TEXAS REGISTER

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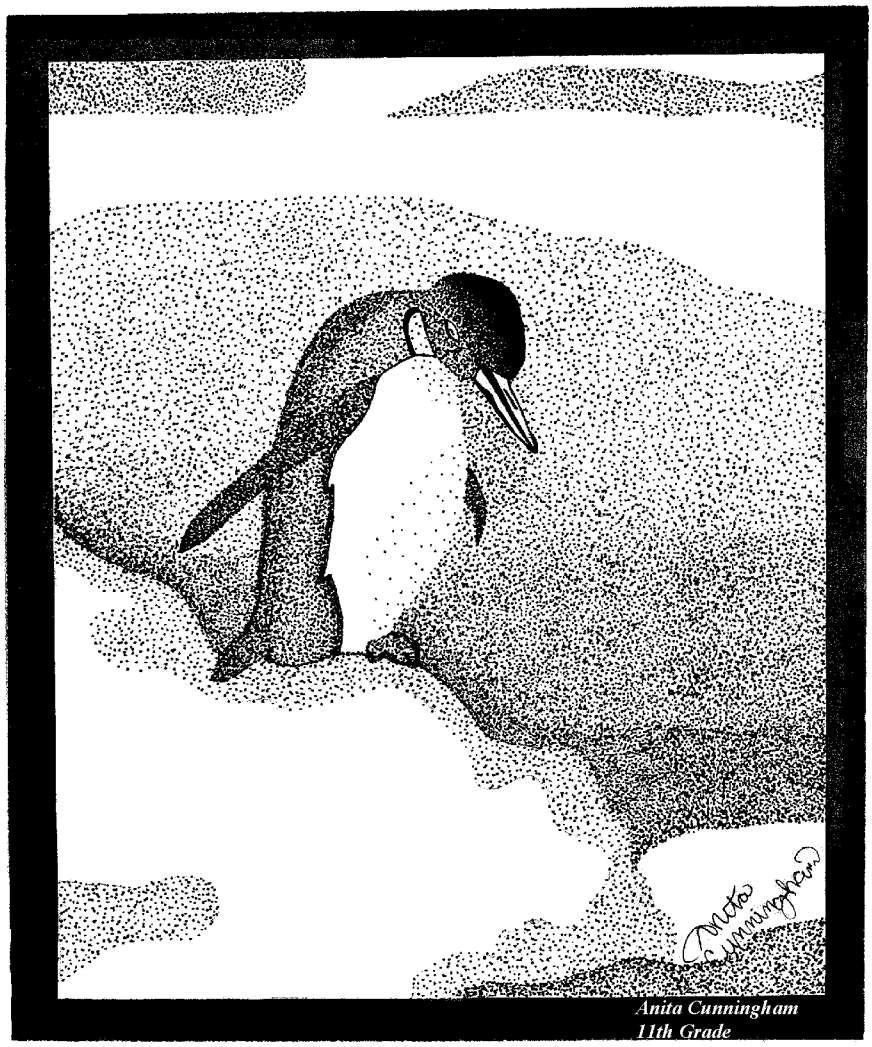

Anita Cunningham
11th Grade

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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IN THIS ISSUE

RULE REVIEW

TABLES AND GRAPHICS

IN ADDITION

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.
http://www.sos.state.tx.us/texreg

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 February 11, 2004

Appointed to the Texas Board of Professional Land Surveying for a term to expire January 31, 2009, Stephen Titus "Ty" Runyan of Austin (replacing Joan White of Brownsville whose term expired).

Appointed to the Public Safety Commission for a term to expire December 31, 2005, Colleen McHugh of Corpus Christi (replacing James Francis of Dallas who resigned).

Appointed to the Public Safety Commission for a term to expire December 31, 2009, Carlos H. Cascos of Brownsville (replacing Colleen McHugh of Corpus Christi whose term expired).

Appointed to the Texas Military Facilities Commission, pursuant to SB 287, 78th Legislature, Regular Session, for a term to expire April 30, 2009, Regino J. Gonzales of Galena Park.

Appointed to the State Board of Barber Examiners for a term to expire January 31, 2005, Mary Lou Daughtrey of Tyler (replacing Taren Hollister of Houston who resigned).

Appointed to the State Board of Barber Examiners for a term to expire January 31, 2009, Terissa Johnson of Sanger (replacing H. Wayne Moore of Garland whose term expired).

Appointed to the State Board of Barber Examiners for a term to expire January 31, 2009, James Hinton Dickerson, Jr. of Lake Jackson (pursuant to SB 287, 78th Legislature, Regular Session).

Appointed as Judge of the 139th Judicial District Court, Hidalgo County, for a term until the next General Election and until his successor shall be duly elected and qualified, Ernest Aliseda of Edinburg. Aliseda will replace Judge Leticia Hinojosa who resigned.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, Commissioner Victor G. Carrillo of Austin.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, Commissioner Julie C. Parsley of Austin.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, Commissioner Larry Ross Soward of Austin.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, Commissioner Jerry Patterson of Austin.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, The Honorable G. E. Buddy West of Austin.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, The Honorable Kenneth Armbrister of Austin.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, F. Scott LaGrone of Austin.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, Michael Flores of Irving.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, Kimberly A. Godfrey of Houston.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, Paula Harris of Sugar Land.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, R. William Jewell of Houston.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, Ken Kelley of Armarillo.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, Irwin Kowenski of Houston.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, Jerry Jay Langdon of Houston.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, Stephen K. Mayer of San Angelo.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, Lawrence O'Donnell, III of Houston.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, Ronald E. Oligney of Sugar Land.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, Charles R. Patton of Austin.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, Douglass C. Robison of Midland.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, Grant Swartzwelder of Irving.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, Joel E. Trouart of Jewett.

Appointed to the Texas Energy Planning Council, pursuant to Executive Order No. RP-29, for a term at the pleasure of the Governor, William M. Wallace of Midland.

Appointments for February 12, 2004

Appointed to the Board of Tax Professional Examiners for a term to expire March 1, 2007, James E. Childers of Canyon (replacing Stanton Brown who resigned).

Designating Deborah M. Hunt of Austin as Presiding Officer of the Board of Tax Professional Examiners for a term at the pleasure of the Governor. Ms. Hunt is being named presiding officer pursuant to SB 276, 78th Legislature, Regular Session.

Rick Perry, Governor

TRD-200401106

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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.

Request for Opinions

RQ-0173-GA (Will not be published. The case was closed due to litigation.)

RQ-0174-GA

Requestor:

The Honorable Jose R. Rodriguez

El Paso County Attorney

County Courthouse

500 East San Antonio, Room 503

El Paso, Texas 79901

Re: Whether a member of the board of directors of a water improvement district may simultaneously serve as school district trustee (Request No. 0174-GA)

Briefs requested by March 9, 2004

RQ-0175-GA

Requestor:

Shirley J. Neeley, Ed.D.

Commissioner of Education

Texas Education Agency

1701 North Congress Avenue

Austin, Texas 78701-1494

Re: Whether a school district may honor current employment contracts of employees whose relationship to the superintendent is barred by the nepotism statute: Clarification of Attorney General Opinion GA-123 (2003) (Request No. 0175-GA)

Briefs requested by March 2, 2004

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

TRD-200401095
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: February 17, 2004

♦ ♦ ♦

Opinions

Opinion No. GA-0147

The Honorable Jeri Yenne

Brazoria County Criminal District Attorney

Brazoria County Courthouse

111 East Locust, Suite 408A

Angleton, Texas 77515

Re: Whether, under Code of Criminal Procedure article 45.041(b)(1)(C), a justice of the peace may order a convicted defendant to pay a fine before court costs (RQ-0093-GA)

S U M M A R Y

Article 45.041(b)(1) of the Code of Criminal Procedure authorizes a justice of the peace to order a convicted defendant to pay costs and fines due either as a lump sum or in installments, but it does not preempt the application of the long-standing costs-first allocation rule. Under the allocation rule, a county must allocate monies received from a defendant first to pay costs and then to pay a fine. If the monies received do not cover all of the costs, then the monies must be allocated to costs on a pro rata basis. If a justice of the peace has ordered installment payments, the total sum received must be allocated in accordance with the allocation rule.

If a private collector collects the costs and fines under article 103.0031 of the Code of Criminal Procedure, the private collector will receive thirty percent of the aggregate amount collected. Remaining monies must be allocated to costs first, on a pro rata basis, and then to the fine.

Opinion No. GA-0148

The Honorable Fred Hill

Chair, Committee on Local Government Ways and Means

Texas House of Representatives

P.O. Box 2910

Austin, Texas 78768-2910

Re: Whether recent amendments to section 11.13(*l*) of the Tax Code may be applied to restrict homestead exemptions for the 2003 tax year (RQ-0104-GA)

S U M M A R Y

Amendments to section 11.13(*l*) of the Tax Code adopted pursuant to House Bill 1223, Seventy-eighth Legislature, Regular Session do not apply to homestead exemptions for the 2003 tax year.

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

TRD-200401107
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: February 18, 2004

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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 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 81. ELECTIONS

SUBCHAPTER I. IMPLEMENTATION OF THE HELP AMERICA VOTE ACT OF 2002

1 TAC §81.171

The Office of the Secretary of State, Elections Division, proposes an amendment to §81.171, which concerns the state's administrative complaint procedure designed to comply with Section 402 of the federal Help America Vote Act of 2002 ("HAVA").

Ann McGeehan, Director of Elections, has determined that for the first five-year period that the amended rule is in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the rule.

Ms. McGeehan has also determined that for each year of the first five years that the amended rule is in effect, the public benefit anticipated as a result of enforcing it will be: (1) for the Secretary of State to provide citizens with a grievance process for violations of HAVA and (2) for the state to comply with Section 402 of HAVA as necessary to receive federal requirements payments. There will be no effect on small businesses, micro-businesses, or individuals.

Comments on the proposal may be submitted to Ann McGeehan, Director of Elections, Office of the Secretary of State, P.O. Box 12060, Austin, Texas 78711-2060.

The amended rule is proposed pursuant to Section 13, House Bill 1549, 78th Legislative Session, 2003, which requires the Secretary of State to adopt rules establishing an administrative complaint procedure to remedy grievances. The rule must comply with Section 402 of HAVA.

No other codes or sections are affected.

§81.171. Administrative Complaint Procedures for Violations of Title III of the Help America Vote Act of 2002.

(a) Definitions. In this section:

(1) "HAVA" means the federal Help America Vote Act.

(2) "Party or Parties" means the person making the complaint and any political subdivisions, officer-holders, or individuals against whom the complaint is being alleged.

(3) "Secretary of State" means the currently appointed Secretary of State or his or her designee.

(b) A person who believes that a violation of Title III of the Help America Vote Act of 2002 has occurred, is occurring, or is about to occur may file a complaint with the secretary of state. Violations of Title III include but are not limited to:

(1) failure to comply with federal voting system standards, as set out in Section 301(a) of HAVA, including standards for accessibility for individuals with disabilities and alternate language accessibility;

(2) failure to comply with provisional voting procedures in an election as required by Section 302(a) of HAVA;

(3) failure to create statewide voter registration system in the manner set out in HAVA; and

(4) failure to post required voter information at the polling place as required by Section 302(b).

(c) All complaints must:

(1) be in writing, signed and notarized by the complainant.

(2) include the full name, telephone number, and mailing address of the complainant.

(3) include a description of the alleged violation of Title III sufficient to apprise the Secretary of State of the nature and specifics of the complaint.

(4) include a statement requesting a hearing on the record it desired.

(d) The complaint shall be reviewed by an employee of the Secretary of State to determine if the complaint meets the requirements as to form and content and identifies a violation of Title III of HAVA. The complaint shall also be reviewed to determine whether it alleges a Title III violation that falls within the direct authority of the Secretary of State or a Title III violation that falls within the authority of another jurisdiction. If the complaint does not meet the requirements as to form and content, it shall be returned to the complainant with an explanation as to its insufficiency. If the complaint meets the requirements, it shall be assigned a unique number and receipt date. Notice that the complaint has been accepted shall be mailed to all parties.

(e) Within 60 days of the receipt of the complaint by the Secretary of State, the Secretary of State shall review the alleged violation and make an initial determination as to whether there is a violation of Title III of HAVA.

(f) If the Secretary of State determines that there is a violation of a provision of Title III of HAVA, the Secretary of State shall inform the complainant in writing and provide the appropriate remedy. The remedy may not include any award of monetary damages, costs or attorney fees, and may not include the invalidation of any election or a determination of the validity of any ballot or vote.

(g) If the Secretary of State determines that no violation of a provision of Title III of HAVA has occurred, the Secretary of State shall inform the complainant in writing. The notice to the complainant shall inform the complainant of his or her right to a hearing.

(h) Upon the initial determination of the Secretary of State, whether or not a violation was found, the complainant may exercise his or her right to a hearing by making [~~make~~] a written request for a hearing on the record, which shall be held at the Secretary of State's offices in Austin, unless otherwise determined by the Secretary of State. If the nature of the complaint concerns a matter over which the Secretary of State has direct authority, the hearing shall be conducted by the Secretary of State. The hearing shall proceed as follows:

(1) The hearing shall be tape recorded, and the tape shall constitute the official record of the hearing.

(2) Written notice of the hearing shall be given to all parties including the date, time, and place of the hearing, and notice shall be sent to the mailing addresses set out in the complaint. Notice must be sent at least seven (7) days prior to the date of the hearing.

(3) If, in the discretion of the Secretary of State, the hearing is held via conference telephone call or video teleconferencing, the notice shall so state and further provide for the mechanics of the teleconference.

(4) The hearing may only be continued to a new date upon a determination of the Secretary of State that finds good cause, and in no event may it be continued more than once, or in no event may it be continued so as to make it difficult to issue a final determination within ninety (90) days of the filing of the complaint.

(5) At the hearing, each party shall be given an opportunity to explain their positions, and present evidence to support their position. At the sole discretion of the Secretary of State, this presentation may include documents, witnesses, oral argument, and tangible items relevant to the determination of the complaint. The record of the hearing shall consist of the written complaint, the written response(s), the tape of the hearing, and any documents/exhibits introduced at the hearing.

(6) If the Secretary of State permits witnesses to testify, they must be sworn in prior to their testimony being given.

(7) If a complainant fails to appear at the hearing, the complaint shall be dismissed with prejudice.

