendar days prior to the start of any course on the schedule. Requests for exceptions to the 14 calendar day rule shall be submitted in writing to the Asbestos Programs Branch Training Coordinator along with a written justification why the notice could not be submitted earlier. Approval for shorter notice will be granted, if appropriate, in writing. The minimum time for course notification, when an exception is granted, is 72 hours prior to the start of the course. If there is a cancellation of a scheduled course, the department shall be notified in writing at least 24 hours in advance. Facsimiles of cancellation notices will be accepted, but the training provider must follow-up with an original cancellation notice with the signature of an authorized representative of the training provider. In the event the instructor cannot provide written notice of cancellation at least 24 hours in advance, the instructor shall notify the department not later than two hours after the scheduled class start time and provide a written explanation of the cancellation.

(3) There shall be a description and an example of numbered certificates issued to students who attend the course and pass the examination. The uniquely numbered certificate must be in conformance with 40 CFR, Part 763, Subpart E, Appendix C, and must show the school's name, address, telephone number, name of accredited person, discipline of the training course completed, name of instructor, dates of the training course, expiration date of one year after the date upon which the person successfully completed the course or examination, as applicable, and a statement that the student passed the examination and the date it was taken. The certificate must include the signature of the instructor and the signature of the course director, principal officer, owner, or CEO, and a statement that the person receiving the certificate has completed the requisite training for asbestos accreditation under TSCA Title II. Refresher certificates require all of the above except the examination date.

(4) Trainers may present other courses or seminars relevant to asbestos activities including, but not limited to, courses on respirator training and compliance, airborne sample analysis (NIOSH 582 or equivalent), sample analysis by polarized light microscopy, construction safety (29 CFR Part 1926), hazard communications (Texas or OSHA), hazardous materials response worker (29 CFR §1910.120), local education agency-asbestos coordinator, two-hour and 16-hour AHERA awareness course or advanced hands-on for worker and supervisor, or floor tile removal. Such courses will not be accredited by the department. Any federal accreditation requirements will be complied with by the provider. Such courses and seminars may not be used for refresher training credit.

(f) Approval of course instructors and guest speakers. Course instruction must be provided by EPA or State-approved instructors. The training provider shall submit a resume of each instructor and guest speaker who will participate in the conduct of any asbestos training course to be approved by the department. Prior approval of instructors and guest speakers is required. The training provider will notify the department of additions and deletions to their instructor roster within 15 working days of actual occurrence.

(1) Instructor qualifications. Training instructors shall be qualified in any one of the categories in subparagraphs (A)-(D) of this paragraph. Training qualifications must be fully documented, and verifiable by the department. Instructors shall have current accreditation training from an Environmental Protection Agency (EPA) approved course for the discipline in which the instructor desires to teach. Instructors shall have current training from a Texas Department of Health (department) approved course for Air Monitor Technician (AMT) to teach the AMT course. The categories include:

(A) at least two years of actual hands-on experience in asbestos-related activities (abatement or consulting) with current training accreditation from Environmental Protection Agency (EPA) asbestos courses for the subject which the instructor will teach, and a high school diploma and completion of at least one teacher education course in vocational or industrial teaching;

(B) graduation from an accredited college or university with a bachelor's degree in natural or physical sciences or a related field, with one year's hands-on experience in asbestos-related activities (abatement or consulting), and current accreditation in at least one EPA asbestos course;

(C) at least three years teaching experience in Hazmat or HazWoper or EPA approved asbestos courses, and completion of one or more teacher education courses in vocational or industrial teaching from an accredited junior college or university; or

(D) a vocational teacher with certification from the Texas Education Agency with one year's hands-on experience in asbestos related activities (abatement or consulting) and current accreditation in at least one EPA asbestos course.

(2) Professional references. Each instructor application shall include three professional references attesting to teaching experience and asbestos-related qualifications. No more than one reference will be accepted from an employee of the same company as the applicant. References will be submitted on a form provided by the department which will be completed by the person providing the reference and mailed directly to the department for inclusion with the instructor application.

(3) Guest speaker qualifications. Guest speakers must be qualified on an individual basis of professional expertise for the purpose of teaching their specialty, such as law, medicine, insurance, etc.

(4) Complete applications. The department shall not accept any instructor or guest speaker application until it is complete. The department shall reject any such application that does not contain sufficient references to be fully verifiable.

(5) Responsibilities. The asbestos training provider shall be responsible for:

(A) complying with standards of operation, as described in §295.64 of this title (relating to Training: Required Asbestos Training Courses);

(B) presenting to students all course material as outlined in syllabus and as represented to the department for approval;

(C) providing a teaching environment, training, and testing as specified;

(D) cooperating with department personnel in the discharge of their official duties to conduct inspections and investigations as described in §295.68 of this title (relating to Compliance: Inspections and Investigations); and

(E) taking an aggressive approach in meeting the needs of the student to include providing course review in preparation for the examination and specialized attention to enhance comprehension.

(6) Revocation or suspension of approval. The department may revoke or suspend instructor approval if field site inspections or classroom audits indicate an instructor is not providing training that meets the requirements of the Model Accreditation Plan or these sections. Training course sponsors shall permit department representatives to attend, evaluate, and monitor any training course instructor without charge. The inspection staff is not required to give advance notice of their inspections.

(g) Record keeping Requirements for Training Providers. All records shall be kept in accordance with §295.62(b) of this title (relating to Operations: Record keeping).

§295.56. Licensure: Asbestos Transporters.

(a) Licensing. A person must be licensed as an asbestos transporter in compliance with these sections to engage in the transport of asbestos removed from a public building. The requirement for licensure does not apply to the removal of flooring materials done in accordance with §295.36 of this title (relating to Licensing and Registration: Exemption; Emergency).

(b) Fee. The fee for an initial application or for an annual renewal of the license for an asbestos transporter shall be $200.

(c) Applications and renewals. Applications shall be submitted as required by §295.38 of this title (relating to Licensing and Registrations: Applications and Renewals). Out-of-state applicants must comply with §295.39 of this title (relating to Licensing and Registration: Out-of-State Applicants).

(d) Qualifications. To qualify for a transporter license, an applicant must submit the following:

(1) if the applicant is situated outside the State of Texas, a certificate of authority issued by the Texas Secretary of State authorizing the corporation to do business in the state;

(2) pollution liability insurance in the amount of $1 million as required by §295.40 of this title (relating to Licensing and Registration: Insurance Requirements), when transporting asbestos-containing building material (ACBM) for hire; and

(3) a copy of the emergency response plan in accordance with 29 CFR §1910.120(q)(1).

(e) Responsibilities. An asbestos transporter shall:

(1) comply with federal regulations in 49 Code of Federal Regulations (CFR), Parts 100-199 titled "Hazardous Materials Regulations," 40 CFR, Part 61 titled "National Emission Standards for Hazardous Air Pollutants (NESHAP)," specifically the provisions concerning asbestos transport, and, where applicable, 40 CFR, Part 763, Subpart E, Appendix D, titled "Transport and Disposal of Asbestos Waste";

(2) qualify all employees who will be transporting, loading and unloading asbestos, in accordance with 49 CFR Parts 171-177;

(3) train and supply employees who will handle asbestos with personal protective equipment and training for its use, and supervise their compliance;

(4) establish and maintain records of transporting asbestos to disposal sites, and report annually to the department on the quantity transported to each disposal site destination;

(5) comply with department personnel in the discharge of their official duties to conduct inspections and investigations, as set forth in §295.68 of this title (relating to Compliance: Inspections and Investigations);

(6) train employees in compliance with OSHA regulations in 29 CFR, §1910.120(a)(1)(v) or 49 CFR 172 Subpart H, as applicable, in anticipation of possible spills of asbestos;

(7) ensure asbestos-containing waste material is properly labeled; and

(8) in Texas, deliver all asbestos-containing waste material for disposal to a facility from the approved list provided by the Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087. If transporting out-of-state, follow the regulations of the receiving state.

§295.58. Operations: General Requirements for Public Buildings.

(a) Responsibility. It is the responsibility of owners of public buildings or their designated agents to engage persons licensed under the provisions of these sections to perform any asbestos-related activity.

(b) Supervision.

(1) Every asbestos abatement project undertaken by a licensed contractor in a public building shall be supervised by at least one licensed asbestos abatement supervisor.

(2) Abatement supervisors shall remain on the job site and in immediate contact with those under their supervision during all periods of asbestos abatement activity.

(3) During every day of the asbestos abatement activity, from the start date and through the completion date of the project, an abatement supervisor shall be stationed within the containment area at least 25% of the time for the purpose of supervising the abatement work.

(4) Every small-scale, short-duration maintenance or repair activity that involves asbestos-containing material (ACM) in a public building shall be supervised by at least one restricted-license operations and maintenance (O&M) supervisor. Restricted-activity supervisors shall be at the job site during all periods of asbestos disturbance activity.

(5) Abatement contractors or building management licensees may also employ licensed abatement supervisors to supervise small-scale, short-duration operations and maintenance activities.

(6) Supervisors with either restricted or unrestricted licenses may be employed as asbestos abatement workers.

(7) All licensed supervisors are responsible for respirator fit testing, personal protection of the workers, security, and control of access at the job site.

(8) Supervisors licensed under these sections shall require that operations at the asbestos job site cease whenever hazardous or unlawful situations are detected, so as to effect a remedy.

(c) Employees. Each employee or agent of any licensee who must intentionally disturb, handle, or otherwise work with asbestos-containing building material (ACBM), or who shall engage in an asbestos abatement project, asbestos O&M activities or other asbestos-related activity shall have an annual physical examination, respirator fit-test, be properly equipped and trained, and be licensed or registered in accordance with these sections.

(d) Records. Each licensee shall keep a complete record of each asbestos related activity or operation in public buildings to the extent of his or her participation. Such records shall be kept for 30 years. Each licensee shall also keep a copy of all violations issued against him by the Environmental Protection Agency (EPA), Occupational Safety and Health Administration of the United States Department of Labor (OSHA), or a state agency. All required records shall be made available, upon request, for inspection and review by the department. See §295.62 of this title (relating to Operations: Recordkeeping) for specific requirements.

(e) Compliance inspections. Each licensee shall assist and cooperate with all properly identified representatives of the department in the conduct of asbestos inspections or investigations at all reasonable or necessary times, with or without prior notice. Such inspections may be made at proposed, actual, or former sites of asbestos-related activities, or of the premises, records, equipment and personnel of licensees or applicants, or of those who have held active licenses previously. It is a violation to interfere with or delay an inspection or investigation conducted by a department representative. A licensee may not deny entry to a properly identified representative of the department.

(f) Respiratory protection program. Each employer licensee shall be responsible for establishing and maintaining a written respiratory protection program, as required by OSHA regulations in 29 Code of Federal Regulations (CFR) §1910.134, as amended. Each employer shall maintain a current copy of the respiratory protection program at all project locations. A copy of 29 CFR §1910.134 is not acceptable as a written respiratory protection program. Respirators shall be properly worn at all times in containment during asbestos abatement activity.

(g) Individual respirator fit. The licensee must maintain in safe working condition a sufficient number of respirators of the types and styles approved by the National Institute of Occupational Safety and Health (NIOSH) to meet all anticipated requirements of his/her employees; and any employee whose facial characteristics, hair, mustache, or beard preclude a tight fit of a negative-pressure respirator shall not be allowed to enter the containment of an asbestos operation using this type of respirator.

(h) Sampling for asbestos. Building materials that have not been surveyed in accordance with this subsection and are suspect asbestos-containing material shall be treated as asbestos-containing material. At a minimum, three samples from each homogeneous area must be analyzed to rebut the presence of ACBM for abatement or operations and maintenance (O&M) activities, regardless of the protocol used. A survey performed by a licensed asbestos inspector must use accepted standards such as the Asbestos Hazard Emergency Response Act (AHERA) protocol specified in 40 CFR §§763.85-763.88. Only laboratories licensed by the State of Texas may be used to evaluate samples taken from within public buildings in Texas. Building materials that have not been surveyed in accordance with this subsection and are suspect asbestos-containing material shall be treated as containing asbestos.

(1) Composite sample analysis in a public building is not allowed.

(2) Results obtained by counting of asbestos samples supersede and replace the initial PLM analysis results. Results of TEM/gravimetric analysis of asbestos samples supersede and replace PLM and point counting.

(3) Each sample analyzed by visual PLM as greater than one percent asbestos is regarded as ACBM, unless that sample result is rebutted through additional analysis (i.e., point counting).

(i) Project monitoring. The asbestos consultant shall specify the protocol for monitoring the project. This will include the duties and responsibilities of the project manager and the air monitoring requirements. Only one cassette may be placed on a pump at a time.

(1) Baseline.

(A) The asbestos consultant shall insure that baseline samples are collected. This requirement shall be made a part of the specifications for an asbestos project. Air samples for analysis by Phase-contrast Microscopy will be collected under normal building conditions for any abatement activity prior to the disturbances of asbestos-containing building material (ACBM) as a part of the activity. A minimum of three samples shall be collected on 0.8 micron mixed cellulose ester (MCE) filters loaded in conducting cassettes with extension cowls. Sampling and analysis will be in accordance with the latest edition of NIOSH 7400 protocol, counting rules A. The minimum sample volume will be 1,250 liters.

(B) These samples may be analyzed or archived at the consultant's discretion. The samples shall be preserved for no less than 60 days following achieving clearance.

(2) Ambient.

(A) Ambient samples will be collected every day of the asbestos abatement activity, from the start date and through the completion date of the project and analyzed in accordance with the latest edition of NIOSH 7400 protocol, counting rules A.

(B) Ambient samples will be collected: inside containment; outside containment but inside the building (if applicable); the negative air unit discharge; immediately outside the entrance to the decontamination facility (representative of the air being drawn into the facility); outside the bag out facility; and any other locations required by the specifications.

(3) Clearance.

(A) All project activities, except O&M, shall be cleared by using aggressive air sampling. Aggressive air sampling is the use of an air blower, such as a leaf blower with the force of air unaltered and operating as it comes from the factory, directed at all surfaces in order to cause loose asbestos fibers to become airborne. The maximum levels of residual fibers shall be as cited in subparagraph (C) of this paragraph.

(B) A visual inspection of the abatement area shall be made upon completion of ACBM removal but before the containment is removed to determine if the project has been properly conducted in accordance with the specifications and with applicable state and federal regulations and confirm that all ACBM has been properly removed, encapsulated, or maintained. A final visual will be performed by the asbestos consultant, or project manager delegated by the asbestos consultant, once the abatement contractor has removed all containment and other materials from the project site.

(C) For all projects, samples may be collected and analyzed by NIOSH 7400 protocol, counting rules A, Phase-contrast Microscopy (PCM) as amended. Clearance samples shall be collected at a rate of at least 0.5 less than 16 liters per minute on 0.8 micron MCE filters in conducting cassettes with extension cowls. Minimum sample volume will be 1,250 liters. Clearance will be achieved if no sample is reported greater than 0.01 f/cc by the analysis report from the licensed laboratory. Asbestos Hazard Emergency Response Act (AHERA) protocol will be used in schools. A licensed asbestos consultant shall design the air monitoring scheme and may deviate from this subsection only if public health is maintained in accordance with all regulations. The asbestos consultant shall, upon request by the department, provide documentation and justification to support deviations and must be able to demonstrate that the design meets the requirements and intent of the applicable regulations.

(D) The visual inspection must be conducted by a properly licensed asbestos consultant. The asbestos consultant may delegate the visual inspection responsibility in writing to a licensed asbestos project manager considered experienced enough to properly perform this duty.

(E) All samples, including clearance samples, may be collected by licensed air monitoring technicians or a licensed consultant. The sample pumps will be monitored during the sampling period by the person collecting the samples, or some other means of control will be established to ensure the integrity of the samples and prevent tampering.

(j) Posting of documents. The following documents are required to be posted conspicuously by licensees involved in the project to be visible at the entrance to the regulated area and must not be covered by any other documents:

(1) the asbestos information poster issued by the department; and

(2) copies of any violations issued as evidenced by an order from the federal or state asbestos-regulating authorities within the preceding 12 months from any asbestos project.

(k) Documents required to be on-site are as follows:

(1) all current licenses and registrations, and copies of accreditation certificates, current "Physician's Written Statements", and current respirator fit-test records. The department licensed company is responsible for its employees' documents to be on-site;

(2) EPA "Green Book" for O&M work;

(3) appropriate publications as listed in §295.33 of this title (relating to Adoption by Reference of Federal Standards) for the asbestos activity which is being performed;

(4) a copy of the "Recommended Work Practices for the Removal of Resilient Floor Coverings," published by the Resilient Floor Covering Institute, if removing floor coverings using this method.

(l) Prohibitions.

(1) Solvents with a flash point of 140 degrees Fahrenheit or below shall not be used.

(2) Disposal of improperly labeled or classified asbestos-containing waste material as defined in 40 CFR Part 61, Subpart M is prohibited.

§295.59. Operations: Operations and Maintenance (O&M) Requirements for Public Buildings.

(a) Restrictions. O&M activities involving asbestos-containing building materials (ACBM) are restricted to small-scale, short-duration activities, according to 40 CFR Part 763, Subpart E, Appendix B, titled, "Work Practices and Engineering Controls for Small-Scale, Short-Durations Operations Maintenance and Repair (O&M) Activities Involving ACM," July 1, 1997, as amended. Asbestos O&M licensees shall not engage in any activity for which the primary purpose is asbestos abatement unless otherwise licensed to perform such activity.

(b) Work practices. Work practices shall include the following requirements.

(1) Employers shall be responsible for furnishing and requiring the use of respirators, protective clothing, high-efficiency particulate air filter (HEPA) vacuum machines, glove bags, and other necessary equipment for all who perform O&M activities.

(2) Only licensed persons, responding emergency personnel (police, fire, EMS, etc.), specialists required for assistance as determined by the consultant, or appropriate governmental inspectors are allowed to enter the containment, decontamination, bag-out, and temporary storage areas.

(3) Physical barriers shall be used to limit access to the work area.

(4) A mini-containment shall be constructed for containment of asbestos fibers, or a glove bag technique may be used for removal or repair of ACBM on pipes or ducts as described the references in §295.43(f)(2) of this title (relating to Licensure: Asbestos Operations and Maintenance Contractor (Restricted)).

(5) Asbestos material must be wetted with amended water and remain wet throughout the work operation.

(6) Asbestos exposed as a result of spot repairs shall be suitably enclosed or encapsulated.

(7) HEPA vacuuming or wet cleaning shall be used to decontaminate work areas and equipment until there is no visible debris.

(8) Asbestos shall be double bagged by placing asbestos-containing waste material into bags that meet the dart impact test as specified in §295.60(j)(1) of this title (relating to Operations: Abatement Practices and Procedures for Public Buildings), and shall be disposed of in accordance with §295.60 of this title and 40 CFR Part 61, Subpart M.

(9) Air clearance and visual inspections shall be performed before removing any mini-containment.

(10) The O&M book or manual developed for the building on which O&M is being performed shall be on site during all O&M operations.

§295.60. Operations: Abatement Practices and Procedures for Public Buildings.

(a) General provisions. The following general work practices are minimum requirements for protection of public health, and do not constitute complete or sufficient specifications for an asbestos abatement project. More detailed requirements in plans and specifications for a particular abatement project, or requirements that address the unusual or unique circumstances of a project, may take precedence over the provisions of this section. The specifications written for the abatement project shall also include the required air clearance procedures.

(1) Federal work practices for asbestos abatement are referenced in 40 Code of Federal Regulations (CFR) §61.145, Environmental Protection Agency (EPA) titled "Standard for Demolition and Renovation," as amended.

(2) An asbestos project consultant, who is licensed under §295.47 of this title (relating to Licensure: Individual Asbestos Consultant), may specify work practices that vary from the requirements of this section as long as the work practices specified are at least as protective of public health and are clearly described in the project notification submitted to the Texas Department of Health (department). The burden of proof for establishing equivalent protection rests with the asbestos consultant. Alternative control methods as referred to in 29 CFR §1926.1101(g)(6), such as dry removal or no negative air, shall be reviewed and certified in writing as at least as protective of the public health as the standard method described in this section by a Certified Industrial Hygienist (CIH) or a Professional Engineer (PE) licensed in Texas and shall be approved in writing by the Chief of the Asbestos Programs Branch, Toxic Substances Control Division, prior to the start of abatement. An applicant should allow 30 days from the date of submitting an alternative control method until final department approval or denial is issued.

(3) If asbestos-containing building material (ACBM) is to be removed or encapsulated, it must be within a regulated area.

(4) Only licensed persons, responding emergency personnel (police, fire, EMS, etc.), specialists required for assistance as determined by the consultant, or appropriate governmental inspectors are allowed to enter the containment, decontamination, bag-out, and temporary storage areas.

(b) Critical barriers. Regulated areas within which asbestos abatement is to be conducted shall be separated from adjacent areas by impermeable barriers such as plastic sheeting attached securely in place. All openings between containment areas and adjacent areas, including but not limited to windows, doorways, elevator openings, corridor entrances, ventilation openings, drains, ducts, grills, grates, diffusers, and skylights, shall be sealed. All penetrations that could permit air infiltration or air leaks through the barrier shall be sealed, with exceptions of the make-up air provisions and the means of entry and exit.

(c) Movable objects. All movable objects shall be removed from the containment area. Cleaning of contaminated items shall be performed if the items are to be salvaged or reused. Otherwise, they shall be properly disposed of as asbestos waste. All non-movable objects that remain in the containment area shall be covered with a minimum of four-mil plastic sheeting, secured in place.

(d) Floor and wall preparation. Floor sheeting shall completely cover all floor surfaces and consist of a minimum of two layers of sheeting with at least a dart impact of 270 grams and tear resistance of machine direction (M.D.) 512 grams and transverse direction (T.D.) of 2067 grams or at least six-mil true thickness. Floor sheeting shall extend up sidewalls at least 12 inches and be sized to minimize the number of seams. No seams shall be located at wall-to-floor joints. Sealing of all floor penetrations against water leakage is mandatory. Wall sheeting shall completely cover all wall surfaces and consist of a minimum of two layers of four-mil sheeting. Wall sheeting shall be installed so as to minimize joints and shall extend beyond wall/floor joints at least 12 inches. No seams shall be located at wall-to-wall joints. Where a fire hazard exists, all plastic sheeting will be certified by the Underwriters Laboratory (UL) as being fire retardant. Where feasible, when containment walls which exceed 260 linear feet must be constructed, a viewing window will be included in the wall for each 260 linear feet or fraction of that distance which will permit the viewing of at least 51% of the abatement work area. The window shall be constructed of plexiglass which measures approximately 18 inches by 18 inches. The bottom of the window will be at a reasonable viewing height from the outside floor.

(e) Decontamination system. A worker decontamination system in the regulated area shall be used, consisting of a clean room, shower room, and equipment room, each separated from the other and from the containment area by airlocks accessible through doorways. Except for the doorways and the make-up air provisions for the containment, the worker decontamination system shall be sealed against leakage of air. All personnel must exit the containment area through the shower before entering the clean room. No asbestos-contaminated individuals or items shall enter the clean room. The abatement contractor shall ensure that workers and supervisors:

(1) remove all gross contamination and debris from their protective clothing before leaving the containment area;

(2) remove their protective clothing in the equipment room and deposit the clothing in impermeable bags or containers labeled in accordance with subsection (j)(1) of this section;

(3) do not remove their respirators in the equipment room;

(4) shower prior to entering the clean room; and

(5) enter the clean room before changing into street clothes.

(f) Heating, ventilation, and air conditioning system equipment (HVAC). All HVAC equipment in or passing through the work area shall be shut down, and preventative measures taken to prevent accidental start-ups. All intake and exhaust openings and any seams in system components shall be sealed with at least six-mil sheeting and/or tape. All old filters shall be disposed of as asbestos waste.

(g) Warning signs. Danger signs in accordance with 29 CFR §1926.1101, shall be displayed, in both the Spanish and English languages, at all entrances to regulated areas, and on the outside of critical barriers.

(h) High-efficiency particulate air (HEPA) cleaning. Except with prior written approval from the department, cleaning procedures shall use wet methods and HEPA vacuuming. A working HEPA vacuum shall remain on-site every day of the asbestos abatement activity, from the start date and through the completion date of the project, and the unit shall have proper HEPA filter(s) in place.

(i) Containment-area ventilation. Units with HEPA filtration, and in sufficient number to provide a negative pressure of at least 0.02 inches of water column differential between the containment and outside, as measured by manometric measurements, and a minimum of four containment air changes per hour, shall be operated continuously for the duration of the project. The duration of the asbestos abatement project for the purpose of this requirement shall be considered from the time a regulated area is established through the time acceptable final clearance air-monitoring results are obtained in accordance with §295.58(i)(3) of this title relating to Operations: General Requirements for Public Buildings). These units shall exhaust filtered air to the outside of the building wherever technically feasible.

(j) Requirements for removal. The requirements for removing ACBM are that:

(1) all ACBM shall be adequately wetted prior to removal or other handling; the bags (or other suitable containers) of ACBM shall be marked per the applicable Occupational Safety and Health Administration (OSHA) and the National Emission Standards for Hazardous Air Pollutants (NESHAP) regulations and double bagged by placing asbestos-containing waste material into bags with true 6 mil thickness or may be placed in a bag or fiberboard drum that meets the following criteria: tear resistance of M.D. 300 grams, T.D. 2,068 grams, and dart impact of 216 grams. Documentation from the manufacturer shall be on site;

(2) in order to double bag the asbestos-contaminated waste material, the inner bag shall be no more than half full, excess air must be evacuated out while in containment. The top of the inner bag must be twisted closed, folded over and sealed with duct tape. The inner bag must be rinsed off or HEPA vacuumed to remove asbestos contamination and placed inside another bag (or in a fiberboard drum). If an outer bag is used, excess air shall be evacuated while in containment and the outer bag twisted closed, the top folded over and sealed with duct tape;

(3) the exterior bag or fiberboard drum shall have warning and generators labels applied as specified in 40 CFR §61.150(a)(1)(iv)-(v). Fiberboard drums shall require the application of a self-adhesive placard identifying the contents as asbestos-containing material. If a fiberboard drum is used, the top shall be sealed. It is a violation of these rules to have a container leak or break due to overfilling. Labeling of asbestos-containing waste material containers must be done prior to removal from the regulated area;

(4) in the event of a bag or fiberboard drum leak, the drum or bag shall be placed into a third bag or wrapped in a minimum of one layer of 6-mil polyethylene plastic and be sealed and labeled as stated in subsections (j)(2) and (j)(3) of this section;

(5) any additional bags or wrapping must be properly identified as being asbestos-contaminated and shall have proper generator labels attached;

(6) labeling of asbestos-containing waste material containers must be done prior to removal from the regulated area;

(7) asbestos-covered components that are going to be removed from the building may either be stripped in place and cleaned (and pass a visual inspection by the consultant), or the ACBM may be adequately wetted and the entire component wrapped in two layers of six-mil plastic or a single layer of plastic with a tear resistance of no less than M.D. 512 grams, T.D. of 2,068 grams, and a dart impact of no less than 297 grams as measured using American Society for Testing and Materials (ASTM) methods D1709, D1922, and D882, labeled and sealed, providing that:

(A) components such as sections of metal lath that cannot be safely lowered to the floor shall be stripped in place;

(B) any component that cannot be lowered or handled without presenting an excessive fiber release or safety hazard shall be stripped in place;

(C) sharp edges of components shall be protected to preclude tearing the plastic wrapping and causing injury; and

(8) ACBM shall be removed in small sections and containerized while wet. At no time shall material be allowed to accumulate on the floor or become dry. Structural components and piping shall be adequately wetted prior to wrapping in plastic sheeting for disposal;

(9) proper temporary storage of asbestos-containing waste material shall be provided (e.g., a roll-off box, dumpster or storage room lined with plastic sheeting). Final disposal of asbestos-containing waste material shall be within 30 days of project completion or when receiving container is full, whichever is sooner.

(k) Requirements for the encapsulation of ACBM.

(1) Prior to encapsulation, loose and hanging ACBM shall be removed.

(2) Filler material applied to gaps in existing material must contain no asbestos, shall adhere well to the substrate, and shall provide an adequate base for the encapsulating agent.

(3) Encapsulant shall be applied using only airless spray equipment with the nozzle pressure and tip size set according to the manufacturer's recommendations.

(4) Encapsulated materials shall be specifically designated by signs, labels, color coding, or some other mechanism to warn individuals who may in the future be required to disturb the material.

(l) Requirements for the enclosure of ACBM.

(1) Acceptable enclosure shall be airtight and of permanent construction, so that the area behind them is inaccessible.

(2) All areas of ACBM shall be wetted if they are to be disturbed during the installation of hangers, brackets, or other portions of the enclosure.

(3) Prior to enclosure, loose and hanging ACBM shall be removed.

(4) Filler material applied to gaps in existing materials shall contain no asbestos, and shall adhere well to the substrate.

(5) Enclosures for ACBM shall be specifically designated by signs, labels, color coding, or some other mechanism to warn individuals who may in the future be required to disturb the material.

(m) Safety requirements. The following safety requirements shall be in effect for an abatement project:

(1) Fire safety. A minimum of one fire extinguisher with a minimum National Fire Protection Association rating of 10BC (dry chemical) shall be placed within each abatement project containment for every 3,000 square feet, or fraction thereof, of containment area. Each fire extinguisher shall be maintained in a fully charged and operable condition.

(2) Electrical safety. All active electrical service lines within the regulated and containment areas shall be connected through ground-fault circuit interrupter (GFCI) units.

(3) Air monitoring. Air monitoring shall include personal samples according to 40 CFR Part 763, Subpart G or 29 CFR §1926.1101, base line sampling, area sampling, and clearance sampling according to §295.58(i) of this title.

§295.61. Operations: Notifications.