(i) If the Secretary of State fails to make a final determination within 90 days, which begins on the date the complaint is filed, unless the complainant consents to a longer period for making such determination, the complaint shall be resolved within 60 days under alternative dispute resolution procedures established for purposes of this section. The record and other materials from any proceedings conducted under the complaint procedures established under this section shall be made available for use under the alternative dispute resolution procedures [~~after the original receipt of the complaint, or an extended period if the Secretary of State determines that more time is required to resolve the issue and the complainant agrees to the extension, the complainant may request resolution of the complaint under an alternative dispute resolution process as agreed upon by the Secretary of State and the parties to the dispute~~].

(j) The Secretary of State may consolidate complaints filed under this rule if the Secretary of State determines that the complaints concern the same violation.

(k) Complaints, information filed with the Secretary of State in connection with complaints, and the Secretary of State's response to the complaint are public records.

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 February 13, 2004.

TRD-200401055
Ann McGeehan
Director of Elections
Office of the Secretary of State
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 463-5562

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1 TAC §81.173

The Office of the Secretary of State, Elections Division, proposes new §81.173, concerning provisional voting procedures for precinct count optical scan ballots as required under Section 302 of the federal Help America Vote Act of 2002 ("HAVA").

Ann McGeehan, Director of Elections, has determined that for the first five-year period that this rule is in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the rule.

Ms. McGeehan has also determined that for each year of the first five years that the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be for the Secretary of State to provide counties and other political subdivisions of the state with uniform procedures for carrying out the provisional voting requirement of Section 302 of HAVA. There will be no effect on small businesses, micro-businesses, or individuals

Comments on the proposal may be submitted to Ann McGeehan, Director of Elections, Office of the Secretary of State, P.O. Box 12060, Austin, Texas 78711-2060.

The new rule is proposed pursuant to Section 31.010 of the Code, which requires the Secretary of State to adopt rules as necessary to implement HAVA.

Statutory Authority: Texas Election Code, §31.010.

No other codes or sections are affected.

§81.173. Provisional Voting Procedures for Electronic Voting System: Optical Scan Precinct Ballot Counters.

(a) Polling Place Preparation.

(1) The Election Judge shall set aside a sufficient number of regular ballots from the supply of official ballots and write or stamp "provisional" on the back of the ballot (referred to below as "provisional ballots").

(2) The Election Judge shall keep the provisional ballots separate from the regular ballots.

(b) Eligibility to vote provisional ballot.

(1) At all elections, the following Voters shall be eligible to cast a provisional ballot:

(A) A Voter who claims to be properly registered and eligible to vote at the election precinct, but whose name does not appear on the list of registered voters and whose registration cannot be determined by the Voter Registrar; or

(B) A Voter who is designated as a first time Voter on the list of registered voters, but who is unable to produce the required identification; or

(C) A Voter who has applied for a ballot by mail, but has not returned the ballot by mail; or

(D) A Voter who votes during the polling hours that are extended by a state or federal court; or

(E) A Voter who is registered to vote but attempting to vote in a different precinct other than the one in which the Voter is registered.

(F) A Voter who is required to present identification but does not.

(G) A Voter who is on the list, but registered residence address is outside the political subdivision.

(2) A person voting by mail may not vote a provisional ballot.

(c) Polling Place Procedures.

(1) If a Voter is eligible to cast a provisional ballot, the Election Judge shall immediately inform the Voter of this right. The Election Judge shall also inform the Voter that his or her provisional ballot will not be counted if the Voter casts a provisional ballot at a precinct in which the Voter is not registered (regardless of whether the Voter is registered in another precinct but in the same political subdivision) or if there is an indication on the list of registered Voters that the Voter has voted early in person or by mail.

(2) The Election Judge must request the Voter to present a valid form of identification to vote a provisional ballot. If the Voter has no identification, he may still be permitted to vote a provisional ballot, but his ballot will not be approved for counting and the Election Judge must notify the Voter of that fact. Acceptable forms of identification include:

(A) a driver's license or personal identification card issued to the person by the Department of Public Safety or a similar document issued to the person by an agency of another state, regardless of whether the license or card has expired;

(B) a form of identification containing the person's photograph that establishes the person's identity;

(C) a birth certificate or other document confirming birth that is admissible in a court of law and establishes the person's identity;

(D) United States citizenship papers issued to the person;

(E) a United States passport issued to the person;

(F) official mail addressed to the person by name from a governmental entity;

(G) a copy of a current utility bill, bank statement, government check, paycheck or other government document that shows the name and address of the Voter; or

(H) any other form of identification prescribed by the secretary of state.

(3) Prior to casting a provisional ballot, the Voter shall be required to sign a Provisional Ballot Affidavit Envelope. The Provisional Ballot Affidavit Envelope shall state that the Voter is a registered Voter in the political subdivision and a resident on election day and that he is eligible to vote in the election. The Provisional Ballot Affidavit Envelope shall also require the information necessary to register the Voter, if he proves to be unregistered. A Voter who refuses to sign the Provisional Ballot Affidavit Envelope is not eligible to vote provisionally.

(4) The Election Judge shall make clear to the Voter that in order for the provisional ballot to be evaluated by the Early Voting Ballot Board, he must complete and sign the Provisional Ballot Affidavit Envelope.

(5) The Election Judge shall enter the Provisional Voter's name on the list of Provisional Voter's form.

(6) The Election Judge shall add the name of the Provisional Voter to the poll list and check the column "Provisional".

(7) The Provisional Voter signs the regular signature roster.

(8) The Election Judge shall check the reason under which the Voter voted provisionally on the provisional ballot envelope. The reasons include:

(A) Voter not on list of registered voters, Voter Registrar could not be reached;

(B) Voter not on list of registered voters and could not be verified by Voter Registrar;

(C) Voter on list of registered voters, but did not provide certificate or other form of identification;

(D) Voter not on list and no identification;

(E) Voter on list of persons who voted early by mail, Voter says he/she did not receive or return the ballot and refuses to cancel the ballot with the Early Voting Clerk; or

(F) First time Voter without any identification.

(9) The Election Judge shall then sign the provisional ballot envelope.

(10) The Election Judge shall direct the Voter to choose a ballot from a stack of pre-designated "provisional" ballots.

(11) The Election Judge shall inform the Voter that ballots stamped "provisional" will not be counted if placed in the ballot box without sealing it inside the corresponding envelope.

(12) The Election Judge shall inform the Voter that the Voter will receive notice in the mail as to whether or not their ballot was counted and shall immediately provide to the Voter a written notice which will inform the Voter of this fact in writing, along with information that explains that the Provisional Ballot Affidavit Envelope will be used by the Voter Registrar to register the Voter or update his registration, as applicable.

(13) After the provisional ballot has been voted, the Voter shall

(A) seal the provisional ballot in a plain white secrecy envelope,

(B) seal the secrecy envelope inside the provisional ballot envelope; and

(C) deposit the Provisional Ballot Affidavit Envelope in the Ballot Box #1 or a separate container that meets the requirements of Section 51.034 of the Code or has been approved by the Secretary of State.

(d) Early Voting Provisional Ballot Procedures.

(1) To the extent practicable, the Early Voting Clerk or Deputy Early Voting Clerk shall follow election day provisional ballot procedures during the early voting period.

(2) The Provisional Voter's precinct number shall be added to an Early Voting List of Provisional Voters.

(3) The presiding judge shall direct the provisional ballot envelopes to be separated from the regularly cast ballots and placed in a ballot box or transfer case for delivery to the General Custodian of election records. The General Custodian shall deliver the provisional ballots to the Voter Registrar. The Voter Registrar shall sign the List of Early Voting Provisional Voters to verify receipt of the provisional ballot envelopes.

(4) The Voter Registrar shall review the Provisional Ballot Affidavit Envelopes as set out in subsection (e) of this section.

(e) Provisional Ballot Affidavit Envelope Transfer Procedures.

(1) After the election day polls have closed, the Election Judge shall enter the number of Provisional Ballot Affidavit Envelopes cast on the register of official ballots and on the List of Provisional Voters.

(2) The Election Judge shall place a copy of the List of Provisional Voters form inside Envelope Number 2.

(3) The ballot box (or other secure container) containing ballots cast on the tabulator and the separate ballot box (or other secure container) containing Provisional Ballot Affidavit Envelopes shall be delivered to the General Custodian of election records or central counting personnel, if applicable under §127.157 of the Texas Election Code.

(4) After the polls have closed and the ballots cast on the precinct tabulator have been reviewed, if ballots stamped "provisional" but not contained in a Provisional Ballot Affidavit Envelope are discovered, such ballots may not be counted and are not transferred to the Voter Registrar. The ballots shall be treated as irregularly marked ballots and the procedure set out in Section 127.157 of the Code.

(5) The voted Provisional Ballot Affidavit Envelopes shall be placed into a ballot box or transfer case and locked with a copy of the List(s) of Provisional Voters.

(6) The General Custodian of election records or central counting station personnel, if applicable under §127.157 of the Texas Election Code, shall verify that the number of Provisional Voters on the List of Provisional Voters matches the number of Provisional Ballot Affidavit Envelopes recorded on the ballot register. The General Custodian shall also sign the List of Provisional Voters evidencing the number of Provisional Voters per precinct and the number of Provisional Ballot Affidavit Envelopes to be forwarded to the Voter Registrar.

(7) The General Custodian shall also prepare a Summary of Provisional Ballots listing each precinct and the number of Provisional Ballot Affidavit Envelopes received by that precinct.

(8) The General Custodian shall give the Voter Registrar a copy of the Summary of Provisional Ballots at the same time the Provisional Ballot Affidavit Envelopes and List of Provisional Voters are delivered to the Voter Registrar.

(9) The General Custodian shall lock and seal each ballot box or transfer case that contains Provisional Ballot Affidavit Envelopes prior to delivery to the Voter Registrar. The numbers on the seal shall be recorded on the Summary of Provisional Ballots.

(10) A Poll Watcher, if available, may sign the Summary of Provisional Ballots.

(f) Transfer to Voter Registrar.

(1) The General Custodian shall deliver the ballot box(es) or transfer case(s) containing the Provisional Ballot Affidavit Envelopes along with the Summary of Provisional Ballots and the List of Provisional Voters for each precinct to the Voter Registrar on the next business day after the election.

(2) If the Voter Registrar wishes to take possession of the ballot box(es) or transfer case(s) containing the Provisional Ballot Affidavit Envelopes from the General Custodian of election records on election night, the Voter Registrar must inform the General Custodian of election records and post a Notice of Election Night Transfer no later than 24 hours before election day. If the Voter Registrar makes this determination, the Voter Registrar must go to the General Custodian's office and take possession on election night.

(3) Upon receipt of the ballot box(es) or transfer case(s) containing the Provisional Ballot Affidavit Envelopes and their keys, the Voter Registrar shall sign the Verification of Provisional Ballots and Serial Numbers to verify such receipt, that the box was intact, and that the seal was not broken.

(4) The Voter Registrar shall break the seal and unlock the box.

(5) The General Custodian of election records shall supply the Voter Registrar with a sufficient number of seals to re-seal the ballot box(es) or transfer case(s) containing the provisional ballots once her review is completed.

(6) The Voter Registrar must keep the List of Provisional Voters together with the corresponding Provisional Ballot Affidavit Envelopes for that precinct. The Voter Registrar does not complete any information on this form.

(7) If the Early Voting Ballot Board meets prior to election day to prepare ballots for counting as authorized under Section 87.101 of the Code, the Voter Registrar may attend the meeting and take possession of early voting Provisional Ballot Affidavit Envelopes prior to election day. The Voter Registrar shall give the General Custodian of election records written notice of his or her intent to take early possession of the Provisional Ballot Affidavit Envelopes at least 24 hours prior to the scheduled meeting of the ballot board.

(g) Voter Registrar Review of Provisional Ballot Affidavit Envelopes.

(1) No later than the third business day after election day, the Voter Registrar shall complete the review of the Provisional Ballot Affidavit Envelopes. As part of the review, the Voter Registrar shall review information from the following sources to attempt to determine the Provisional Voter's registration status: the Department of Public Safety, Volunteer Deputy Registrars, and other records that may establish the Voter's eligibility. The Voter Registrar must examine each Provisional Ballot Affidavit Envelope, determine the Voter's registration status, and indicate the status on the face of the Provisional Ballot Affidavit Envelope as one of the following:

(A) No record of voter registration application on file in this county;

(B) Registration cancelled on _____ (fill in date);

(C) Registered less than 30 days before the election;

(D) Incomplete registration received, but additional information not returned;

(E) Voter rejected for registration due to ineligibility;

(F) Registered to vote, but erroneously listed in wrong precinct;

(G) Registered to vote in a different precinct within the county;

(H) Information on file indicating applicant completed a voter registration application, but it was never received in the Voter Registrar's office; and/or

(I) Voter erroneously removed from list of registered voters.

(2) The Voter Registrar shall sign and date his review of each Provisional Ballot Affidavit Envelope.

(3) The Voter Registrar shall copy the Provisional Ballot Affidavit Envelope of each Voter who was not registered to vote, who was registered but whose information contains updated voter registration information, or who was erroneously cancelled or listed in the wrong precinct.

(4) For purposes of voter registration, the copied Provisional Ballot Affidavit Envelope serves as an original voter registration application or change form; the effective date will be calculated as of the Election Date.

(5) The Voter Registrar shall keep the Provisional Ballot Affidavit Envelopes by election precinct during the review. The Voter Registrar shall replace the Provisional Ballot Affidavit Envelopes in the boxes in which the Provisional Ballot Affidavit Envelopes were originally received for transfer to the Early Voting Ballot Board, along with the List of Provisional Voters for each precinct. The copy of the Summary of Provisional Ballots is returned to the General Custodian. The box is relocked and resealed in the same manner in which it was received. The serial number of the seal shall be recorded on the Verification of Provisional Ballots and Serial Number form.

(6) The Voter Registrar shall sign the Verification of Provisional Ballots and Serial Numbers form verifying transfer, and the presiding judge of the Early Voting Ballot Board shall sign indicating receipt of the Provisional Ballot Affidavit Envelopes and that the key and ballot box(es) was properly sealed.

(7) Poll Watchers are not entitled to be present during the Voter Registrar's review.

(h) Early Voting Ballot Board defined. The authority appointing the Early Voting Ballot Board may determine which members of the board will review and count the provisional ballots. The entire ballot board is not required to be present. A minimum of three members of the board is required to conduct the review.

(i) Review of Provisional Ballot Affidavit Envelopes by Early Voting Ballot Board; Counting Rules.

(1) The presiding judge of the Early Voting Ballot Board shall take receipt of the Provisional Ballot Affidavit Envelopes from the Voter Registrar at a time and place to be determined by the presiding judge.

(2) The presiding judge of the Early Voting Ballot Board may convene the board as soon as practicable after the Voter Registrar has completed the review of the provisional ballots. The judge must post a notice on the bulletin board used for posting notices of meetings of the governing body ordering the election no later than 24 hours before the board is scheduled to meet. The board may also convene while the Voter Registrar continues the review.

(3) The Early Voting Ballot Board must receive and review the Provisional Ballot Affidavit Envelopes.

(4) The Early Voting Ballot Board shall review both the Election Judge's and the Voter Registrar's notation on each Provisional Ballot Affidavit Envelope to determine whether or not the ballot should be counted as indicated below:

(A) If the Voter Registrar indicates that the Provisional Voter is registered to vote and was erroneously registered in the wrong election precinct, the ballot shall be counted.

(B) The ballot shall be counted if the Voter Registrar determines that the Provisional Voter is eligible and submitted a timely voter registration application, but was not timely received by the Voter Registrar.

(C) If the Election Judge indicated that the Voter did not provide a valid registration certificate or other form of identification, the ballot shall not be counted.

(D) If the Election Judge indicated that the reason for casting a provisional ballot was that the Voter appeared on the list of registered voters as having cast a ballot by mail and the Voter claimed that he never received the mail ballot and is not willing to cancel his or her mail ballot application with the main Early Voting Clerk, the provisional ballot shall not be counted.

(E) If the Voter Registrar indicates that there is no record of the Provisional Voter's registration application on file with the county, the provisional ballot shall not be counted.

(F) If the Voter Registrar indicates that the Provisional Voter's registration has been cancelled and provides the date, the ballot shall not be counted.

(G) If the Voter Registrar indicates that the Provisional Voter was registered less than 30 days before Election Day and therefore did not have effective registration for the precinct at which he attempted to vote, the ballot shall not be counted.

(H) If the Voter Registrar indicates that an incomplete application was received from the Provisional Voter but the required additional information was not returned, the ballot shall not be counted.

(I) If the Voter Registrar indicates that the Provisional Voter's registration application was rejected due to ineligibility, the ballot shall not be counted.

(J) If the Voter Registrar indicates that the Provisional Voter is registered to vote at a different precinct other than the one the Voter voted in, the ballot shall not be counted.

(K) If the board determines that the Provisional Voter was not registered and not entitled to vote at the election precinct where the ballot was cast, the ballot shall not be counted.

(L) The Voter Registrar has information in the office that the Voter did complete an application, and the Voter is otherwise qualified, the ballot shall be counted.

(M) If the Voter was erroneously removed from list and Voter is otherwise qualified to vote, the ballot shall be counted.

(5) The presiding judge shall indicate the disposition of each ballot on the Provisional Ballot Affidavit Envelope.

(6) The presiding judge shall indicate the disposition of each ballot on the appropriate space of the List of Provisional Voters for that precinct.

(7) The ballots to be counted shall be removed from their Provisional Ballot Affidavit Envelopes and counted under the normal procedure for counting ballots by mail in the election, unless the presiding judge of the ballot board decides to count the ballots by hand.

If counted by hand, the ballots are tallied by precinct in the regular manner. The board prepares the returns and submits the returns to the General Custodian of election records.

(8) The Provisional Ballot Affidavit Envelopes for accepted ballots shall be placed in an Envelope for Provisional Ballot Affidavit Envelopes marked "Accepted" and the Provisional Ballot Affidavit Envelopes and their Provisional Ballots for the rejected ballots shall be placed in an Envelope for Provisional Ballot Envelopes marked "Rejected".

(9) If the provisional ballots are to be counted electronically:

(A) Prior to the beginning of the count at a central counting station, the manager shall run the required second logic and accuracy test using the same test deck as on Election Day. After the count is complete, the manager shall run the required third logic and accuracy test. If the test is not successful, the count is void.

(B) The central counting manager may add the provisional ballots to the original returns by hand in order to provide one complete return sheet or may provide a return sheet with just provisional ballot vote totals. The return sheets are distributed in the same manner as on Election Day.

(C) The counted Provisional Ballot Affidavit Envelopes are secured and returned to the General Custodian of election records to be retained for the appropriate preservation period.

(10) Once counted, the Provisional Ballot Affidavit Envelopes shall be re-locked in the container and returned to the General Custodian of election records. The key shall be delivered to the General Custodian of the key.

(11) The List of Provisional Voters for each precinct shall be delivered to the General Custodian in the Envelope for Accepted Provisional Ballot Affidavit Envelopes.

(12) The provisional ballots and Provisional Ballot Affidavit Envelopes shall be retained for the appropriate preservation period for the election.

(13) The Lists of Provisional Voters for each precinct shall be retained and used by the General Custodian of election records to provide information to Voters on whether the provisional ballot was counted or not.

(14) All Provisional Ballot Affidavit Envelopes and the List of Provisional Voters are public records.

(15) Rejected Provisional Ballot Affidavit Envelopes may not be opened except by court order.

(16) Poll Watchers are entitled to be present at the meeting of Early Voting Ballot Board pursuant to §33.054 of the Texas Election Code.

(j) Request for Return of Original Envelopes. Upon request of the Voter Registrar, the General Custodian shall deliver the original Provisional Ballot Affidavit Envelopes to the Voter Registrar after the preservation period.

(k) Notice to Provisional Voters. Not later than the 10th day after the local canvass, the presiding judge of the Early Voting Ballot Board shall deliver written notice regarding whether the provisional ballot was counted, and if the ballot was not counted, the reason the ballot was not counted. The presiding judge shall use the information provided on the Provisional Ballot Affidavit Envelope to obtain the proper mailing address for the Voter and the final resolution of the provisional ballot.

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 February 13, 2004.

TRD-200401054
Ann McGeehan
Director of Elections
Office of the Secretary of State
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 463-5562

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 7. PESTICIDES

SUBCHAPTER E. REGULATED HERBICIDES

4 TAC §7.52, §7.53

The Texas Department of Agriculture (the department) proposes amendments to §7.52 concerning counties regulated and §7.53 concerning County Special provisions for the use of regulated herbicides. The amendments are proposed to make changes to the regulations necessitated by orders entered by the county commissioner courts of counties subject to the regulations.

Proposed amendments to §7.52 will add Baylor county to the list of counties regulated and remove Archer, Dimmit, Liberty, Orange and Rains counties from the list of regulated counties.

Proposed amendments to §7.53 will make changes to the county special provisions by removing the county special provisions for Archer, Dimmit and Liberty counties, and will add county special provisions for Baylor County. The proposed amendments will also modify the county special provisions for Brazoria, Brazos, Calhoun, Deaf Smith, Fort Bend, Jackson, Matagorda, Refugio and Wharton Counties.

Phil Tham, assistant commissioner for pesticides, has determined that for the five-year period the amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections, as amended.

Mr. Tham also has determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing the sections will be increased efficiency and effectiveness in the use of regulated herbicides in regulated counties. There will be no effect on micro-businesses or small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Phil Tham, Assistant Commissioner for Pesticide Programs, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposed amendments in the *Texas Register*.

The amendments are proposed under the Texas Agriculture Code §76.144, which provides that the Texas Department of

Agriculture with the authority to adopt rules concerning the use of regulated herbicides in a county in which the commissioners court has entered an order in accordance with the Texas Agriculture Code §76.144(a).

The Texas Agriculture Code, Chapter 76, is affected by the proposal.

§7.52. Counties Regulated.

The following counties shall be subject to the provisions of the Act, Subchapter G, unless specifically excepted by provisions of §7.53 of this title (relating to County Special Provisions): Aransas, [~~Archer,~~] Austin, Bailey, Baylor, Bexar, Brazoria, Brazos, Briscoe, Burleson, Calhoun, Cochran, Collin, Collingsworth, Culberson, Dallas, Dawson, Deaf Smith, Delta, Dickens, [~~Dimmit,~~] Donley, El Paso, Falls, Foard, Fort Bend, Gaines, Galveston, Hall, Harris, Haskell, Hidalgo, Hudspeth, Hunt, Jackson, King, Knox, Lamar, Lamb, [~~Liberty,~~] Loving, McLennan, Martin, Matagorda, Midland, Milam, Motley, [~~Orange,~~] Parmer, [~~Rains,~~] Refugio, Robertson, Rockwall, Runnels, San Patricio, Waller, Ward, Wharton and Wilbarger.

§7.53. County Special Provisions.

(a) (No change.)

[~~(b) Archer.~~]

[~~(1) No permit is required for the application of regulated herbicides during the period of September 16th to May 9th of the following year.~~]

[~~(2) The application of the following regulated herbicides is prohibited during the regulated period beginning May 10th and ending September 15th of each year:~~]

[~~(A) the ester formulations of 2,4-dichlorophenoxyacetic acid (2,4-D); and~~]

[~~(B) 2-methyl-4-chlorophenoxyacetic acid (MCPA).~~]

[~~(3) The aerial application of polychlorinated benzoic acids and 2,4-D amine is prohibited during the regulated period except during the period beginning May 10th and ending May 20th of each year. Ground applications of polychlorinated benzoic acids and 2,4,-D amine may be made during the regulated period with the requirement of a permit.~~]

(b) [~~(c)~~] Austin.

(1) Only that portion of Austin County lying east and south of the line beginning at the point where State Highway 36 crosses the north county line, thence southerly along Highway 36 to FM 949; thence westwardly along FM 949 to the San Bernard River is regulated by the Act, Subchapter G and regulations adopted thereunder.

(2) Between March 15th and July 31st, in that portion of Austin County lying south of Interstate Highway 10, the following restrictions on the use of 2,4-D formulations shall apply:

(A) the application by aircraft is prohibited;

(B) the use of all ester formulations by any method is prohibited.

(c) [~~(d)~~] Bailey.

(1) For the period beginning on October 1 of one calendar year through May 1 of the following calendar year, no permit will be required for the use of the regulated herbicides in that part of Bailey County defined by the following landmarks: south of Highway 746 from Texas/New Mexico state line extending east to Highway 214; then south on Highway 214 to the intersection of Highway 214 and Highway 746; then proceeding east on Highway 746 to the Bailey/Lamb County Line.

(2) Aerial application of regulated herbicides is prohibited in the area described in this subsection during the regulated period.

(3) For the period beginning on October 1 of one calendar year through April 15 of the following calendar year, no permit will be required for the use of regulated herbicides in that part of Bailey County defined by the following landmarks: north of 746 from Texas/New Mexico state line extending east to Highway 214, then south on Highway 214 to the intersection of Highway 214 and Highway 746; then proceeding east on Highway 746 to the Bailey/Lamb County line.

(4) Except as provided in these subsections, the aerial application of regulated herbicides is prohibited except that the aerial application of dicamba is allowed in the area described in this subsection during the regulated period.

(d) Baylor.

(1) No permit is required for the application of a regulated herbicide during the period of September 16 to May 14 of the following year.

(2) The application of the following regulated herbicides are prohibited during the regulated period beginning May 15 and ending September 15 of each year:

(A) the ester formulations of 2,4-dichlorophenoxyacetic acid (2,4-D0; and

(B) 2-methyl-4-chlorophenoxyacetic acid (MCPA).

(e) Brazoria.

(1) - (4) (No change.)

[~~(5) Brazoria, Calhoun, Fort Bend, Jackson, Matagorda, and Wharton Counties, for purposes of this subsection, are considered as one unit, and paragraphs (1) and (3) of this subsection are not to be changed without a public hearing for the unit as a whole.~~]

(f) Brazos. That portion of Brazos County lying east of the Brazos River and west of the following described line shall be regulated by the Act, Subchapter G and regulations adopted thereunder. The eastern boundary of the regulated area is as follows:

(1) beginning at the intersection of State Highway No. 6 and Old San Antonio Road (OSR), which point is on the north boundary line of Brazos County; thence in a southerly direction along OSR to its intersection with Texas Highway 21; thence in a westerly direction along Texas Highway 21 to the Little Brazos River; thence in a southerly direction along the east bank of the Little Brazos River to its intersection with the Brazos River; thence in a southerly direction along the east bank of the Brazos River to Koppe Bridge Road; thence in an easterly direction along Koppe Bridge Road [~~Fountain Switch Road (County Road 315); thence in a northeasterly direction to its intersection with Luza Lane (County Road 308); thence in an easterly direction along Luza Lane to its intersection with State Highway 21; thence easterly along State Highway 21 to its intersection with State Highway 47; thence easterly along State Highway 47 to its intersection with FM 60 (Raymond Stotzer Parkway); thence north along FM 60 to its intersection with FM 2818; thence southeasterly along FM 2818 to its intersection with North Dowling Road; thence southwesterly along North Dowling Road to its intersection with North Graham Road; thence northeasterly along North Graham Road to its intersection with South Dowling Road; thence southeasterly along South Dowling Road~~] to its intersection with FM 2154 (Wellborn Road); thence southeasterly along FM 2154 to its intersection with State Highway 6; thence

southeast along State Highway 6 to its intersection with the Navasota River, which is the southern boundary of Brazos County.

(2) (No change.)

(g) - (h) (No change.)

(i) Calhoun.

(1) - (2) (No change.)

[~~(3) Brazoria, Calhoun, Fort Bend, Jackson, Matagorda and Wharton Counties, for purposes of this subsection, are considered as one unit and paragraph (1) of this subsection is not to be changed without a public hearing for the unit as a whole.~~]

(j) - (l) (No change.)

(m) Deaf Smith. [~~The use of all butyl ester formulations of 2,4-D and/or all high volatile formulations of 2,4-D is prohibited between April 15 and October 1 of each year.~~]

(1) The use of all ester formulations of regulated herbicides is prohibited from May 1 through September 30 of each year;

(2) A permit is required for the application of all other formulations of regulated herbicides from May 1 through September 30 of each year; and

(3) A permit is not required for the application of regulated herbicides between the dates of October 1 through April 30 of each year.

(n) - (o) (No change.)

[~~(p) Dimmit.~~]

[~~(1) Only that portion of Dimmit County within the area beginning at the intersection of the center line of U.S. Highway 83 and the Dimmit-Zavala County line; thence in a southerly direction following the center line of U.S. Highway 83, through Carrizo Springs, and Asherton, to its intersection with FM Road 190 East; thence in an easterly direction following the center line of State Highway 85 to its intersection with FM Road 65; thence following the center line of FM Road 65 to its intersection with the Dimmit-Zavala County line; thence in a westerly direction following the Dimmit-Zavala County line to the place of beginning is regulated by the Act, Subchapter G and regulations adopted thereunder.~~]

[~~(2) Aerial application of regulated herbicides in the regulated portion of Dimmit County is prohibited.~~]

(p) [~~(q)~~] Falls.