(a) General provision. The Texas Department of Health (department) shall be notified on a form specified by the department of any asbestos abatement activity, renovation or operations and maintenance (O&M) activity affecting asbestos-containing building materials (ACBM), or any demolition in facilities or public buildings. Notification shall be made to the department no less than ten working days (not calendar days) prior to commencement of the activity and shall be submitted on the form specified by the department. It is a requirement that the department notification form be filled out completely and properly. Blanks which do not apply shall be marked N/A. The designation of N/A will not be accepted for references requiring identification of the work site, building description, building owner, abatement and transportation companies, individuals required to be identified on the notification form, or start and completion dates in compliance with 40 CFR §61.145, and this section. National Emission Standards for Hazardous Air Pollutants (NESHAP) requirements apply equally to both the NESHAP and Texas Asbestos Health Protection Act (TAHPA) notification requirements. An original signature is required on each notification form. A copied signature is not acceptable. An invoice for the required fee for notifications will be sent from the department to the building owner.

(1) Public buildings. The department shall be notified of any demolition of a public building whether or not asbestos has

been identified. The department shall be notified of other abatement projects, disturbances, or renovations involving the abatement of any amount of asbestos within a public building.

(2) Facilities. For all facilities which are not otherwise subject to this title as public buildings, the department shall be notified of any demolition of a facility, whether or not asbestos has been identified. The department shall be notified of any abatement project, disturbance, or renovation involving the abatement of asbestos within a facility, as required by and in accordance with NESHAP.

(b) Responsibility for Proper Notification. It is the responsibility of the facility owner and/or operator to notify the department under this section. In a public building, this task may be delegated to the owner's agent such as a licensed asbestos abatement contractor or consultant and must be delegated in writing. In a demolition where a licensed abatement contractor or consultant is not required, the task may be delegated in writing to the demolition contractor or other agent. The notification must be filed on the form specified by the department. The notification shall have all information completed with no blocks left blank. The facility owner, and the agent to whom the task of notification has been delegated, are jointly and severally responsible for the accuracy and timeliness of the notification.

(c) Timeliness of notification. Written notifications of asbestos abatement activity or demolition must be hand delivered, express mailed, or postmarked at least 10 working days (not calendar days) before asbestos abatement or any other activity begins that will disturb asbestos. Notifications must be delivered by United States Postal Service, commercial delivery service, or by hand delivery. Telephone facsimile (FAX) is not permitted.

(d) Start-date change to later date. When asbestos abatement activity, demolition, renovation or O&M will begin later than the date contained in the notice, the department shall:

(1) be notified (Asbestos Programs Branch or Regional Office) of the changed start date by telephone as soon as possible but prior to the original start date. An amended notification is required in writing immediately following the foregoing notification; and

(2) be provided with a written notice of the new start date as soon as possible before, but no later than the original start date. Delivery of the updated notice by the United States Postal Service, commercial delivery service, or hand delivery is acceptable.

(e) Start-date change to earlier date. When asbestos abatement, demolition, renovation, or O&M will begin on a date earlier than the date contained in the notice, the department shall be provided with a written notice of the new start date at least ten working days before the start of work.

(f) Start-date/stop-date (completion date) requirement. In no event shall asbestos abatement, demolition, operations and maintenance (O&M), or renovation, as covered by this section, begin or be completed on a date other than the date contained in the written notice except for operation covered under subsection (g) of this section. Amendments to start date changes are to be submitted as required in subsections (d) and (e) of this section. An amendment is required for any stop dates which change by more than one work day for each week (seven calendar day period) for which the project has been scheduled and notification submitted. The building owner, or his/her delegated agent, shall provide schedule changes to the department no less than 24 hours prior to the change or completion of the project. Changes less than 10 days in advance shall be confirmed with the regional office telephonically and followed up in writing to the central office located in Austin, Texas.

(g) Consolidated notifications of small operations. Notifications involving a series of small, separate asbestos O&M or abatement operations (each less than 160 square feet or 260 linear feet or 35 cubic feet in size) may be combined by listing the information on a single notification form. Predict the combined additive amount of asbestos to be removed or stripped during a calendar year of January 1 through December 31. If the total amount is less than one asbestos reporting unit per subsection (j) of this section, and the facility is not a public building, a notification is not required. If the facility is a public building, a notification is required for any amount. The department shall be notified at least 10 working days (not calendar days) before the end of the calendar year preceding the year for which notice is being given.

(1) The building owner shall keep records of the individual O&M projects in an O&M manual. An amendment of the annual notification shall be submitted if the amount of asbestos that is abated surpasses that amount of asbestos that was predicted in the original notification by 20%. Fees will be based upon the annual notification and any amendments. The fee that is calculated for the amended notification will only be for the amount of asbestos (number of ARUs) that increased from the original notification. The $50 administrative fee will not be reassessed.

(2) The department during a routine inspection shall review the O&M manual for the amount of asbestos that has been abated and compare the amount to the amount estimated on the annual notification. If the amount of asbestos that has been abated exceeds the amount estimated in the annual notification by more than 20%, the notification will be improper.

(h) Provision for emergency. In the event of emergency renovations made necessary by an unexpected or unplanned asbestos incident, notification will be made as soon as practicable, but not later than the following work day after the occurrence of the incident. Initial notification can be made by telephone, followed by formal notification on the department's notification form. Emergencies shall be documented to the extent that the need for the emergency is evident. An emergency renovation operation means a renovation operation that was not planned, but results from a sudden, unexpected event. This event, if not immediately attended to, presents a public health or safety hazard, and is necessary to protect equipment from damage, or is necessary to avoid imposing an unreasonable financial burden. This term includes operations necessitated by non-routine failures of equipment. This term does not include immediate renovations resulting solely from a lack of adequate planning for foreseeable asbestos abatement activity.

(i) Demolition notifications. The department shall be notified of all demolitions regardless of size. If the facility is being demolished under an order of a state or local government agency, issued because the facility is structurally unsound and in danger of imminent collapse, then the department notification must be delivered as early as possible before, but not later than, the following working day of the commencement of demolition. The judgment that a structure is in danger of imminent collapse or that it is unsafe for anyone to enter shall be made by a professional engineer, registered architect, or government official. Emergencies shall be documented to the extent that the need for the emergency is evident. Public health and safety or unavoidable economic concerns are the qualifications for an emergency rather than expediency.

(j) Asbestos notification fees.

(1) Applicability. The building owner shall remit to the department a fee that is based upon the amount of asbestos removed.

(2) Payment. An invoice for the required fee will be sent to the building owner after the notification has been received by the department. Fee amounts, address, and fund numbers are included on

the form. Payment must be remitted in the manner instructed on the invoice. The facility owner is responsible for the payment of the required notification fee. The task may be delegated to an agent but the facility owner is solely responsible for timely and sufficient payment.

(3) Basis for fees. The fees shall be based on the total amount of the regulated asbestos-containing material (RACM) reported to be removed as defined in 40 CFR §61.141 or asbestos-containing building material (ACBM) to be removed as defined in §295.31(c) of this title (relating to General Provisions) and notified in accordance with §295.34(f) of this title (relating to Asbestos Management in Facilities and Public Buildings), and subsection (a) of this section. The fee shall be calculated at the rate of $25 per asbestos reporting unit (ARU). The number of ARUs associated with the removal activity is determined by dividing the number of linear feet by 260, the number of square feet reported by 160, and the number of cubic feet by 35 and adding these individual results. The sum of this addition, minus any fraction, shall then be multiplied by the $25 rate to calculate the notification fee. The minimum fee shall be $50 administration fee per original notification. The maximum fee shall be $3,000 per notification, except for schools, which shall be $300 per notification. The fee shall be assessed only for the amount of asbestos to be removed. If no asbestos is removed or if the amount of asbestos removed is less than two ARUs, only the minimum administrative fee shall be assessed. Annual notifications of maintenance activities subject to 40 CFR, Part 61, Subpart M and subsection (g) of this section, are included in the fee requirement. If less than the reported amount will be removed, a notification amendment should be provided to the department no later than five working days following the completion of the project. A refund request must be sent with the amended notification. A new invoice will be sent to the building owner which will reflect a new fee based upon the actual amount of asbestos that was removed. If the fee has been paid, refunds will be made, when appropriate, minus a $50 administrative fee. Revision of the form will require an additional fee only if the amount of reportable asbestos to be removed is increased.

(4) Nonpayment of fees. Failure to pay the required fee after an invoice has been sent shall be considered a violation and may subject the building owner to administrative penalties as listed in §295.70 of this title (relating to Compliance: Administrative Penalty). The building owner and his agent may also be subject to criminal penalties if applicable. Governmental organizations may submit a copy of the interagency transfer document or a statement that a check has been requested and is in processing. Payment must then be received no later than 60 working days following date of the invoice.

§295.62. Operations: Record Keeping.

(a) Record retention. Records and documents required by this section shall be retained for a period of 30 years from the date of project completion unless otherwise stated in this section. Such records and documents shall be made available to the department upon request. Persons ceasing to do business, shall notify the Texas Department of Health (department) in writing within 30 days of such event. The department, on receipt of such notification may instruct that the records be surrendered and may specify a repository for such records. The persons shall comply with the department's instructions within 60 days.

(b) Training providers. Licensed training providers shall comply with the following minimum record-keeping requirements.

(1) Training course materials. A training provider must retain copies of all instructional materials used in the delivery of the classroom training such as student manuals, instructor notebooks and handouts.

(2) Instructor qualifications. A training provider must retain copies of all instructors' resumes, and the documents approving each instructor issued by the department or EPA. Instructors must be approved by the department before teaching courses for accreditation purposes. A training provider must notify the department in advance whenever it changes course instructors. Records must accurately identify the instructors that taught each particular course for each date that a course is offered together with the course student roster.

(3) Examinations. A training provider must document that each person who receives an accreditation certificate for an initial training course has achieved a passing score on the written examination in accordance with §295.64(j) of this title (relating to Training: Required Asbestos Training Courses). These records must include a copy of the exam and clearly indicate the date on which the exam was administered, the training course and discipline for which the exam was given, the name of the person who proctored the exam, and the name, examination answer sheet, and test score of each person taking the exam. All information from the training course and examination, including the topic and dates of the training course, must correspond to the information listed on each person's accreditation certificate. All records required to be maintained under this section shall be available for inspection by the department immediately upon conclusion of the course and administration of the examination.

(4) Accreditation certificates. The training providers shall maintain records that document the names of all persons who have been awarded certificates, their certificate numbers, the disciplines for which accreditation was conferred, training and expiration dates, and the training location. The training provider shall maintain the records in a manner that allows verification of the required information by telephone.

(5) Verification of certificate information. Training providers of refresher training courses for accreditation must reasonably confirm that their students possess valid accreditation before granting course admission. Training providers offering the initial management planner training course must reasonably confirm that students have met the prerequisite of possessing valid inspector accreditation at the time of course admission. A valid accreditation certificate to receive refresher training would be one in the same course and not expired over 12 months.

(6) Records retention and access.

(A) The training provider shall maintain all required records for a minimum of three years.

(B) The training provider must allow the department reasonable access to all of the records required by the MAP, and to any other records which may be required by the department for the approval of asbestos training providers or the accreditation of asbestos training courses.

(C) If a training provider ceases to conduct training, the training provider shall notify the department and provide reasonable opportunity for the department to take possession of that provider's asbestos training records.

(c) Asbestos contractors.

(1) Central location. The following records and documents shall be maintained by asbestos contractors at a central location at the principal place of business for a period of 30 years and shall be made available to the department upon request:

(A) records and documents required by 29 CFR §1910, and 29 CFR §1926.1101, as amended;

(B) name, address, and asbestos certificate number of each employee, past and present, including dates of employment, and description of each employee's involvement in each asbestos project

while employed by the contractor, including name, address, location, and duration of project;

(C) copies of all regulatory agency correspondence including letters, notices, citations received and notifications made by the building owner or operator;

(D) records and documents required to be maintained under any other applicable federal, state, or local law, regulation, or ordinance;

(E) receipts and documentation of disposal of asbestos waste showing dates, locations, and amounts of asbestos waste disposed including the identification of the source of the asbestos waste and the transporter (company name or driver name, if an employee of the contractor);

(F) copies of laboratory reports and sample analysis documenting workplace and personal exposure levels, including copies of consultant's reports provided to the contractor regarding employee or clearance level monitoring; and

(G) copies of all specifications of contracts awarded for asbestos abatement projects.

(2) On site. Records and documents shall be maintained on-site at the asbestos project location for the duration of the project. Records and documents with personal references shall be made available to all persons employed at the site upon request. All on-site records and documents shall be made available to the department upon request. The records and documents covered by this paragraph include:

(A) all current licenses, registrations and accreditation certificates;

(B) a current copy of the work practice requirements;

(C) a copy of the contract or technical specifications governing the project or if no contract, location and description of operations and description of abatement procedures;

(D) a listing of all employees, by name, social security number and certificate number working on the project;

(E) a listing of each of the contractors, subcontractors and consultants on the project;

(F) a daily sign-in/out log which identified persons by name and the length of time each spent at the site;

(G) records of all on-site air monitoring;

(H) a written respirator program which conforms to requirements of 29 CFR §1910.134(b), as amended;

(I) name and address of the contractor or building owner-operator;

(J) name and address of project supervisor(s);

(K) description of personal safety practices;

(L) name and address of waste disposal site;

(M) dates of participation in the operation;

(N) a roster of registered asbestos workers employed; and

(O) current copies of the "Physician's Written Statement" and respirator fit-tests of individuals who enter a regulated area.

(d) Analytical services. Licensed providers of asbestos analytical services shall maintain copies of all records and documents for 30 years, which are required by these sections and copies of all analyses performed, including the sample identification number and analytical results, and make such documents available to the department for inspection upon request. Samples which have been taken as part of an inspection are required to be retained by the analyzing laboratory for ten days after the completion of the project or for 30 days, whichever is longer.

(e) Consultants. Licensed consultants shall maintain client files pertaining to surveys, sampling, assessment, and clearance level monitoring and copies of daily construction logs pertaining to contractor work practices and make such documents available to the department for inspection upon request. Logs for completed projects shall be maintained at the consultant's principal place of business. Logs for current projects shall be kept at the asbestos project work site until final cleanup has been certified.

(f) Operations and maintenance manual. The public building owner shall record each individual operations and maintenance activity in the manual, including the date of activity, the persons performing the activity, complete description of the activity, including methods used to prevent the emission of asbestos fibers, and the amount of asbestos removed. An updated total of the amount of asbestos abated shall be kept as a comparison to the amount estimated in the annual consolidated notification. The manual shall be made available to the department upon request.

§295.64. Training: Required Asbestos Training Courses.

(a) General provisions. Persons working with asbestos must be appropriately accredited to perform as a worker, contractor/supervisor, inspector, management planner, or project designer. In a commercial building, only EPA accreditation is required as specified in this section. In a public building, licensing is also required. Applicants for licensing or renewal must submit evidence of fulfillment of specific training requirements acceptable to the Texas Department of Health (department) under these sections. Course content, hours of instruction, refresher training, etc., are subject to change or modification. At the conclusion of each training course, the instructor shall provide the student a copy of the registration form for the state licensing examination and a copy of the examination schedule. The training provider shall also assist the applicant if needed to complete the application to include listing any special requirements of the student, such as an accommodation for a disability covered by the Americans With Disabilities Act.

(1) The provisions of the Environmental Protection Agency (EPA) Model Accreditation Plan (MAP) reaffirm the principle that each of the accredited training disciplines is distinct from the others, because each reflects a different functional job role. Training courses for all disciplines shall be in accordance with the MAP.

(2) Each initial and refresher training course offered for accreditation must be specific to a single discipline, and not combined with training for any other discipline. This prohibition against combined training also applies to hands-on training sessions.

(3) Training courses shall be conducted by training providers licensed by the department. Persons trained within the confines of this State by unlicensed providers shall not be licensed by the department.

(4) Valid training courses performed in other states, in the past 12 months, by EPA approved training providers shall be accepted by the department provided that applicants have completed an approved course in Texas asbestos law and rules from a training provider licensed by the department.

(5) The one-year period of validity following the effective date of a required asbestos course may be extended by completing the

appropriate annual refresher training. Failure to complete annual refresher training within two years of the most recent training shall require that the original course be repeated.

(6) A day of training shall consist of eight hours of classroom instruction, hands-on practical training sessions, and field trips in any suitable combination, including lunch and break periods. A total of 80 minutes in lunch and breaks are authorized for each training day as determined by the instructor. A trainee is not eligible to complete a given course if more than 10% of the session has been missed. The 10% includes being absent from the course at times other than allotted break periods. No more than eight hours of instruction as described in this paragraph are authorized within a calendar day.

(7) Courses requiring hands-on practical training must be presented in an environment that permits the trainees individually to have actual experience performing tasks associated with the appropriate asbestos activity studied. Hands-on training sessions shall maintain a student to instructor ratio of not more than 15 to one. Demonstrations and audio-visuals shall not substitute for required hands-on training.

(b) Asbestos project designer training. The project designer training course shall be at least three days in length. Persons seeking to be licensed as an asbestos consultant or accredited as a project designer under these sections shall complete the approved project design training course as described in this subsection. For work in public buildings, see also the other training required for asbestos consultants in §295.47(f)(3) of this title (relating to Licensure: Individual Consultant). Successful completion of the course shall be demonstrated by achieving a score of at least 70% correct on the written course examination. The course shall adequately address:

(1) background information on asbestos;

(2) potential health effects related to asbestos exposure;

(3) overview of abatement construction projects to include clearance of the project area;

(4) safety system design specifications, including written sampling rationale for air clearance;

(5) field trip;

(6) employee personal protective equipment;

(7) additional safety hazards;

(8) fiber aerodynamics and control;

(9) designing abatement solutions and written project design;

(10) budgeting/cost estimation;

(11) writing abatement specifications;

(12) preparing abatement drawings;

(13) contract preparation and administration;

(14) legal/liabilities/defenses;

(15) replacement;

(16) role of other consultants;

(17) occupied buildings;

(18) how to accomplish a complete visual inspection;

(19) relevant federal, Texas, and local regulatory requirements; and

(20) course review.

(c) Contractor/supervisor training. The contractor/supervisor course shall consist of at least five days of training. Persons seeking to be licensed as an asbestos abatement contractor, asbestos abatement supervisor, project manager, or operations and maintenance (O&M) (restricted) contractor/supervisor or accredited as an asbestos abatement contractor or supervisor, shall successfully complete an approved contractor/supervisor training course as described in this subsection. The course may be substituted for the asbestos abatement worker course; this substitution also applies to annual refresher training. This training shall include lectures, demonstrations, audio-visuals and hands-on training, including individual respirator fit testing, course review, and a written examination of 100 multiple-choice questions. Each trainee must score at least 70% correct on this written exam to successfully complete the course. The course shall adequately address:

(1) physical characteristics of asbestos and asbestos-containing building material (ACBM);

(2) potential health effects related to asbestos exposure;

(3) employee personal protective equipment;

(4) state-of-the-art work practices;

(5) personal hygiene;

(6) additional safety hazards;

(7) medical monitoring;

(8) air monitoring;

(9) relevant federal, state, and local regulatory requirements;

(10) establishment of respiratory protection programs and medical surveillance programs;

(11) 14 hours of hands-on training, including work area preparation, decontamination chamber construction, cleaning and disposal, and respirator fit testing and maintenance;

(12) insurance and liability issues;

(13) recordkeeping for asbestos abatement projects;

(14) supervisory techniques for asbestos abatement activities;

(15) contract specifications; and

(16) course review and manual.

(d) Asbestos abatement worker training. The worker training course shall consist of at least four days of training. Persons seeking registration or accreditation as asbestos abatement workers shall successfully complete the approved training course, as described in this subsection. Successful completion of the contractor/supervisor training course shall also be acceptable as qualification for asbestos worker applicants. Worker training courses are required to have a classroom student-instructor ratio of not more than 25 to 1 (25:1). The worker training course shall include lectures, demonstrations, hands-on training including individual respirator fit testing, course review, and a written examination consisting of 50 multiple-choice questions. Successful completion of the course shall be demonstrated by achieving a score of at least 70% correct on the written examination. The course shall adequately address:

(1) physical characteristics of asbestos and ACBM;

(2) potential health effects related to asbestos exposure;

(3) employee personal protective equipment;

(4) state-of-the art work practices;

(5) personal hygiene;

(6) additional safety hazards;

(7) medical monitoring;

(8) air monitoring;

(9) relevant federal, state, and local regulatory requirements;

(10) establishment of respiratory protective programs and medical surveillance programs;

(11) 14 hours of hands-on training, including work area preparation, decontamination chamber construction, cleaning and disposal, and respirator fit testing and maintenance; and

(12) course review and manual.

(e) Asbestos inspectors. The inspector course shall consist of at least three days of training. Persons seeking to be licensed or accredited as asbestos inspectors shall successfully complete the approved training course as described in this subsection. The inspector training course shall include lectures, demonstrations, hands-on individual respirator fit testing, course review and a written examination consisting of 50 multiple choice questions. Successful completion of the course shall be demonstrated by achieving a score of at least 70% correct on the written examination. The course shall adequately address:

(1) background information of asbestos;

(2) potential health effects related to asbestos exposure;

(3) functions/qualifications and role of inspectors;

(4) legal liabilities and defenses;

(5) understanding of building systems;

(6) public/employee/building occupant relations;

(7) pre-inspection planning, and review of previous survey records;

(8) inspecting for friable and non-friable ACBM;

(9) assessing of the condition of friable ACBM;

(10) bulk sampling/documentation of asbestos;

(11) air monitoring;

(12) employee personal protective equipment;

(13) record keeping and writing of the survey report;

(14) regulatory review;

(15) field trip, to include a building walk-through inspection at a suitable location outside of the classroom; and

(16) course review and manual.

(f) Management planners. The management planner course shall consist of at least two days of training, and has as a prerequisite, the three-day asbestos inspector course. Persons seeking to be licensed as management planners shall successfully complete the training program for inspectors, as described in subsection (d) of this section, plus the approved asbestos management planner training course, as described in this subsection. The management planner course shall include lectures, demonstration, course review and a written examination consisting of 50 multiple choice questions. Successful completion of the course shall be demonstrated by achieving a score of at least 70% correct on the written examination. The course shall adequately address:

(1) course overview;

(2) evaluation and interpretation of survey results;

(3) hazard assessment;

(4) legal implications;

(5) evaluation and selection of control options;

(6) role of other professionals;

(7) developing an operations and maintenance (O&M) plan; and

(8) regulatory review; and

(9) recordkeeping for the management planner;

(10) assembling and submitting of a management plan;

(11) financing abatement actions; and

(12) course review and manual.

(g) Air monitoring technician. Persons seeking to be licensed as air monitoring technicians shall successfully complete an approved three-day training course as described in this subsection. The air-monitoring technician course shall include lectures, demonstrations, hands-on individual respirator fit testing, course review and a written examination consisting of 50 multiple choice questions. Successful completion of the course shall be demonstrated by achieving a score of at least 70% correct on the examination. The course shall adequately address the:

(1) health effects of asbestos;

(2) asbestos regulations (state and federal);

(3) asbestos sampling and evaluation methods;

(4) calculating sampling times;

(5) time weighted average calculation;

(6) calibration of air sample pumps;

(7) sample logs and records;

(8) compliance testing;

(9) clearance testing; and

(10) clearance procedures.

(h) Texas law and rules. Persons seeking an asbestos license or worker registration with the department who submit out-of-state training as a means of qualification must successfully complete an approved three-hour course on Texas asbestos health protection law which shall be conducted by a training sponsor licensed by the department. This requirement shall be completed prior to commencing any licensed asbestos activity within the state.

(i) Refresher training. All disciplines shall receive refresher training annually. Satisfactory completion of such training shall be a condition of renewal, and evidence of satisfactory completion shall be included in the annual renewal application. No refresher training can be accredited if the training course for licensure or registration was never completed. Refresher training courses for all disciplines shall be in accordance with the MAP and shall adequately address and include:

(1) federal and Texas regulations;

(2) state-of-the-art developments for the topic specialty of the course; and

(3) review of the training manual and key aspects of the initial training course.

(j) Examinations. Each training provider shall administer a closed book written examination to persons seeking accreditation who have completed an initial training course. Demonstration testing may also be included as part of the written examination. A person seeking initial accreditation in a specific discipline must pass the written examination for that discipline in order to receive accreditation. For example, a person seeking accreditation as an abatement project designer must pass the written examination for an abatement project designer. Training providers shall develop written examinations that conform to the following requirements for accreditation under the Toxic Substances Control Act (TSCA) Title II.

§295.65. Training: Approval of Training Courses.

(a) General provision. Asbestos training courses shall be individually approved only for those training providers currently licensed by the Texas Department of Health (department). Applications for each course shall be made separately. The department shall consider prior teaching of the course applied for as a part of the approval process.

(b) Contingent approval. Contingent approval of an asbestos training course shall be granted to an applicant after all required information and documentation submitted has been found to meet the requirements set forth in these sections for approval of the course by the department. Once the department grants contingent approval, a training provider license will be issued and its status will be regarded as contingent. The license will be valid for a one-year period after it has been issued.

(c) Full approval. Full approval of an asbestos training course and the training provider license shall be granted for a period of one year after the department has granted contingent approval, has had the opportunity to conduct an on-site observation and evaluation of the training course, its instructors and its facilities, and has determined that the applicant's asbestos training course meets the requirements set forth in these sections. Training course providers shall permit representatives of the department to attend, evaluate, and monitor any training course without charge. The department compliance inspection staff are not required to give advance notice of their inspections.

(d) Applications. An applicant for approval of an asbestos training course must submit an application in writing to the department. Within 30 working days after receiving an application, the department shall acknowledge receipt of the application and notify the applicant of any deficiency in the application. The department will approve or deny the application only upon receipt of the completed application which shall contain the following information:

(1) Initial Training Course Approval. The following minimum information is required for approval of initial training courses:

(A) the name and address of the licensed training provider who will present the course, and the name and phone number of the responsible individual;

(B) the type of course for which approval is being requested, including the length of training in days;

(C) a detailed outline of the course curriculum including the specific topics taught, the amount of time allotted to each topic, the amount and type of hands-on training, the name and qualifications of the individual developing the instruction program for each topic, and copies of all written materials to be distributed to the student;

(D) a description of the type of equipment owned which must be used in all full-length courses for demonstrations and/or "hands-on" exercises, including but not limited to, types of respirators, negative air units, water spray devices, protective clothing, construction materials, high efficiency particulate air (HEPA) vacuum, air purifying panel, glove bags, shower unit, water filter assembly;

(E) documentation, including photos and details of assurance that the number of instructors, the amount of equipment, and the facilities are adequate to provide the students with proper training;

(F) administration of a written multiple choice examination at the conclusion of the course. If copies of the exam are required by the department, measures to protect the confidentiality of the exam as proprietary information will be maintained by the department to the extent authorized by law;

(G) acknowledgement that the minimum grade which must be obtained on the exam for a trainee to successfully complete the course is 70% correct;

(H) a list of any other states that currently approve the training course;

(I) a copy of all course materials (student manuals, instructor notebooks, handouts, and other course related materials);

(J) a detailed statement about the development of the examination used in the course;

(K) names and qualifications of all course instructors. Instructors must have academic and/or field experience in asbestos abatement; and

(L) a description and example of the numbered certificates issued to students who attend the course and pass the examination.

(2) Refresher Training Course Approval. The following minimum information is required for approval of refresher training courses:

(A) the length of training in half-days or days.

(B) the topics covered in the course.

(C) a copy of all course materials (student manuals, instructor notebooks, handouts, and other course related materials).

(D) the names and qualifications of all course instructors. Instructors must have academic and/or field experience in asbestos abatement; and

(E) a description and an example of the numbered certificates issued to students who complete the refresher course and pass the examination, if required.

(3) Withdrawal of Training Course Approval. The following criteria are grounds for suspending or withdrawing approval from accredited training programs under §295.69 of this title (relating to Compliance: Reprimand, Suspension, Revocation). At a minimum, the criteria shall include:

(A) misrepresentation of the extent of a training course's approval by a State or EPA;

(B) failure to submit required information or notifications in a timely manner;

(C) failure to maintain requisite records;

(D) falsification of accreditation records, instructor qualifications, or other accreditation information;

(E) failure to adhere to the training standards and requirements of the EPA MAP or State Accreditation Program;

(F) an approved training course instructor, or other person with supervisory authority over the delivery of training that has been found in violation of other asbestos regulations in a manner that indicates a lack of ability, capacity or fitness to perform training duties and responsibilities. An administrative order under §295.69 of

this title or §295.70 of this title (relating to Compliance: Administrative Penalty) constitutes evidence of a failure to comply with relevant statutes or regulations; or

(G) submittal of false information as a part of the self-certification required under Unit V.B. of the revised MAP.

(e) Re-training (refresher) courses. For all disciplines except inspectors, management planners, and air monitoring technicians, a state accreditation program shall include a one-day annual refresher training course for reaccreditation. Refresher courses for inspectors shall be a half-day in length. Management planners shall attend the inspector and management planner refresher courses. Consultants shall attend an approved two-day annual refresher training course, or four separate refreshers consisting of project designer, inspector, management planner, and air monitoring technician. The inspector, management planner, and air monitoring refresher courses shall each be four hours in length. For each discipline, the refresher course shall review and include: federal, state and local regulations; state-of-the-art developments; and a review of the key aspects of the initial training course.