(1) The use of all ester formulations of regulated herbicides is prohibited from April 1 through August 31 of each year.

(2) A permit is required for the application of the other formulations of regulated herbicides from April 1 through August 31 of each year.

(3) A permit is not required for the application of regulated herbicides between the dates of September 1 to March 31 of each year.

(q) [~~(r)~~] Foard. That portion of Foard County within the area described as follows is regulated by the provisions of the Act, Subchapter G and regulations adopted thereunder, for the period beginning May 25 and ending October 10 of each year: all of that portion of Foard County lying east of a line which has its origin beginning at a point where the Pease River intersects the east boundary line of Section 509, Block A, H.&T.C.RR.C, survey, thence continuing southerly along the adjoining section lines ending at a point of intersection with the 345 KV transmission electric power lines, then, all of the portion of Foard County lying north of a line along the 345 KV transmission electric power lines extending easterly to the Wilbarger County line.

(r) [~~(s)~~] Fort Bend.

(1) The aerial application of all formulations of 2,4-D is prohibited between March 10 and September 15 of each year.

(2) The application of high volatile herbicides is prohibited.

(3) In no case shall 2,4-D be used to treat any area that is nearer than two miles to any susceptible crop.

[~~(4) Brazoria, Calhoun, Fort Bend, Jackson, Matagorda, and Wharton Counties, for purposes of this subsection, are considered one unit, and paragraph (1) of this subsection is not to be changed without a public hearing for the unit as a whole.~~]

(s) [~~(t)~~] Gaines.

(1) The application of all regulated herbicides is allowed without the requirement of a permit between the dates of October 1 and March 31 of the following year.

(2) A permit is required for the application of the regulated herbicides between the dates of April 1 to September 30 of each year.

(t) [~~(u)~~] Hall. The application of regulated herbicides is prohibited between May 15 and October 15 of each year, with the exception of the spot application of dicamba by means of a pressurized hand held spray device, provided the user obtains a permit from the department prior to the use during the regulated period.

(u) [~~(v)~~] Harris.

(1) The use of high volatile herbicides is prohibited.

(2) In no case shall 2,4-D be used to treat any area that is nearer than two miles to any susceptible crop.

(v) [~~(w)~~] Haskell.

(1) No permit is required between November 1 and May 20 of the following calendar year.

(2) Aerial application of regulated herbicides is prohibited between June 2 and November 1 of each year.

(w) [~~(x)~~] Hidalgo. The regulated portion of Hidalgo County is as follows:

(1) beginning at north county line and U.S. 281; thence south to FM 495; thence west to State Highway 107 (Conway Drive); thence south to U.S. 83 Expressway; thence west along U.S. 83 to west county line;

(2) all other lands in Hidalgo County are exempt from the Act, Subchapter G and regulations adopted thereunder.

(x) [~~(y)~~] Hudspeth.

(1) The use of all ester formulations of regulated herbicides is prohibited between the dates of April 1 and October 15 of each year.

(2) A permit is required for the application of the other formulations of regulated herbicides between the dates of April 1 and October 15 of each year.

(3) A permit is not required for the application of the regulated herbicides between the dates of October 16 to March 31 of the following year.

(y) [~~(z)~~] Hunt.

(1) The aerial application of regulated herbicides shall be prohibited from April 15 through September 1 of each year.

(2) No permit is required for the application of regulated herbicides from September 1 of one calendar year through April 15 of the following calendar year.

(z) [~~(aa)~~] Jackson.

(1) The aerial application of all formulations of 2,4-D is prohibited between March 10 and September 15 of each year.

(2) No permit is required for the application of regulated herbicides during the months of January and February of each year.

~~[(3) Brazoria, Calhoun, Fort Bend, Jackson, Matagorda, and Wharton Counties, for purposes of this subsection, are considered one unit and paragraph (1) of this subsection is not to be changed without a public hearing for the unit as a whole.]~~

(aa) [~~(bb)~~] King. Aerial application of regulated herbicides is prohibited between June 10 and October 15 of each year.

(bb) [~~(cc)~~] Knox. That portion of the county lying north of the Brazos River to its intersection with longitude 99 degrees 35'; thence north to latitude 33 degrees 42' going west to State Highway 6, then north to the Foard County line, west to King County line; thence south to the Brazos River, is exempt from the Act, Subchapter G and regulations adopted thereunder. All other portions of Knox County are required to comply with provisions of the Act, Subchapter G and regulations adopted thereunder, except that during the period between October 1 through March 31 of the following calendar year no permit will be required.

(cc) [~~(dd)~~] Lamar.

(1) That portion of Lamar County beginning at the Red River County line on State Highway 271N, which point is the east boundary line of Lamar County; thence on a northwesterly direction along 271 North to the town of Pattonville; thence in a westerly direction from Pattonville along Jefferson Road for a distance of two miles; thence south on unnamed oil top county road 0.9 mile to community of Shady Grove; thence in a westerly direction on unnamed oil top county road for one mile to the intersection of FM 905; thence south one mile on FM 905 to first unnamed oil top county road in community of Plainview; thence in a westerly direction on county road four miles to the town of Biardstown to intersection of FM 1497; thence northwesterly on FM 1497 0.3 mile to Hickory Creek; thence southeasterly on Hickory Creek to North Sulphur River, which is the south boundary line of Lamar County; thence easterly along the south county line to the southeast corner of the county; thence northerly along the east county line to its intersection with Highway 271 North, to the point of beginning is regulated by the Act, Subchapter G and regulations adopted thereunder.

(2) Aerial application of regulated herbicides is prohibited in the regulated portion of Lamar County between April 15 and September 1 each year.

(dd) [~~(ee)~~] Lamb. During the period between September 15 of one calendar year through April of the following year, no permit will be required for the following regulated herbicides:

(1) 2-methyl-4 chlorophenoxyacetic acid (MCPA);

(2) polychlorinated benzoic acids; and

(3) either alone or in mixtures any of the herbicides listed in paragraph (1) and (2) of this subsection.

~~[(ff) Liberty.]~~

~~[(1) The application of high volatile herbicides is prohibited.]~~

~~[(2) That portion of Liberty County lying south of Luce Bayou from the Harris County line to Highway 321, then the area south of a line from the point where Luce Bayou crosses Highway 321 due east to the Trinity River, then the area east of the Trinity River from this point north to the San Jacinto County line is exempt from the Act, Subchapter G and regulations adopted thereunder. All other portions of Liberty County are required to comply with provisions of the Act, Subchapter G and regulations adopted thereunder.]~~

(ee) [~~(gg)~~] Matagorda.

(1) The aerial application of all formulations of 2,4-D is prohibited between March 10 and September 15 of each year.

(2) The application of high volatile herbicides is prohibited.

(3) In no case shall 2,4-D be used to treat any area that is nearer than two miles to any susceptible crop.

~~[(4) Brazoria, Calhoun, Fort Bend, Jackson, Matagorda, and Wharton Counties, for purposes of this subsection, are considered as one unit, and paragraph (1) of this subsection is not to be changed without a public hearing for the unit as a whole.]~~

(ff) [~~(hh)~~] Milam.

(1) The use of all ester formulations of regulated herbicides will be prohibited between the dates of April 1 and August 31 of each year.

(2) A permit will be required for the application of the other formulations of regulated herbicides between the dates of April 1 and August 31 of each year.

(3) A permit will not be required for the application of the regulated herbicides between the dates of September 1 to March 31 of the following year.

(gg) [~~(ii)~~] McLennan.

(1) The use of all ester formulations of regulated herbicides will be prohibited between the dates of April 1 and August 31 of each year.

(2) A permit will be required for the application of the other formulations of regulated herbicides between the dates of April 1 and August 31 of each year.

(3) A permit will not be required for the application of the regulated herbicides between the dates of September 1 to March 31 of the following year.

(hh) [~~(jj)~~] Motley. No permit is required for the period of November 1 to May 14 of the following year.

(ii) [~~(kk)~~] Parmer. No permit is required in Parmer County for applications of regulated herbicides between November 1 and March 31 of the following year. However, the application of all ester formulations of 2,4-D is prohibited between the dates of April 15 and October 1 of each year.

(jj) [~~(ll)~~] Refugio.

(1) The application of the ester formulations of 2,4-D by any means is prohibited between the period of March 1 and September 15 of each year. The application of the amine formulations of 2,4-D is prohibited between the period of March 10 and September 15 of each year except by permit. [~~The aerial application of any formulation of 2,4-D is prohibited between March 10 and September 15 of each~~

year; except that if the county commissioners court determines that no cotton is growing on that date, in said county, permits may be issued until such time the county commissioners court determines that cotton is growing.]

(2) No permit is required for the application of regulated herbicides during the period of September 16 and ending the last day of February of the following year [months of January and February of each year].

(kk) [(mm)] Robertson.

(1) Persons in that portion of Robertson County, east of State Highway 6, are exempted from requirements of the Act, Subchapter G and regulations adopted thereunder.

(2) A permit is required for the application of regulated herbicides in that portion of Robertson County, west of State Highway 6 between the dates of April 1 and September 15 each year.

(ll) [(nn)] Runnels. That portion of Runnels County beginning on the west county line at the point of intersection with the Colorado River, east-southeasterly along the Colorado River to its intersection with U.S. Highway 83, thence north along U.S. Highway 83 to its intersection with the north county line, thence westerly along the north Runnels County line to the northwest corner of the county, thence southerly along the west county line to the Colorado River, the point of beginning, is regulated by the Act, Subchapter G and regulations adopted thereunder. In regulated areas, no permit is required from October 1 through May 25 of the following year. The application of ester formulations of regulated herbicides is prohibited from May 26 through September 30 of each year. The application of other regulated herbicides will be allowed beginning May 26 through September 30 of each year provided that a spray permit is obtained prior to each application.

(mm) [(oo)] San Patricio. No permit is required during the period beginning September 1 and ending March 1 of the following year. Application of regulated herbicides during the period of March 2 through August 31 must be in compliance with the Act, Subchapter G and regulations adopted thereunder. Only boom-type equipment can be used, for ground applications with nozzle height not to exceed 24 inches and maximum pressure not to exceed 20 pounds per square inch. The use of 2,4-D amine herbicides must meet the following requirements for both ground and aerial applications:

(1) wind velocity of 0-5 mph downwind within 16 rows and upwind 8 rows;

(2) wind velocity of 6-10 mph downwind 1/8 mile and upwind 8 rows.

(nn) [(pp)] Wharton.

(1) The aerial application of all formulations of 2,4-D is prohibited in that portion of Wharton County east of the Colorado River between March 10 and September 15 of each year.

(2) The application of all formulations of 2,4-D by any method is prohibited during the period beginning March 10 and ending October 1 of each year, in that portion of Wharton County lying west of the Colorado River.

(3) The use of high volatile herbicides is prohibited.

(4) In no case shall 2,4-D be used to treat any area that is nearer than two miles to any susceptible crop.

[(5) Brazoria, Calhoun, Fort Bend, Jackson, Matagorda, and Wharton Counties, for purposes of this subsection, are considered as one unit, and paragraph (1) of this subsection is not to be changed without a public hearing for the unit as a whole.]

(oo) [(qq)] Wilbarger.

(1) No permit is required for the application of regulated herbicides during the period of September 16 to May 9 of the following calendar year.

(2) The application of the following regulated herbicides is prohibited during the regulated period beginning May 10 and ending September 15 of each year:

(A) Ester formulations of 2,4-Dichlorophenoxyacetic Acid (2,4-D);

(B) 2-Methyl-4-Chlorophenoxyacetic Acid (MCPA);

(3) The aerial application of polychlorinated benzoic acids and 2,4-D amine is prohibited during the regulated period except during the period of May 10 and ending May 20 of each year. Ground applications of polychlorinated benzoic acids and 2,4-D Amine may be made during the regulated period with the requirement of a permit.

(4) Research conducted by the Texas A&M University System under the auspices of brush and weed control, using all regulated herbicides, will be allowed during the regulated period. Aerial applications must provide a buffer zone of at least five statute miles from any susceptible crops, and wind velocity must not exceed 10 mph during application. Research will be allowed during the period beginning May 15 and ending September 15 of each year. The department shall be notified before the commencement of such research projects.

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 February 13, 2004.

TRD-200401045
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 463-4075

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TITLE 7. BANKING AND SECURITIES

PART 7. STATE SECURITIES BOARD

CHAPTER 105. RULES OF PRACTICE IN CONTESTED CASES

7 TAC §105.6

The Texas State Securities Board proposes an amendment to §105.6, concerning notice of hearing. The amendment would add the Director of the Inspections and Compliance Division to the Staff personnel authorized to sign a notice of hearing in an administrative case filed with the State Office of Administrative Hearings. Since the amendment would provide an alternative director-level person as an authorized signatory, the need for having Assistant Directors serve in that capacity no longer exists. Accordingly, the signatory authorization of the Assistant Directors in the Enforcement Division would be removed from the rule.

John Morgan, Director, Enforcement Division, and Benette Zivley, Director, Inspections and Compliance Division, have determined that for the first five-year period the rule is in effect there

will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Morgan and Mr. Zivley also have determined that for each year of the first five years the rule is in effect the public benefits anticipated as a result of enforcing the rule will be the clear delineation of signatory authority and the related internal review process in administrative cases. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 60 days after publication of the proposed section in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

Statutory authority: Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

Cross-reference to Statute: Texas Civil Statutes, Articles 581-14, 581-23, 581-23-2, and 581-24.

Statutes and codes affected: Texas Civil Statutes, Articles 581-14, 581-23, 581-23-2, and 581-24.

§105.6. Notice of Hearing.

(a) (No change.)

(b) Either the [~~The~~] Director [~~or an Assistant Director~~] of the Enforcement Division or of the Inspections and Compliance Division may sign notices of hearings.

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 February 12, 2004.