(f) Issuance of certificates. All training certificates shall bear the name, address, and telephone number of the licensed training facility and the name of the instructor. The training provider shall:

(1) issue certificates that bear the school's name, address, telephone number, name of accredited person, discipline of the training course completed, name of instructor, expiration date of one year after the date upon which the person successfully completed the course or examination, as applicable, and a statement that the student passed the examination and the date it was taken. The certificate must include the signature of the instructor and the signature of the course director, principal officer, owner, or CEO. Refresher certificates require all of the above except the examination date;

(2) issue a wallet-size photo-identification card, including a description of the course completed, the effective date, and the social security number of the trainee;

(3) submit the names, social security numbers (or other identifiers if the student does not wish to provide his/her social security number), one-inch by one-inch photos, taken during the course, and a group photo of the class taken at the end of the course that identifies which students did and did not pass the course, to the department within 10 working days of the completion date of each course on a form provided by the department. Digital or scanned images will be accepted. The group photograph must be no smaller than a standard 3-1/2 inches x 4-1/4 inches print; and

(4) provide student with a current one-inch by one-inch photo attached to a department application for license/registration. The photograph submitted to the department for licensing purposes must have a white background.

(g) Revocation or suspension of approval. The department may revoke or suspend approval if field site inspections indicate a training course is not providing training that meets the requirements of the model accreditation plan or these sections. Training course sponsors shall permit department representatives to attend, evaluate, and monitor any training course without charge. The inspection staff may not give advance notice of their inspections.

(h) Minimum number of instructors. Each course requiring approval according to the model accreditation plan shall require at least the minimum number of instructors for that course as specified by EPA. Only one instructor is required for courses with five or fewer students. In cases where a second instructor is required, a guest speaker can substitute for one of the required instructors. The person acting as the second instructor shall teach a minimum of two hours. Two instructors are not required for worker courses or refresher courses.

§295.69. Compliance: Reprimand, Suspension, Revocation, Probation.

(a) After notice to the licensee or registrant of an opportunity for a hearing in accordance with subsection (e) of this section, the Texas Department of Health (department) may deny or shall reprimand the licensee or registrant or modify, suspend, suspend on an emergency basis, refuse to renew, or revoke a license or registration under the Texas Asbestos Health Protection Act.

(b) If the department suspends a license on an emergency basis, the suspension is effective immediately. The department shall then provide an opportunity for a hearing in accordance with subsection (e) of this section within 20 days after the date of the emergency suspension.

(c) The department may deny or shall reprimand any licensee or registrant, or shall modify, suspend, suspend on an emergency basis, refuse to renew, or revoke a license if the licensee, registrant, or applicant engages in the behavior listed below. If a license or application has been denied, revoked or suspended for the reasons listed below, the licensee/applicant named in the revocation is not eligible to reapply for licensing for the time periods listed. If the licensee or applicant:

(1) has fraudulently or deceptively obtained or attempted to obtain a license, registration, or a contract to perform an asbestos-related activity - ineligible to reapply for three years;

(2) fails at any time to meet the qualifications for a license - ineligible to reapply until qualifications are met;

(3) fails to comply with these rules - ineligible to reapply for three years;

(4) fails to comply with any applicable federal or state standard for licensed asbestos activities - ineligible to reapply for three years;

(5) fails to maintain the records required by a federal agency or by the department for the licensed asbestos activities - ineligible to reapply for one year;

(6) falsifies the records required by a federal agency or by the department for the licensed asbestos activities - ineligible to reapply for three years; or

(7) has been convicted within the past five years of a felony or misdemeanor arising from an asbestos-related activity- ineligible to reapply for three years.

(d) The contested-case hearing provisions of the Administrative Procedure Act, Texas Government Code, Chapter 2001, shall apply to any enforcement action proposed to be taken under this section. The formal hearing procedures of the department in Chapter 1 of this title (relating to the Board of Health) shall also apply.

(e) Probation. The department may place on probation a person whose license or registration is suspended. If a suspension is probated, the department may require the person:

(1) to report regularly to the department on matters that are the basis of the probation;

(2) to limit practice to the areas prescribed by the board; or

(3) to continue or review professional education until the person attains a degree of skill satisfactory to the board in those areas that are the basis of the probation.

§295.70. Compliance: Administrative Penalty.

(a) If a person violates the Texas Asbestos Health Protection Act (Act), or a rule adopted or order issued under the Act, the Texas Department of Health (department) may assess an administrative penalty.

(b) The penalty shall not exceed $10,000 a day per violation. Each day a violation continues will be considered a separate violation. The total penalty will be the sum of all individual violation penalties.

(c) In assessing administrative penalties, the department shall consider the:

(1) history of previous violation(s);

(2) seriousness of the violation(s);

(3) hazard to the health and safety of the public; and

(4) demonstrated good faith, and any other matter which justice may require.

(d) Individual violations may be reduced or enhanced based on the considerations listed in subsection (c) of this section, or any others that justice may require.

(e) A person is subject to double the initial penalty on second finding of violation of any provision of the act or rules. Third and subsequent violations of a provision are subject to five times the initial penalty.

(f) Violations shall be placed in one of the following severity levels.

(1) Critical violation. Severity Level I covers violations that are most significant and have a direct negative impact on public health and safety. This category shall include fraud and misrepresentation. The base penalty for a Level I violation, first occurrence will not exceed $10,000 per day, per violation. Examples of Level I violations include, but are not limited to:

(A) failure to establish effective containment during abatement of friable material;

(B) permitting disposal of friable asbestos-containing building material (ACBM) at uncontrolled sites;

(C) working without a license or with improper (forged, altered, etc.) license;

(D) failure to adequately prevent public entry to potentially contaminated areas;

(E) failure to maintain material in an adequately wet condition;

(F) submitting a forged or altered training certificate in order to obtain a training provider or other license;

(G) training providers training without a license or with an improper license;

(H) training providers providing training certificates to persons who have not attended the required training course as specified by the department and/or the Model Accreditation Plan; and

(I) failure to submit a notification.

(2) Serious violation. Severity Level II covers violations that are significant and which, if not corrected, could threaten public health and safety. The base penalty for Level II violations on a first occurrence will not exceed $1,000 per day, per violation. Examples of Level II violations include, but are not limited to:

(A) working with a lapsed or suspended license;

(B) submitting an improper notification;

(C) a training provider failing to conduct a training course for the specified time period as specified in §295.64 of this title (relating to Training: Required Asbestos Training Courses);

(D) training with a lapsed training provider license. If this results in a suspension, the organization and its principals will not be allowed to be licensed for a period of one year;

(E) failure of a licensed person to maintain current training or physical; and

(F) failure to pay the required notification fee.

(3) Significant violation. Severity Level III covers violations that are of more than minor significance and, if left uncorrected, could lead to more serious circumstances. The base penalty for Level III violations on first occurrence will not exceed $100 per day, per violation. Examples of Level III violations include, but are not limited to:

(A) failure to properly complete the notification form;

(B) failure to post required documents listed in §295.58(j) of this title (relating to Operations: General Requirements for Public Buildings);

(C) failure to have worker certificate on a job site;

(D) failure of a training provider to submit information to the department regarding training course schedules or to notify the department of cancellations within the specified time periods;

(E) failure of a training provider to submit course completion information within the specified time period as described in §295.65(f)(3) of this title (relating to Training: Approval of Training Courses);

(F) a training provider exceeding the maximum trainee-instructor ratio; and

(G) failure to pay the required notification fee within 60 days from the date of the invoice.

(g) The person charged with the violation will be given the opportunity for a hearing conducted in accordance with the applicable provisions of the Administrative Procedure Act, Texas Government Code, Chapter 2001, and the department's formal hearing procedures in Chapter 1 of this title (relating to the Board of Health).

(h) The hearing regarding a proposed administrative penalty may be consolidated with another hearing on an administrative penalty.

(i) If the person charged with the violation fails to request a hearing within 30 days following receipt of a notice of violation, the commissioner of health or his/her designee may issue a default order assessing the administrative penalty.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Texas Department of Health
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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 9. TRAINING

The Texas Commission on Environmental Quality (commission) adopts an amendment to §9.1. The commission also adopts new §§9.10 - 9.17. Section 9.13 is adopted *with change* to the proposed text as published in the November 22, 2002, issue of the *Texas Register* (27 TexReg 10890). Sections 9.1, 9.10 - 9.12, and 9.14 - 9.17 are adopted *without changes* and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

Texas Government Code, Chapter 656, Subchapter C, mandates that state agencies adopt rules relating to the eligibility of employees for training and education supported by the agency and the obligations assumed by employees upon receiving the training and education. It also authorizes agencies to use public funds to provide job-related training and education for its employees and to require employees to attend job-related training. Additionally, it identifies the specific purposes of agency training and education programs, and mandates that agencies adopt policies that relate to an employee's duties following participation in an education assistance program.

SECTION BY SECTION DISCUSSION

The adopted amendments to Chapter 9, Training for Commissioners, include changing the title of the chapter to "Training" to broaden the scope of the chapter by including training for commissioners and the agency's employee training and education programs. Adopted new Subchapter A, Training for Commissioners, contains the existing sections of Chapter 9. Adopted new Subchapter B, Employee Training and Education, establishes the agency's training and education programs.

Subchapter A, Training for Commissioners

The adopted amendment to §9.1, Purpose, changes the name of the commission from the Texas Natural Resource Conservation Commission to the Texas Commission on Environmental Quality.

Subchapter B, Employee Training and Education

The adopted new §9.10, Purpose, establishes the purpose of this subchapter, which is to govern procedures applicable to the employee training and education assistance programs of the agency.

The adopted new §9.11, Definitions, establishes definitions for words and terms used in this subchapter.

The adopted new §9.12, Scope, identifies the types of opportunities available through the employee training and education assistance programs.

The adopted new §9.13, Eligibility, identifies eligibility requirements for participating in employee training and education assistance programs. In adoption, staff broadened the eligibility for participating in the agency's training program to include all employees.

The adopted new §9.14, Obligations, specifies the obligations that employees assume for participating in the employee training and education assistance programs.

The adopted new §9.15, Reimbursement, identifies the sources of funding for the employee training and education assistance programs.

The adopted new §9.16, Training Records, identifies responsibilities for maintaining a centralized training management system for all employees, as well as individual training records for employees.

Adopted new §9.17, At-Will Employment, establishes that approval to participate in agency training and education programs does not affect an employee's at-will employment status.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. "Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rulemaking does not meet the definition of "major environmental rule" because the rulemaking is not specifically intended to protect the environment or reduce risks to human health from environmental exposure and is intended to simply implement the State Employees Training Act.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking and performed a preliminary assessment of whether Texas Government Code, Chapter 2007, is applicable. The specific primary purpose of the rulemaking is to revise commission rules to comply with Texas Government Code, Chapter 656, Subchapter C. This rulemaking will substantially advance this stated purpose by providing specific procedures applicable to the employee training and education assistance programs of the agency. Accordingly, promulgation and enforcement of the rules will not burden private real property. Further, as explained in this section, the adopted rules do not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of governmental action. Consequently, the rulemaking action does not meet the definition of a takings under Texas Government Code, §2007.002(5).

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the rules are not subject to the Texas Coastal Management Program.

PUBLIC COMMENT

There was no public hearing held on the proposed rulemaking and there were no written comments submitted during the comment period which closed at 5:00 p.m., December 23, 2002.

SUBCHAPTER A. TRAINING FOR COMMISSIONERS

30 TAC §9.1

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; and TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 7, 2003.

TRD-200301613
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: March 27, 2003
Proposal publication date: November 22, 2002
For further information, please call: (512) 239-5017

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SUBCHAPTER B. EMPLOYEE TRAINING AND EDUCATION

30 TAC §§9.10 - 9.17

STATUTORY AUTHORITY

The new sections are adopted under TWC, §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and Texas Government Code, §656.048, which requires state agencies to adopt rules relating to the eligibility of the agency's administrators and employees for training and education supported by the agency and the obligations assumed by the administrators and employees on receiving the training and education.

§9.13. Eligibility.

(a) Employee training program. Employees are eligible to participate in the agency's training program to increase their job-related knowledge and skills, without regard to race, color, religion, sex, sexual orientation, age, national origin, disability, or veteran status.

(b) Education assistance program. Full-time employees may participate in the agency's education assistance program without regard to the employee's race, color, religion, sex, sexual orientation, age, national origin, disability, or veteran status, if they meet the following eligibility requirements as set forth in the agency's policies:

(1) tenure requirement;

(2) performance requirements; and

(3) conduct requirements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-5017

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CHAPTER 10. COMMISSION MEETINGS

30 TAC §10.7

The Texas Commission on Environmental Quality (commission) adopts an amendment to §10.7. Section 10.7 is adopted *without change* to the proposed text as published in the November 22, 2002 issue of the *Texas Register* (27 TexReg 10893) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

Previously existing §10.7(a) provided that the chief clerk shall make audio recordings of commission meetings which shall serve as minutes, and that the chief clerk shall keep all recordings in the commission's permanent records. Under Texas Government Code, §551.021(a), a governmental body is required to prepare and keep minutes or make a tape recording of each open meeting of the governmental body. Because of concerns over the feasibility of retaining audio recordings as permanent records, the commission adopts an amendment to the existing rule requiring audio recordings. Rather than requiring audio recordings to serve as the minutes, the rule now requires the chief clerk to prepare written minutes of each commission open meeting.

Texas Government Code, §551.021(b), requires that the minutes must state the subject of each deliberation and indicate each vote, order, decision, or other action taken. The commission adopts amended §10.7(a) to incorporate this statutory language. The adopted rule also requires that the minutes be kept in accordance with the agency's records retention schedule. Although the amendment changes the media of the minutes, the rule requires the agency to make an audio recording of each commission open meeting and retain the recording for ten years unless a longer period is required by Texas Government Code, §441.187(b). Section 441.187(b) provides that a state record may not be destroyed if any litigation, claim, negotiation, audit, open records request, administrative review, or other action involving the record is initiated before the expiration of the applicable retention period until completion of the action and resolution of all issues that arise from the action.

SECTION DISCUSSION

The adopted amendment to §10.7(a) deletes the language requiring the chief clerk to make audio recordings of commission meetings, which serve as the minutes, and deletes the language requiring the chief clerk to keep all recordings in the commission's permanent records. This deleted language is replaced with language requiring the chief clerk to prepare written minutes of each commission open meeting, which shall state the subject of each deliberation and indicate each vote, order, decision, or other action taken. Section 10.7(a) is also amended to state that the general counsel is authorized to approve the minutes, which shall be kept in accordance with the agency's records retention schedule. Previously existing §10.7(b) is redesignated as subsection (c), in order to accommodate the addition of adopted

subsection (b), which states that the agency shall make an audio recording of each commission open meeting which shall be retained for ten years after creation unless a longer retention period is required by Texas Government Code, §441.187(b). Finally, adopted subsection (c) changes "chief clerk" to "agency" in the first sentence, to more accurately reflect duties and responsibilities.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. Furthermore, it does not meet any of the four applicability requirements listed in §2001.0225(a).

A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the rulemaking is procedural in nature and revises procedures concerning minutes and recordings of commission meetings, the rulemaking does not meet the definition of a "major environmental rule."

In addition, even if the adopted rule is a major environmental rule, a regulatory impact analysis is not required because the rule does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency. This adoption does not exceed a standard set by federal law because federal law does not set standards for the media of commission minutes. This adoption does not exceed an express requirement of state law because it is authorized by Texas Government Code, §551.021. This adoption does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program because no delegation agreement addresses the media of commission minutes. Finally, this adoption does not adopt a rule solely under the general powers of the agency, but rather under Texas Government Code, §551.021.

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the adopted rule is subject to Texas Government Code, Chapter 2007. The specific primary purpose of the rulemaking is to revise commission rules relating to minutes and recordings of commission meetings. This rule will substantially advance this stated purpose by providing specific procedural requirements relating to making and keeping written minutes and recordings of commission meetings. Accordingly, promulgation and enforcement of the rule will not burden private real property. Further, as explained in this section, the adopted rule does not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of governmental action. Consequently, the rulemaking action does not meet the definition of a takings under Texas Government Code, §2007.002(5).

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the rulemaking does not relate to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Management Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq*.) and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with Texas Coastal Management Program. The rulemaking action concerns only the procedural rules of the commission, is not substantive in nature, does not govern or authorize any actions subject to the CMP, and is not itself capable of adversely affecting a coastal natural resource area (31 TAC Natural Resources and Conservation Code, Chapter 505; 30 TAC §§281.40 *et seq.*).

PUBLIC COMMENT

There was no public hearing held on the proposed rulemaking and there were no written comments submitted during the comment period which closed at 5:00 p.m., December 23, 2002.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103, which provides the commission authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules when adopting, repealing, or amending any agency statement of general applicability that interprets or prescribes law or policy, or describes the procedure or practice requirements of an agency; TWC, §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and Texas Government Code, §551.021, which requires a governmental body to prepare and keep minutes or make a tape recording of each open meeting of the body.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-5017

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CHAPTER 20. RULEMAKING

The Texas Commission on Environmental Quality (commission) adopts amendments to §20.9, Submission of Documents, and §20.15, Petition for Adoption of Rules. The commission also repeals §20.19, Working Committees and Groups. Sections 20.9, 20.15, and 20.19 are adopted *without changes* to the proposal as published in the November 22, 2002 issue of the *Texas Register* (27 TexReg 10895) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The adopted amendments and repeal are a result of the quadrennial review of this chapter (Rule Log Number 2002-014-020-AD) which was adopted in the January 3, 2003 issue of the *Texas Register* (28 TexReg 374).

SECTION BY SECTION DISCUSSION

Adopted §20.9, Submission of Documents, is reworded to amend the deadline for the submission of documents to the executive director to the time of the public meeting or the end of the comment period, which ever is later. This is necessary for a clearer understanding of document submission requirements.

Adopted §20.15, Petition for Adoption of Rules, includes an update of the agency's name. During the 77th Legislature, 2001, the agency underwent the sunset review process culminating in the enactment of House Bill (HB) 2912, which, among other things, extended the term of the agency to September 1, 2013, and changed its name to the Texas Commission on Environmental Quality. HB 2912, §18.01(a), states that: "Effective January 1, 2004: (1) the name of the Texas Natural Resource Conservation Commission is changed to the Texas Commission on Environmental Quality, and all the powers, duties, rights, and obligations of the Texas Natural Resource Conservation Commission are the powers, duties, rights and obligations of the Texas Commission on Environmental Quality. . . ."

Section 20.19, Working Committees and Groups, is repealed. This is necessary to remove rule language that is already more appropriately addressed in 30 TAC Chapter 5, Advisory Groups.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

Staff reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The principal intent of these changes is to amend Chapter 20 due to the name change of the agency from the "Texas Natural Resource Conservation Commission" to the "Texas Commission on Environmental Quality" and to revise administrative practices of the agency. The adopted amendment to §20.9 clarifies the deadline for the submission of comments and §20.19 is repealed because this language is already more appropriately addressed in another chapter. The changes are not specifically intended to protect the environment or reduce risks to human health. The changes affect the commission's administrative procedures. Therefore, these adopted rules will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission concludes that these changes do not meet the definition of major environmental rule.

The commission invited public comment regarding the draft regulatory impact analysis determination. No comments were received regarding the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

Staff conducted a takings impact assessment for these changes in accordance with Texas Government Code, Chapter 2007. The principal intent of this rulemaking is to amend Chapter 20 due to the name change of the agency from the "Texas Natural Resource Conservation Commission" to the "Texas Commission on Environmental Quality" and to revise and repeal sections relating to the commission's administrative procedures. The changes would be neither a statutory nor a constitutional taking because they do not affect private real property. Specifically, the changes only revise or repeal some of the commission's administrative procedures, and do not affect a landowner's rights in private real property by burdening private real property, nor restricting or limiting a landowner's right to property, or reducing the value of property by 25% or more beyond that which would otherwise exist in the absence of the adopted rules. Therefore, the changes will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that it is neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), nor will it affect any action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the changes are not subject to the CMP.

The commission invited public comment regarding the consistency of the rules with the CMP. No comments were received regarding the consistency of the rules with the CMP.

PUBLIC COMMENT

The commission held a public hearing on December 17, 2002. The comment period closed on December 23, 2002 and no comments were received.

30 TAC §20.9, §20.15

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-4712

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30 TAC §20.19

STATUTORY AUTHORITY

The repeal is adopted under TWC, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 239-4712

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CHAPTER 117. CONTROL OF AIR POLLUTION FROM NITROGEN COMPOUNDS

The Texas Commission on Environmental Quality (commission) adopts amended §§117.260, 117.265, 117.279, and 117.283, concerning Cement Kilns; and §117.524 and §117.570, concerning Administrative Provisions; and corresponding revisions to the state implementation plan (SIP). Sections 117.265, 117.279, 117.283, and 117.524 are adopted *with changes* to the proposed text as published in the November 8, 2002, issue of the *Texas Register* (27 TexReg 10562). Sections 117.260 and 117.570 are adopted *without changes* to the proposed text and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

On April 19, 2000 the commission adopted rules, which were published in the May 5, 2000 issue of the *Texas Register* (25 TexReg 4101), as part of the SIP control strategy for the Dallas/Fort Worth (DFW) ozone nonattainment area to achieve attainment with the national ambient air quality standard (NAAQS) for ozone. The adopted rules required portland cement kilns in Bexar, Comal, Ellis, Hays, and McLennan Counties to meet specific nitrogen oxides (NO_x) emission limits.

Under the adopted rules, owners or operators of cement kilns were given several options to meet the emission requirements in Chapter 117. Specifically, owners or operators of cement kilns have the option of complying with an emission limit measured in pounds of NO_x per ton (lbs/ton) of clinker produced. Compliance with the emission limits may be achieved on the basis of a weighted average if there are multiple kilns at the same account that are subject to the same limit. Also, owners or operators of wet-process cement kilns have a technology option in which compliance is through installation of low-NO_x burners and mid-kiln firing. Finally, owners or operators of cement kilns have the option of complying through a source cap which requires NO_x emission reductions of at least 30% from the total NO_x emissions from all cement kilns in the account's 1996 emissions inventory, on a 30-day rolling average basis.

The purpose of this adoption is to give the owners and operators of cement kilns in the affected counties additional flexibility in meeting their NO_x reduction requirements through either the use of a technology option (for dry-process cement kilns) or emission reduction credits (ERCs). In addition, owners and operators of wet-process kilns can, in lieu of mid-kiln firing, use some other form of secondary combustion which achieves equivalent levels of NO_x reductions, or can make other additions or changes to the kiln system which achieve at least a 30% reduction in NO_x emissions. Finally, owners and operators will be able to use a 90-day rolling average for determination of compliance with the source cap in lieu of the current 30-day rolling average.

The adopted amendments to the Chapter 117 cement kiln rules modify the existing rules and result in a similar level of emission reductions. Therefore, the NO_x reductions previously claimed in the DFW Attainment Demonstration SIP will, as a result of this rulemaking, be achieved through alternate, but equivalent, Chapter 117 rules. Additionally, the flexibility in these adoptions will settle a lawsuit filed by two cement companies challenging the adoption of the original cement kiln rules. If this lawsuit is settled, compliance by the regulated community is more likely, thus providing more certainty that emission reductions needed for the SIP will actually occur.

In addition, the adopted amendments to Chapter 117 and revisions to the SIP will improve implementation of Chapter 117 by correcting typographical errors, deleting unnecessary section title references, replacing ambiguous language, and deleting obsolete language.

SECTION BY SECTION DISCUSSION

The adopted amendment to §117.260, concerning Cement Kiln Definitions, will revise a reference to the Texas Natural Resource Conservation Commission (the commission's former name) for consistency with the agency's style guidelines, delete unnecessary section title references, and add definitions of indirect-firing system, low- NO_x precalciner, and secondary combustion. Subsequent definitions are renumbered to accommodate the new definitions.

The adopted amendment to §117.260 will also revise the definition of long dry kiln and long wet kiln to delete references to the kiln length because the appropriate criterion is whether or not the inlet feed to the kiln is a slurry; i.e., the kiln length is irrelevant to this determination. In addition, the adopted amendment to §117.260 will revise the definition of low-NO_x burner to include design criteria for dry-process kilns.

Finally, the adopted amendment to §117.260 will revise the definition of mid-kiln firing to specify that this term is applicable to long wet kilns and long dry kilns, and will add the phrase "or to" in order to specify that solid fuel can be delivered to an intermediate point in the kiln either vertically through a trapdoor in the kiln wall or horizontally from the end of the kiln.

The adopted amendment to §117.265, concerning Emission Specifications, will specify that the existing technology option of §117.265(c) is applicable to long wet kilns and long dry kilns. In addition, the adopted amendment to §117.265(c) will add flexibility by allowing owners and operators of wet-process kilns, in lieu of mid-kiln firing, to use some other form of secondary combustion which achieves equivalent levels of NO_x reductions, or to make other additions or changes to the kiln system which achieve at least a 30% reduction in NO_x emissions.

The adopted amendment to §117.265 will also add §117.265(d), which establishes a technology option for preheater kilns and precalciner kilns.

Finally, the adopted amendment to §117.265 will add §117.265(e), which specifies that ERCs may be used to meet the NO_x control requirements in accordance with §117.570, concerning Use of Emissions Credits for Compliance.

The adopted amendment to §117.279, concerning Notification, Recordkeeping, and Reporting Requirements, will revise §117.279(c)(1) to include a 90-day averaging period for consistency with the adopted revisions to §117.283.

The adopted amendment to §117.283, concerning Source Cap, will revise §117.283(a) - (d) from a 30-day averaging period to a 90-day averaging period for consistency with the calculation of the ozone season daily emissions in the 1996 emissions inventory, upon which the source cap is based. In addition, the adopted amendment to §117.283(a) will specify that only hourly emissions data on or after the compliance date is included in determining compliance with the source cap. The adopted amendment to §117.283 will also specify that for sources opting to use the source cap, the initial control plan is due by December 31 of the year preceding the final compliance date specified in §117.524, concerning Compliance Schedule for Cement Kilns.

The adopted amendment to §117.524 will add §117.524(b), which extends the compliance schedule until six months after the issuance of the permit for operation of a low- NO_x burner and 12 months after issuance of the permit for operation of a secondary combustion system for cement kilns in Ellis County, provided that the owner or operator has filed an application for modification of its facility to meet the requirements of 30 TAC Chapter 117, Subchapter B, Division 4 on or before May 30, 2003 (approximately two months after the effective date of the rule revisions). This is necessary due to the possibility of a hearing request on the permit application amendment, which could delay the implementation of NO_x control measures. The compliance date extension is limited to permit applications concerning only those modifications necessary to comply with the NO_x control requirements of this division.

The adopted amendment to §117.570 will add §§117.135, 117.265, and 117.283 to the sections listed in §117.570(a) for which ERCs may be used for compliance. The addition of §117.265 and §117.283 is necessary for consistency with adopted §117.265(e) and §117.283(f), and the addition of §117.135 corrects an inadvertent omission in previous rulemaking and is necessary to allow electric generating facilities in east and central Texas to use ERCs for compliance. The adopted amendment to §117.570 also corrects typographical errors in the definitions of the variables ER_{OLD} and ER_{NEW} in the figure in §117.570(d).

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The commission is adopting the amendments to Chapter 117 and revisions to the SIP to allow greater flexibility for cement kilns in the affected counties to meet NO_x emission limitations. The adopted amendments do not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state; therefore, these adopted amendments do not constitute a major environmental rule. The amendments will provide flexibility to the regulated community to allow new options for compliance while still achieving the reductions needed to achieve and maintain attainment in east and central Texas. In addition, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking is not subject to the regulatory analysis provisions of §2001.0225(b), because the adopted rules do not meet any of the four applicability requirements. Specifically, the cement kiln requirements were developed in order to meet the ozone NAAQS set by the United States Environmental Protection Agency (EPA) under the Federal Clean Air Act (FCAA), §109 (42 United States Code (USC), §7409), and therefore meet a federal requirement. Provisions of 42 USC, §7410, require states to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. This rulemaking would provide flexibility to help ensure that the reductions needed are actually accomplished. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, 382.016, 382.017, and 382.051(d), as well as under 42 USC, §7410(a)(2)(A). The commission received no comments on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the adopted rules under Texas Government Code, §2007.043. The specific purposes of this rulemaking are to allow greater flexibility for cement kilns in the affected counties to meet NO_x emission limitations, achieve reductions in ozone formation in the DFW ozone nonattainment area, help bring DFW into compliance with the air quality standards established under federal law as NAAQS for ozone, and maintain air quality in east and central Texas. Promulgation and enforcement of the rules will not burden private real property. The adopted rulemaking does not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, the adopted rulemaking does not meet the definition of a takings under Texas Government Code, §2007.002(5). Although the adopted rulemaking does not directly prevent a nuisance or prevent an immediate threat to life or property, it does prevent a real and substantial threat to public health and safety, and partially fulfills a federal mandate under USC, §7410. Specifically, the emission limitations and control requirements within this proposal were developed in order to meet the ozone NAAQS set by the EPA under USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rulemaking is to implement a NO_x strategy which is necessary for the DFW area to meet the air quality standards established under federal law and to maintain air quality in east and central Texas. Consequently, the exemption which applies to this rulemaking is that of an action reasonably taken

to fulfill an obligation mandated by federal law. Therefore, these adopted rules will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found that the adoption is a rulemaking identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11 and therefore, required applicable goals and policies of the Coastal Management Program (CMP) to be considered during the rulemaking process.

The commission prepared a consistency determination for the adopted rules under 31 TAC §505.22 and found that the adopted rulemaking is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants will be authorized as a result of these rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR. Therefore, in compliance with §505.22(e), this rulemaking action is consistent with CMP goals and policies. The commission received no comments on the consistency of the proposed rule amendments with applicable CMP goals and policies.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMIT PROGRAM

Chapter 117 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program; therefore, owners or operators subject to the Federal Operating Permit Program must, consistent with the revision process in Chapter 122, revise their operating permits to include the revised Chapter 117 requirements for each emission unit affected by the revisions to Chapter 117 at their sites.

PUBLIC COMMENT

The commission held public hearings on this proposal in Arlington on December 5, 2002, and in Austin on December 9, 2002. The period for receipt of written comments closed on December 9, 2002.