TRD-200400974
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 305-8300

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CHAPTER 109. TRANSACTIONS EXEMPT FROM REGISTRATION

7 TAC §109.3

The Texas State Securities Board proposes an amendment to §109.3, concerning sales to financial institutions and certain institutional investors under the Texas Securities Act, §5.H. The amendment to subsection (e) would add a reference to investment adviser registration to conform to the bifurcation of dealer and investment adviser registration provisions in the Act and to update terminology. The addition of a new subsection (f) would clarify that there is no exemption from registration for an investment adviser to a private investment entity containing natural persons. An adviser to a private investment entity, including a hedge fund, with natural person participants (including individual accredited investors) would either register with the Securities Commissioner or notice file if it is a federal covered investment adviser. This is consistent with previous interpretative letters issued by the Board's General Counsel. An investment adviser to an investment entity consisting of institutional clients and containing no natural persons would continue to be exempt from registration and notice filing pursuant to subsection (c).

Micheal Northcutt, Director, Registration Division, and Benette Zivley, Director, Inspections and Compliance Division, have determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Northcutt and Mr. Zivley also have determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to clarify the applicability of the exemption to investment advisers to private investment entities. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments are sought regarding several aspects of the proposed amendment and clarifying that there is no exemption from investment adviser registration for investment advisers rendering services to certain private investment entities, including hedge funds. Since discussion of some of the topics raised for comment may go beyond the provisions being currently considered for amendment, the input may form the basis for future rulemaking or result in a reformulated proposal and opportunity for additional comments.

Specific comments are solicited by the Board on the following points:

(1) How should "private investment entity" be defined in determining when an investment adviser to the entity is not exempt from registration under §109.3(e)?

(2) Should the exemption provided by §109.3(e) be available for an investment adviser to a private investment entity, with substantial net worth or total asset holdings, regardless of whether the security holders of that private investment entity include natural persons? If so, what should the net worth or total asset standards be?

(3) When analyzing whether an investment adviser to a private investment entity should be exempt from registration, should a minimum investment in the private investment entity be required from each of its securities holders? If so, what should the amount of that minimum investment be?

(4) When analyzing whether an investment adviser to a private investment entity should be exempt from registration, should a standard higher than that for natural persons included in "accredited investor" as defined in SEC Rule 501(a) be utilized for the natural persons investing in the private investment entity that receives the investment advice? If so, what should the standard be for this "super-accredited investor"?

(5) Any other comments and background information that would assist the staff in crafting an exemption from investment adviser registration for investment advisers dealing with natural person

investors that are knowledgeable, sophisticated, and with sufficient net worth to not need the additional protections and oversight provided by requiring the investment adviser to register or submit a notice filing to the Securities Commissioner.

Comments on the proposal to be considered by the Board should be submitted in writing within 60 days after publication of the proposed section in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

Statutory authority: Texas Civil Statutes, Articles 581-28-1 and 581-12.C. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. Section 12.C provides the Board with the authority to prescribe new dealer/agent registration exemptions by rule.

Cross-reference to Statute: Texas Civil Statutes, Articles 581-12, 581-12-1, and 581-18.

Statutes and codes affected: Texas Civil Statutes, Articles 581-12, and 581-12-1.

§109.3. Sales to Financial Institutions and Certain Institutional Investors under the Texas Securities Act, §5.H.

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

(e) Exemption from registration for dealers, agents [~~salesmen~~], investment advisers, and investment adviser representatives [~~agents~~]. The State Securities Board, pursuant to the Texas Securities Act, §5.T and §12.C [~~§12.B~~], exempts a dealer, agent [~~salesman~~], investment adviser, or investment adviser representative [~~agent~~] from the dealer and/or investment adviser registration requirements of the Texas Securities Act, when such person is engaging in the offer or sale of securities and/or the rendering of investment advisory services to a financial institution or other institutional investor listed in the Texas Securities Act, §5.H, or subsection (c) of this section, where such financial institution or other institutional investor is acting for its own account or as a bona fide trustee of a trust organized and existing other than for the purpose of acquiring the specific securities or the investment advisory services for which the dealer, agent [~~salesman~~], investment adviser, or investment adviser representative [~~agent~~] is claiming an exemption under §5.H or subsection (c) of this section.

(f) Not applicable to certain investment advisers. The exemption provided by subsection (e) of this section does not provide an exemption from registration for an investment adviser or investment adviser representative rendering investment advice to a private investment entity, including a hedge fund, when the owners/participants of the investment entity include individuals who are natural persons, regardless of whether the individuals are "accredited investors."

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 February 12, 2004.

TRD-200400975

Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 305-8300

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CHAPTER 115. SECURITIES DEALERS AND AGENTS

7 TAC §115.1

The Texas State Securities Board proposes an amendment to §115.1, concerning general provisions applicable to dealers and their agents. The amendment to §115.1 would add subsection (d) containing reminders to dealers and their agents that registration is not required if an exemption from registration is available and that the antifraud provisions of the Texas Securities Act (Act) will apply to their activities.

Micheal Northcutt, Director, Registration Division, and Benette Zivley, Director, Inspections and Compliance Division, have determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Northcutt and Mr. Zivley also have determined that for each year of the first five years the rule is in effect the public benefits anticipated as a result of enforcing the rule will be that dealers and agents will be reminded that registration exemptions exist and that the antifraud provisions of the Act apply to exempt activities. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 60 days after publication of the proposed section in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

Statutory authority: Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

Cross-reference to Statute: Texas Civil Statutes, Articles 581-12, 581-18, 581-23, 581-23-1, 581-23-2, 581-25-1, 581-29, 581-29-1, 581-29-2, 581-29-3, 581-32, and 581-33.

Statutes and codes affected: Texas Civil Statutes, Articles 581-12 and 581-18.

§115.1. General Provisions.

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

(d) Availability of an exemption from registration. The requirements detailed in this chapter do not apply to dealers and agents that are exempt from registration as such pursuant to the Texas Securities Act, §5, or by Board rule pursuant to the Texas Securities Act, §5.T or §12.C, contained in Chapters 109 or 139 of this title. Persons not required to register with the Securities Commissioner pursuant to an exemption are reminded that the Texas Securities Act prohibits fraud or fraudulent practices in dealing in any manner in any securities whether

or not the person engaging in fraud or fraudulent practices is required to be registered. The Agency has jurisdiction to investigate and bring enforcement actions to the full extent authorized in the Texas Securities Act with respect to fraud or deceit, or unlawful conduct by a dealer or agent in connection with transactions involving securities in Texas.

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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Denise Voigt Crawford
Securities Commissioner
State Securities Board
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For further information, please call: (512) 305-8300

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7 TAC §115.2

The Texas State Securities Board proposes an amendment to §115.2, concerning application requirements. The proposal would amend the requirement that a branch office manager must satisfy the examination qualification requirements of the dealer and eliminate the necessity for submission of a branch-specific, written undertaking where conditions justify a waiver of the rule. The amendment would make it the branch manager's responsibility to restrict activities of the branch based on the examination(s) he or she has passed. By formalizing an existing practice in the regulation it would be possible to eliminate the need for a dealer to request a waiver and enter into an undertaking when it limits its branch office's activities to activities corresponding to the branch office manager's qualification examinations.

Micheal Northcutt, Director, Registration Division, and Benette Zivley, Director, Inspections and Compliance Division, have determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Northcutt and Mr. Zivley also have determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to alleviate the need for certain dealers restricting activities in their branch offices to make an additional paper filing. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 60 days after publication of the proposed section in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

Statutory authority: Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

Cross-reference to Statute: Texas Civil Statutes, Articles 581-12, and 581-13.

Statutes and codes affected: Texas Civil Statutes, Article 581-13.

§115.2. Application Requirements.

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

(c) Branch office registration and inspection. A request for registration of a branch office of a dealer may be made upon initial application of the dealer or by amendment to a current registration. No sales-related activity may occur in any branch office location until such time as the dealer receives notification from the Securities Commissioner that such location has been approved as a branch office. The request for registration of a branch office may be made in letter form or by the submission of Schedule E of Form BD. The fee for registration of each branch office is $25. Simultaneous with the request for registration of a branch office, a branch office manager must be designated. [~~The manager must satisfy the examination qualifications required of the dealer before the branch office may be registered.~~] A branch office manager is not required to be registered as a NASD principal, but must be registered in Texas as an agent and is responsible for supervision of the activities of the branch office. A branch office manager may not supervise sales activities encompassing a broader range of products than those covered by the manager's qualification examination(s). Within 10 business days from when a branch office manager ceases to be employed or registered in such capacity by the dealer, a new branch office manager, qualified by passage of the appropriate examinations, must be designated. Absent the designation of a new branch manager to the Securities Commissioner within the 10 business day period, the registration of a branch office whose manager ceases to be employed as such by a dealer may be automatically terminated. The branch office registration may be reinstated upon the designation of a qualified branch office manager and payment of the branch office registration fee. Each branch office registered with the Securities Commissioner is subject to unannounced inspections at any time during normal business hours.

(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.

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Denise Voigt Crawford
Securities Commissioner
State Securities Board
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For further information, please call: (512) 305-8300

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CHAPTER 116. INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES

7 TAC §116.1

The Texas State Securities Board proposes an amendment to §116.1, concerning general provisions applicable to investment advisers and their representatives. The amendment would add subsection (d) containing reminders to investment advisers and

their representatives that registration is not required if an exemption from registration is available and that the antifraud provisions of the Texas Securities Act will apply to their activities.

Micheal Northcutt, Director, Registration Division, and Benette Zivley, Director, Inspections and Compliance Division, have determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Northcutt and Mr. Zivley also have determined that for each year of the first five years the rule is in effect the public benefits anticipated as a result of enforcing the rule will be that investment advisers and their representatives will be reminded that registration exemptions exist and that the antifraud provisions of the Act apply to exempt activities. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 60 days after publication of the proposed section in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

Statutory authority: Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

Cross-reference to Statute: Texas Civil Statutes, Articles 581-12, 581-12-1, 581-18, 581-23, 581-23-1, 581-23-2, 581-25-1, 581-29, 581-29-1, 581-29-2, 581-29-3, 581-32, 581-33, and 581-33-1.

Statutes and codes affected: Texas Civil Statutes, Articles 581-12, 581-12-1, and 581-18.

§116.1. General Provisions.

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

(d) Availability of an exemption from registration. The requirements detailed in this chapter do not apply to investment advisers and investment adviser representatives that are exempt from registration as such pursuant to the Texas Securities Act, §5, or by Board rule pursuant to the Texas Securities Act, §5.T or §12.C, contained in Chapters 109 or 139 of this title. Persons not required to register with the Securities Commissioner pursuant to an exemption are reminded that the Texas Securities Act prohibits fraud or fraudulent practices in dealing in any manner in any securities whether or not the person engaging in fraud or fraudulent practices is required to be registered. The Agency has jurisdiction to investigate and bring enforcement actions to the full extent authorized in the Texas Securities Act with respect to fraud or deceit, or unlawful conduct by an investment adviser or investment adviser representative in connection with transactions involving securities in Texas.

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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TRD-200400978

Denise Voigt Crawford
Securities Commissioner
State Securities Board
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For further information, please call: (512) 305-8300

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CHAPTER 139. EXEMPTIONS BY RULE OR ORDER

7 TAC §139.22

The Texas State Securities Board proposes a new §139.22, concerning an exemption from investment adviser registration for persons rendering investment advice to a family entity. This new rule would provide an exemption from registration for an investment adviser to a "family entity" with a minimum net worth of $5 million. The exemption would be conditioned upon the firm or individual not holding itself out to the public as an investment adviser.

Micheal Northcutt, Director, Registration Division, and Benette Zivley, Director, Inspections and Compliance Division, have determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Northcutt and Mr. Zivley also have determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that persons engaged in limited activities with certain private entities will be able to conduct those activities without registration. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments are sought regarding several aspects of the exemption proposal and how such an exemption should be structured. Since comments and additional consideration of these matters may result in the proposal being substantially revised, the input received may form the basis for a new proposal and an opportunity for additional comments.

Specific comments are solicited by the Board on the following points:

(1) How should "family entity" and "single family" be defined in this section?

(2) Should the exemption be limited to an investment adviser that renders services to a family entity as a full-time employee or on an exclusive basis? If not, should the standard be "substantially employed" by the family entity? If so, how should "substantially employed" be defined?

(3) If an investment adviser is permitted to render services to more than one family entity under the exemption, how many separate family entity clients should be permitted?

(4) Should the exemption be limited to an investment adviser who is related to and/or is included among the family members investing in the family entity or should an unrelated person or non-participating family member serving as an investment adviser be exempt as well?

(5) How should "hold itself out to the public" be defined for purposes of the exemption?

(6) Should the net worth of the family entity receiving investment advice be raised above the $5 million threshold contemplated in the proposal? If so, what should that revised threshold amount be?

(7) Should aggregating multiple entities formed by members of a single family be permitted in order to reach the minimum net worth threshold? If so, what threshold amount should be used? Should a higher threshold apply when aggregating multiple family entities, some of which may, on an individual basis, fall below the proposed $5 million threshold?

(8) Should each individual family member participating in the family entity be an "accredited investor," as defined in SEC Rule 501(a), or meet some other minimum net worth standard? If so, what standard should be used?

(9) Should a minimum investment be required from each family member participating in the family entity? If so, what should that minimum investment be?

(10) Any other comments and background information that would assist the staff in crafting an exemption from investment adviser registration for investment advisers dealing with family entities comprised of investors that are knowledgeable, sophisticated, and with sufficient net worth to not need the additional protections and oversight provided by requiring the investment adviser to register with the Securities Commissioner.

Comments on the proposal to be considered by the Board should be submitted in writing within 60 days after publication of the proposed section in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

Statutory authority: Texas Civil Statutes, Articles 581-28-1 and 581-12.C. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. Section 12.C provides the Board with the authority to prescribe new dealer/agent registration exemptions by rule.

Cross-reference to Statute: Texas Civil Statutes, Articles 581-5 and 581-12.

Statutes and codes affected: Texas Civil Statutes, Articles 581-5, 581-12, 581-12-1, and 581-18.

§139.22. Exemption for Investment Adviser to a Family Entity.

(a) The State Securities Board, pursuant to the Texas Securities Act, §5.T and §12.C, exempts an investment adviser from the investment adviser registration requirements of the Act when such adviser:

(1) renders services as an investment adviser to a family entity, and

(2) does not hold itself out to the public as one who renders services as an investment adviser.

(b) For purposes of this section, "family entity" is a closely-held corporation, partnership or limited liability company, with all of its owners, partners, or members belonging to a single family. The family entity must have a net worth of not less than $5 million in order for the adviser to be exempt from registration.

(c) For purposes of determining net worth under this section, an investment adviser may rely on the entity's most recent annual balance sheet or other financial statement which shall have been audited by an independent accountant or which shall have been verified under oath by a principal of the entity.

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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Denise Voigt Crawford
Securities Commissioner
State Securities Board
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For further information, please call: (512) 305-8300

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TITLE 10. COMMUNITY DEVELOPMENT

PART 6. OFFICE OF RURAL COMMUNITY AFFAIRS

CHAPTER 255. TEXAS COMMUNITY DEVELOPMENT PROGRAM

SUBCHAPTER A. ALLOCATION OF PROGRAM FUNDS

10 TAC §§255.1, 255.5, 255.6, 255.9 - 255.13

The Office of Rural Community Affairs (Office) proposes amendments to §255.1, §255.5, §255.6, §255.9, §255.10, §255.11 and two new sections §255.12 and §255.13 concerning the allocation of Community Development Block Grant (CDBG) non-entitlement area funds under the Texas Community Development Program (TCDP).

The amendments are being proposed to establish new procedures under the general provisions and to establish the standards and procedures by which the Office will allocate and distribute funds under the disaster relief fund, the urgent need fund, the colonia fund, the housing fund, and the small towns environment program fund. The two new sections are being proposed to establish the standards and procedures by which the Office will allocate and distribute funds under the microenterprise fund and the small business fund. The amendments are being proposed to make changes to the Texas Capital Fund application and selection criteria for the disaster relief fund, the urgent need fund, the colonia fund, the housing fund, and the small towns environment program fund and to describe the application and selection criteria for two new programs the microenterprise fund and the small business fund.

Robt. J. "Sam" Tessen, MS, Executive Director of the Office, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Robt. J. "Sam" Tessen, MS, Executive Director of the Office, also has determined that for the period that the section is in effect, the public benefit as a result of enforcing the section will be

the equitable allocation of CDBG non-entitlement area funds to eligible units of general local government in Texas. There will be an effect on small businesses or micro-businesses as two new programs are being proposed to assist small businesses and micro-businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is an anticipated impact on local employment if new jobs are created or retained under the proposed new microenterprise and small business programs.

Comments on the proposal may be submitted to Jerry Hill, General Counsel, Office of Rural Community Affairs, P.O. Box 12877, Austin, Texas 78711, telephone : (512) 936-6701. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register*.

The amendments are proposed under the §487.052 of the Government Code, which provides the executive committee with the authority to adopt rules concerning the implementation of the Office's responsibilities.

No other code, article, or statute is affected by the proposed amendments.

§255.1. General Provisions.

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

(1) Applicant--A unit of general local government which is preparing to submit or has submitted an application for Texas Community Development funds to the Office or to the Texas Department of Agriculture (TDA).

(2) Application--A written request for Texas Community Development Program TCDP funds in the format required by the Office or by the TDA for Texas Capital Fund TCF applications

(3) Community Development Block Grant nonentitlement area funds--The funds awarded to the State of Texas pursuant to the Housing and Community Development Act of l974, Title I, as amended, (42 United States Code §§5301 et seq.) and the regulations promulgated thereunder in 24 Code of Federal Regulations Part 570.

(4) Community--A unit of general local government.

(5) Contract--A written agreement, including all amendments thereto, executed by the Office, or by the TDA, and contractor which is funded with community development block grant nonentitlement area funds.

(6) Contractor--A unit of general local government with which the Office or the TDA has executed a contract.

(7) Office--The Office of Rural Community Affairs.

(8) Local government--A unit of general local government.

(9) Low-and moderate-income person--A member of a family which earns less than 80% of the area median family income, as defined under the United States Department of Housing and Urban Development §8 Assisted Housing Program.

(10) Nonentitlement area--An area which is not a metropolitan city or part of an urban county as defined in 42 United States Code, § 5302.

(11) Poverty--The current official poverty line established by the Director of the Federal Office of Management and Budget.

(12) Primary beneficiary--A low or moderate income person.

(13) Regional review committee--A regional community development review committee, one of which is established in each of the 24 state planning regions established by the governor pursuant to Texas Local Government Code, §391.003.

(14) Slum or blighted area--An area which has been designated a state enterprise zone, or an area within a municipality or county that is detrimental to the public health, safety, morals, and welfare of the municipality or county because the area:

(A) has a predominance of buildings or other improvements that are dilapidated, deteriorated, or obsolete due to age or other reasons;

(B) is prone to high population densities and overcrowding due to inadequate provision for open space;

(C) is composed of open land that, because of its location within municipal or county limits, is necessary for sound community growth through replatting, planning, and development for predominantly residential uses; or

(D) has conditions that exist due to any of the causes enumerated in subparagraphs (A)-(C) of this paragraph or any combination of those causes that:

(i) endanger life or property by fire or other causes; or

(ii) are conducive to:

(I) the ill health of the residents;

(II) disease transmission;

(III) abnormally high rates of infant mortality;

(IV) abnormally high rates of juvenile delinquency and crime; or

(V) disorderly development because of inadequate or improper platting for adequate residential development of lots, streets, and public utilities.

(15) Slum or blight, spot basis--A building which has been declared as a slum or blight and has multiple and unattended building code violations, and qualifies as slum or blighted on a spot basis under local law.

(16) State review committee--The State Community Development Review Committee established pursuant to Texas Government Code, §487.353.

(17) Unemployed person--A person between the ages of 16 and 64, inclusive, who is not presently working but is seeking employment.

(18) Unit of general local government--An entity defined as a unit of general local government in 42 United States Code §5302(a)(1), as amended.

(b) Overview--Community Development Block Grant nonentitlement area funds are distributed by the TCDP to eligible units of general local government in the following program areas:

(1) community development fund;

(2) Texas Capital fund. The Texas Capital Fund TCF is administered by the TDA under an interagency agreement with the Office. Applications for the TCF shall be submitted to the TDA.

(3) planning/capacity building fund;

(4) disaster relief fund;

(5) urgent need fund;

(6) colonia fund;

(7) *Young v. Martinez* fund;

(8) housing fund;

(9) small towns environment program fund;[,]

(10) microenterprise fund (program income);

(11) small business fund (program income).

(c) - (e) (No change.)

(f) Citizen Participation.

(1) Public hearing requirements. For each public hearing scheduled and conducted by an applicant or contractor, the following public hearing requirements shall be followed.

(A) Notice of each hearing must be published in a newspaper having general circulation in the city or county at least 72 hours prior to each scheduled hearing. The published notice must include the date, time, and location of each hearing and the topics to be considered at each hearing. The published notice must be printed in both English and Spanish, if appropriate. Articles published in such newspapers which satisfy the content and timing requirements of this subparagraph will be accepted by the Office and, in the case of TCF hearings, by the TDA, in lieu of publication of notices. Notices should also be prominently posted in public buildings and distributed to local Public Housing Authorities and other interested community groups.

(B) Each public hearing shall be held at a time and location convenient to potential or actual beneficiaries, with accommodation for persons with disabilities. Persons with disabilities must be able to attend the hearings and an applicant must make arrangements for individuals who require auxiliary aids or services if contacted at least two days prior to each hearing.

(C) When a significant number of non-English speaking residents can reasonably be expected to participate in a public hearing, an applicant or contractor shall provide an interpreter to accommodate the needs of the non-English speaking residents.

(2) Application requirements. Prior to submitting a formal application, an applicant for TCDP funding shall satisfy the following requirements.

(A) A t least one public hearing shall be held prior to the preparation of its application and a public notice shall be published in a newspaper having general circulation in the city or county notifying the public of the availability of the application for public review prior to submitting its completed application to the Office and, in the case of TCF applications, to the TDA. The requirements described in this subparagraph are not applicable to applications submitted under the housing infrastructure fund.

(B) For an application submitted for housing infrastructure fund assistance, an applicant must hold two public hearings. At least one public hearing shall be held prior to the preparation of the application and a second public hearing shall be held prior to submission of the application.

(C) [~~(B)~~] An applicant shall retain documentation of the hearing notices, a list of attendees at each hearing, minutes of the hearings, and any other records concerning the proposed use of funds for a period of three years or until the project, if funded, is closed out. Such records must be made available to the public in accordance with Texas Government Code, Chapter 552.

(D) [~~(C)~~] The public hearing must include a discussion with citizens on the development of housing and community development needs, the amount of funding available, all eligible activities under the TCDP, the plans of the applicant to minimize displacement of persons and to assist persons actually displaced as a result of activities assisted with TCDP funds, and the use of past TCDP contract funds, if applicable. Citizens, with particular emphasis on persons of low and moderate income who are residents of slum and blight areas, shall be encouraged to submit their views and proposals regarding community development and housing needs. Local organizations that provide services or housing for low to moderate income persons, including but not limited to, the local or area Public Housing Authority, the local or area Health and Human Services office, and the local or area Mental Health and Mental Retardation office, must receive written notification concerning the date, time, location, and topics to be covered at the first public hearing. Citizens shall be made aware of the location where they may submit their views and proposals should they be unable to attend the public hearing. For submission of a housing infrastructure fund application, these requirements must be followed for the first public hearing.

(E) [~~(D)~~] The notice announcing the availability of the application for public review must be published five days prior to the submission of the application and the published notice must include the fund category for which the application is submitted, the amount of funds requested, a description of the application activities, the location or locations of the application activities, and the location and hours when the application is available for review.

(F) The second public hearing for a housing infrastructure fund application must include a discussion with citizens on the proposed project, including the locations and the project activities, the amount of funds being requested, and the estimated amount of funds proposed for activities that will benefit low and moderate income persons. The published notice for this public hearing must include the location and hours when the application is available for review.

(G) [~~(E)~~] Any[~~The~~] public hearing held prior to submission of the application must be held after 5 p.m. on a weekday or at a convenient time on a Saturday or Sunday.

(3) - (5) (No change.)

(g) (No change.)

(h) Threshold requirements. An applicant must satisfy each of the following requirements in order to be eligible to apply for or to receive funding under the TCDP:

(1) Demonstrate [~~demonstrate~~] the ability to manage and administer the proposed project, including meeting all proposed benefits outlined in its application.[;]

(2) Demonstrate [~~demonstrate~~] the financial management capacity to operate and maintain any improvement made in conjunction with the proposed project.[;]

(3) Levy [~~levy~~] a local property tax or local sales tax option.[;]

(4) Demonstrate [~~demonstrate~~] satisfactory performance on previously awarded TCDP contracts.[;]

(5) Resolve [~~resolve~~] all outstanding compliance and audit findings related to previously awarded TCDP contracts and any other Office contracts.[;]

(6) Submit [~~submit~~] any past due audit to the Office.[; ~~and~~]

(A) A community with one year's delinquent audit may be eligible to submit an application for funding by the established application deadline, but may not receive a contract award if the audit continues to be delinquent on the date the state review committee meets to review funding recommendations for applications from fund categories scheduled for state review committee review. For applications from fund categories that are not reviewed by the state review committee, a community with one year's delinquent audit may be eligible to submit an application for funding by the established application deadline, but may not receive a contract award if the audit continues to be delinquent on the date that the executive director approves funding recommendations, or in the case of funding recommendations over $300,000, on the date that the Executive Committee reviews the funding recommendations. Applications for the colonia self-help center fund and the disaster relief/urgent need fund are exempt from this threshold.

(B) A community with two years of delinquent audits may not apply for additional funding and may not receive a funding recommendation. This applies to all funding categories under the Texas Community Development Program. The colonia self-help centers fund may be exempt from this threshold, since funds for the self-help centers fund is included in the program's state budget appropriation. Failure to meet the threshold will be reported to the Legislative Budget Board for review and recommendation. The disaster relief fund may be exempt from this threshold, but failure to meet this threshold will be forwarded to the Executive Committee for review and consideration.

(7) TCDP funds cannot be expended in any county that is designated as eligible for the Texas Water Development Board Economically Distressed Areas Program unless the county has adopted and is enforcing the Model Subdivision Rules established pursuant to §16.343 of the Water Code. An incorporated city that is located in a Texas Water Development Board Economically Distressed Areas Program eligible county that has not adopted, or is not enforcing, the Model Subdivision Rules, may submit an application for TCDP funds. However, in lieu of county adoption of the Model Subdivision Rules, the incorporated city must adopt the Model Subdivision Rules prior to the expenditure of any TCDP funds by the incorporated city.

(i) - (j) (No change.)

(k) Substitution of standardized data. Any applicant that chooses to substitute locally generated data for standardized information available to all applicants must use the survey instrument provided by the Office and must follow the procedures prescribed in the instructions to the survey instrument. This option does not apply to applications submitted to the TCF.

(1) - (4) (No change.)

(5) A survey that was completed on or after January 1, 1993, or January 1, 1994, [~~January 1, 1990,~~] for a previous TCDP application may be accepted by the Office for a new application to the extent specified in the most recent application guide for the proposed project.

(l) Unobligated and recaptured funds. Deobligated funds, unobligated funds and program income [~~(except program income recovered from local revolving loan funds)~~] generated by TCF projects shall be retained for expenditure in accordance with the Consolidated Plan. Program income derived from TCF projects will be used by the Office for eligible TCDP activities in accordance with the Consolidated Plan. Any deobligated funds, unobligated funds, program income, and unused funds from the current year's allocation or from previous years' allocations derived from any TCDP Fund, including program income recovered from TCF local revolving loan funds, and any reallocated funds which HUD has recaptured from Small Cities may be redistributed among the established current program year fund categories, for otherwise eligible projects. The selection of eligible projects to receive such funds is approved by the Office Executive Director, or when applicable, approved by the Office Executive Committee or by the TDA on a priority needs basis with eligible disaster relief and urgent need projects as the highest priority; followed by, [~~*Young v. Martinez* litigation projects,~~] TCF projects, special needs projects, projects in colonias, housing activities, and other projects as determined by the Office Executive Director. Should the TCDP be required to make payments to HUD to cover any loan payments not made by any recipient of a TCDP Section 108 loan guarantee, it would first use any available deobligated funds.

(m) (No change.)

(n) Performance threshold requirements. In addition to the requirements of subsection (h) of this section, an applicant must satisfy the following performance requirements in order to be eligible to apply for program funds. A contract is considered executed for the purposes of this subsection on the date stated in section 2 of such contract.