Forty-five commenters submitted testimony on the proposal. EPA supported the rule provided that certain revisions were made. Jenkens & Gilchrist on behalf of Alamo Cement Company, Capitol Aggregates, Ltd., CEMEX, Inc., North Texas Cement Company, and TXI Operations, LP (Jenkens); Lehigh White Cement Company (Lehigh); and Thompson & Knight on behalf of Texas Lehigh Cement Company LP (Thompson) supported the proposed revisions, but suggested modifications or clarifications. Blue Skies Alliance; Downwinders at Risk (DAR); Sierra Club - Dallas Regional Group (Sierra Club); and 38 individuals opposed the proposed rules.

RESPONSE TO COMMENTS

GENERAL

DAR and an individual asked if TXI will be required to obtain an amendment to its permit to authorize the use of tires as a fuel. Blue Skies Alliance requested an opportunity to comment again after it has the results of the TXI trial burn.

Response

It should be noted that any potential permit actions are outside the scope of this rulemaking. This rule does not provide any authorization to emit for cement kilns; to the extent that additional authorization is needed for the changes made to a kiln in order to comply with the rule, the permitting rules and procedures will apply. TXI received approval to conduct a limited purpose trial burn by letter dated July 18, 2002. This approval only allowed limited testing with tires as fuel in one of TXI's wet-process kilns in Midlothian. TXI has submitted a Class 3 modification application to its permit (HW-50316-001) seeking approval to conduct a trial burn and authorization to add the tire feeding system and low-NO_x burners to its wet-process cement kilns which are authorized to burn waste- derived fuel. If TXI chooses to pursue burning of tires for fuel on a permanent basis, the application for permit modification would have to be in accordance with 30 TAC §305.69 and the permit to incorporate the results of the trial burn and authorize burning tires on an ongoing basis. A Class 3 modification application must meet the requirements of §305.69(d). There is a requirement for public notice and a 60-day public comment period. A public hearing may be granted pursuant to the requirements under 30 TAC Chapter 50, Action on Applications and Other Authorizations and Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment. No changes to the rule were made in response to this comment.

An individual recommended that the state review TXI's permit and have the necessary emission control devices placed on the stacks. The individual commented further that there are other states that have done risk assessments and trial burns and that these states know before they pass any rules what the effects will be. DAR expressed similar concerns.

Response

As noted in the response to the previous comment, any potential permit actions are outside the scope of this rulemaking. The rule proposal only addresses NO_x emissions and does not address emissions of air toxics, which are regulated by other commission rules and permits as well as a variety of federal standards. However, the Community Air Toxics Monitoring network includes a total of 44 monitors in 18 counties, with two in Ellis County, two in Dallas County, and one in Tarrant County. Should this air toxics monitoring indicate levels of concern, the commission will take appropriate action to ensure that health effects concerns are thoroughly addressed. No changes to the rule were made in response to this comment.

An individual commented that health has deteriorated since 1988 with TXI's use of waste-derived fuel and also complained of the burning smell.

Response

In order to address previous odor complaints related to sulfur compounds, the commission has required TXI's wet-process kilns to maintain an average oxygen content, as measured at the kiln exit, of at least 0.75% by volume on a five-minute average. To the commission's knowledge, this successfully resolved the odor situation. Regarding any current odor or other complaints the individual may have, the commission recommends that the individual contact the regional office in Fort Worth at (817) 588-5800 for investigation and response as appropriate. No changes to the rules were made in response to this comment.

Blue Skies Alliance, DAR, Sierra Club, and 24 individuals opposed the state giving up to $2 million to subsidize the startup

of tire burning at cement kilns. Blue Skies Alliance and DAR commented that the state should subsidize cleanups rather than pollution, and asserted that the $2 million subsidy offers an incentive to burn tires in the dirtiest kilns without giving money to put on modern pollution technology.

Response

The $2 million fund to which the commenters are referring was established by the 77th Legislature, 2001, to support the use of tire-derived fuel and to implement the settlement of lawsuits related to the SIP. Legislative funding of pollution control projects is beyond the scope of this rulemaking. The commission has made no change in response to the comments.

An individual commented that the American Concrete Pressure Pipe Association and some Texas cities have banned the use of cement made at waste-burning plants and cited three EPA studies that conclude that contaminants can leak from cement after it is cured in the presence of leaching solutions like rain water. The commenter concluded by saying that this is an unacceptable method of producing concrete if it is going to be around people, while acknowledging that "this has nothing to do with the air quality issues."

Response

As noted earlier in this preamble, the rule proposal only addresses NO_x emissions. It does not address air toxics, water quality, or waste, which are regulated by other commission rules and permits as well as a variety of federal standards. The individual's comment is beyond the scope of this rulemaking, and the commission has made no change in response to the comment.

Blue Skies Alliance commented that DFW is in violation of the one-hour and eight-hour ozone standards and asserted that the proposed rules undermine these clean air goals instead of working toward meeting them.

Response

EPA has not yet designated any areas as nonattainment with the eight-hour ozone standard and is not scheduled to do so until April 15, 2004. The commission concurs that DFW has been designated as nonattainment with the one-hour ozone standard, but disagrees that the rule revisions undermine progress toward meeting this standard. As noted earlier in this preamble, the amendments to the Chapter 117 cement kiln rules modify the existing rules and result in a similar level of emissions reductions. Therefore, the NO_x reductions previously claimed in the DFW Attainment Demonstration SIP will, as a result of this rulemaking, be achieved through alternate, but equivalent, Chapter 117 rules. Additionally, the flexibility in these adoptions will settle a lawsuit filed by two cement companies challenging the adoption of the original cement kiln rules. If this lawsuit is settled, compliance by the regulated community is more likely, thus providing more certainty that emission reductions needed for the SIP will actually occur. No changes to the rule were made in response to this comment.

Lehigh commented that there should be an expenditure limitation and that sources should not be required to expend more than $2,000 per ton of NO_x emissions reduced. Lehigh suggested that when the incremental cost for reducing emissions at a given source exceeds this level, the source should be treated as having complied with the Chapter 117 rules.

Response

The commission agrees that cost should be taken into account in the development of control strategies and has done so. However, the commission disagrees with the suggested concept of including a maximum cost (in dollars per ton of NO_x reduced) in the rules. Such a concept would not ensure that the necessary emission reductions occur. In addition, the concept raises numerous issues such as the calculation methodology, enforceability, and especially the cutoff level. For example, the commission is aware of one company that spent approximately $31,000 per ton to comply in an ozone nonattainment area while the company was in Chapter 11 bankruptcy. Finally the commission has provided the opportunity for the use of emission reduction credits in lieu of compliance with this rule. In the event that the cost of certain technologies is high, companies would be able to seek out more cost effective strategies within the area to reduce their cost of compliance. No changes to the rule were made in response to this comment.

Lehigh commented that an exemption should be included for cement plants undergoing new source review (NSR) as follows:

"An existing affected unit at a portland cement plant is exempt from NO_x emissions reductions provided that:

1. A permit for a new kiln had been issued by the Department prior to May of the designated year, as specified in §117.524 of this title (Compliance Schedule for Cement Kilns), that would replace an existing kiln system; and

2. The new kiln system would be installed using best available control technology (BACT) for NO_x emissions; and

3. The new kiln system would become fully operational within three years of May of the designated year, as specified in §117.524 of this title (Compliance Schedule for Cement Kilns); and

4. Old affected kiln systems are shut down after startup of the new kiln system."

Response

The commission disagrees with the commenter's suggestion because if implemented, the result would be no emission reductions from certain cement kilns to which technically feasible controls can be applied to accomplish the necessary emission reductions. The commenter's suggestion would also result in no reductions for up to three years after the final compliance date. In the event that an owner or operator plans to replace an existing kiln with a new kiln and therefore would prefer not to spend money on controlling the existing kiln, an option would be to use discrete emission reduction credits (DERCs) during the interim period, as allowed by §117.265(e) in conjunction with §117.570. No changes to the rule were made in response to this comment.

Section 117.260 (Definitions)

Sierra Club asserted that the revisions to the definitions of "low-NO_x burner" and "mid-kiln firing" would allow the use of an unproven, mid-kiln process.

Response

The commission disagrees with this comment. The revisions to the definition of low-NO_x burner add design criteria for dry-process kilns. This revision is unrelated to the definition of mid-kiln firing, which is being revised to specify that this term is applicable to long wet kilns and long dry kilns, and to specify that solid fuel can be delivered to an intermediate point in the kiln either vertically through the kiln wall or horizontally from the end of

the kiln. This revision is appropriate because mid-kiln firing has been demonstrated to reduce NO_x emissions, regardless of the mechanism for transporting the fuel to the mid-kiln firing point. No changes to the rule were made in response to this comment.

Lehigh commented that the rules should include an exemption stating that the requirements do not apply to startup and shutdown periods and periods of malfunction or regularly scheduled maintenance activities. Lehigh also suggested the addition of definitions for malfunction, shutdown, and startup.

Response

The commission disagrees with this comment. Emissions events and scheduled maintenance, startup, and shutdown activities are addressed by 30 TAC Chapter 101, Subchapter F (Emissions Events and Scheduled Maintenance, Startup, and Shutdown Activities). The associated definitions of emissions event, reportable emissions event, reportable quantity, and scheduled maintenance, startup, or shutdown activity are found in 30 TAC §101.1 (Definitions). No changes to the rule were made in response to this comment.

Lehigh commented that the definition of low-NO_x burner should be changed to read: "(5) a type of cement kiln burner (a device that functions as an injector of fuel and combustion air into the kiln to produce a flame that burns as close as possible to the centerline of the kiln) that has a series of channels or orifices that: (A) allow for the adjustment of the volume, velocity, pressure, and direction of the air carrying the fuel (known as primary air) and the combustion air (known as secondary air) into the kiln; and (B) impart high momentum and turbulence to the fuel stream to facilitate mixing of the fuel and secondary air."

Response

Lehigh did not explain its reasoning for suggesting this revision, nor does the suggested change appear to be necessary. Therefore, the commission has made no change in response to the comment.

Section 117.265(a)

Lehigh commented that the rule should only apply during the ozone season period, defined as May - September, which it asserted is consistent with EPA guidance provided in the NO_x federal implementation plan.

Response

The issue of seasonal controls involves significant air quality considerations. The season for the one-hour ozone standard in DFW has been defined by EPA policy by the monitoring period in 40 CFR Part 58, Appendix D as an eight-month period from March 1 - October 31. For Beaumont/Port Arthur (BPA) and Houston/Galveston (HGA), the season for the one-hour ozone standard has been defined as year-round by EPA policy by the monitoring period in 40 CFR Part 58, Appendix D. Although exceedances of the one-hour standard in DFW generally have been limited to the five months of June - October, there may be ozone and other environmental benefits to year-long NO_x control in DFW. Regional transport may move DFW NO_x southerly into areas with more of a year-long potential for ozone exceedances, such as BPA and HGA. Year- long controls could help prevent current near-nonattainment areas from becoming nonattainment under the ozone NAAQS. Locally, year-long controls would reduce nitrates in the winter season. Nitrates contribute to the winter visibility impairment in DFW sometimes called the white or brown cloud. In addition, NO_x adds to the nitrification of surface waters, an adverse ecological impact which at times may contribute to algae buildup and related problems.

Weighed against the potential approvability issues and loss of environmental benefits are the reductions in costs and effort that seasonal NO_x controls would offer. The commission expects that the cement kiln requirements will be complied with in most cases through the use of additional combustion controls, for which the expense is primarily capital rather than operating. Capital costs must be incurred regardless of the length of the compliance season. The primary benefit to the regulated community of an eight-month compliance season would be a reduced compliance effort during a portion of the normal unit outage period, when test firing and other scheduled maintenance may occur. While not minimizing these efforts, the fact that there has been a documented visibility problem in DFW in the winter in particular has to be weighed carefully against the additional effort. In this regard, year-long compliance makes sense and is consistent with the application of Chapter 117 elsewhere in the state. The commission has made no change in response to this comment.

Blue Skies Alliance, DAR, EPA, Sierra Club, and four individuals opposed changing the 30-day rolling average to a 365-day rolling average. Blue Skies Alliance, DAR, Sierra Club, and four individuals stated that a 365-day averaging period allows for pollution spikes and, in general, increased emissions. EPA similarly commented that it does not believe that a 365-day rolling average provides for adequately determining compliance with the emission limitation. EPA expressed the belief that cement production varies from month to month, given the increase in construction-related activities during the spring and summer. EPA stated that monitored ozone readings for Texas indicate that the ozone design value exceedances predominantly occur during the summer and early fall. EPA further stated that if the annual production rates are constant, then the 30-day rolling average warrants no revision. EPA stated that it considers replacing the existing 30-day rolling average period with a 365-day rolling average period as lowering the bar of compliance. EPA noted that the proposed revision would allow the commission to settle a lawsuit and stated that lawsuit settlement is not acceptable justification for the revision. EPA stated that retaining the proposed 365-day averaging period requires a technical explanation and justification using actual and historical data information, for each one of the affected sources, substantiating the change from the existing 30-day rolling average basis to the proposed 365-day rolling average basis.

Jenkens commented that cement production in Texas is characterized by almost continuous operations 365 days per year because the Texas cement industry does not typically have scheduled downtime in the winter months. Jenkens asserted that the stack emissions from each kiln remain relatively constant throughout the year. Jenkens stated that the averaging period applies to the emission specifications in §117.265(a) and the source cap in §117.283 and noted that the technology options offered in §117.265(c) and (d) are not subject to the averaging period. Jenkens stated that EPA's proposed federal implementation plan for cement kilns includes only a technology option for which no averaging period is included. Jenkens stated that the Chapter 117 rule only includes the averaging time provision for alternatives that go beyond EPA alternatives in the federal implementation plan.

Jenkens asserted that the 365-day rolling average is more technically defensible than the existing 30-day rolling average due to the variable nature of NO_x emissions from cement kilns and

that its review of actual operating data and emission data has shown that NO_x emissions are extremely variable and can spike up or down during a kiln's operation. Jenkens stated that these data would make it extremely difficult to comply with the emission specifications set out in §117.265(a) and stated that the emission specification for wet-process cement kilns in Ellis County is already 33% lower (4.0 pounds/ton vs. 6.0 pounds/ton) than the emission specification EPA determined would be capable of being met by wet-process cement kilns, on average, when EPA studied the nationwide emissions of NO_x from such kilns. Jenkens also stated that changing the averaging period will make the cement kiln rules more consistent with the NO_x rules applicable to electric generating facilities in east and central Texas (which specify compliance with the electric generating facility emission specifications on an annual (calendar year) average basis)) and recognizes the variable nature of NO_x emissions from cement kilns. Jenkens also stated that cement plants are subject to short-term NO_x emission rate limits in their air quality permits.

Response

The commission assumes that the production goal at a cement plant is to operate as continuously as possible, with downtime typically not exceeding approximately 5.0 to 10%. Review of production data indicates that cement production does not vary particularly by season. Scheduled shutdowns on the order of two weeks in length are no more likely to occur during the winter months than any other time of year because cement is easily stored in silos with a significant total storage capacity. Consequently, a cement plant can readily continue to supply cement to customers during a kiln shutdown because of the significant quantity of available cement storage capacity.

However, NO_x emissions (on a pound per ton of clinker basis) are erratic from one day to the next. This variability in pounds of NO_x per ton of clinker is smoothed out considerably when evaluated on a 30-day rolling average. There is no question that a longer averaging period represents a less difficult standard than a shorter averaging period, as confirmed by a review of available NO_x continuous emissions monitoring system (CEMS) data. Based on limited data for two cement plants, a 365-day average is approximately 5.0 to 10% higher than a 30-day average.

On September 24, 1998, in accordance with 42 USC, §7410, EPA issued a final rule to require 22 states and the District of Columbia to submit SIP revisions to prohibit specified amounts of emissions of NO_x (see the October 27, 1998 issue of the *Federal Register* (63 FR 57356)). EPA expects to finalize its October 27, 1998, NO_x SIP Call shortly (see the January 16, 2003 issue of the *Federal Register* (68 FR 2215)).

On October 21, 1998, EPA proposed federal implementation plans that may be needed if any state fails to revise its SIP to comply with the NO_x SIP Call (see the October 27, 1998 issue of the *Federal Register* (63 FR 56393)). The federal implementation plan proposes to control NO_x emissions from large stationary sources, including cement kilns. Specifically, the federal implementation plan proposed to require installation and operation of low-NO_x burners, mid-kiln firing, or "alternative control techniques," subject to approval by EPA, that achieve at least the same 30% emissions decrease as low-NO_x burners or mid-kiln firing (see the October 21, 1998 issue of the *Federal Register* (63 FR 56416)). The proposal listed emission rates for each type of kiln that would be considered to meet the "alternative control techniques" test.

Jenkens is correct that an averaging period only applies to the emission specifications in §117.265(a) and the source cap in §117.283. The commission further agrees that an averaging period obviously does not apply to the technology options available in §117.265(c) and (d). Regarding the emission specification of 4.0 pounds of NO_x per ton of clinker in §117.265(a)(1)(B) for wet-process cement kilns in Ellis County, the commission agrees that this limit is more stringent than the emission specification of 6.0 pounds of NO_x per ton of clinker that EPA determined could be achieved using low-NO_x burners or mid-kiln firing (see the October 21, 1998 issue of the *Federal Register* (63 FR 56416)). However, the commission notes that the Chapter 117 rules offer multiple alternatives to direct compliance with the emission specifications in §117.265, including the technology options available in §117.265(c) and (d), the use of emission credits in accordance with §117.570, and the source cap of §117.283.

Regarding Jenkens' comparison of the cement kiln rules' averaging period to that of the electric generating facility rules of Chapter 117, Subchapter B, Division 2, concerning Utility Electric Generation in East and Central Texas, the commission believes that there is no reason that cement kilns and electric generating facilities must have the same averaging time. The averaging period for the Subchapter B, Division 2 electric generating facility rules was established to be consistent with the driving force behind those rules. Specifically, Senate Bill 7 (SB 7), 76th Legislature, 1999, amended Texas Utilities Code (TUC), Title 2, concerning Public Utility Regulatory Act, Subtitle B, concerning Electric Utilities, and created a new TUC, Chapter 39, concerning Restructuring of Electric Utility Industry. SB 7 required the commission to implement the permitting and allowance requirements of TUC, §39.264, concerning Emissions Reductions of "Grandfathered Facilities." Section 39.264 requires electric generating facilities that were existing on January 1, 1999, and that were not subject to the requirement to obtain a permit under TCAA, §382.0518(g), to obtain a permit from the commission. These facilities are referred to as grandfathered facilities. A grandfathered facility is one that existed at the time the legislature amended the TCAA in 1971. These facilities were not required to comply with (i.e., grandfathered from) the then new requirement to obtain permits for construction or modifications of facilities that emit air contaminants.

TUC, §39.264 requires owners or operators of grandfathered electric generating facilities to apply for a permit to emit NO_x and, for coal- fired grandfathered electric generating facilities, sulfur dioxide and particulate matter through opacity limitations. These applications were due on or before September 1, 2000. A grandfathered electric generating facility that does not obtain a permit may not operate after May 1, 2003, unless the commission finds good cause for an extension. It is the intent of TUC, §39.264 that for the 12- month period beginning May 1, 2003, and for each 12-month period following, annual emissions of NO_x from grandfathered electric generating facilities not exceed 50% of the NO_x emissions reported to the commission for 1997. An annual averaging period was established in Subchapter B, Division 2, for consistency with the intent of TUC, §39.264, and the annual averaging period of 30 TAC Chapter 101, Subchapter H, Division 2, concerning Emissions Banking and Trading of Allowances, which the commission adopted on December 16, 1999 in order to implement SB 7. There is no such regulatory driver for an annual averaging period for the Chapter 117 cement kiln rules.

Regarding Jenkens' comment that cement plants are subject to short-term NO_x emission limits in air permits, the commission

notes that air permits include a maximum hourly mass emission rate for various pollutants. However, because an hourly limit must take into account the maximum short-term emission rates that could occur during normal operations, it is higher than the value that would be determined by simply dividing a long-term (annual or 30-day average) value. Therefore, the fact that cement plants are subject to short-term NO_x emission limits in air permits is not relevant.

For the reasons delineated in the preceding paragraphs, the commission has determined that a 30-day rolling average is appropriate for the emission specifications in §117.265. Therefore, the commission has deleted the proposed 365-day rolling average in §117.265(a) and retained a 30-day rolling average. For the source cap available under §117.283, the commission notes that the 2002 *Emissions Inventory Guidelines* guidance document, available at *http://www.tnrcc.state.tx.us/air/aqp/eidata/rg_360_02.PDF*, specifies that ozone season daily emissions are to be calculated as the average daily emission rates during the ozone season, which for emissions inventory purposes is defined as June 1- August 31, inclusive. The *Emissions Inventory Guidelines* guidance document further specifies that estimating the ozone season emission rates from the associated annual rates is unacceptable. These same requirements were in place for the 1996 emissions inventory, which is the baseline for the source cap of §117.283. Because the ozone season daily NO_x emission rate represents a three-month average, the commission has revised §117.283(a) - (d) to specify use of a 90-day rolling average. (While June 1 - August 31 comprises a total of 92 days, the commission has selected a 90-day average for simplicity in the source cap rather than a 92-day average.) The commission also revised the recordkeeping requirements in §117.279(c)(1) to include a 90-day averaging period for consistency with §117.283(a) - (d), and has retained the existing 30-day averaging period for consistency with §117.265(a).

Jenkens stated that the nine cement plants located in east and central Texas (in Bexar, Comal, Ellis, Hayes, and McClennan Counties) contribute only approximately 2.9% of the total point source NO_x emissions in east and central Texas. Jenkens noted that existing modeling tended to show that these plants may have an impact on the DFW ozone nonattainment area but asserted that this modeling showed that even those cement plants closest to the DFW ozone nonattainment area (i.e., those in Ellis County) have only a negligible impact on the ozone levels in the DFW ozone nonattainment area. Jenkens asserted that the ozone problems in the DFW nonattainment area are predominantly caused by mobile sources.

Response

As noted in the May 5, 2000 issue of the *Texas Register*, commission staff reviewed the 1997 emissions inventory and note that cement plants represent 26.1% of the permitted non-utility stationary NO_x sources in the 95 east and central Texas attainment counties and 13.7% of the total (permitted and grandfathered) non-utility stationary NO_x sources in these counties. Because cement plants are one of the largest stationary sources of NO_x emissions in the east and central Texas and because modeling has demonstrated that NO_x reductions from these sources are beneficial for meeting the one-hour ozone standard in DFW as well as in the east and central Texas counties, the commission believes it is appropriate to include these cement plants as part of a regional strategy to reduce NO_x emissions.

Mobile source emissions make varying contributions to ozone formation in the ozone nonattainment and near-nonattainment areas. There is no question that the largest contributor of ozone precursors in DFW is the mobile source category, but there is no basis for Jenkens' conclusion that point source controls are not beneficial in making progress toward attaining the ozone NAAQS, as demonstrated by the modeling described in the preamble to the Chapter 117 revisions published in the May 5, 2000 issue of the *Texas Register*. The commission agrees that mobile source emissions need to be reduced and notes that the SIP incorporates a variety of state and federal mobile source rules which will result in cleaner-burning gasoline, cleaner-burning diesel fuel, cleaner large gasoline engines, cleaner new motor vehicles, an improved program for inspection and maintenance of motor vehicles, and a voluntary scrappage program to retire high- emitting motor vehicles.

Jenkens asserted that the proposed rule revisions apply all of the proven cement industry NO_x reduction technology to the plants that are affected. Jenkens asserted that low-NO_x burners, low-NO_x precalciners, and secondary combustion are the only technologies that have been proven to reduce NO_x in cement manufacturing and that other technologies are either unproven or inappropriate for specific cement manufacturing processes.

Response

The commission disagrees that low-NO_x burners, low- NO_x precalciners, and secondary combustion are the only technologies that have been proven to reduce NO_x in cement manufacturing and that other technologies are either unproven or inappropriate for specific cement manufacturing processes. Indeed, Jenkens' own clients use other NO_x control technology such as CemStar. In addition, post- combustion controls are available and technically feasible as described later in this preamble in the responses to comments on §117.265(c) and §117.265(c)(1).

Section 117.265(c)

DAR and Sierra Club commented that the commission is maintaining that cement kilns located in Ellis County will be able to burn tires in addition to hazardous waste as a means to make a 30% emissions reduction, while it does not guarantee the reductions by the SIP. Sierra Club commented that the settlement agreement states that by installing a gunnax pneumatic gun, the "kiln operation is NOT required to meet the NO_x emissions limits of subsection (a) of this section," with subsection (a) referring to the 30% reduction required under the SIP. Sierra Club requested the removal of this language from the cement kiln rules, while DAR and 38 individuals likewise suggested that a 30% reduction be guaranteed. Similarly, Blue Skies Alliance commented that not requiring a cement kiln to meet the NO_x emissions in §117.265(a) is a huge loophole.

Response

On September 24, 1998, in accordance with 42 USC, §7410, EPA issued a final rule to require 22 states and the District of Columbia to submit SIP revisions to prohibit specified amounts of emissions of NO_x (see the October 27, 1998 issue of the *Federal Register* (63 FR 57356)). EPA expects to finalize its October 27, 1998, NO_x SIP Call shortly (see the January 16, 2003 issue of the *Federal Register* (68 FR 2215)).

On October 21, 1998, EPA proposed federal implementation plans that may be needed if any state fails to revise its SIP to comply with the NO_x SIP Call (see the October 27, 1998 issue of the *Federal Register* (63 FR 56393)). The federal

implementation plan proposes to control NO_x emissions from large stationary sources, including cement kilns. Specifically, the federal implementation plan proposed to require installation and operation of low-NO_x burners, mid-kiln firing, or "alternative control techniques," subject to approval by EPA, that achieve at least the same 30% emissions decrease as low-NO_x burners or mid-kiln firing (see the October 21, 1998 issue of the *Federal Register* (63 FR 56416)). The proposal listed emission rates for each type of kiln that would be considered to meet the "alternative control techniques" test.

In the October 26, 2000 issue of the *Federal Register* (65 FR 64189), EPA published information to support estimates of costs and NO_x emissions reductions potential for cement kilns in the event that EPA issues a federal implementation plan because a state fails to respond adequately to the NO_x SIP Call. The new information in the October 26, 2000 issue of the *Federal Register* is primarily contained in "NO_x Control Technologies for the Cement Industry" (September 19, 2000), which was prepared for EPA by EC/R, Incorporated. This report updates information in the "Alternative Control Techniques Document-NO_x Emissions from Cement Manufacturing" (EPA-453/R-94-004), which was the primary reference used in preparing the cement kiln portion of the October 27, 1998 proposed federal implementation plan rulemaking. The September 2000 report includes updated information on uncontrolled NO_x emissions from cement kilns and on the current use, effectiveness, and cost of NO_x controls, including low-NO_x burners, mid-kiln firing, CemStar, and selective non-catalytic reduction (SNCR). In addition to low- NO_x burners and mid-kiln firing, Chapter 5 of the September 2000 EC/R report identifies the following NO_x control techniques that are also expected to achieve, on average, at least a 30% decrease in NO_x emissions: CemStar, low-NO_x precalciner, tire-derived fuel at a preheater or precalciner, and SNCR, including biosolids injection.

Therefore, while it is true that a cement kiln which complies with the Chapter 117 cement kiln rules through a technology option is not required to meet an emission specification under §117.265(a), it is also true that EPA has determined that a 30% reduction in NO_x emissions can be achieved from cement kilns using cost-effective measures, including those identified in §117.265(c) and (d). In fact, it is uncommon for a commission air quality rule to contain a specific emission reduction percentage requirement. Rules which require a certain level of technology or a certain emission specification are much more common, and the commission then estimates the emission reductions for SIP quantification purposes. As noted previously in this preamble, TXI received approval to conduct a limited purpose trial burn by letter dated July 18, 2002. This approval only allowed limited testing with tires as fuel in one of TXI's wet-process kilns in Midlothian. Testing of TXI's Kiln No. 4 on November 22, 2002 revealed that firing four tires per minute resulted in a 64% reduction in NO_x, which is significantly better than the 30% NO_x reduction that EPA identified as the average expected reduction.

Lehigh commented on §117.265(c)(1) and stated that it should not be required to install a combination of controls (i.e., a low-NO_x burner and either mid-kiln firing, or some other form of secondary combustion achieving equivalent levels of NO_x reductions) because this is more stringent than the federal implementation plan.

Response

Lehigh is not required to install a combination of controls in order to comply with the Chapter 117 cement kiln rules. Instead, the technology option available under §117.265(c) is but one control option. In addition to the controls described in the previous paragraph, the commission notes that selective catalytic reduction (SCR) has been employed in boilers firing high sulfur fuel oil (up to 5.4% sulfur) and on cement kilns in commercial demonstrations in Sweden and Germany. Although the use of SCR may be technically challenging, SCR catalyst formulations are adjustable to reduce sensitivities to various catalyst poisons. The inorganic compounds and particulate matter present in the exhaust streams of these applications degrade the performance more rapidly than cleaner fuels and exhaust streams, thereby shortening the life of the catalysts. Although catalyst replacement cost may be higher relative to a conventional SCR, SCR is still technically feasible.

In addition to SCR, there is an oxidation technology for NO_x reduction which has been successfully applied to a variety of full-scale commercial operations. This technology, low-temperature oxidation, injects ozone as the oxidant to form dinitrogen pentoxide (N_2O_5), which is then removed in a wet scrubber. Because N_2O_5 is highly soluble in water, this process produced NO_x removal efficiencies in the 99% range (i.e., achieved reductions to two parts per million NO_x) when demonstrated commercially on a natural gas-fired boiler in Los Angeles which began operation in October 1996. More recent full-scale commercial installations include: a natural gas-fired boiler in California, achieving 85% - 90% NO_x removal; a nitric acid pickling process in Pennsylvania, achieving 90% - 95% NO_x removal; a 25 megawatt coal-fired boiler in Ohio, achieving 85% - 90% NO_x removal; and a lead smelting furnace in California, achieving 80% NO_x removal. Recent pilot project demonstrations in HGA include a wood-fired boiler in summer 2002, and a fluid catalytic cracking unit in fall 2002. A cement kiln with an existing scrubber would logically be a good candidate for NO_x scrubber technology because of the potential avoidance of capital expenditure for a new scrubber as well as the operational experience in place with the scrubber.