(1) Obligate at least 50% of the total TCDP funds awarded under an open TCDP contract within 12 months from the start date of the contract or prior to the application deadlines. This threshold is applicable to TCDP contracts with an original 24-month contract period. To meet this threshold, 50% of the TCDP funds must be obligated through executed contracts for administrative services, engineering services, acquisition, construction, materials purchase, etc. The TCDP contract activities do not have to be 50% completed, nor do 50% of the TCDP contract funds have to be expended to meet this threshold. This threshold is applicable to previously awarded TCDP contracts under the community development fund, the colonia construction fund, the colonia planning fund, the planning and capacity building fund, and the disaster relief/urgent need fund. This threshold is not applicable to previously awarded TCDP contracts under the TCF, the housing infrastructure fund, the housing rehabilitation fund, the colonia self-help centers fund, the colonia economically distressed area program fund, the *Young v. Martinez* fund, the disaster recovery initiative program, and the small towns environment program fund. This paragraph does not apply to a city or county that meets the eligibility criteria for current assistance from the TCDP disaster relief fund. [~~Obligate at least 50% of the total funds awarded under a contract with a 24 month contract period (except for TCF contracts, housing fund contracts, colonia self-help center contracts, colonia economically distressed area program contracts, *Young v. Martinez* contracts, disaster recovery initiative contracts, and small towns environment program fund contracts) executed at least 12 months prior to the current program year application deadline. This paragraph does not apply to disaster relief fund applicants.~~]

(2) Submit to the Office the certificate of expenditures (COE) report showing the expended TCDP funds and a final drawdown for any remaining TCDP funds as required by the most recent edition of the TCDP Project Implementation Manual. Any reserved funds on the COE must be approved in writing by TCDP staff. To meet this threshold "expended" means that the construction and services covered by the TCDP funds are complete and a drawdown for the TCDP funds has been submitted prior to the application deadlines. This threshold will apply to an open TCDP contract with an original 24-month contract period and to TCDP contractors that have reached the end of the 24-month period prior to the application deadlines. This threshold is applicable to previously awarded TCDP contracts under the community development fund, the colonia construction fund, the colonia planning fund, the planning and capacity building fund, and the disaster relief/urgent need fund. This threshold is not applicable to previously awarded TCDP contracts under the TCF, the housing infrastructure fund, the housing rehabilitation fund, the

colonia self-help centers fund, the colonia economically distressed area program fund, the *Young v. Martinez* fund, the disaster recovery initiative program, and the small towns environment program fund. This paragraph does not apply to a city or county that meets the eligibility criteria for current assistance from the TCDP disaster relief fund.

~~[(2) Obligate at least 50% of the total funds awarded under a contract with a thirty-six month contract period (except for TCF contracts, housing fund contracts, colonia self-help center contracts, colonia economically distressed area program contracts, *Young v. Martinez* contracts, disaster recovery initiative contracts, and small towns environment program fund contracts) executed at least 18 months prior to the current program year application deadline. This paragraph does not apply to disaster relief fund applicants.]~~

~~[(3) Expend all but the reserved audit funds, or other reserved funds that are pre-approved by TCDP staff, awarded under a contract with a contract period of 24 months (except for TCF contracts, housing fund contracts, colonia self-help center contracts, colonia economically distressed area program contracts, *Young v. Martinez* contracts, disaster recovery initiative contracts, and small towns environment program fund contracts) that has been in effect for at least 24 months prior to the current program year application deadline and submit to the Office a certificate of completion required by the most recent edition of the TCDP Project Implementation Manual which documents the expenditure of all contract funds with the exception of any contract funds reserved for audits and other reserved funds that are pre-approved by TCDP staff. This paragraph does not apply to disaster relief fund applicants.]~~

(3) [~~(4)~~] TCF applicants may not have an existing contract with an award date in excess of 48 months prior to the application deadline date, regardless of extensions granted. If an existing contract requires an extension beyond the initial term, TDA must be in receipt of the request for extension no less than 30 days prior to contract expiration date. If an existing contract expires prior to or on the new application deadline date, without an approved extension, TDA must be in receipt of complete closeout documentation for the existing contract, no less than 30 days prior to the new application deadline date (complete closeout documentation is defined in the most recent version of the TCF Implementation Manual).

(4) Submit to the Office the certificate of expenditures (COE) report showing the expended TCDP funds and a final drawdown for any remaining TCDP funds as required by the most recent edition of the TCDP Project Implementation Manual. Any reserved funds on the COE must be approved in writing by TCDP staff. To meet this threshold "expended" means that the construction and services covered by the TCDP funds are complete and a drawdown for the TCDP funds has been submitted prior to the application deadlines. This threshold will apply to an open TCDP contract with an original 36-month contract period and to TCDP contractors that have reached the end of the 36-month period prior to the application deadlines. This threshold is applicable to previously awarded TCDP contracts under the housing infrastructure fund (when the applicant is applying for the current housing infrastructure fund competition) and the small towns environment program fund. This threshold is not applicable to previously awarded TCDP contracts under the TCF, the housing rehabilitation fund, the colonia self-help centers fund, the colonia economically distressed area program fund, the *Young v. Martinez* fund, and the disaster recovery initiative program. This paragraph does not apply to a city or county that meets the eligibility criteria for current assistance from the TCDP disaster relief fund.

~~[(5) Expend all but the reserved audit funds or other reserved funds that are pre-approved by TCDP staff, awarded under a contract (except for TCF contracts, housing fund contracts, colonia self-help center contracts, colonia economically distressed area program contracts, *Young v. Martinez* contracts, disaster recovery initiative contracts, and small towns environment program fund contracts) with a contract period of 36 months and that has been in effect for at least 36 months prior to the current program year application deadline, and submit to the Office a certificate of completion required by the most recent edition of the TCDP Project Implementation Manual which documents the expenditure of all contract funds with the exception of any contract funds reserved for audits and other reserved funds that are pre-approved by TCDP staff. This paragraph does not apply to disaster relief fund applicants.]~~

(o) - (q) (No change.)

(r) Withdrawal of award.

(1) Should the applicant fail to substantiate or maintain the claims and statements made in the application upon which the award is based within a period ending 90 days after the date of the TCDP's award letter to the applicant, the award will be immediately withdrawn by the TCDP (excluding the colonia self-help center awards).

(2) Should the applicant fail to execute the Office's award contract (excluding Texas Capital Fund and colonia self-help center contracts) within 60 days from the date of the letter transmitting the award contract to the applicant, the award will be withdrawn by the Office.

(s) Funds recaptured from withdrawn awards. For an award that is withdrawn from an application, the Office follows different procedures for the use of those recaptured funds depending on the fund category where the award is withdrawn.

(1) Funds recaptured under the community development fund from the withdrawal of an award made from the first year of the biennial funding are offered to the next highest ranked applicant from that region that was not recommended to receive an award from the first year regional allocation. Funds recaptured under the community development fund from the withdrawal of an award made from the second year of the biennial funding are offered to the next highest ranked applicant from that region that was not recommended to receive full funding (the applicant recommended to receive marginal funding) from the second year regional allocation. Any funds remaining from the second year regional allocation after full funding is accepted by the second year marginal applicant are offered to the next highest ranked applicant from the region as long as the amount of funds still available exceeds the minimum community development fund grant amount. Any funds remaining from the second year regional allocation that are not accepted by an applicant from the region or that are not offered to an applicant from the region are then subject to the procedures described in §255.1(l) of this title (relating to General Provisions).

(2) Funds recaptured under the planning and capacity building fund from the withdrawal of an award made from the first year of the biennial funding are offered to the next highest ranked applicant from that statewide competition that was not recommended to receive an award from the first year allocation. Funds recaptured under the planning and capacity building fund from the withdrawal of an award made from the second year of the biennial funding are offered to the next highest ranked applicant from that statewide competition that was not recommended to receive full funding (the applicant recommended to receive marginal funding) from the second year allocation. Any funds remaining from the second year allocation after full funding is accepted by the second year marginal applicant are offered to the next highest ranked applicant from the statewide competition. Any funds remaining from the second year allocation that are not accepted by an applicant from the statewide competition

or that are not offered to an applicant from the statewide competition are then subject to the procedures described in §255.1(l) of this title (relating to General Provisions).

(3) Funds recaptured under the housing rehabilitation fund from the withdrawal of an award made from the first year of the biennial funding are offered to the next highest ranked applicant from that statewide competition that was not recommended to receive an award from the first year allocation. Funds recaptured under the housing rehabilitation fund from the withdrawal of an award made from the second year of the biennial funding are offered to the next highest ranked applicant from that statewide competition that was not recommended to receive full funding (the applicant recommended to receive marginal funding) from the second year allocation. Any funds remaining from the second year allocation after full funding is accepted by the second year marginal applicant are offered to the next highest ranked applicant from the statewide competition. Any funds remaining from the second year allocation that are not accepted by an applicant from the statewide competition or that are not offered to an applicant from the statewide competition are then subject to the procedures described in §255.1(l) of this title (relating to General Provisions).

(4) Funds recaptured under the colonia construction fund from the withdrawal of an award remain available to potential colonia program fund applicants during that program year to meet the 10 percent colonia set-aside requirement.

(5) Funds recaptured under the colonia planning fund from the withdrawal of an award remain available to potential colonia program fund applicants during that program year to meet the 10 percent colonia set-aside requirement.

(6) Funds recaptured under the program year allocation for the colonia economically distressed areas program fund from the withdrawal of an award remain available to potential colonia economically distressed areas program fund applicants during that program year. Any funds remaining from the program year allocation that are not used to fund colonia economically distressed areas program fund applications within twelve months after the Office receives the federal letter of credit would remain available to potential colonia program fund applicants during that program year to meet the 10 percent colonia set-aside requirement.

(7) Funds recaptured under the housing infrastructure fund from the withdrawal of an award are subject to the procedures described in §255.1(l) of this title (relating to General Provisions).

(8) Funds recaptured under the program year allocation for the disaster relief/urgent need fund from the withdrawal of an award are subject to the procedures described in §255.1(l) of this title (relating to General Provisions).

(9) Funds recaptured under the small towns environment program fund from the withdrawal of an award are subject to the procedures described in §255.1(l) of this title (relating to General Provisions).

(10) Funds recaptured under the microenterprise fund from the withdrawal of an award are subject to the procedures described in §255.1(l) of this title (relating to General Provisions).

(11) Funds recaptured under the small business fund from the withdrawal of an award are subject to the procedures described in §255.1(l) of this title (relating to General Provisions).

(12) Funds recaptured under the Texas Capital Fund from the withdrawal of an award are subject to the procedures described in §255.1(l) of this title (relating to General Provisions).

§255.5. Disaster Relief Fund.

(a) General provisions. Assistance under this fund is available to units of general local government for eligible activities under the Housing and Community Development Act of 1974, Title I, as amended, for the alleviation of a disaster situation. To receive assistance under this program category, the situation to be addressed with TCDP funds must be both unanticipated and beyond the control of the local government. For example, the collapse of a municipal water distribution system due to lack of regular maintenance does not qualify. If the same situation was caused by a tornado or flood, the community could apply for disaster relief funds. An applicant may not apply for funding to construct public facilities that did not exist prior to the occurrence of the disaster. Starting with the 2004 TCDP program year, TCDP disaster relief funds will not be provided under the Federal Emergency Management Agency's Hazard Mitigation Grant Program unless the Office receives satisfactory evidence that any property to be purchased was not constructed or purchased by the current owner after the property site location was officially mapped and included in a designated flood plain area. Additionally, in disaster relief situations, the TCDP dollars are to be viewed as gap financing or funds of last resort. In other words, the community may only apply to the Office for funding of those activities for which local funds are not available, i.e., the entity has less than six months of reserve funds available in its balance as evidenced by the last available audit as required by state statute, orassistance from other sources is not available. Assistance under the disaster relief fund is provided only if one of the following has occurred:

(1) The governor has requested a presidential declaration of a major disaster; or

(2) The governor has declared a state of disaster or emergency.

(b) Funding cycle. Funds for disaster relief projects will be awarded throughout the program year in response to disaster situations. The application for assistance must be submitted no later than 12 months from the date of the presidential declaration of a major disaster or governor's declaration of a state of disaster or emergency.

(c) Selection procedures. As soon as an area qualifies for disaster relief assistance, the Office works with the local government, the governor's office, and the Emergency Management Division of the Texas Department of Public Safety to determine where TCDP funds can best be utilized. The Office then works with the unit of local government selected for funding to negotiate a contract. A unit of general local government cannot receive a disaster relief grant and an urgent need grant to address problems caused by the same natural disaster situation. In no instance will a unit of general local government receive more than one disaster relief grant to address a single occurrence of a natural disaster.

(d) - (h) (No change.)

§255.6. Urgent Need Fund.

(a) General provisions. Urgent need assistance is contingent upon the availability of funds for activities that will restore water or sewer infrastructure whose sudden failure has resulted in either death, illness, injury, or pose an imminent threat to life or health within the affected applicant's jurisdiction. The infrastructure failure must not be the result of a lack of maintenance and must be unforeseeable. An application for urgent need assistance will not be accepted by the TCDP until discussions between the potential applicant and representatives of the TCDP, the Texas Commission on Environmental Quality (TCEQ), and the Texas Water Development Board (TWDB) have taken place. Through these discussions, a determination shall be made whether the situation meets TCDP urgent need threshold criteria; whether shared financing is possible; whether financing for the necessary improvements

is, or is not, available from the TWDB; or that the potential applicant does, or does not, qualify for TWDB assistance. Based on the availability of such funds, deobligated funds and/or program income not to exceed $1,000,000 may be made available for urgent need assistance during the 2004 TCDP program year. If TCDP funds are made available, a potential applicant that meets these requirements will be invited to submit an application for urgent need funds. [~~Assistance under this fund is provided only to eliminate existing water and sewer conditions which pose a serious and immediate threat to the health or welfare of the residents of the applicant where other financial resources are not available to meet such conditions. A unit of general local government that wishes to receive assistance under this fund must submit an application, as provided by the Office, to the Office. There is no application deadline. However, an application for urgent need assistance is not accepted for funding until discussions between the potential applicant and representatives of the Office and other state regulatory and funding resource agencies (such as the Texas Commission on Environmental Quality and the Texas Water Development Board) have occurred and a determination is made that the potential applicant and the situation meet urgent need fund threshold criteria. An applicant may not submit an application under this fund and also under any other TCDP fund category at the same time if the proposed activity under each application is the same or substantially similar. An applicant may receive one contract award under this fund in any one program year. The Office may negotiate the level of funding to be provided to an applicant and the scope of work to be performed by the applicant.~~]

(b) Threshold requirements. In addition to the threshold requirements set forth in §255.1(h) and §255.1(n) of this title (relating to General Provisions), each of the following requirements must be satisfied in order to be eligible for funding under this fund:

(1) The situation addressed by the applicant must not be related to a proclaimed state disaster declaration or a federal disaster declaration.