Finally, the federal implementation plan was formulated for the area to which it applies while the Chapter 117 rule requirements have been written to require the amount of reductions needed to achieve attainment of the NAAQS for Texas. While the federal implementation plan is useful as a reference point it does not necessarily meet the needs of the Texas SIP.

Section 117.265(d)

Thompson supported the commission's efforts to develop a more flexible technology-based approach to achieving the state's air quality goals, and specifically supported the incorporation of a technology option for dry-process cement kilns in the proposed §117.265(d). Thompson stated that this change is appropriate to recognize the demonstrated effectiveness of the more modern technology already in place at some of the cement plants in Texas.

Response

The commission appreciates the support for new §117.265(d).

Thompson stated that Texas Lehigh employs a low-NO_x precalciner at its plant in Buda, Texas, and commented that companies desiring to use the technology option should be able to confirm that their design satisfies the definition of the technology before the deadline for the notice required by proposed §117.265(d). Thompson stated that §117.265(d) or the preamble should describe how these determinations are to be obtained.

Response

The commission disagrees that §117.265(d) should include an approval mechanism. However, an affected owner or operator may direct a written request for review and confirmation that a particular design satisfies the appropriate definition to the commission's Engineering Services Team.

Section 117.273 (Continuous Demonstration of Compliance)

Thompson questioned whether a CEMS already installed to meet existing permit conditions and certified in accordance with 40 CFR Part 60, Appendix B, would be required to recertify when §117.273 becomes applicable to the source.

Response

No revisions were proposed to the existing monitoring requirements of 117.273. However, §117.273(a) requires the owner or operator to install, calibrate, operate, and maintain a CEMS or predictive emissions monitoring system (PEMS) in accordance with the schedule in §117.524. No recertification is required if the initial certification meets the requirements of §117.273 and the owner or operator is continuing to comply with the requirements of §117.273.

Thompson questioned how the owner or operator should address days when less than 24 hours of CEMS data are obtained for calculating the rolling average. As an example, Thompson cited times when cylinder gas audits are conducted or when maintenance is conducted. Thompson questioned if the production for periods when the CEM is off-line are intended to be deducted from the total number of tons of clinker produced.

Response

The commission's intention for missing data is as follows. For each kiln equipped with a CEMS, the owner or operator should either use a PEMS in accordance with §117.273(c), or the maximum emission rate as measured by hourly emission rate testing conducted in accordance with 40 CFR Part 60, Appendix A, to provide emissions compliance data during periods when the CEMS is off-line. For each kiln equipped with a PEMS, the owner or operator should use the methods specified in 40 CFR §75.46 to provide emissions substitution data.

Section 117.283 (Source Cap)

Jenkens noted that the source cap in §117.283 includes not only cement kilns in existence in 1996 as well as any cement kilns subsequently placed into service in the five affected counties. Jenkens stated that cement plants have added approximately three million tons of production capacity since 1996, representing almost a 30% increase in production capacity, while the 30% reduction in NO_x emissions is based on the cement plants' 1996 emission inventories. Jenkens stated that for any plant that has added capacity since 1996, the source cap option actually requires much more than a 30% reduction in NO_x emissions.

Response

Any cement kilns placed into service on or after December 31, 1999 are included in the source cap to allow a new cement kiln's lower NO_x emission rate to be credited toward the NO_x emission reductions needed by older cement kilns at the same account while still achieving the goal of an overall reduction in NO_x emissions. This in-plant trading between the cement kilns at a cement plant will provide more flexibility so that the owner or operator can evaluate individual units to determine the most cost- effective approach to reduce NO_x emissions. If the cement kilns placed into service on or after December 31, 1999 were not included in the source cap, the goal of an overall 30% reduction in NO_x emissions might not occur because there could be significant growth outside the source cap, as evidenced by Jenkens' comment that cement plants have added approximately three million tons of production capacity since 1996. However, the source cap is only one option for compliance; the other options do not necessarily include the newer kilns (with the exception of the weighted average provision of §117.265(b)).

Section 117.524 (Compliance Schedule for Cement Kilns)

Jenkens supported the proposed revisions to §117.524 and commented that the revisions are necessary to ensure that the affected cement plants are able to comply with the rule.

Response

The commission appreciates the support and has revised §117.524(b) to include a hyphen in the term "low-NO_x burner." In addition, the proposed §117.524(b) specifies that the permit application must be filed "within two months of the effective date of this subsection." The commission has replaced "within two months of the effective date of this subsection" with the specific date that is two months after the estimated effective date of the revisions, May 30, 2003, in order to make the deadline more apparent when reading the rule language.

Section 117.570 (Use of Emissions Credits for Compliance)

Sierra Club and 38 individuals asked that the commission reconsider its position on emissions trading and stated that emissions trading between one facility and another does not decrease emissions, but instead displaces emissions from one facility to another. Sierra Club and 38 individuals asserted that this is a practice that should cease statewide but especially as it applies to cement kilns. Likewise, Blue Skies Alliance questioned the validity of emissions trading.

Response

The commission believes the banking and trading rules are consistent with its statutory authority to develop a plan for control of the state's air and its authority to issue permits. Banking and other economic incentive programs are also authorized for use in the SIP by 42 USC, §7410(a)(2). The commission disagrees that trading will not result in real reductions. To the extent that it enables the commission to achieve more overall reduction through other rules, the trading program provides a benefit to air quality. Additionally, trading of ERCs and DERCs in many cases requires the retirement of 10% of the credits used to benefit air quality. Trading provides an incentive to reduce emissions since reductions result in ERCs that have market value. The commission further notes that 30 TAC §101.309(d)(3) and 30 TAC §101.378(c)(3) provide for the executive director to halt trading for a certain area if problems result from trading in a localized area of concern. Finally, NO_x is not generally associated with environmental justice concerns because it does not have the localized impact of volatile organic compounds, especially air toxics. Therefore, the commission has made no changes in response to the comments.

SUBCHAPTER B. COMBUSTION AT MAJOR SOURCES

DIVISION 4. CEMENT KILNS

30 TAC §§117.260, 117.265, 117.279, 117.283

STATUTORY AUTHORITY

The amendments are adopted under Texas Water Code (TWC), §5.103, which provides the commission the authority to adopt rules necessary to carry out its powers and duties under the TWC; and under Texas Health and Safety Code (THSC), TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendments are also adopted under TCAA, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; and §382.051(d), concerning Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under TCAA, Chapter 382; and FCAA, 42 USC, §7401.

§117.265. Emission Specifications.

(a) In accordance with the compliance schedule in §117.524 of this title (relating to Compliance Schedule for Cement Kilns), the owner or operator of each portland cement kiln shall ensure that nitrogen oxides (NO_x) emissions do not exceed the following rates on a 30-day rolling average. For the purposes of this section, the 30-day rolling average is calculated as the total of all the hourly emissions data (in pounds) that fuel was combusted in a cement kiln in the preceding 30 consecutive days, divided by the total number of tons of clinker produced in that kiln during the same 30-day period:

(1) for each long wet kiln:

(A) in Bexar, Comal, Hays, and McLennan Counties, 6.0 pounds per ton (lbs/ton) of clinker produced; and

(B) in Ellis County, 4.0 lbs/ton of clinker produced;

(2) for each long dry kiln, 5.1 lbs/ton of clinker produced;

(3) for each preheater kiln, 3.8 lbs/ton of clinker produced; and

(4) for each preheater-precalciner or precalciner kiln, 2.8 lbs/ton of clinker produced.

(b) If there are multiple cement kilns at the same account, the owner or operator may choose to comply with the emission limits of subsection (a) of this section on the basis of a weighted average for the cement kilns at the account that are subject to the same limit. Each owner or operator choosing this option shall submit written notification of this choice to the executive director, the appropriate regional office, and any local air pollution control program with jurisdiction before the appropriate compliance date in §117.524 of this title (relating to Compliance Schedule for Cement Kilns).

(c) Each long wet or long dry kiln for which the following controls are installed and operated during kiln operation is not required to meet the NO_x emission limits of subsection (a) of this section, provided that each owner or operator choosing this option submits written notification of this choice to the executive director, the appropriate regional office, and any local air pollution control program with jurisdiction before the appropriate compliance date in §117.524 of this title:

(1) a low-NO_x burner and either:

(A) mid-kiln firing; or

(B) some other form of secondary combustion achieving equivalent levels of NO_x reductions; or alternatively;

(2) other additions or changes to the kiln system achieving at least a 30% reduction in NO_x emissions, provided the additions or changes are approved by the executive director with concurrence from EPA.

(d) Each preheater or precalciner kiln for which either a low-NO_x burner or a low-NO_x precalciner is installed and operated during kiln operation is not required to meet the NO_x emission limits of subsection (a) of this section. Each owner or operator choosing this option shall submit written notification of this choice to the executive director, the appropriate regional office, and any local air pollution control program with jurisdiction before the appropriate compliance date in §117.524 of this title.

(e) An owner or operator may use §117.570 of this title (relating to Use of Emissions Credits for Compliance) to meet the NO_x emission control requirements of this section, in whole or in part.

§117.279. Notification, Recordkeeping, and Reporting Requirements.

(a) Notification. The owner or operator of each portland cement kiln shall submit verbal notification to the executive director of the date of any continuous emissions monitoring system (CEMS) or predictive emissions monitoring system (PEMS) performance evaluation conducted under §117.273 of this title (relating to Continuous Demonstration of Compliance) at least 15 days before such date followed by written notification within 15 days after testing is completed.

(b) Reporting of test results. The owner or operator of each portland cement kiln shall furnish the executive director and any local air pollution control agency having jurisdiction a copy of any CEMS or PEMS relative accuracy test audit conducted under §117.273 of this title:

(1) within 60 days after completion of such testing or evaluation; and

(2) not later than the appropriate compliance date in §117.524 of this title (relating to Compliance Schedule for Cement Kilns).

(c) Recordkeeping. The owner or operator of a portland cement kiln subject to the requirements of this division shall maintain written or electronic records of the data specified in this subsection. Such records shall be kept for a period of at least five years and shall be made available upon request by authorized representatives of the executive director, EPA, or local air pollution control agencies having jurisdiction. The records shall include:

(1) for each kiln, monitoring records of:

(A) daily and rolling 30-day average (and, for each kiln subject to the source cap in §117.283 of this title (relating to Source Cap), rolling 90-day average) nitrogen oxides (NO_x) emissions (in pounds (lbs));

(B) daily and rolling 30-day average (and, for each kiln subject to the source cap in §117.283 of this title, rolling 90-day average) production of clinker (in tons); and

(C) average NO_x emission rate (in lbs/ton of clinker produced) on the basis of a rolling 30-day average (and, for each kiln subject to the source cap in §117.283 of this title, a rolling 90-day average);

(2) records of the results of initial certification testing, evaluations, calibrations, checks, adjustments, and maintenance of CEMS and PEMS; and

(3) records of the results of any stack testing conducted.

§117.283. Source Cap.

(a) As an alternative to complying with the requirements of §117.265 of this title (relating to Emission Specifications) in Bexar, Comal, Ellis, Hays, and McLennan Counties, an owner or operator may reduce total nitrogen oxides (NO_x) emissions (in pounds per day (ppd)) from all cement kilns at the account (including any cement kilns placed into service on or after December 31, 1999) to at least 30% less than the total NO_x emissions (in ppd) from all cement kilns in the account's 1996 emissions inventory (EI), on a 90-day rolling average basis. For the purposes of this section, the 90- day rolling average is calculated as the total of all the hourly emissions data for the preceding 90 days. For the calendar year which includes the appropriate compliance date in §117.524 of this title (relating to Compliance Schedule for Cement Kilns), only hourly emissions data on or after that compliance date is included, such that the first 90-day period ends 90 days after the appropriate compliance date in §117.524 of this title. A 90-day rolling average emission cap shall be calculated using the following equation. Figure: 30 TAC §117.283(a)

(b) To qualify for the source cap option available under this section, the owner or operator must submit an initial control plan to the executive director, the appropriate regional office, and any local air pollution control program with jurisdiction which demonstrates that the overall reduction of NO_x emissions from all cement kilns at the account will be at least 30% from the 1996 baseline EI on a 90-day rolling average basis. The plan shall be submitted no later than December 31 of the year preceding the appropriate compliance date in §117.524 of this title. Each control plan must be approved by the executive director before the owner or operator may use the source cap available under this section for compliance. At a minimum, the control plan shall include the emission point number (EPN), facility identification number (FIN), and 1996 baseline EI NO_x emissions (in ppd) from each cement kiln at the account; a description of the control measures which have been or will be implemented at each cement kiln; and an explanation of the recordkeeping procedure and calculations which will be used to demonstrate compliance.

(c) Beginning on March 31 of the year following the appropriate compliance date in §117.524 of this title, the owner or operator shall submit an annual report no later than March 31 of each year to the executive director, the appropriate regional office, and any local air pollution control program with jurisdiction which demonstrates that the overall reduction of NO_x emissions from all cement kilns at the account is at least 30% from the 1996 baseline EI on a 90-day rolling average basis. At a minimum, the report shall include the EPN, FIN, and each 90-day rolling average NO_x emissions (in ppd) during the preceding calendar year for the cement kilns at the account.

(d) All representations in control plans and annual reports become enforceable conditions. The owner or operator shall not vary from such representations if the variation will cause a change in the identity of the specific cement kilns subject to this section or the method of control of emissions unless the owner or operator submits a revised control plan to the executive director, the appropriate regional office, and any local air pollution control program with jurisdiction no later than 30 days after the change. All control plans and reports shall demonstrate that the total NO_x emissions (in ppd) from all cement kilns at the account (including any cement kilns placed into service on or after December 31, 1999) are being reduced to at least 30% less than the total NO_x emissions (in ppd) from all cement kilns in the account's 1996 EI on a 90-day rolling average basis.

(e) The NO_x emissions monitoring required by §117.273 of this title (relating to Continuous Demonstration of Compliance) for each cement kiln in the source cap shall be used to demonstrate continuous compliance with the source cap.

(f) An owner or operator may use §117.570 of this title (relating to Use of Emissions Credits for Compliance) to meet the NO_x emission control requirements of this section, in whole or in part.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 7, 2003.

TRD-200301620
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: March 27, 2003
Proposal publication date: November 8, 2002
For further information, please call: (512) 239-6087

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SUBCHAPTER E. ADMINISTRATIVE PROVISIONS

30 TAC §117.524, §117.570

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission the authority to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendments are also adopted under TCAA, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for owners or operators of sources to make and maintain records of emissions measurements; and §382.051(d), concerning Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under TCAA, Chapter 382; and FCAA, 42 USC, §7401.

§117.524. Compliance Schedule for Cement Kilns.

(a) The owner or operator of each portland cement kiln which was placed into service before December 31, 1999 in Bexar, Comal, Ellis, Hays, and McLennan Counties shall be in compliance with the requirements of Subchapter B, Division 4 of this chapter (relating to Cement Kilns) as soon as practicable, but no later than the following dates:

(1) May 1, 2003 for cement kilns in Ellis County; and

(2) May 1, 2005 for cement kilns in Bexar, Comal, Hays, and McLennan Counties.

(b) Notwithstanding subsection (a)(1) of this section, for a cement kiln in Ellis County for which the owner or operator has filed an application for modification of its facility to meet the requirements of Subchapter B, Division 4 of this chapter on or before May 30, 2003, the compliance schedule is extended until six months after the issuance

of the permit for operation of a low-NO_x burner and 12 months after issuance of the permit for operation of a secondary combustion system. Such application(s) shall relate only to those modifications required to comply with Subchapter B, Division 4 of this chapter, and any issues incident thereto.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 7, 2003.

TRD-200301619
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: March 27, 2003
Proposal publication date: November 8, 2002
For further information, please call: (512) 239-6087

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 18. TOBACCO SETTLEMENT PERMANENT TRUST ACCOUNT

34 TAC §§18.1 - 18.8

The Comptroller of Public Accounts adopts amendments to §§18.1-18.8, concerning the administration and management of the assets of the Tobacco Settlement Permanent Trust Account and the distribution formula, without changes to the proposed text as published in the January 31, 2003, issue of the *Texas Register* (28 TexReg 905). The purposes of the amendments are as follows:

First, the amendment to the definitions in §18.1 will reflect changes intended to protect and grow the corpus, to stabilize and grow distributions over time and to address deposits into the distribution stabilization account.

Second, the amendment to §18.2 will outline distribution objectives and change the distribution formula to stabilize and grow distributions over time.

Third, the amendment to §18.8 will amend the termination clause and provide for an annual review by the comptroller.

Fourth, amendments to §§18.3-18.8 will make technical and non-substantive improvements to the sections.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Government Code, §403.1041(h), which authorizes the comptroller to adopt rules related to the management and implementation of the Tobacco Settlement Permanent Trust Account.

The amendments implement Government Code, §403.1041(h).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 7, 2003.

TRD-200301612
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: March 27, 2003
Proposal publication date: January 31, 2003
For further information, please call: (512) 475-0387

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 12. SPECIAL NUTRITION PROGRAMS

SUBCHAPTER A. CHILD AND ADULT CARE FOOD PROGRAM

40 TAC §12.3

The Texas Department of Human Services (DHS) adopts an amendment to §12.3, without changes to the proposed text published in the January 24, 2003, issue of the *Texas Register* (28 TexReg 654) and will not be republished.

In 1996, DHS instituted a requirement that day care home sponsors maintain secondary business offices in each DHS region in which they sponsor day care homes. This was done at the request of day care home providers whose sponsoring organization's business office was often in a city far from the provider's day care home. In October 2000, the United States Department of Agriculture (USDA) mandated a number of program integrity initiatives and management standards for all CACFP contractors, including day care home sponsors. In light of these new standards and with the emergence of improved communication methods available to providers, DHS conducted a survey to determine whether the need for secondary offices still existed. The survey results concluded that the secondary office policy was an unnecessary business expense. DHS is therefore adopting this amendment to its CACFP rules in part to eliminate the requirement that day care home sponsors maintain secondary business offices in each DHS region in which they sponsor day care homes.

Justification for the amendment is also to implement a provision of the Agricultural Risk Protection Act of 2000 (Public Law 106-224), as codified in 7 CFR §226.6(b)(11), requiring new sponsoring organizations of day care home providers or child or adult day care centers to demonstrate that they are serving an unmet need through their participation in the CACFP. USDA requires DHS to develop the criteria for what constitutes an unmet need. DHS determined unmet need is met when a sponsoring organization applying to participate in the CACFP demonstrates that the facilities it sponsors are currently not contracted to participate in the CACFP or have not contracted to participate during the 12 months before the sponsoring organization's application.

DHS received no comments regarding adoption of the amendment.

The amendment is adopted under the Human Resources Code, Chapters 22 and 33, which authorizes DHS to administer public and nutritional assistance programs.

The amendment implements the Human Resources Code, §§22.0001-22.038 and §§33.001-33.027.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 5, 2003.

TRD-200301559
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: March 25, 2003
Proposal publication date: January 24, 2003
For further information, please call: (512) 438-3734

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CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

SUBCHAPTER C. NURSING FACILITY LICENSURE APPLICATION PROCESS

40 TAC §19.215

The Texas Department of Human Services (DHS) adopts an amendment to §19.215, without changes to the proposed text published in the January 24, 2003, issue of the *Texas Register* (28 TexReg 656).

Justification for the amendment is to conform rule language to current language in the Government Code, Chapter 2001, §2001.054(c)(2).

DHS received no comments regarding adoption of the amendment.

The amendment is adopted under the Health and Safety Code, Chapter 242, which authorizes DHS to license and regulate convalescent and nursing homes and related institutions.

The amendment implements the Health and Safety Code, §§242.001-242.852

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 10, 2003.

TRD-200301641
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: May 1, 2003
Proposal publication date: January 24, 2003
For further information, please call: (512) 438-3734

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SUBCHAPTER T. ADMINISTRATION

40 TAC §19.1934

The Texas Department of Human Services (DHS) adopts an amendment to §19.1934, without changes to the proposed text published in the January 24, 2003, issue of the *Texas Register* (28 TexReg 657) and will not be republished.

Justification for the amendment is to comply with the Texas Education Code, §29.012, which requires DHS, the Texas Education Agency, the Texas Department of Mental Health and Mental Retardation, the Texas Department of Health, the Texas Department of Protective and Regulatory Services, the Interagency Council on Early Childhood Intervention, the Texas Commission on Alcohol and Drug Abuse, the Texas Juvenile Probation Commission, and the Texas Youth Commission to develop and adopt a memorandum of understanding (MOU) concerning interagency coordination of special education services to students with disabilities in residential facilities. The agencies met and developed an MOU, in accordance with the Texas Education Code, that covers the minimum requirements for school districts and residential care facilities. The Texas Education Agency adopted the MOU in its rule base at 19 TAC §89.1115, which became effective August 6, 2002. DHS's amended §19.1934 adopts the MOU by reference.

DHS received no comments regarding adoption of the amendment.

The amendment is adopted under the Health and Safety Code, Chapter 242, which authorizes DHS to license and regulate convalescent and nursing homes and related institutions, and under the Texas Education Code, §29.012.

The amendment implements the Health and Safety Code, §§242.001-242.852, and the Texas Education Code, §29.012.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 5, 2003.

TRD-200301581
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: May 1, 2003
Proposal publication date: January 24, 2003
For further information, please call: (512) 438-3734

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TEXAS DEPARTMENT OF INSURANCE

Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Department of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the proposal is adopted. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the proposal is adopted. The Administrative Procedure Act, Government Code, Chapters 2001 and 2002, does not apply to department action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78701.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

Texas Department of Insurance

Final Action on Rules

TEXAS DEPARTMENT OF INSURANCE EXEMPT FILING NOTIFICATION PURSUANT TO THE INSURANCE CODE CHAPTER 5, SUBCHAPTER L, ARTICLE 5.96 ADOPTION OF NEW AND/OR ADJUSTED 2003 MODEL PRIVATE PASSENGER AUTOMOBILE PHYSICAL DAMAGE RATING SYMBOLS FOR THE TEXAS AUTOMOBILE RULES AND RATING MANUAL

The Commissioner of Insurance adopted amendments proposed by Staff to the Texas Automobile Rules and Rating Manual (the Manual). The amendments consist of new and/or adjusted 2003 model Private Passenger Automobile Physical Damage Rating Symbols and revised identification information. Staff's petition (Ref. No. A-0103-03-I) was published in the January 31, 2003 issue of the *Texas Register* (28 TexReg 967).

The new and/or adjusted symbols for the Manual's Symbols and Identification Section reflect data compiled on damageability, repairability, and other relevant loss factors for the 2003 model year of the listed vehicles.

The amendments as adopted by the Commissioner of Insurance are shown in exhibits on file with the Chief Clerk under Ref. No. A-0103-03-I, which are incorporated by reference into Commissioner's Order No. 03-0146.

The Commissioner of Insurance has jurisdiction over this matter pursuant to Insurance Code Articles 5.10, 5.96, 5.98, and 5.101.

This notification is made pursuant to Insurance Code Article 5.96, which exempts it from the requirements of the Government Code, Chapter 2001 (Administrative Procedure Act).

Consistent with Insurance Code Article 5.96(h), the Department will notify all insurers writing automobile insurance of this adoption by letter summarizing the Commissioner's action.

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that the Manual is amended as described herein, and the amendments are adopted to become effective on the 60th day after publication of the notification of the Commissioner's action in the *Texas Register*.

TRD-200301593
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: March 6, 2003

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Education Agency

Title 19, Part 2

The Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 53, Regional Education Service Centers, pursuant to the Texas Government Code, §2001.039.

As required by the Texas Government Code, §2001.039, the TEA will accept comments as to whether the reason for adopting 19 TAC Chapter 53 continues to exist. The comment period begins with the publication of this notice and must last a minimum of 30 days.

Comments or questions regarding this rule review may be submitted to Cristina De La Fuente-Valadez, Accountability Reporting and Research, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494, (512) 463-9701. Comments may also be submitted electronically to rules@tea.state.tx.us or faxed to (512) 475-3499.

TRD-200301642
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Filed: March 10, 2003

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The Texas Education Agency (TEA) proposes the review of 19 TAC Chapter 92, Interagency Coordination, pursuant to the Texas Government Code, §2001.039.

As required by the Texas Government Code, §2001.039, the TEA will accept comments as to whether the reason for adopting 19 TAC Chapter 92 continues to exist. The comment period begins with the publication of this notice and must last a minimum of 30 days. One of the rules in this chapter, §92.1003, is a memorandum of understanding between the TEA and the Texas Department of Protective and Regulatory Services (PRS) concerning the Communities in Schools program. The PRS has proposed modification to their rules related to the Communities in Schools program. Section 92.1003 is being included in the review of rules in 19 TAC Chapter 92 at this time; however, the TEA may propose an amendment to this rule in a future issue of the *Texas Register*, contingent upon PRS action.

Comments or questions regarding the rule review of 19 TAC Chapter 92 may be submitted to Cristina De La Fuente-Valadez, Accountability Reporting and Research, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494, (512) 463-9701. Comments may also be submitted electronically to rules@tea.state.tx.us or faxed to (512) 475-3499.

TRD-200301643
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Filed: March 10, 2003

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Texas Commission on Environmental Quality

Title 30, Part 1

The Texas Commission on Environmental Quality (commission) files this notice of intention to review and proposes the readoption of Chapter 308, Criteria and Standards for the National Pollutant Discharge Elimination System.

This review of Chapter 308 is proposed in accordance with the requirements of Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist.

CHAPTER SUMMARY

Chapter 308 incorporates by reference criteria and standards for the National Pollutant Discharge Elimination System. Chapter 308 provides criteria and standards for imposing technology-based treatment requirements; criteria for issuance of permits to aquaculture projects; criteria for extending compliance dates for facilities installing innovative technology under the Clean Water Act (CWA); criteria and standards for determining fundamentally different factors under the CWA; criteria and standards for granting economic variances from best available technology economically achievable under the CWA; criteria for modifying water quality related variances under the CWA; criteria for modifying the secondary treatment requirements under the CWA; criteria for determining alternative effluent limitations under the CWA; criteria applicable to cooling water intake structures under the CWA; criteria for extending compliance dates under the CWA; criteria and standards for imposing conditions for the disposal of sewage sludge under the CWA; and ocean discharge criteria.

PRELIMINARY ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a preliminary review and determined that the reasons for the rules in Chapter 308 continue to exist. The rules are needed to maintain the Texas Pollutant Discharge Elimination System program authorization. The rules are needed under Texas Water Code (TWC), §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of Texas; TWC, §5.105, which provides the commission's authority to,

by rule, establish and approve general policy of the commission; TWC, §5.120, which provides the commission's authority to administer the law to promote conservation and protection of the quality of the environment; TWC, §26.011, which provides the commission's authority to establish rules to maintain and control the quality of the water in the state; TWC, §26.041, which provides the commission's authority to set standards to prevent the discharge of waste that is injurious to the public health; and TWC, §26.0345, which provides the commission's authority to establish permit conditions relating to suspended solids in a discharge permit for an aquaculture facility located within the coastal zone and engaged in shrimp production. This rule review proposes to readopt the rules without any changes.

PUBLIC COMMENT

This proposal is limited to the review in accordance with the requirements of Texas Government Code, §2001.039. The commission invites public comment on whether the reasons for the rules in Chapter 308 continue to exist. Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2003-006-308-WT. Comments must be received in writing by 5:00 p.m., April 21, 2003. For further information or questions concerning this proposal, please contact Deborah Dyer, Policy and Regulations Division, at (512) 239-3972.

TRD-200301608
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: March 7, 2003

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The Texas Commission on Environmental Quality (commission) files this notice of intention to review and proposes the readoption of Chapter 312, Sludge Use, Disposal, and Transportation, without changes. Any updates, consistency issues, or other changes, if needed, will be addressed in a separate rulemaking.

This review of Chapter 312 is proposed in accordance with the requirements of Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist.

CHAPTER SUMMARY

Chapter 312 provides for regulation of the processing, use, and disposal of sewage sludge, domestic septage, and water treatment sludge, as well as regulation of the transportation of these and other liquid wastes. Registrations or permits are usually required to engage in any of these activities. Chapter 312 is divided into Subchapters A - G, which set forth general administrative provisions and fees; provisions for the use of sewage sludge and/or domestic septage as a soil amendment; provisions for land disposal of sewage sludge and domestic septage; criteria for pathogen reduction and odor control for use or disposal of sewage sludge and domestic septage; guidelines for incineration of sewage sludge and domestic septage; provisions for disposal of water treatment sludge or its use as a soil amendment; and provisions for the transportation of sewage sludge, water treatment sludge, domestic septage, grease trap waste, grit trap waste, and chemical toilet waste (collective termed "liquid wastes"). This rules review proposes to readopt the rules without any changes.

PRELIMINARY ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a preliminary review and determined that the reasons for the rules in Chapter 312 continue to exist. The rules are needed to implement the provisions of Texas Health and Safety Code, Chapter 361 that govern the use and disposal of sewage sludge, water treatment sludge, and domestic septage and that govern the transportation of liquid wastes. The rules are also needed to protect the quality of the water in the state under Texas Water Code, Chapter 26.

PUBLIC COMMENT

This proposal is limited to the review in accordance with the requirements of Texas Government Code, §2001.039. The commission invites public comment on this preliminary review of the rules in Chapter 312. Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2003-011-312-WT. Comments must be received in writing by 5:00 p.m., April 21, 2003. For further information or questions concerning this proposal, please contact Joseph Thomas, Policy and Regulations Division, at (512) 239-4580.

TRD-200301644
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: March 10, 2003

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The Texas Commission on Environmental Quality (commission) files this notice of intention to review and proposes the readoption of Chapter 324, Used Oil Standards, without changes.

This review of Chapter 324 is proposed in accordance with the requirements of Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist.

CHAPTER SUMMARY

Chapter 324 adopts by reference federal law regarding used oil recycling under 40 Code of Federal Regulations (CFR) Part 279, Standards for the Management of Used Oil, which includes definitions, applicability, and prohibitions. Additionally, Chapter 324 provides registration and reporting standards for used oil generators, collection centers, transporters, transfer facilities, processors and re-refiners, burners of off-specification used oil for energy recovery, and marketers of used oil fuel. Procedures for used oil spills, procedures for commission suspension or revocation of a used oil registration, and soil remediation requirements for used oil handlers are also defined in this chapter.

PRELIMINARY ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission reviewed the rules in Chapter 324 and determined that the reasons for adopting the rules continue to exist. The rules are necessary to encourage the recycling of used oil; to protect the environment from used oil contamination; to implement Texas Health and Safety Code, Chapter 371, Used Oil Collection, Management, and Recycling; and to implement 40 CFR Part 279.

PUBLIC COMMENT

This proposal is limited to the review in accordance with the requirements of Texas Government Code, §2001.039. The commission invites public comment on this preliminary review of the rules in Chapter 324. Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should

reference Rule Log Number 2003-005-324-WS. Comments must be received in writing by 5:00 p.m., April 21, 2003. For further information or questions concerning this proposal, please contact Jill Burditt, Policy and Regulations Division, at (512) 239-0560.

TRD-200301609
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: March 7, 2003

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Adopted Rule Reviews

Texas Education Agency

Title 19, Part 2

The Texas Education Agency (TEA) adopts the review of 19 TAC Chapter 75, Curriculum, pursuant to the Texas Government Code, §2001.039. The TEA proposed the review of 19 TAC Chapter 75 in the January 24, 2003, issue of the *Texas Register* (28 TexReg 761).

The TEA finds that the reason for adopting continues to exist. The TEA received no comments related to the rule review requirement as to whether the reason for adopting the rules continues to exist. The rule review prompts the modification of three rules to update statutory references. In a future issue of the *Texas Register*, the TEA plans to propose amendments to §§75.1001-75.1003 to modify reference to the Alcohol Beverage Code and the Health and Safety Code. This concludes the review of 19 TAC Chapter 75.

TRD-200301661
Cristina De La Fuente-Valadez
Manager, Policy Planning Board
Texas Education Agency
Filed: March 10, 2003

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The Texas Education Agency (TEA) adopts the review of 19 TAC Chapter 76, Extracurricular Activities, pursuant to the Texas Government Code, §2001.039. The TEA proposed the review of 19 TAC Chapter 76 in the January 24, 2003, issue of the *Texas Register* (28 TexReg 761).

The TEA finds that the reason for adopting continues to exist. The TEA received no comments related to the rule review requirement as to whether the reason for adopting the rules continues to exist. No changes are being proposed as a result of the review. This concludes the review of 19 TAC Chapter 76.

TRD-200301662
Cristina De La Fuente-Valadez
Manager, Policy Planning
Texas Education Agency
Filed: March 10, 2003

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Texas Commission on Environmental Quality

Title 30, Part 1

The Texas Commission on Environmental Quality (commission) adopts the rules review and readopts Chapter 1, Purpose of Rules, General Provisions, in accordance with Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist. The notice of intention to review was published in the November 29, 2002, issue of the *Texas Register* (27 TexReg 11183).

CHAPTER SUMMARY

Chapter 1 states that the purpose of the commission's rules is to implement statutory authorizations and to establish the general policies of the commission. The chapter also sets forth procedures to be followed in agency proceedings, addresses open records request matters, and contains basic information concerning the Texas Commission on Environmental Quality, including the business office and mailing address of the agency.

ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a preliminary review and determined that the reasons for the rules in Chapter 1 continue to exist. The rules are needed to provide basic information about the agency and to set forth procedures concerning agency proceedings and open record requests.

PUBLIC COMMENT

The public comment period closed on December 30, 2002. No comments were received.

TRD-200301627
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: March 7, 2003

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The Texas Commission on Environmental Quality (commission) adopts the rules review and readopts Chapter 3, Definitions, in accordance with Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist. The notice of intention to review was published in the January 10, 2003 issue of the *Texas Register* (28 TexReg 487).

CHAPTER SUMMARY

Chapter 3 provides definitions of certain words and terms used in commission rules. The meanings for each word and term defined provide a basis for consistent usage throughout the commission rules unless the context clearly indicates otherwise. This rules review readopts the rules without any changes.

ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a review and determined that the reasons for the rules in Chapter 3 continue to exist. The rules are needed to define key terms used in commission rules and to provide citations to state and federal statutes referenced in commission rules.

During the review of Chapter 3, the commission identified a number of changes to citations needed in §3.2. The commission intends to consider correction of these items in a separate rulemaking in the future.

PUBLIC COMMENT

The public comment period closed on February 10, 2003. No comments were received.

TRD-200301628

Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: March 7, 2003

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The Texas Commission on Environmental Quality (commission) adopts the rules review and readopts Chapter 101, General Air Quality Rules, in accordance with Texas Government Code, §2001.039, which requires state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist. The notice of intention to review was published in the December 20, 2002 issue of the *Texas Register* (27 TexReg 12021).

CHAPTER SUMMARY

Chapter 101 contains definitions and sections that can apply to all sources of air contaminants. Chapter 101, Subchapter A contains sections that address issues basic to the operation of an air pollution control program including prohibition of nuisance, circumvention of rules, air contaminants from multiple properties, emission inventory procedures, sampling, and fee assessment. Also in Subchapter A are sections concerning the application of federal standards in Texas and conformity of federal entities to state implementation plans. The sections of Subchapter F apply to the reporting and recording of exceedences of established commission air contaminant standards during source maintenance, startup, shutdown, or the malfunction of a source. Subchapter H addresses the generation, banking, and use of emission credits, as well as the mass emissions cap and trade program in the Houston-Galveston ozone nonattainment area. This rules review readopts the rules without any changes.

ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a review and determined that the reasons for the rules in Chapter 101 continue to exist. The rules are needed to retain a general regulatory structure for the operation of all air contaminant sources in Texas and for application of federal standards, as well as to provide flexibility in complying with the rules of the commission.

PUBLIC COMMENT

The public comment period closed on January 21, 2003. No comments were received.

TRD-200301645
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: March 10, 2003

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Public Utility Commission of Texas

Title 16, Part 2

The Public Utility Commission of Texas (commission) readopts Texas Administrative Code (TAC), Chapter 26, Substantive Rules Applicable to Electric Service Providers, pursuant to the Texas Government Code, Administrative Procedure Act (APA), §2001.039, Agency Review of Existing Rules. The notice of intention to review Chapters 24 and 26 was published in the *Texas Register* on September 13, 2002 (27 TexReg 8784). As a result of this review, the commission shall initiate a proceeding to repeal TAC Chapter 24, Policy Statements. Project Number 22067 is assigned to this review proceeding. This concludes the review of Chapters 24 and 26 pursuant to APA §2001.039.

APA §2001.039 requires that each state agency review its rules every four years and readopt, readopt with amendments, or repeal the rules adopted by that agency pursuant to the Texas Government Code, Chapter 2001. Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rules continues to exist. The commission requested specific comments on whether the reason for adopting the substantive rules in Chapters 24 and 26 continues to exist.

The commission finds that Chapter 24 should be repealed. Chapter 24 was adopted in March of 1995 to establish the commission's broad policy goals regarding telecommunications that would be considered, where applicable, in each contested case or rulemaking presented for decision.

The policy goals stated in §24.10 and §24.31 are found in the commission's enabling statute, the Public Utility Regulatory Act (PURA), §11.002 and §51.001. These policy goals are now also established in the commission's substantive rules in Chapter 26.

Section 24.32, Universal Service, was adopted prior to the commission adopting its substantive rules regarding universal service. The statutory requirements for universal service can be found in PURA, Chapter 56, Subchapter B, Universal Service Fund (USF). The commission's rules implementing the requirements for universal service were first adopted in February of 1998 in Chapter 23 and later reorganized under Chapter 26, Subchapter P, Texas Universal Service Fund.

Section 24.33 discusses the commission's policy regarding advanced telecommunications infrastructure. The statutory requirements for advanced telecommunications infrastructure are located in PURA, Chapter 58, Subchapter F, General Infrastructure Commitment, and PURA, Chapter 59, Subchapter B, Infrastructure Incentives. In addition, the commission has adopted the following substantive rules implementing its policy on advanced telecommunications infrastructure: §26.142, Integrated Services Digital Network (ISDN); §26.143, Provision of Advanced Services in Rural Areas; §26.276, Unbundling; and §26.283, Infrastructure Sharing.

Now that the commission's policy regarding universal service and advanced telecommunications infrastructure is established in PURA and its substantive rules, the need for the policy statements in Chapter 24 no longer exists. A rulemaking project will be initiated to publish the proposed repeal of Chapter 24 and providing interested persons the opportunity for comment.

The commission finds that the reasons for adopting Chapter 26 continue to exist. However, the commission also finds that certain sections need amendments and other sections are obsolete due to changes in the telecommunications industry or the passage of time. Separate rulemaking proceedings will be initiated to amend or repeal these sections as discussed further in this preamble.

Comments on the noticed review were due on October 14, 2002. The commission received written comments from Office of the Attorney General of Texas, Consumer Protection Division, Public Agency Representation Section (OAG). Reply comments were due on October 28, 2002. Southwestern Bell Telephone Company (SWBT) filed reply comments on October 29, 2002.

In its reply comments, SWBT raised significant new issues that were not in response to OAG's comments in this proceeding. Therefore, on November 15, 2002, the commission published notice in the *Texas Register* (27 TexReg 10816) extending the reply comment period until November 22, 2002. Comments filed during this extension period were limited to replies to issues raised in the initial comments of OAG and the reply comments of SWBT. On November 22, 2002, the commission received additional reply comments from AT&T Communications

of Texas, LP (AT&T), MCImetro Access Transmission Services, LLC (MCI), and OAG.

General comments related to Chapters 24 and 26

OAG was generally supportive of the rules and discovered no rules for which the reason for adoption are no longer present; however, OAG stated that at least two of the rules need clarification, as discussed later in this preamble.

OAG and MCI asserted that SWBT's comments should be rejected on procedural grounds. OAG and MCI stated that: (1) SWBT did not file "reply" comments or even recognize the initial comments of OAG, but instead raised significant new issues to which interested persons have not had adequate notice to respond, notwithstanding the extension of time for reply comments noticed by the commission; and (2) SWBT's comments were late filed and did not claim any good cause for its late filing in violation of the commission's procedural rules.

The commission recognizes that SWBT's "reply" comments raised significant new issues, which is why the commission noticed an extended reply comment period for interested persons to file responses. The commission also recognizes that SWBT's comments did not comply in all aspects with the commission's procedural rules. If actual amendments or repeals of commission rules were subject to adoption in this proceeding, the commission would consider rejecting SWBT's late-filed comments. However, the purpose of this review is to determine if the reason for adopting the rules continues to exist and identify areas that may need additional review or modification; therefore, the commission will summarize and respond to the comments of SWBT. Since any actual changes to be made to the rules as a result of this review will be properly noticed pursuant to the requirements of APA, Chapter 2001, Subchapter B, Rulemaking, giving all interested persons adequate notice and the opportunity for comment, no person is harmed by the commission's consideration of SWBT's comments.

SWBT expressed concern that many of the existing rules do not apply equally to all providers of local exchange telecommunications services and some rules that are the product of the era of rate-of-return regulation are outmoded and continue to be applied only to incumbent local exchange companies (ILECs), including companies that rejected rate-of-return regulation and elected incentive regulation under the Public Utility Regulatory Act (PURA), Chapter 58. SWBT stated that competitive local exchange companies (CLECs) continue to receive preferential treatment under commission rules and that this non-parity treatment is not supportable under the law on the basis that only ILECs are subject to "carrier/provider of last resort obligations." SWBT urged that the same service quality rules, reporting requirements, and customer protection rules should apply to all certificated telecommunications utilities (CTUs) to the greatest extent permitted under law. SWBT asserted that not being bound by these rules gives CLECs a distinct and unwarranted advantage and preference.

AT&T stated that SWBT's comments have been carefully considered and rejected by the commission in other proceedings and that SWBT's statements provide no compelling reason for the commission to pay greater credence to SWBT's arguments now than in the past. OAG replied that SWBT raised no new issues as to why the rules should be repealed or amended due to a change in the reason for their adoption and that SWBT is simply rearguing issues that were addressed in the adoption of rules under Project Number 21423, *Rulemaking to Amend Substantive Rules in Chapter 26, Subchapter B, Except for §§26.25, 26.29, and 26.32, Regarding Telephone Customer Service and Protection*. AT&T commented that there are sound reasons why there is differing regulatory treatment for dominant certificated telecommunications utilities (DCTUs) than for non-dominant certificated telecommunications utilities (NCTUs). MCI stated that Texas's local telecommunications market is still in its infancy and that revision to the rules as suggested by SWBT would place CLECs at parity with ILECs when clearly from a market perspective such is not the case. AT&T stated that a disparity in regulations applicable to DCTUs as opposed to NCTUs is not anti-competitive or preferential, but is a proper recognition that DCTUs are, by definition, incumbent, dominant providers with years of monopoly market power and captive ratepayer funding at their disposal to pay for the development and implementation of systems necessary to comply with evolving regulatory requirements.

AT&T commented that the differential treatment of DCTUs and NCTUs is embodied in PURA, where the commission's regulatory authority over DCTUs is wide and deep and its authority over NCTUs is relatively narrow and only as specifically provided by PURA. MCI stated that PURA §51.001(e) expressly recognizes the tenuous status of the marketplace and that the commission is, therefore, required to take those actions "necessary to enhance competition by adjusting regulation to match the degree of competition in the marketplace to: (1) reduce the cost and burden of regulation; and (2) protect markets that are not competitive." AT&T commented that there are significant statutory differences in the regulatory treatment of DCTUs and NCTUs, i.e., in the areas of certification requirements, rate setting, commission authority to revoke certification, and obligations to serve, to name a few. AT&T submitted that these differences are in recognition of the different levels of market power exercised by DCTUs and NCTUs; that declaring SWBT's local exchange market "open" is not the same as declaring that SWBT no longer possesses monopoly market power that requires a different level of regulation or that competition is so irreversibly robust that SWBT can be relieved of its carrier of last resort obligations. AT&T stated that the regulatory conditions which gave rise to the rules still exist. MCI submitted that the rules SWBT alleges to be discriminatory are necessary to achieve the state's telecommunications policy as stated in PURA §51.001(b).

The commission believes the current market conditions justify the continued application of the rules. The rules provide strong customer protections while allowing the flexibility necessary to encourage increased competition. The commission's rules serve to enhance competition by adjusting regulation to match the degree of competition in the marketplace. The rules thereby reduce the cost and burden of regulation to the extent warranted by market conditions and protect markets that are not sufficiently competitive. In this way, the commission's rules implement the state's telecommunications policy as stated in PURA §51.001(b) to: "(1) promote diversity of telecommunications providers and interconnectivity; (2) encourage a fully competitive telecommunications marketplace; and (3) maintain a wide availability of high quality, interoperable, standards-based telecommunications services at affordable rates." The commission continues to monitor the market and will make appropriate changes to these rules when necessitated by future market conditions.

Comments on specific rule sections

Subchapter B, Customer Service and Protection

SWBT, in connection with its general comments, stated that the following rules in Subchapter B should be individually reconsidered at this time but provided no specific information: §26.22, Request for Service; §26.23, Refusal of Service; §26.24, Credit Requirements and Deposits; §26.27, Bill Payment and Adjustments; §26.28, Suspension or Disconnection of Service; §26.29, Prepaid Local Telephone Service (PLTS); and §26.31, Disclosures to Applicants and Customers.

See commission's response to SWBT's general comments.

Subchapter C, Quality of Service

SWBT, in connection with its general comments, stated that the following rules in Subchapter C should be individually reconsidered at this time but provided no specific information: §26.52, Emergency Operations; §26.53, Inspections and Tests; and §26.54, Service Objective and Performance Benchmarks.

See commission's response to SWBT's general comments.

Subchapter D, Records, Reports, and Other Required Information

SWBT, in connection with its general comments, stated that the following rules in Subchapter D should be individually reconsidered at this time but provided no specific information: §26.71, General Procedures, Requirements and Penalties; §26.72, Uniform System of Accounts; and §26.73, Financial and Operating Reports.

See commission's response to SWBT's general comments.

§26.78, State Agency Utility Account Information

OAG stated that this section provides for the submission of state agency account information to the General Services Commission (GSC) (now the Texas Building and Procurement Commission) or its designee. However, the information is now actually collected by the Office of the Attorney General, Consumer Protection Division, Public Agency Representation Section. OAG stated that the rule should be amended to indicate that OAG is the actual repository for submission of the information. MCI stated that it does not oppose OAG's request.

The commission agrees with the comments of OAG.

Subchapter F, Regulation of Telecommunications Service

§26.128, Telephone Directories

OAG commented that references to GSC should be changed to reflect that the Department of Information Resources (DIR) has now assumed responsibility with respect to preparation of the State of Texas Telephone Directory. MCI stated that it does not oppose OAG's request.

The commission agrees with the comments of OAG.

Additional results of the commission's rule review

In reviewing the rules, the commission determined that there are rule sections that need non-substantive amendments, e.g., to update references from rules in Chapter 23, now repealed, to the current rules in Chapter 26; to correct cross-references that have changed as a result of rule amendments; remove language which has become obsolete due to the passage of time; correction of typographical errors, etc. In addition, some rules may require more substantive amendments to clarify policy and procedures. Projects will be initiated to implement additional changes as needed. Interested persons may find a "Table of Rules in Chapter 26 in Need of Amendment or Repeal" in the commission's Central Records Division or through the commission's Interchange at www.puc.state.tx.us under Project Number 22067 or on the commission's website at http://www.puc.state.tx.us/rules/rulemake/22067/22067.cfm. This table provides a summary of amendments being considered for future rulemaking projects.

On September 17, 2002, Project Number 26647, *Review of Texas Universal Service Fund (TUSF) Pursuant to Substantive Rule §26.403(d)(2)(A)(i) and §26.403(e)(2)(A)(i)* was established for a more extensive review of the rules in Subchapter P, Texas Universal Service Fund. While the commission finds that the reason for adopting the rules in Subchapter P continues to exist and readopts these rules pursuant to APA §2001.039, Project Number 26647 will determine if any changes are needed for the rules in Subchapter P.

Rules in Chapter 26 in need of repeal

Section 26.161, Electronic Publishing, subsection (d), has a sunset provision that provides that this section does not apply to conduct occurring after February 8, 2000; therefore, this section is obsolete and may be repealed. In addition, §26.275, IntraLATA Equal Access, subsection (i), has a sunset provision that provides that this section expires on December 31, 2002. To ensure that all issues regarding §26.275 have been resolved, this section will be considered for repeal after the end of the fiscal year.

The commission readopts Chapter 26 pursuant to the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2003) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and Texas Government Code §2001.039 which requires each state agency to review and readopt its rules every four years. In addition, pursuant to the same statutory authority, the commission finds that Chapter 24 should be repealed.

Cross Reference to Statutes: Texas Utilities Code Annotated, Title II, Public Utility Regulatory Act, Subtitles A and C; and Title IV, Chapter 162, Chapter 181, Subchapter E, Chapter 182 and Chapter 183.

CHAPTER 24

SUBCHAPTER A. GENERAL

§24.10. Purpose and Scope of Policy Statements.

SUBCHAPTER B. TELECOMMUNICATIONS UTILITIES

§24.31. General Policy Regarding Telecommunications Utilities.

§24.32. Universal Service.

§24.33. Advanced Telecommunications Infrastructure.

CHAPTER 26

SUBCHAPTER A. GENERAL PROVISIONS.

§26.1. Purpose and Scope of Rules.

§26.2. Cross-Reference Transition Provision.

§26.3. Severability Clause.

§26.4. Statement of Nondiscrimination.

§26.5. Definitions.

§26.6. Cost of Copies of Public Information.

§26.7. Local Exchange Company Assessment.

SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION.

§26.21. General Provisions of Customer Service and Protection Rules.

§26.22. Request for Service.

§26.23. Refusal of Service.

§26.24. Credit Requirements and Deposits.

§26.25. Issuance and Format of Bills.

§26.26. Foreign Language Requirements.

§26.27. Bill Payment and Adjustments.

§26.28. Suspension or Disconnection of Service.

§26.29. Prepaid Local Telephone Service (PLTS).

§26.30. Complaints.

§26.31. Disclosures to Applicants and Customers.

§26.32. Protection Against Unauthorized Billing Charges ("Cramming").

§26.34. Telephone Prepaid Calling Services.

§26.37. Texas No-Call List.

SUBCHAPTER C. QUALITY OF SERVICE.

§26.51. Continuity of Service.

§26.52. Emergency Operations.

§26.53. Inspections and Tests.

§26.54. Service Objectives and Performance Benchmarks.

§26.55. Monitoring of Service.

SUBCHAPTER D. RECORDS, REPORTS, AND OTHER REQUIRED INFORMATION.

§26.71. General Procedures, Requirements and Penalties.

§26.72. Uniform System of Accounts.

§26.73. Financial and Operating Reports.

§26.74. Reports on Sale of Property and Mergers.

§26.75. Reports on Sale of 50% or More of Stock.

§26.76. Gross Receipts Assessment Report.

§26.77. Payments, Compensation, and Other Expenditures.

§26.78. State Agency Utility Account Information.

§26.79. Equal Opportunity Reports.

§26.80. Annual Report on Historically Underutilized Businesses.

§26.81. Service Quality Reports.

§26.82. Construction Reports.

§26.84. Annual Reporting of Affiliate Transactions of DCTUs.

§26.85. Report of Workforce Diversity and Other Business Practices.

§26.87. Infrastructure Reports.

§26.88. Traffic Usage Studies.

§26.89. Information Regarding Rates and Services of Nondominant Carriers.

§26.98. Cost Allocation Manual.

SUBCHAPTER E. CERTIFICATION, LICENSING AND REGISTRATION.

§26.101. Certification Criteria.

§26.102. Registration of Pay Telephone Service Providers.

§26.103. Affiliate Guidelines for Certificates of Convenience and Necessity Holders.

§26.107. Registration of Interexchange Carriers, Prepaid Calling Services Companies, and Other Nondominant Telecommunications Carriers.

§26.109. Standards for Granting of Certificates of Operating Authority (COAs)

§26.111. Standards for Granting Service Provider Certificates of Operating Authority (SPCOAs).

§26.113. Amendment of Certificate of Operating Authority (COA) or Service Provider Certificate of Operating Authority (SPCOA).

§26.114. Suspension or Revocation of Certificates of Operating Authority (COAs) and Service Provider Certificates of Operating Authority (SPCOAs).

SUBCHAPTER F. REGULATION OF TELECOMMUNICATIONS SERVICE.

§26.121. Privacy Issues.

§26.122. Customer Proprietary Network Information.

§26.123. Caller Identification Services.

§26.124. Pay-Per-Call Information Services Call Blocking.

§26.125. Automatic Dial Announcing Devices (ADAD).

§26.126. Telephone Solicitation.

§26.127. Abbreviated Dialing Codes.

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TRD-200301605
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 7, 2003

♦ ♦ ♦

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

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Figure: 1 TAC Chapter 355

Transfer Table	
Current Citation	**New Citation**
Title 25, Part 1, Chapter 33, Subchapter G	**Title 1, Part 15, Chapter 355, Subchapter J, Division 23**
25 TAC §33.310. Maximum Payment	1 TAC §355.8443. Maximum Payment
25 TAC §33.311. Explanation of Maximum Payment Terms	1 TAC §355.8445. Explanation of Maximum Payment Terms

Figure: 16 TAC §25.489(h)(1)

Date: _____

Address: _____

DISCONNECT NOTICE

Code #999

The State of Texas requires all customers to have a Retail Electric Provider (REP) before receiving electric service. Our records indicate that you do not have a REP and are not receiving bills for electric service. Thus, you have not been billed for the electricity used at these premises.

In order to avoid any disruption in your service, you must select and enroll with a REP no more than ten (10) business days from the date of this notice. **To ensure proper identification of your premise, please inform the REP you have a Code 999 order to process.** If you do not enroll with a REP within ten (10) business days, electricity to this address will be disconnected.

If you have already contacted a REP to set up an electric service account, we urge you to contact your REP to check the status of your request to avoid disconnection of service.

A list of REPs is printed below. If you have selected a REP and believe this notice is in error, please contact your REP immediately. You may call the Public Utility Commission of Texas (PUC) toll-free at 1-888-782-8477 to address any questions that your REP cannot answer.

Figure: 30 TAC §117.283(a)

$$\text{NO}_x \text{ 90-day rolling average emission cap (ppd)} = 0.7\sum_{i=1}^{N} R_i$$

Where:

i = Each cement kiln at a single account

N = The total number of cement kilns at the account

R_i = The kiln's ozone season daily NO_x emission rate (in ppd) reported in the account's 1996 EI

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas Department of Agriculture

Notice of Public Hearing - Sapote Fruit Fly Quarantine

The Texas Department of Agriculture (the department) will hold a hearing to take public comment on the department's Sapote Fruit Fly Quarantine, Title 4, Part 1, Sections 19.170-19.178, which was filed by the department on an emergency basis on March 10, 2003, for publication in the Friday, March 28, 2003 issue of the *Texas Register.*

The hearing will be held on April 1, 2003, beginning at 9:00 a.m., at the department's San Juan Regional Office located at 900-B East Expressway, San Juan, Texas.

For more information regarding the quarantine, please contact Dr. Shashank Nilakhe, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711, (512) 463-1145.

TRD-200301665
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Filed: March 11, 2003

♦ ♦ ♦

Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. Requests for federal consistency review were deemed administratively complete for the following projects(s) during the period of February 28, 2003, through March 6, 2003. The public comment period for these projects will close at 5:00 p.m. on April 11, 2003.

FEDERAL AGENCY ACTIONS:

Applicant: Orion Construction, Inc.; Location: The project site is located in Old River, a tributary of the Houston Ship Channel, at 14140 market Street, in Channelview, Harris County. The project can be located on the U.S.G.S. quadrangle map entitled: Highlands, Texas. Approximate UTM Coordinates: Zone 15; Easting: 298043; Northing: 3297016. Project Description: The applicant is requesting authorization to amend Permit #21836 to extend a sheetpile bulkhead and to perform dredging immediately in front of the area to be bulkheaded. The proposed permit amendment is necessary to expand the existing facility. The proposed sheetpile bulkhead will measure 485 feet long and will require the discharge of approximately 1725 cubic yards of material as backfill below mean low tide (MLT). Fill material to be discharged behind the bulkhead will be excavated from upland areas onsite. The area to be dredged lies immediately in front of the area to be bulkheaded and extends approximately 150 feet waterward. The area will be dredged to a depth of -10 feet MLT. The proposed dredging involves the mechanical excavation of 10,500 cubic yards of material that will serve to backfill the upland borrow areas. Permit #21836 was issued on March 6, 2000 and authorized the expansion of an existing barge slip; the construction of a sheetpile bulkhead along the north, south, and west side of the slip; the installation of a geotube along the eastern side of the slip; and the discharge of concrete riprap along the southeastern segment of the slip. In addition, the permit authorized the construction of 6 mooring dolphins. To compensate for impacts to the aquatic environment, the applicant constructed 1.98 acres of wetlands on the eastern part of the site. To date, all of the previously authorized construction, including the mitigation, has been completed. The proposed bulkhead and dredging activities will not impact any additional wetlands or vegetated shallow. CCC Project No.: 03-0069-F1; Type of Application: U.S.A.C.E. permit application #21836(01) is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §125-1387).

Applicant: Gryphon Exploration Company; Location: The project site is located approximately 13 miles SE of Freeport in the Freeport Anchorage Area, in Galveston Area, OCS Block 313, offshore Texas in the Gulf of Mexico. Approximate State Plane Coordinates using North American Datum 27, South-Central Zone: X=3,240,670.81; Y=379,280. Project Description: The applicant proposes to install, operate, and maintain a typical jack-up rig, production platform and/or well protector, with appurtenant structures and equipment necessary to conduct oil and gas drilling/production operations. CCC Project No.: 03-0072-F1; Type of Application: U.S.A.C.E. permit application #22955 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §125-1387).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Ms. Diane P. Garcia, Council Secretary, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or diane.garcia@glo.state.tx.us. Comments should be sent to Ms. Garcia at the above address or by fax at 512/475-0680.

TRD-200301714
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: March 12, 2003

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Comptroller of Public Accounts

An additional 1/4% city sales and use tax for Municipal Street Maintenance and Repair as permitted under Chapter 327 of the Texas Tax Code will become effective April 1, 2003, in the cities listed below.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Deport (Lamar Co)	2139022	.017500	.080000
Deport (Red River Co)	2139022	.017500	.080000
Georgetown (Williamson Co)	2246031	.017500	.080000
Morgans Point Resort (Bell Co)	2014086	.017500	.080000
Nassau Bay (Harris Co)	2101204	.017500	.080000

An additional 1/8% city sales and use tax for improving and promoting economic and industrial development as permitted under Article 5190.6, Section **4A** will become effective April 1, 2003 in the city listed below.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Corpus Christi (Nueces Co)	2178015	.020000	.082500
Corpus Christi (San Patricio Co)	2178015	.020000	.082500

An additional 1/4% city sales and use tax for improving and promoting economic and industrial development as permitted under Article 5190.6, Section **4B** will become effective April 1, 2003 in the city listed below.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Bee Cave (Travis Co)	2227150	.020000	.082500

The 1/2% city sales and use tax for improving and promoting economic and industrial development as permitted under Article 5190.6, Section **4B** was abolished and will become effective March 31, 2003 in the city listed below.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Lone Star (Morris Co)	2172039	.015000	.077500

An additional 1/2% city sales and use tax for improving and promoting economic and industrial development as permitted under Article 5190.6, Section **4B** will become effective April 1, 2003 in the cities listed below.

CITY NAME	LOCAL CODE	LOCAL RATE	TOTAL RATE
Corinth (Denton Co)	2061122	.015000	.077500
Quitaque (Briscoe Co)	2023012	.020000	.082500

An additional 1% city sales and use tax for improving and promoting economic and industrial development that includes an additional 1/2% as permitted under Article 5190.6, Section **4A** plus an additional 1/2% as permitted under Article 5190.6, Section **4B** will become effective April 1, 2003 in the cities listed below.

CITY NAME	LOCAL CODE	NEW RATE	TOTAL RATE
Matador (Motley Co)	2173010	.020000	.082500

A 1/2% Special Purpose District sales and use tax will become effective April 1, 2003 in the Special Purpose Districts listed below.

SPD NAME	LOCAL CODE	NEW RATE	TOTAL RATE
Blanco County North Library District	5016510	.005000	SEE NOTE 1

NOTE 1: The Blanco County North Library District is located in the northern portion of Blanco County, which has a county sales and use tax, but the district does **not** include all of Blanco County. The City of Round Mountain is located entirely within the Blanco County North Library District. The Blanco County North Library District does **not** include any area within Johnson City. The unincorporated area of Blanco County in ZIP codes 78620, 78635, 78636, 78654, 78663, 78669, and 78671 is partially located within the Blanco County North Library District. Contact the district representative at 830/868-4469 for additional boundary information.

TRD-200301676
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Filed: March 11, 2003

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §303.003 and §303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of March 17, 2003 - March 23, 2003 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of March 17, 2003 - March 23, 2003 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200301677
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: March 11, 2003

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Court Reporters Certification Board

Certification of Court Reporters

Following the examination of applicants on February 7, 2003, the Texas Court Reporters Certification Board certified to the Supreme Court of Texas the following individuals who are qualified in the method indicated to practice shorthand reporting pursuant to Chapter 52 of the Texas Government Code, V.T.C.A.:

MACHINE SHORTHAND: RUBY CASTILLEJA - NEW BRAUNFELS, TX; CHERYL SAMPLEY MANN - ORANGE, TX; LESA CLAPP - GRAND PRAIRIE, TX; SHAYNE WIMMER - MUENSTER, TX; STACEY BIEGERT - SCHERTZ, TX; MARY LOPEZ - SAN ANTONIO, TX; MARSHA ST. NICHOLASY - DICKINSON, TX; J'LYN WILLIAMS - ARLINGTON, TX; DEANA ROUSE - DALLAS,TX; KATHY WILLEFORD - ROWLETT, TX; CAMILLA MADRID - EL PASO, TX; ANICA DIAZ - MERCEDES, TX; SARAH BINA - ALLEN, TX; WHITNEY MORROW - COLLEYVILLE, TX; ALMA RODRIGUEZ - HALTOM CITY, TX; YVETTE PERRODIN - HOUSTON, TX; and EMILY EAKLE - YUKON, OK.

Following the examination of applicants on February 7, 2003, the Texas Court Reporters Certification Board certified to the Supreme Court of Texas the following individuals who are qualified in the method indicated to practice shorthand reporting pursuant to Chapter 52 of the Texas Government Code, V.T.C.A.:

ORAL STENOGRAPHY: DEBORAH HOLDERBY - BURLESON, TX; SHERRI ROBINSON - DALLAS, TX; JULIE EDMONDS - HOUSTON, TX; KARLA CLARK - ARLINGTON, TX; and MELODY WRIGHT - AUBREY, TX.

TRD-200301635
Sheryl Jones
Director of Administration
Court Reporters Certification Board
Filed: March 10, 2003

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Interagency Council on Early Childhood Intervention

Public Hearings on Proposed Agency Policy Changes

The Texas Interagency Council on Early Childhood Intervention will host public hearings on proposed agency policy changes to the ECI Policy and Procedures Manual. The public is encouraged to attend these hearings and provide comments to the agency. Depending on the number of individuals interested in testifying, participants may be asked to limit their testimony to five minutes in order to allow all interested parties to present comments. Individuals are encouraged, but not required, to submit their comments or testimony in written form.

The hearings will be held at:

Brown Heatly Building, Room 1420, 4900 North Lamar Boulevard Austin, Texas 78751, Monday, March 24, 2003 2:00 p.m. - 3:00 p.m.

Harris County Department of Education, 6300 Irvington Houston, Texas 77022, Tuesday, March 25, 2003 3:30 p.m. - 4:30 p.m.

The proposed policy changes are posted on the agency's website at www.eci.state.tx.us or you may obtain a copy by calling (512) 424-6754. For more information, please contact Cindy Martin, Deputy Executive Director, at (512) 424-6754.

Persons who plan to attend this hearing and who need auxiliary aids, interpreter services, or other accommodations are requested to call (512) 424-6754 at least 3 days prior to the scheduled meeting so that arrangements can be made.

TRD-200301710
Mary Elder
Executive Director
Interagency Council on Early Childhood Intervention
Filed: March 12, 2003

♦ ♦ ♦

Texas Commission on Environmental Quality

Notice of Application and Preliminary Decision for Hazardous Waste Permit Modification

For the Period of February 27, 2003

APPLICATION Vopak Industrial Services USA, Inc., 2759 Battleground Road, Deer Park, Harris County, Texas 77536, a commercial waste management facility that stores and treats industrial and hazardous wastes prior to disposal in a injection well that is permitted under the Clean Water Act, has applied to the Texas Commission on Environmental Quality (TCEQ) for a Class 3 modification to Hazardous Waste Permit HW-50025-001 to authorize the addition of 20 new hazardous waste storage and treatment tanks, the replacement of seven existing hazardous waste storage and treatment tanks with larger tanks, the addition of a new hazardous waste container storage area, the increase of hazardous waste storage capacity for two existing container storage areas, and the modification of the inspections schedule, waste analysis plan and closure plan. The facility is located approximately 0.8 miles southwest of the San Jacinto Monument in Deer Park, on approximately 5.4720 acres. The application was submitted to the TCEQ on May 1, 2002.

The TCEQ executive director has reviewed this action for consistency with the goals and policies of the Texas Coastal Management Program (CMP) in accordance with the regulations of the Coastal Coordination Council and has determined that the action is consistent with the applicable CMP goals and policies.

The TCEQ executive director has completed the technical review of the application and prepared a draft permit. The draft permit, if approved, would establish the conditions under which the facility must operate. The executive director has made a preliminary decision that this permit, if issued, meets all statutory and regulatory requirements. The permit application, executive director's preliminary decision, and draft permit are available for viewing and copying at the Deer Park Community Center, 610 East San Augustine, Deer Park, Texas 77536.

PUBLIC COMMENT / PUBLIC MEETING. You may submit public comments or request a public meeting about this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. Generally, the TCEQ will hold a public meeting if the executive director determines that there is a significant degree of public interest in the application, if requested in writing by an affected person, or if requested by a local legislator. A public meeting is not a contested case hearing.

Written public comments and requests for a public meeting must be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 within 45 days from the date of newspaper publication of this notice.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for public comments, the executive director will consider the comments and prepare a response to all relevant and material or significant public comments. The response to comments, along with the executive director's decision on the application, will be mailed to everyone who submitted public comments or requested to be on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting a contested case hearing or reconsideration of the executive director's decision. A contested case hearing is a legal proceeding similar to a civil trial in a state district court.

A contested case hearing will only be granted based on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised during the public comment period and not withdrawn. Issues that are not raised in public comments may not be considered during a hearing.

EXECUTIVE DIRECTOR ACTION. The executive director may issue final approval of the application unless a timely contested case hearing request or request for reconsideration is filed. If a timely hearing request or request for reconsideration is filed, the executive director will not issue final approval of the permit and will forward the application and requests to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

MAILING LIST. In addition to submitting public comments, you may ask to be placed on a mailing list to receive future public notices mailed by the Office of the Chief Clerk. You may request to be added to: (1) the mailing list for this specific application; (2) the permanent mailing list for a specific applicant name and permit number; and/or (3) the permanent mailing list for a specific county. Clearly specify which mailing list(s) to which you wish to be added and send your request to the TCEQ Office of the Chief Clerk at the address below. Unless you otherwise specify, you will be included only on the mailing list for this specific application.

INFORMATION. If you need more information about this permit application or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. The permittee's compliance history during the life of the permit being modified is available from the Office of Public Assistance.

Further information may also be obtained from Vopak Industrial Services USA, Inc. at the address stated above or by calling Mr. Quirino Q. Wong at (713) 561-7200.

TRD-200301678
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: March 11, 2003

♦ ♦ ♦

Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 122 and the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony concerning revisions to 30 TAC Chapter 122, specifically the repeal of §122.131 and §§122.511 - 122.516 and proper notification of §122.217 being submitted as a revision to the state implementation plan (SIP), under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Subchapter B, Chapter 2001; and 40 Code of Federal Regulations, §51.102 of the United States Environmental Protection Agency regulations concerning SIPs.

The rules in Chapter 122 were originally developed to meet Title V of the Federal Clean Air Act Amendments of 1990 (FCAA) as codified in 42 United States Code. The commission is now proposing to repeal §122.131 because the phased permit process has not been used by any facilities and the scheduled dates have since passed. The commission is also proposing the repeal of §§122.511 - 122.516 since the types of permits referenced have been converted to non-rule general operating permits and no longer exist.

On November 20, 2002, the commission adopted amendments to §122.217 regarding minor revision procedures. However, the commission did not submit §122.217 to the EPA as a revision to the state implementation plan (SIP). Public comment will be accepted on this section being submitted as a revision to the SIP. The adopted rule for §122.217 can be viewed on the *Texas Register* web site at: *http://www.sos.state.tx.us*

A public hearing on this proposal will be held in Austin on April 14, 2003 at 10:00 a.m. in Building F, Room 2210 at the commission's central office located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

Comments may be submitted to Joyce Spencer, MC 205, Office of Environmental Policy, Analysis, and Assessment, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or by fax to (512) 239-4808. All comments should reference Rule Log Number 2002-056-122-AI, and must be received by 5:00 p.m., April 21, 2003. For further information, please contact Debra Barber, Policy and Regulations Division at (512) 239-0412.

TRD-200301618
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: March 7, 2003

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Notice of Water Quality Applications

The following notices were issued during the period of March 3, 2003 through March 10, 2003.

The following require the applicants to publish notice in the newspaper. The public comment period, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P O Box 13087, Austin Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THIS NOTICE

CNP UTILITY DISTRICT has applied for a renewal of TPDES Permit No. 11239-001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,500,000 gallons per day. The facility is located on the south bank of Cypress Creek, approximately 2,700 feet west of Interstate Highway 45 in Harris County, Texas.

CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC, that operates the Greenspoint Service Center, which provides auxiliary services for the transmission and distribution of electric power, has applied for a renewal of TPDES Permit No. 02596 which authorizes the discharge of treated domestic wastewater, vehicle wash water, and cooling tower blowdown at a daily average flow not to exceed 20,000 gallons per day via Outfall 001. The facility is located at 2301 Gears Road, approximately 0.5 miles east of the intersection of Veterans Memorial Drive and Gears Road, north of the City of Houston, Harris County, Texas.

CITY OF ENNIS has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. 10443-004, to authorize the discharge of treated filter backwash water at a daily average flow not to exceed 250,000 gallons per day. The facility is located at 4400 Beach Road, approximately two miles south-southwest of the intersection of State Highway 34 and Lakeview Drive in Ellis County, Texas.

FALLBROOK UTILITY DISTRICT has applied for a renewal of TPDES Permit No. 10919- 001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,300,000 gallons per day. The facility is located north of Halls Bayou, 1,300 feet south of West Road and 2,500 feet east of Stuebner-Airline Road (Veteran's Memorial Drive) and approximately 1.0 mile west of Interstate Highway 45 in Harris County, Texas.

CITY OF HONEY GROVE has applied for a renewal of TPDES Permit No. 10710-003, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day. The facility is located approximately 2,000 feet west from Farm-to-Market Road 100 and approximately 3,000 feet north of U.S. Highway 82 in Fannin County, Texas.

LAZY RIVER IMPROVEMENT DISTRICT has applied for a renewal of TPDES Permit No. 11820-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 100,000 gallons per day. The facility is located approximately 7,500 feet southeast of the intersection of Interstate 45 and Farm-to-Market Road 1488, south of the City of Conroe in Montgomery County, Texas.

PONDEROSA JOINT POWERS AGENCY, has applied for a renewal of TPDES Permit No. 11081-001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 4,870,000 gallons per day. The facility is located at 17940 Butte Creek Drive in Houston, immediately south of Cypress Creek and approximately 2.3 miles west of Interstate Highway 45 in Harris County, Texas.

SEABOARD FARMS OF TEXAS, LLC, which proposes to operate a pork processing and fabrication facility, has applied TCEQ for a new permit, Proposed Permit No. 04478 to authorize the disposal of slaughterhouse processing plant wastewater, rendering plant wastewater, stockyard and truck wash water, boiler and cooling tower blowdown, sanitation water, domestic wastewater, utility water (associated with weekend operations), and storm water at an annual average flow not to exceed 2,400,000 gallons per day via irrigation of 3,000 acres; and the disposal of water softener regeneration waste and casing operations wastewater at an annual average flow not to exceed 2,200 gallons per day via evaporation. This permit will not authorize a discharge of pollutants into water in the State. The facility and irrigation site number 1 are located 1.5 miles west of the intersection of State Highway 354 and State Highway 287, on the south side of State Highway 354 in Moore County, Texas. Irrigation site number 2 is located 0.5 miles west of the intersection of State Highway 354 and County Road 2202, on the north side of State Highway 354, Moore County, Texas.

CITY OF WILLIS has applied for a renewal of TPDES Permit No. 10315-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 800,000 gallons per day.

The facility is located 200 yards west of the U.S. Highway 75 crossing of the East Fork of Crystal Creek and approximately 2 miles south of the City of Willis in Montgomery County, Texas.

TRD-200301679
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: March 11, 2003

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Notice of Water Rights Application

Notices mailed March 7, 2003.

APPLICATION NO. 5792; Keith Weber and wife Helen Weber, 20100 Belinda Ln., Manor, Texas, 78653, seek a Water Use Permit pursuant to 11.121, Texas Water Code, and Texas Commission on Environmental Quality Rules 30 TAC 295.1, et seq. Applicants seek authorization to divert not to exceed 9 acre-feet of water from a well that captures underflow of the Colorado River, Colorado River Basin at a point bearing N46 E, 340 feet from the Southwest corner of Lot 1, Owen Acres Section Two, also being Latitude 30.219 N, Longitude 97.498 W. Said point being 17 miles east from the Travis County Courthouse and 16 miles southeast from Manor, Texas. The water will be diverted at a maximum rate of 0.049 cfs (22 gpm) for agricultural purposes to irrigate 3 acres of land out of a 3.6 acre- tract located in the Matthew Duty « League No. 10, Abstract 10, Travis County. Ownership of the land to be irrigated is evidenced by a General Warranty Deed as recorded in Volume 12939, Page 1413 in the Real Property Records Travis County, Texas. The application was received on November 12, 2002. Additional information was received on December 27, 2002. The application was declared administratively complete on January 2, 2003. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

PROPOSED PERMIT NO. 8236; Valero Three Rivers Refinery, P.O. Box 490, Three Rivers, TX 78071-0490, applicant, seeks a temporary Water Use Permit, pursuant to Texas Water Code (TWC)11.138 and Texas Commission on Environmental Quality Rules 30 TAC 295.1, et seq., to divert and use not to exceed 1,200 acre-feet of water during a two year period from the Frio River, tributary of the Nueces River, Nueces River Basin for industrial (hydrostatic testing and refill of fire water pond) purposes. Water will be diverted at a maximum rate of 2.23 cfs (1,000 gpm)from a point located near Highway 72,10 miles northwest of George West, and 1 mile west of Three Rivers, a nearby town, Live Oak County, said point also being Latitude 28.4633 N,Longitude 98.1889 W. The applicant will divert not to exceed 600 acre-feet of water per annum, and the water will be held for approximately 20 days prior to release back into the river. The water will be returned to the Frio River, downstream of the diversion point, at a point being Latitude 28.4558 N, Longitude 98.1944 W. The temporary permit, if issued, will be junior in priority to all senior and superior water rights in the Nueces River Basin. The application was received on December 20, 2002. The application was determined to be administratively complete and filed with the Chief Clerk on February 11, 2003. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, by March 28, 2003.

Information Section

A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in an application.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200301680
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: March 11, 2003

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Texas Department of Health

Notice of Agreed Order with Corinthian Schools, Inc. dba National Institute of Technology, Inc.

On February 28, 2003, the director of the Bureau of Radiation Control (bureau), Texas Department of Health, approved the settlement agreement between the bureau and Corinthian Schools, Inc., doing business as National Institute of Technology, Inc. (registrant-R25596) of Houston. A total administrative penalty in the amount of $4,250 was assessed the registrant for violations of 25 Texas Administrative Code, Chapter 289.

A copy of all relevant material is available for public inspection, by appointment, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays). Contact Chrissie Toungate, Custodian of Records, Bureau of Radiation Control, Texas Department of Health, 1100 West Street, Austin, Texas 78756-3189, by calling (512) 834-6688, or by visiting the Exchange Building, 8407 Wall Street, Austin, Texas.

TRD-200301706
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: March 12, 2003

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Notice of Intent to Revoke Certificates of Registration

Pursuant to 25 Texas Administrative Code, §289.205, the Bureau of Radiation Control (bureau), Texas Department of Health (department), filed complaints against the following registrants: Acupuncture/Chiropractic Pain Clinic, Port Arthur, R25053; Austin Semiconductor, Inc., Austin, R16792; Caleb Brett USA, Inc., St. Rose, Louisiana, R19981; Floyd Howell Tuley, Jr., Ph.D., Dallas, R21982; John M. Cook, III, D.D.S., Houston, R03899; Jose E. Aguirre, D.M.D., San Antonio, R13232; Khanh Q. Nguyen, M.D., P.A., Houston, R10582; McAllen Hospitals LP, Edinburg, R01349; Occupational Health, P.A., San Marcos, R22914; Robert C. McDaniel, M.D., P.A., Longview, R16827; Transpacific Technology Distribution Corporation, Sunnyvale, California, R22144; VG Scientific, Beverly, Massachusetts, R24336; We Pack Logistics LP, Paris, R22841; Brownsville Medical Center, Brownsville, Z00393; Medical Equipment Designs, Inc., Grand Prairie, Z01483; Visual Concepts 2000, Corpus Christi, Z01516.

The complaints allege that these registrants have failed to pay required annual fees. The department intends to revoke the certificates of registration; order the registrants to cease and desist use of radiation machine(s); order the registrants to divest themselves of such equipment; and order the registrants to present evidence satisfactory to the bureau that they have complied with the orders and the provisions of the Texas Health and Safety Code, Chapter 401. If the fee is paid within 30 days of the date of each complaint, the department will not issue an order.

This notice affords the opportunity to the registrants for a hearing to show cause why the certificates of registration should not be revoked. A written request for a hearing must be received by the bureau within 30 days from the date of service of the complaint to be valid. Such written request must be filed with Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), 1100 West 49th Street, Austin, Texas 78756-3189. Should no request for a public hearing be timely filed or if the fee is not paid, the certificates of registration will be revoked at the end of the 30-day period of notice.

A copy of all relevant material is available, by appointment, for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200301705
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: March 12, 2003

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Notice of Intent to Revoke Radioactive Material Licenses

Pursuant to 25 Texas Administrative Code, §289.205, the Bureau of Radiation Control (bureau), Texas Department of Health (department), filed complaints against the following licensees: Colorado-Fayette Medical Center, Weimar, L03470; Independent Testing Laboratories, Houston, L03795; Paragon Wireline, Inc., Bryan, L05367.

The complaints allege that these licensees have failed to pay required annual fees. The department intends to revoke the radioactive material licenses; order the licensees to cease and desist use of such radioactive materials; order the licensees to divest themselves of the radioactive material; and order the licensees to present evidence satisfactory to the bureau that they have complied with the orders and the provisions of the Texas Health and Safety Code, Chapter 401. If the fee is paid within 30 days of the date of each complaint, the department will not issue an order.

This notice affords the opportunity to the licensees for a hearing to show cause why the radioactive material licenses should not be revoked. A written request for a hearing must be received by the bureau within 30 days from the date of service of the complaint to be valid. Such written request must be filed with Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), 1100 West 49th Street, Austin, Texas 78756-3189. Should no request for a public hearing be timely filed or if the fee is not paid, the radioactive material licenses will be revoked at the end of the 30-day period of notice.

A copy of all relevant material is available, by appointment, for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200301704
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: March 12, 2003

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on Anant Mauskar, M.D., P. A.

Notice is hereby given that the Bureau of Radiation Control (bureau), Texas Department of Health (department), issued a notice of violation and proposal to assess an administrative penalty against Anant Mauskar, M.D., P.A. (registrant-R22288) of Houston. A total penalty of $5,000 is proposed to be assessed the registrant for alleged violations of 25 Texas Administrative Code, §289.227.

A copy of all relevant material is available, by appointment, for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200301709
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: March 12, 2003

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on Randy Miles

Notice is hereby given that the Bureau of Radiation Control (bureau), Texas Department of Health (department), issued a notice of violation and proposal to assess an administrative penalty against Randy Miles (registrant-Unregistered) of Arlington. A total penalty of $8,000 is proposed to be assessed Miles for alleged violations of 25 Texas Administrative Code, §289.226.

A copy of all relevant material is available, by appointment, for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200301707

Susan K. Steeg
General Counsel
Texas Department of Health
Filed: March 12, 2003

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on TWM Health Services, Inc.

Notice is hereby given that the Bureau of Radiation Control (bureau), Texas Department of Health (department), issued a notice of violation and proposal to assess an administrative penalty against TWM Health Services, Inc. (registrant-R23651) of Baytown. A total penalty of $10,000 is proposed to be assessed the registrant for alleged violations of 25 Texas Administrative Code, §§289.226 and 289.227.

A copy of all relevant material is available, by appointment, for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200301708
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: March 12, 2003

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Texas Department of Housing and Community Affairs

HTF Capacity Building NOFA

ANNOUNCEMENT OF NOTICE OF FUND AVAILABILITY FOR THE HOUSING TRUST FUND CAPACITY BUILDING PROGRAM

The Texas Department of Housing and Community Affairs' (TDHCA) Housing Trust Fund is accepting applications for the Housing Trust Fund Capacity Building Program. The Capacity Building Program is designed to directly assist eligible organizations to increase their capacity to provide safe, decent, affordable housing in their communities. Eligible activities under this application include hiring qualified persons or contracting with consultants who can provide technical assistance in developing housing for low, very low, and extremely low income individuals and families, including persons with special needs. Funds may also be used to contract directly with qualified technical assistance providers with experience and training in the areas prescribed by this NOFA. A total of $567,729 is available through this NOFA. Funds will be allocated evenly between the 13 Uniform State Service Regions, resulting in a maximum award of $43,671 for one organization in each region. If no qualified applications are received in a region, the funds will be awarded to qualified applicants in another region. These funds may not be used to pay for existing staff. Restructuring of staff duties, re-assignment of staff duties, or other changes to existing staff do not constitute the hiring of additional staff. If the applicant is a recipient of 2001 or 2002 Capacity Building Funds used to hire additional staff, the staff paid for through those funds will be eligible as additional staff under the 2003 Capacity Building Funds, provided that the assistance does not exceed three years.

Respondents will complete an application that includes, but is not limited to, a detail of the type of staff needed for improving the organization's housing development capacity, or the type of training to be provided through the use of a qualified technical assistance consultant. The application will also include a detailed breakdown of all costs associated with the staffing or provision of technical assistance associated with these funds. Applicants must provide a copy of an IRS determination letter which states that the organization is a 501(c)(3) or (4) entity as well as the articles of incorporation of the nonprofit organization which specifically state that the development of affordable housing is one of the entity's tax exempt purposes.

The staff hired with the funds will be required to attend at least two workshops sponsored by TDHCA on multifamily and single family affordable housing development. The funds will be distributed in a lump sum. The Department will monitor the organization at least 2 times during the year. Prior to the expiration of the contract, a final report will be submitted which verifies that the individual has satisfied the measures described in the application. If it is determined that the goals stated in the application were not satisfied, the organization will not be eligible for funds in the following year.

Applications will be evaluated based on the following criteria:

The organization's ability to serve rural areas as evidenced in the articles of incorporation, bylaws, or corporate resolution.

The organization's ability to serve persons with special needs as evidenced in the articles of incorporation, bylaws, or corporate resolution.

The organization's ability to serve individuals and families with incomes at 50% or below of the Area Median Gross Income as evidenced in the articles of incorporation, bylaws, or corporate resolution.

Community support for the organization's effort in affordable housing development.

The organization has unsuccessfully applied for TDHCA funding within the past two years.

Funding is available for the following areas of technical assistance:

Architectural Barrier Removal/Universal Design;

Comprehensive Capacity Building (including Planning, Resource Development, Internal Operations and Governance, Program Delivery, and Networking);

Construction Management;

Energy Efficiency and Alternative Building Methods;

Property Management;

Real Estate/Project Development

Applications must be received at TDHCA by 5:00 p.m. on April 23, 2003. Faxed applications will not be accepted.

The Housing Trust Fund plans to select a diverse group of applications that will serve nonprofit housing development organizations throughout the state. Further detail on the application submission and selection criteria will be outlined in the application guidelines. Awards will be made as grants. Contracts funded under this Notice of Funds Available will be limited to one year. TDHCA's Board of Directors reserves the right to change the award amount, or to award less than the requested amount.

All interested parties with a workable plan are encouraged to participate in the program. For more information or to request an application, please contact the Multifamily Finance Production Division at (512) 475-3340, or e-mail eweilbae@tdhca.state.tx.us. Please direct your proposal to: Texas Department of Housing and Community Affairs, Multifamily Finance Production Division, P.O. Box 13941, Austin, Texas 78711-3941 or Physical Address, 507 Sabine, Suite 400, Austin, Texas 78701.

TRD-200301722
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: March 12, 2003

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Houston-Galveston Area Council

Public Meeting Notice

Public Comment Period Open for Amendments to the 2022 Metropolitan Transportation Plan (MTP) and the 2002-2004 Transportation Improvement Program (TIP)

A public meeting was held on Tuesday, March 18, 2003, at the Houston-Galveston Area Council (H-GAC) on proposed amendments to the 2022 Metropolitan Transportation Plan (MTP) and the 2002-2004 Transportation Improvement Program (TIP). The public is encouraged to provide comments to H-GAC on the following proposed amendments:

Addition of project to add 600 spaces to the Fuqua Park and Ride lot.

Cancellation of Congestion Mitigation and Air Quality Improvement Program projects in Brazoria, Galveston and Harris counties totaling $14.3 million.

The public comment period on the amendments begins **Sunday, March 9, 2003**. All comments must be received by H-GAC no later than **5 p.m., Monday, April 7, 2003**. To obtain more detailed information, please visit **www.hgac.cog.tx.us/transportation** or call Pat Waskowiak, Transportation Senior Planner, at (713) 993-2456. Copies of the proposed amendments will also be available at the meeting. Written comments may be submitted to Pat Waskowiak, Houston-Galveston Area Council, P.O. Box 22777, Houston, Texas 77227, emailed to pwaskowiak@hgac.cog.tx.us or faxed to (713) 993-4508.

In compliance with the Americans with Disabilities Act, H-GAC will provide for reasonable accommodations for persons with disabilities attending H-GAC functions. Requests should be received by H-GAC 24 hours prior to the function. Call Pat Waskowiak at (713) 993-2456 to make arrangements.

TRD-200301601
Alan Clark
MPO Director
Houston-Galveston Area Council
Filed: March 6, 2003

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Request for Proposal

The Houston-Galveston Area Council solicits proposals to implement programs to improve the retention of students enrolled in nursing programs seeking initial licensure as registered nurses. This region includes Austin, Brazoria, Chambers, Colorado, Fort Bend, Galveston, Houston, Liberty, Matagorda, Montgomery, Walker, Waller, and Wharton Counties. A proposal is available to download at www.theworksource.org. Hard copies of the proposal package will be available for mail out beginning February 17, 2003. Proposals are due at H-GAC offices on or before 12:00 noon Central Daylight Time on March 28, 2003. H-GAC will not accept late proposals; there will be no exceptions.

Prospective bidders may contact Carol Kimmick at (713) 627-3200 or ckimmick@theworksource.org or visit the web site to request a proposal package.

TRD-200301583
Jack Steele
Executive Director
Houston-Galveston Area Council
Filed: March 5, 2003

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Request for Proposal

The Houston-Galveston Area Council (H-GAC) is requesting proposals to conduct an access management and traffic mobility study for the FM 518 corridor from US 288 in Brazoria County to SH 146 in Galveston County. The purpose of the study is to identify short-term transportation improvements to improve traffic flow and reduce motorist delay. The study will collect sufficient information to measure and evaluate a range of viable short-term improvement concepts, as well as address cost-benefit and cost-effectiveness of various solutions. The study shall conclude with the identification of a list of recommended improvements and ways to implement them, including time frame and funding sources.

A Pre-Proposal Conference is scheduled at **3 p.m. on Monday, March 24, 2003**, at H-GAC offices. Submittals are due by **3 p.m. on Tuesday, April 15, 2003**. Twelve (12) typewritten, bound/stapled and signed copies of the proposal are required. Late proposals will **NOT** be accepted.

The Request for Proposal packet can be downloaded from the H-GAC Transportation Department Web site at **www.hgac.cog.tx.us/transportation/rfps.html.** Interested firms may also obtain the packet at the H-GAC offices at 3555 Timmons Lane, Suite 120, Houston, Texas 77027, or by contacting Jerry L. Bobo at 713-993-4571. All questions regarding the Request for Proposal can be sent to the attention of Jerry L. Bobo by email to jbobo@hgac.cog.tx.us, faxed to 713-993-4508, or mailed to the Houston-Galveston Area Council, P.O. Box 22777, Houston, TX 77227-2227.

TRD-200301633
Alan Clark
MPO Director
Houston-Galveston Area Council
Filed: March 10, 2003

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Texas Department of Human Services

Request for Proposals to Provide Services to Disabled TANF Recipients

The Texas Department of Human Services (DHS) announces a request for proposal (RFP) from applicant organizations to provide services to disabled recipients of Temporary Assistance for Needy Families (TANF) financial assistance. Proposals should address how the applicant will assist disabled TANF recipients in establishing eligibility for federal Supplemental Security Income (SSI) or Retirement, Survivors, and Disability Insurance (RSDI) for disability benefits issued by the Social Security Administration (SSA).

Description of Services: The contractor must have an extensive and thorough knowledge of the SSI and RSDI programs and application/certification procedures. DHS expects the contractor to screen referred clients to ensure clients are potentially eligible for SSA disability-based benefits and assist clients throughout the SSI/RSDI

application and appeal process. This request for proposals does not address services to any recipients of TANF financial assistance other than those who are disabled and who (with the assistance of the contractor) become qualified for disability- based SSI or RSDI benefits. DHS expects the contractor to provide sufficient resources for the contract period to perform the services required by this proposal.

Applicant organizations must demonstrate ability to provide the following services: assist clients in completing and filing application forms and other required documents; submit medical and other required documentation on applicants' behalf; ensure application and appeal deadlines are met; represent clients at appeals and hearings; monitor and follow up on the progress of applications filed with SSA; and attend meetings with DHS staff, as needed, to discuss issues affecting the efficiency and operation of the project.

Closing Date: Proposals must be received **no later than 5:00 p.m. CDT, Monday, April 21, 2003**. Late proposals will be returned unopened to the applicant. DHS will not accept proposals by facsimile transmission or email. All proposals will receive a date stamp upon receipt.

Terms and/or Amount: The applicant should indicate the amount it intends to charge DHS for each successful referral of a disabled TANF recipient to SSI or disability-based RSDI. Although the cost-per-referral will be considered when awarding the contract, DHS is not bound to award the contract to the bidder with the lowest cost-per-referral.

Offeror's Conference: Applicant's teleconference (participation optional) will be held Monday, March 31, 2003, from 1:30 p.m. to 3:30 p.m. (CST). Notification deadline for participation in the conference is Friday, March 28, 2003, at 5:00 p.m. (CST).

Selection and Evaluation: DHS will review the proposals according to the criteria described in this RFP. DHS will retain all proposals and they will not be returned to the applicants. DHS will screen all proposals for eligibility and completeness. DHS will disqualify any proposal that does not meet the eligibility requirements in this RFP. Proposals that are deemed complete and eligible will be referred to the appropriate evaluation team. Proposals must meet the following in order to be considered complete: received timely; and proposal complete, including signature, copies, attachments, and other specified items.

Proposals must contain the following to be considered: cover page, relevant successful experience of applicant and effectiveness addressing the project needs, staffing, timeframe, and budget summary.

Applicants must submit an original and five copies. Applicants must include an electronic copy submitted on a 3-1/2 inch disk format or on a CD-ROM in MS Word format.

Contact Person: To obtain a Request for Proposal packet, contact Donna Bragdon, Texas Department of Human Services, 701 West 51st St., Mail Code W-323, Austin, Texas 78751; telephone (512) 438-3300; or email: donna.bragdon@dhs.state.tx.us.

The detailed version of the RFP can also be viewed at http://esbd.tbpc.state.tx.us - Texas Department of Human Services requisition number DB0403.

TRD-200301720
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Filed: March 12, 2003

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Texas Department of Insurance

Company Licensing

Application for admission to the State of Texas by HUDSON INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Wilmington, Delaware.

Any objections must be filed with the Texas Department of Insurance, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200301718
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: March 12, 2003

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Notice

The Commissioner of Insurance, or his designee, will consider approval of a rate filing request submitted by National American Insurance Company proposing to use rates for commercial automobile insurance that are outside the upper or lower limits of the flexibility band promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(g). The Company is requesting the following flex percentages of +40.4 for Liability and +30 for Physical Damage under Truckers Coverage and +30 for Liability and Physical Damage under all Other Coverages. The overall rate change is +5.69%.

Copies of the filing may be obtained by contacting the Texas Department of Insurance, P&C Actuarial Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 475-3017.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101 §3(h), is made with the Chief Actuary for P&C, Mr. Phil Presley, at the Texas Department of Insurance, MC 105-5F, P.O. Box 149104, Austin, Texas 78701 by April 7, 2003.

TRD-200301611
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: March 7, 2003

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Notice of Public Hearing

The Commissioner of Insurance will hold a public hearing under Docket No. 2547, on April 2, 2003 at 9:30 a.m. in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, to consider two nominations for re-appointment to the Board of Directors of the Texas Windstorm Insurance Association (TWIA). Mr. Harley Londrie of Laguna Vista, Texas has been nominated by the Office of Public Insurance Counsel for re-appointment as one of the two general public members to serve on the TWIA Board; and Mr. Garry P. Kaufman, of the Galveston Insurance Associates in Galveston, Texas, Texas has been nominated by the Texas Department of Insurance staff for re-appointment as one of the two local recording agent members to serve on the TWIA Board.

The hearing is held pursuant to the Insurance Code, Article 21.49, Section 5A, which provides that the Commissioner after notice and hearing, may issue any orders considered necessary to carry out the purposes of Article 21.49 (Catastrophe Property Insurance Pool Act), including but not limited to, maximum rates, competitive rates, and policy forms. Any person may appear and testify for or against the proposed appointment.

Pursuant to Article 21.49, §5, two members of the nine-member TWIA Board of Directors are to be representatives of the general public, nominated by the Office of Public Insurance Counsel, who, as of the date of the appointment, reside in a catastrophe area and are TWIA policyholders; and two members are to be local recording agents licensed under the Texas Insurance Code with demonstrated experience in the TWIA and whose principal offices, as of the date of the appointment, are located in a catastrophe area.

Any questions concerning this matter should be addressed to Marilyn Hamilton, Associate Commissioner, Property and Casualty Program, (512) 322-2267, MC 104-PC, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

TRD-200301610
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: March 7, 2003

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for admission to Texas of ESIS, Inc, a foreign third party administrator. The home office is Philadelphia, Pennsylvania.

Application for admission to Texas of Midlands Claim Administrators, Inc., a foreign third party administrator. The home office is Oklahoma City, Oklahoma.

Application for admission to Texas of Business Administrators & Consultants, Inc., a foreign third party administrator. The home office is Columbus, Ohio.

Application for incorporation in Texas of Benemetrics Corporation DBA EMS Administrators, a domestic third party administrator. The home office is Fort Worth, Texas.

Any objections must be filed within 20 days after this notice was filed with the Secretary of State, addressed to the attention of Matt Ray, MC 107-1A, 333 Guadalupe, Austin, Texas 78701.

TRD-200301719
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: March 12, 2003

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Texas Lottery Commission

Instant Game No. 378 "Armadillo Dollars"

1.0 Name and Style of Game.

A. The name of Instant Game No. 378 is "ARMADILLO DOLLARS". The play style is "match 3 of 9 with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 378 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 378.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, $500, $5,000, ARMADILLO SYMBOL.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 378 - 1.2D

PLAY SYMBOL	CAPTION
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$5,000	FIV THOU
ARMADILLO SYMBOL	AUTO

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 378 - 1.2E

CODE	PRIZE
ONE	$1.00
TWO	$2.00
FOR	$4.00
FIV	$5.00
TEN	$10.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $1.00, $2.00, $4.00, $5.00, $10.00, or $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100, or $500.

I. High-Tier Prize - A prize of $5,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (378), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 378-0000001-000.

L. Pack - A pack of "ARMADILLO DOLLARS" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 000-004 will be on the first page, tickets 005-009 will be on the next page and so forth with tickets 245-249 on the last page. Tickets 000 and 249 will be folded down to expose the pack-ticket number through the shrink-wrap.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government

Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "ARMADILLO DOLLARS" Instant Game No. 378 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "ARMADILLO DOLLARS" Instant Game is determined once the latex on the ticket is scratched off to expose nine (9) play symbols. If the player gets three (3) like amounts, the player will win that amount. If the player gets two (2) like amounts and an armadillo symbol, the player will win that amount automatically. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly nine (9) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly nine (9) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the nine (9) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the nine (9) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No four or more like play symbols on a ticket.

C. No more than two (2) pairs of like play symbols on a ticket.

D. The armadillo symbol will appear only once on a ticket.

E. When the armadillo symbol appears on a winning ticket, there will be no more than two like play symbols.

2.3 Procedure for Claiming Prizes.

A. To claim a "ARMADILLO DOLLARS" Instant Game prize of $1.00, $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100, or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "ARMADILLO DOLLARS" Instant Game prize of $5,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas

Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "ARMADILLO DOLLARS" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "ARMADILLO DOLLARS" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "ARMADILLO DOLLARS" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 15,010,000 tickets in the Instant Game No. 378. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 378 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$1	1,801,363	8.33
$2	960,438	15.63
$4	240,324	62.46
$5	180,037	83.37
$10	120,080	125.00
$20	60,040	250.00
$50	30,028	499.87
$100	3,751	4,001.60
$500	627	23,939.39
$5,000	63	238,253.97

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.
**The overall odds of winning a prize are 1 in 4.42. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 378 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 378, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200301649
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: March 10, 2003

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Instant Game No. 390 "Hot Numbers"

1.0 Name and Style of Game.

A. The name of Instant Game No. 390 is "HOT NUMBERS". The play style is "match up".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 390 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 390.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - One of the symbols which appears under the Latex Overprint on the front of the ticket. Each Play Symbol is printed in Symbol font in black ink in positive. The possible play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, $1.00, $2.00, $5.00, $10.00, $15.00, $20.00, $30.00, $60.00, $2,000, $6,000.

D. Play Symbol Caption - the small printed material appearing below each Play Symbol which explains the Play Symbol. One and only one of these Play Symbol Captions appears under each Play Symbol and each is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 390 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
$1.00	ONE$
$2.00	TWO$
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY
$30.00	THIRTY
$60.00	SIXTY
$2,000	TWO THOU
$6,000	SIX THOU

E. Retailer Validation Code - Three small letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. The possible validation codes are:

Figure 2: GAME NO. 390 - 1.2E

CODE	PRIZE
ONE	$1.00
TWO	$2.00
FIV	$5.00
TEN	$10.00
FTN	$15.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a four (4) digit security number which will be boxed and placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $1.00, $2.00, $5.00, $10.00, $15.00, or $20.00.

H. Mid-Tier Prize - A prize of $40.00, $60.00, or $180.

I. High-Tier Prize - A prize of $6,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (390), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 000 and end with 249 within each pack. The format will be: 390-0000001-000.

L. Pack - A pack of "HOT NUMBERS" Instant Game tickets contain 250 tickets, which are packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 000-004 will be on the first page, tickets 005-009 will be on the next page and so forth with tickets 245-249 on the last page. Tickets 000 and 249 will be folded down to expose the pack-ticket number through the shrink-wrap.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "HOT NUMBERS" Instant Game No. 390 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "HOT NUMBERS" Instant Game is determined once the latex on the ticket is scratched off to expose 10 (ten) play symbols. The player must scratch the entire play area. If the player gets two (2) like numbers in the play area, the player will win the prize shown. If the player gets three (3) like numbers, the player will double the prize shown. If the player gets four (4) like numbers, the player will triple the prize shown. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 10 (ten) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 10 (ten) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 10 (ten) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 10 (ten) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No more than one set of like numbers on a ticket.

C. No five (5) or more like play symbols on a ticket.

2.3 Procedure for Claiming Prizes.

A. To claim a "HOT NUMBERS" Instant Game prize of $1.00, $2.00, $5.00, $10.00, $15.00, $20.00, $40.00, $60.00, $180, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $60.00 or $180 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "HOT NUMBERS" Instant Game prize of $6,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "HOT NUMBERS" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Department of Human Services for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resource Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "HOT NUMBERS" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "HOT NUMBERS" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated therefor, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated therefor, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated therefor. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 15,174,750 tickets in the Instant Game No. 390. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 390 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$1	1,821,024	8.33
$2	971,087	15.63
$5	121,426	124.97
$10	60,699	250.00
$15	60,699	250.00
$20	60,699	250.00
$40	30,365	499.74
$60	6,206	2,445.17
$180	1,014	14,965.24
$6,000	38	399,335.53

*The number of actual prizes may vary based on sales, distribution, testing, and number of prizes claimed.
**The overall odds of winning a prize are 1 in 4.84. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 390 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 390, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200301650
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: March 10, 2003

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Manufactured Housing Division

Notice of Administrative Hearing

Wednesday, April 9, 2003, 1:00 p.m.

State Office of Administrative Hearings, William P. Clements Building, 300 West 15th Street, 4th Floor, Austin, Texas

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the complaint of the Texas Department of Housing and Community Affairs vs. Gila Multi-Media, Inc. dba New Century Homes to hear alleged violations of Sections 6(m), 6(m)(1), and 6(m)(3) of the Act by not refunding the consumers entire deposit after receiving written notice requesting the deposit be returned. SOAH 332-03-2187. Department MHD2003000205-R and MHD2003000207-R.

Contact: Jim R. Hicks, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-3589, jhicks@tdhca.state.tx.us

TRD-200301602
Tim Irvine
Deputy Executive Director
Manufactured Housing Division
Filed: March 7, 2003

♦ ♦ ♦

North Central Texas Council of Governments

Notice of Availability of Request for Qualifications to Consulting Firms for Hazard Mitigation Action Plan (HazMAP)

This notice by the North Central Texas Council of Governments (NCTCOG) for consultant services is filed under the provisions of Government Code, Chapter 2254.

The North Central Texas Council of Governments (NCTCOG) is providing notice of the availability of a Request for Qualifications (RFQ). This Request for Qualifications (RFQ) is being made available by the North Central Texas Council of Governments (NCTCOG) to professional consulting firms who may have an interest in assisting NCTCOG, its participating member local governments, and other partners to prepare a multi-jurisdictional Hazard Mitigation Action Plan (HazMAP) that can be used in response to a nationally identified need to reduce our vulnerability to disasters. The NCTCOG Department of Environmental Resources has lead responsibility, with direct involvement of the Emergency Preparedness, Transportation, and Research and Information Services Departments.

The HazMAP planning process has been organized into the following four major components, which generally mirror the outline of local mitigation plan contents in 44 CFR Part 201.6(c) Plan Contents of the February 26, 2002 Federal Register rule (http://www.fema.gov/fima/mitactivities.shtm).

These are:

1. Planning Process,

2. Risk Assessment,

3. Mitigation Strategies,

4. Plan Adoption and Maintenance

www.hazmap.dfwinfo.com: This website will be a primary vehicle for up-to-date information on progress of HazMAP, with draft materials posted for comments by NCTCOG throughout the process. The complete Request for Qualifications is available at this website or by contacting NCTCOG staff at (817) 608-2361.

EVALUATION OF QUALIFICATIONS

To assist interested consultants, a Consultant Briefing will be held:

On: Wednesday, March 26, 2003

At: 9:30 a.m.

In: NCTCOG offices

NCTCOG will discuss the proposed project and respond to questions concerning the Request for Qualifications. Questions and NCTCOG responses subsequent to the consultant briefing will be posted on a bulletin board at www.hazmap.dfwinfo.com

A HazMAP Review Team, which will be guiding the planning effort, will review the responses to the RFQ, select the consultants for interviews, and rank the consultants. NCTCOG will negotiate a contract with the top-ranked consultant. If a satisfactory contract cannot be negotiated, NCTCOG will proceed to the next most highly qualified firm pursuant to Texas Government Code--Chapter 2254, Subchapter A--Professional Services Procurement Act. It is anticipated that the contract would include hourly rates for the various categories of consultant staff and/or similar means to establish a fair and equitable costing method. Target funding for the consultant services is $150,000.

It is NCTCOG's intent to engage consultant assistance as soon as possible (target to obtain Executive Board approval at its May 22nd meeting). Once the consultant is engaged, it is anticipated that an intensive two-day work session will be conducted to develop the more detailed consultant scope of services. Given the interactive nature of this engagement, initial work assignments may be best organized into components with a specific cost, while others may require a specific authorization to proceed from NCTCOG at a later time. The consultant may recommend other ways to insure that their services are used effectively and efficiently. This contract is dependent on funding from FEMA through TxDEM. NCTCOG reserves the right to terminate this process at any time.

CONSULTANT RESPONSE

Consultants will submit 25 copies of a written response to the available Request for Qualifications to John Promise, P.E., NCTCOG Director of Environmental Resources, to be received by close of business on Wednesday, April 9, 2003 at the NCTCOG offices. This written response should be concise, specific to this RFQ, and not exceed 20 pages of text and graphics in the main submission document (including any multi-consultant proposal). Additional separate appendices may be submitted without limitation.

NCTCOG CONTACT

The project will be coordinated by NCTCOG's Department of Environmental Resources, with its Director, John Promise, serving in a Principal-in-Charge role. For further information, contact NCTCOG at (817) 608-2361.

TRD-200301664
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: March 11, 2003

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Public Utility Commission of Texas

Notice of Application for A Certificate to Provide Retail Electric Service

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on February 28, 2003, for retail electric provider (REP) certification, pursuant to §§39.101 - 39.109 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Energy West Resources, Ltd. for Retail Electric Provider (REP) Certification, Docket Number 27435 before the Public Utility Commission of Texas.

Applicant's requested service area by geography includes the entire State of Texas.

Persons wishing to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than March 28, 2003. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 27435.

TRD-200301594
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 6, 2003

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Notice of Application for Amendment to Certificated Service Area Boundary in Comal County, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on February 24, 2003, for an amendment to a certificated service area boundary in Comal County, Texas.

Docket Style and Number: Application of Southwestern Bell Telephone, L.P. d/b/a SBC Texas for an Amendment to a Certificate of Convenience and Necessity to Realign the Boundary Between SBC Texas Elm Creek Zone of the San Antonio Metropolitan Exchange and Guadalupe Valley Telephone Cooperative's Bulverde Exchange. Docket Number 27419.

The Application: On February 24, 2003, Southwestern Bell Telephone, L.P. d/b/a SBC Texas (SBC Texas) filed an application to amend its certificate of convenience and necessity (CCN). SBC Texas proposed to realign the boundary between SBC Texas' Elm Creek zone of the San Antonio metropolitan exchange and Guadalupe Valley Telephone Cooperative's (GVTC) Bulverde exchange. In its application, SBC Texas stated it will relinquish a portion of its service area to GVTC so

that the entry gate and all the homes of a new subdivision can be served by a single dominant certificated telecommunications utility (DCTU).

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll- free) 1-800-735-2989. All comments should reference Docket Number 27419.

TRD-200301622
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 7, 2003

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Notice of Application for Amendment to Certificated Service Area Boundary in Montgomery County, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on February 28, 2003, for an amendment to a certificated service area boundary in Montgomery County, Texas.

Docket Style and Number: Application of CenterPoint Energy Houston Electric, LLC for a Certificate of Convenience and Necessity for Service Area Boundaries within Montgomery County. Docket Number 27434.

The Application: On February 28, 2003, CenterPoint Energy Houston Electric, LLC (CenterPoint) filed an application for the purpose of defining the southwest Montgomery County boundary line between the electric distribution service territory of Mid-South Electric Cooperative Association (Mid-South Synergy) and CenterPoint (previously known as HL&P or Reliant Energy). For many years the boundary line between these two electric providers as defined on the ground has been undetermined. Due to the growth in this part of Montgomery County, Texas, the two companies have jointly filed this application for purposes of defining the boundary line. No new loads will be gained or new facilities built by either company. If the application is granted, the boundary line will be more clearly defined between the two companies.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll- free) 1-800-735-2989. All comments should reference Docket Number 27434.

TRD-200301623
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 7, 2003

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Notice of Application for Amendment to Certificated Service Area Boundary in Oldham and Hartley Counties, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on February 28, 2003, for an amendment to a certificated service area boundary in Oldham and Hartley Counties, Texas.

Docket Style and Number: Application of XIT Rural Telephone Cooperative, Inc. for Approval to Amend Certificate of Convenience and Necessity - Certificate Service Area Boundary. Docket Number 27439.

The Application: On February 28, 2003, XIT Rural Telephone Cooperative, Inc. (XIT Rural) filed an application to amend its certificated service area boundary to include an uncertificated service area. XIT Rural requests to be the certified telecommunications provider for existing customers located in the geographic service areas of Oldham and Hartley Counties. No other utilities are affected by this application. The application will not affect XIT's current tariff rates and services.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll- free) 1-800-735-2989. All comments should reference Docket Number 27439.

TRD-200301624
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 7, 2003

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On March 6, 2003, Suretel, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60180. Applicant intends to remove the resale-only restriction.

The Application: Application of Suretel, Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 27465.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than March 26, 2003. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 27465.

TRD-200301666
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 11, 2003

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Notice of Application for Relinquishment of a Service Provider Certificate of Operating Authority

On February 28, 2003, Southwestern Broadband Holdings I, L.P. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60242. Applicant intends to relinquish its certificate.

The Application: Application of Southwestern Broadband Holdings I, L.P. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 27436.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than March 26, 2003. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 27436.

TRD-200301595
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 6, 2003

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Notice of Application for Relinquishment of a Service Provider Certificate of Operating Authority

On March 3, 2003, GiantLoop Telecom, Inc. filed an application with the Public Utility Commission of Texas (commission) to relinquish its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60476. Applicant intends to relinquish its certificate.

The Application: Application of GiantLoop Telecom, Inc. to Relinquish its Service Provider Certificate of Operating Authority, Docket Number 27446.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than March 26, 2003. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 27446.

TRD-200301596
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 6, 2003

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Notice of Application for Relinquishment of its Service Provider Certificate of Operating Authority

On March 6, 2003, Tri-Tel Services, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60448. Applicant intends to relinquish its certificate.

The Application: Application of Tri-Tel Services, Inc. to Relinquish its Service Provider Certificate of Operating Authority, Docket Number 27469.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than March 26, 2003. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 27469.

TRD-200301667
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 11, 2003

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Notice of Petition for Rulemaking in Regards to Quality of Service Rules for Telecommunications Service Providers

The Public Utility Commission of Texas (commission) received a petition for rulemaking on March 11, 2003, from Southwestern Bell Telephone, L.P., doing business as SBC Texas (SBC Texas or Petitioner). SBC Texas requests that the commission conduct a rulemaking to make changes to its service quality benchmarks set forth in substantive rule §26.54, relating to Service Objectives and Performance Benchmarks. The petition is assigned Project Number 27500, *Petition for Rulemaking of SBC Texas to Amend Substantive Rules Applicable to Telecommunications Service Providers in Regard to Quality of Service*. Under the Administrative Procedure Act, Texas Government Code §2001.021, the commission shall either deny the petition in writing, stating its reasons for denial, or initiate a rulemaking proceeding not later than the 60th day after the date the petition is filed.

Petitioner seeks immediate review of two specific standards. First, Petitioner maintained that §26.54(c)(6)(A), regarding customer trouble reports, should be amended to increase from three to six the number of customer trouble reports per 100 customer access lines per month (on average), per exchange. Second, Petitioner stated that the business office speed of answer requirement in §26.54(c)(2)(B) should be eliminated.

Petitioner stated that given the sweeping changes that have followed enactment of the federal Telecommunications Act of 1996 (FTA), it is time to reconsider whether certain provisions of §26.54 should be eliminated or modified. Petitioner opined that the service quality rules are clearly a vestige of traditional rate-of-return regulation in a pre-1996 monopoly environment and that most, if not all, of the benchmarks currently required by §26.54 no longer serve the purposes for which they were created. In addition, SBC Texas urged the commission, to the extent it finds that some of the current service quality standards are still necessary and appropriate, to apply these standards equally to all local exchange carriers. Petitioner asserted that the legislature granted the commission wide latitude in adopting service quality standards, and that the authority to apply its service quality rules is not limited to only incumbent local exchange carriers.

Comments on the petition may be filed no later than 3:00 p.m. on Friday, April 11, 2003. Copies of the petition may be obtained from the commission's Central Records Division, William B. Travis Building, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or through the Interchange on the commission's web site at www.puc.state.tx.us under Project Number 27500.

Questions regarding this notice of petition should be directed to Patrick Tyler, Director of Telecommunications, Legal and Enforcement Division, at (512) 936-7282, or Roni Dempsey, Rules Coordinator, Policy Development Division, at (512) 936-7308. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll-free at 1-800-735-2989. All inquiries and comments concerning this petition for rulemaking should refer to Project Number 27500.

TRD-200301716

Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 12, 2003

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Public Notice of Amendment to Interconnection Agreement

On March 5, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and Max-Tel Communications, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 27457. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27457. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 7, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 27457.

TRD-200301599
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 6, 2003

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Public Notice of Amendment to Interconnection Agreement

On March 5, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and Rosebud Telephone, LLC, collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 27458. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27458. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 7, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas

78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 27458.

TRD-200301600
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 6, 2003

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Public Notice of Amendment to Interconnection Agreement

On March 6, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and Express Telephone Services, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 27472. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27472. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 8, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 27472.

TRD-200301625
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 7, 2003

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Public Notice of Amendment to Interconnection Agreement

On March 6, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and Quick-Tel Communications, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 27473. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27473. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 8, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct

a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 27473.

TRD-200301626
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 7, 2003

♦ ♦ ♦

Public Notice of Amendment to Interconnection Agreement

On March 7, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and New Edge Network, Inc. doing business as New Edge Networks, collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 27479. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27479. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 9, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 27479.

TRD-200301671
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 11, 2003

♦ ♦ ♦

Public Notice of Amendment to Interconnection Agreement

On March 7, 2003, Southwestern Bell Telephone, LP doing business as SBC Texas and Buy-Tel Communications, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 27480. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the amendment to the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27480. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 9, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule

§22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 27480.

TRD-200301672
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 11, 2003

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Public Notice of Interconnection Agreement

On March 4, 2003, Valor Telecommunications of Texas, LP and DVC Enterprises, Inc. doing business as DVC Telecom, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 27453. The joint application and the underlying interconnection agreement is available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27453. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 4, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule

§22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 27453.

TRD-200301597
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 6, 2003

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Public Notice of Interconnection Agreement

On March 4, 2003, Valor Telecommunications of Texas, LP and Focal Communications Corporation of Texas, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 27454. The joint application and the underlying interconnection agreement is available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27454. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 4, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule

§22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 27454.

TRD-200301598
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 6, 2003

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Public Notice of Interconnection Agreement

On March 7, 2003, V3 Global, Inc. and Verizon Southwest, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 27475. The joint application and the underlying interconnection agreement is available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27475. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 9, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule

§22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 27475.

TRD-200301668
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 11, 2003

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Public Notice of Interconnection Agreement

On January 28, 2003, Mid-Plains Rural Telephone Cooperative, Inc. and Sprint Spectrum doing business as Sprint PCS, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 27477. The joint application and the underlying interconnection agreement is available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27477. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 9, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule

§22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 27477.

TRD-200301669
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 11, 2003

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Public Notice of Interconnection Agreement

On March 7, 2003, CAT Communications International, Inc. and Verizon Southwest, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2003) (PURA). The joint application has been designated Docket Number 27478. The joint application and the underlying interconnection agreement is available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing three copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the applicants. The comments should specifically refer to Docket Number 27478. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 9, 2003, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will issue a notice of approval, denial, or determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this action, or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936- 7136. All correspondence should refer to Docket Number 27478.

TRD-200301670
Rhonda G. Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 11, 2003

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Railroad Commission of Texas

Request for Professional Engineering Services

The Railroad Commission of Texas requests the qualifications for professional services from engineering firms with expertise in environmental assessments and remedial design. Selection of the engineering firms will be in accordance with the Professional Services Procurement Act, Texas Government Code, §§ 2254.001, *et seq.* The Commission shall have the sole authority to enter into any contracts.

Interested parties may receive a copy of a Request For Qualifications (RFQ) that describes the format and scope of services by (1) contacting Jill Edwards, Site Remediation, in writing, by mail, e-mail, or fax (mail: Railroad Commission of Texas, Oil and Gas Division, PO Box 12967, Austin Texas 78711; e- mail: jill.edwards@rrc.state.tx.us; fax: 512-463-2388); or (2) on the Railroad Commission web page (www.rrc.state.tx.us, under "What's New @ The RRC/State-Managed Cleanup Bid Opportunities/Site Remediation Engineering Services Contracts" or "Agency Services/Environmental Protection/State-Managed Cleanup Bid Opportunities/Site Remediation Engineering Services Contracts"). All Statements are to be submitted to the RRC in the required format by no later than 5:00 pm, May 15, 2003, at the mailing address noted in Section 14.0 of the Request for Qualifications.

Issued in Austin, Texas, on March 12, 2003.

TRD-200301721
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Filed: March 12, 2003

♦ ♦ ♦

How to Use the Texas Register

Information Available: The 13 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following a 30-day public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Open Meetings - notices of open meetings.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 26 (2001) is cited as follows: 26 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "26 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 26 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For subscription information, see the back cover or call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC)*** is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
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16. Economic Regulation
19. Education
22. Examining Boards
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28. Insurance
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31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15:

1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 19, April 13, July 13, and October 12, 2001). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

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