(2) The situation addressed by the applicant must be both unanticipated and beyond the control of the local government.

(3) The problem being addressed must be of recent origin. For urgent need assistance, this means that the situation first occurred or was first discovered no more than 30 days prior to the date that the potential applicant provides a written request to the TCDP for urgent need assistance.

(4) Each applicant for these funds must demonstrate that local funds or funds from other state or federal sources are not available to completely address the problem.

(5) The distribution of these funds will be coordinated with other state agencies.

(6) The infrastructure failure cannot have resulted from a lack of maintenance.

(7) Urgent need funds cannot be used to restore infrastructure that has been cited previously for failure to meet minimum state standards.

(8) The infrastructure failure cannot have been caused by operator error.

(9) The infrastructure requested by the applicant cannot include back-up or redundant systems.

[~~(1) the condition which gives rise to the application must have occurred or become critical no more than 18 months before the date the application is received by the Office;~~]

[~~(2) the condition addressed in the application must have directly resulted in a human fatality within the jurisdiction of the applicant, or must have directly resulted in illness or injury within the jurisdiction of the applicant as documented by the applicable state agency, or poses an imminent threat to human life or health as documented by the applicable state agency;~~]

[~~(3) the applicant must provide the Office with evidence that the applicant is unable to finance the proposed activity with local funds and that no other sources of funding are available;~~]

[~~(4) the conditions addressed in the application must be unanticipated and beyond the control of the local government and the conditions, if not addressed, must represent a permanent threat to public health and safety; and~~]

[~~(5) the applicant must provide matching funds equal to 20% of the TCDP urgent need fund application request if the applicant is a city with a population of more than 1,500 persons or if the applicant is a county and the number of project beneficiaries is more than 1,500 persons; or the applicant must provide matching funds equal to 10% of the TCDP urgent need fund application request if the applicant is a city with a population of equal to or less than 1,500 persons or if the applicant is a county and the number of project beneficiaries is equal to or less than 1,500 persons.~~]

(c) Start of construction. Construction on an urgent need fund project must begin within ninety (90) days from the start date of the TCDP contract. The TCDP reserves the right to deobligate the funds under an urgent need fund contract if the grantee fails to meet this requirement.

(d) Matching funds. Each applicant for urgent need funds must provide matching funds. If the applicant's 2000 census population is equal to or fewer than 1,500 persons, the applicant must provide matching funds equal to 10 percent of the TCDP funds requested. If the applicant's 2000 census population is over 1,500 persons, the applicant must provide matching funds equal to 20 percent of the TCDP funds requested. For county applications where the beneficiaries of the water or sewer improvements are located in unincorporated areas, the population category for matching funds is based on the number of project beneficiaries.

§255.9. Colonia Fund.

(a) General provisions. This fund covers the payment of assessments, access fees, and capital recovery fees for low and moderate income persons for eligible water and sewer improvements projects, all other program eligible activities, eligible planning activities projects, and the establishment of colonia self-help centers to serve severely distressed unincorporated areas of counties which meet the definition of a colonia under this fund. A colonia is defined as: any identifiable unincorporated community that is determined to be a colonia on the basis of objective criteria, including lack of potable water supply, lack of adequate sewage systems, and lack of decent, safe, and sanitary housing; and was in existence as a colonia prior to November 28, 1990. For an eligible county to submit an application on behalf of eligible colonia areas, the colonia areas must be within 150 miles of the Texas-Mexico border region, except that any county that is part of a standard metropolitan statistical area with a population exceeding one million is not eligible under this fund.

(1) An applicant may not submit an application under this fund and also under any other TCDP fund category at the same time if the proposed activity under each application is the same or substantially similar.

(2) In addition to the threshold requirements of §255.1(h) and §255.1(n) of this title (relating to General Provisions), in order

to be eligible to apply for colonia funds, an applicant must document that at least 51% of the persons who would directly benefit from the implementation of each activity proposed in the application are of low to moderate income.

(3) Eligibility for the Office's colonia economically distressed areas program EDAP fund (colonia EDAP fund) is limited to counties, and nonentitlement cities located in those counties, that are eligible under the TCDP Colonia Fund and Texas Water Development Board's EDAP. Eligible colonia EDAP fund projects shall be located in unincorporated colonias and in eligible cities that annexed the eligible colonia where improvements are to be made within five years after the effective date of the annexation, or are in the process of annexing the colonia where improvements are to be made. A colonia EDAP fund application cannot be submitted until the construction of the Texas Water Development Board's Economically Distressed Areas Program financed water or sewer system begins.

(4) In accordance with Subchapter Z, Chapter 43, Section 43.905 of the Local Government Code, eligible colonia areas annexed by municipalities on or after September 1, 1999, remain eligible for five years after the effective date of the annexation to receive any form of assistance for which the colonia would be eligible if the annexation had not occurred. A nonentitlement city located in a county that is eligible under the TCDP Colonia Fund and Texas Water Development Board's Economically Distressed Areas Program that has annexed a colonia area is an eligible applicant for the Office's colonia EDAP fund. However, an application for TCDP colonia construction fund or colonia planning fund assistance for a colonia area annexed by a municipality on or after September 1, 1999, may only be submitted by the county where the annexed colonia area is located.

(b) Eligible activities. The only eligible activities under the colonia fund are:

(1) the payment of assessments (including any charge made as a condition of obtaining access) levied against properties owned and occupied by persons of low and moderate income to recover the capital cost for a public water and/or sewer improvement;

(2) payment of the cost of planning community development (including water and sewage facilities) and housing activities; costs for the provision of information and technical assistance to residents of the area in which the activities are located and to appropriate nonprofit organizations and public agencies acting on behalf of the residents; and costs for preliminary surveys and analyses of market needs, preliminary site engineering and architectural services, site options, applications, mortgage commitments, legal services, and obtaining construction loans;

(3) other activities eligible under the Housing and Community Development Act of 1974, §105, as amended, designed to meet the needs of residents of colonias;

(4) the establishment of colonia self-help centers and activities conducted by colonia self-help centers in accordance with the provisions of Chapter 2306, Subchapter Z, of the Government Code.

(5) For the Office's colonia EDAP fund, eligible activities are limited to those that provide assistance to low and moderate income colonia residents that cannot afford the costs associated with connections and service to water or sewer systems funded through the Texas Water Development Board's Economically Distressed Areas Program. The eligible activities are water distribution lines connecting to water lines installed through the Texas Water Development Board's Economically Distressed Areas Program (when approved by the TCDP), sewer collection lines connecting to sewer lines installed through the Texas Water Development Board's Economically Distressed Areas Program (when approved by the TCDP), water or sewer connection fees, water or sewer taps, water meters, water or sewer yard service lines, plumbing improvements associated with the provision of water or sewer service to an occupied housing unit, water or sewer house service connections, reasonable associated administrative costs, and reasonable associated engineering costs.

(c) Types of applications. Eligible applicants may submit one application for the colonia construction fund and the colonia planning fund. Eligible applicants may submit one application for the colonia EDAP fund, unless the TCDP has an excess amount of colonia EDAP funds available in which case an eligible applicant could submit more than one application for the colonia EDAP fund. Eligible planning activities cannot be included in an application for the colonia construction fund. Two separate fund categories are available under the colonia planning fund. The colonia area planning fund is available for eligible planning activities that are targeted to selected colonia areas. The colonia comprehensive planning fund is available for countywide comprehensive planning activities that include an assessment and profiles of a county's colonia areas. Separate competitions are held for the colonia area planning fund and colonia comprehensive planning fund allocations. A county that has previously received a colonia comprehensive planning fund grant award from the Office may not submit another application for colonia comprehensive planning fund assistance. For a county to be eligible to submit an application for the colonia area planning fund, the county must have previously completed a colonia comprehensive plan that prioritizes problems and colonias for future action. The colonia or colonias included in the colonia area planning fund application must be colonias that were included in the colonia comprehensive plan.

(d) Funding cycle. The colonia construction fund and the colonia planning fund are allocated on an annual basis to eligible county applicants through competitions conducted during the program year. Applications for funding must be received by the Office by the dates and times specified in the most recent application guide for each separate colonia fund category. The colonia self-help centers fund is allocated on an annual basis to counties included in Subchapter Z, Chapter 2306, §2306.582, Government Code, and/or counties designated as economically distressed areas under Chapter 17, Water Code. The colonia EDAP fund is allocated on an annual basis and the funds are distributed on an as-needed basis.

(e) Selection procedures.

(1) On or before the application deadline, each eligible county may submit one application for the colonia construction fund, for colonia comprehensive planning, and for colonia area planning. Eligible applicants for the colonia EDAP fund may submit one application after construction begins on the water or sewer system financed by the Texas Water Development Board's Economically Distressed Areas Program. [~~Copies of the application must be provided to the applicant's regional planning commission and the Office.~~]

(2) Upon receipt of an application, the Office staff performs an initial review to determine whether the application is complete and whether all proposed activities are eligible for funding. The results of this initial review are provided to the applicant. If not subject to disqualification, the applicant may correct any deficiencies identified within ten calendar days of the date of the staff's notification.

(3) Each regional review committee may, at its option, review and comment on a colonia fund proposal from a jurisdiction within its state planning region. These comments will become part of the application file, provided such comments are received by the Office prior to scoring of the applications.

(4) The Office then scores the colonia construction fund and colonia planning fund applications to determine rankings. Scores on the selection factors are derived from standardized data from the Census Bureau, other federal or state sources, and from information provided by the applicant. For colonia EDAP fund applications, the Office evaluates information in each application and other factors before the completion of a final technical review of each application.

(5) Following a final technical review, the Office staff makes funding recommendations to the executive director of the Office.

(6) The executive director of the Office reviews the final recommendations and except for awards exceeding $300,000 announces the contract awards. Awards exceeding $300,000 are submitted to the Executive Committee for approval.

(7) Upon announcement of contract awards, the Office staff works with recipients to execute the contract agreements. While the award must be based on the information provided in the application, the Office may negotiate any element of the contract with the recipient as long as the contract amount is not increased and the level of benefits described in the application is not decreased. The level of benefits may be negotiated only when the project is partially funded.

(f) Selection criteria (colonia construction fund). The following is an outline of the selection criteria used by the Office for scoring colonia construction fund applications. Four hundred twenty [~~forty~~] points are available.

(1) Community distress (total--40 [~~60~~] points). All community distress factor scores are based on the unincorporated population of the applicant. An applicant that has 125% or more of the average of all applicants in the competition [~~its region~~] of the rate on any community distress factor, except per capita income, receives the maximum number of points available for that factor. An applicant with less than 125% of the average of all applicants in the competition [~~its region~~] on a factor will receive a proportionate share of the maximum points available for that factor. An applicant that has 75% or less of the average of all applicants in the competition [~~its region~~] on the per capita income factor will receive the maximum number of points available for that factor. An applicant with greater than 75% of the average of all applicants in the competition on the per capita income factor will receive a proportionate share of the maximum points available for that factor.

(A) Percentage of persons living in poverty--15

(B) Per capita income--15

(C) Percentage of housing units without complete plumbing--10

[~~(C) Percentage of housing units without public sewer service--15~~]

[~~(D) Percentage of housing units without public water service--15~~]

(2) Benefit to low and moderate income persons (total--30 [~~50~~] points). A formula is used to determine the percentage of TCDP funds benefiting low to moderate income persons. The percentage of low to moderate income persons benefiting from each construction, acquisition, and engineering activity is multiplied by the TCDP funds requested for each corresponding construction, acquisition, and engineering activity. Those calculations determine the amount of TCDP benefiting low to moderate income person for each of those activities. Then, the funds benefiting low to moderate income persons for each of those activities are added together and divided by the TCDP funds requested minus the TCDP funds requested for administration to determine the percentage of TCDP funds benefiting low to moderate income persons. Points are then awarded in accordance with the following scale: [~~To determine the percentage of TCDP funds benefitting low to moderate income persons, the number equal to the percentage of low to moderate income persons benefitting from the proposed project multiplied by the amount of TCDP funds requested for construction activities is divided by the total amount of TCDP funds requested. Points are awarded based on the percentage of TCDP funds benefitting low to moderate income persons in accordance with the following scale:~~]

(A) 100% to 90% of funds benefitting low to moderate income persons--30[~~50~~]

(B) 89.99% to 80% of funds benefitting low to moderate income persons--25 [~~40~~]

(C) 79.99% to 70% of funds benefitting low to moderate income persons--20 [~~25~~]

(D) 69.99% to 60% of funds benefitting low to moderate income persons--15 [~~10~~]

(E) Below 60% of funds benefitting low to moderate income persons--5 [~~0~~]

(3) Project priorities (total--195 points) When necessary, a weighted average is used to assign scores to applications which include activities in the different project priority scoring levels. Using as a base figure the TCDP funds requested minus the TCDP funds requested for engineering and administration, a percentage of the total TCDP construction dollars for each activity is calculated. The percentage of the total TCDP construction dollars for each activity is then multiplied by the appropriate project priorities point level. The sum of the calculations determines the composite project priorities score. The different project priority scoring levels are:

(A) activities (service lines, service connections, and/or plumbing improvements) providing access to water and/or sewer systems funded through the Texas Water Development Board Economically Distressed Area program--195

(B) first time public water service activities (including yard service lines)--145

(C) first time public sewer service activities (including yard service lines)--145

(D) installation of approved residential on-site wastewater disposal systems --145

(E) housing activities--140

(F) first time water and/or sewer service through a privately-owned for profit utility--135

(G) expansion or improvement of existing water and/or sewer service--110

(H) street paving and drainage activities--75

(I) all other eligible activities--20

[~~(B) first time public water and/or sewer service and housing activities--145~~]

[~~(C) first time water and/or sewer service through a privately-owned for profit utility--135~~]

[~~(D) installation of approved residential on-site wastewater disposal systems--110~~]

[~~(E) expansion or improvement of existing water and/or sewer service--95~~]

[~~(F) street paving and drainage activities--75~~]

[~~(G) all other eligible activities--20~~]

(4) Matching funds (total--20 points). An applicant's matching share may consist of one or more of the following contributions: cash; in-kind services or equipment use; materials or supplies; or land. An applicant's match is considered only if the contributions are used in the same target areas for activities directly related to the activities proposed in its application; if the applicant demonstrates that its matching share has been specifically designated for use in the activities proposed in its application; and if the applicant has used an acceptable and reasonable method of valuation. The population category under which county applications are scored is dependent upon the project type and the beneficiary population served. If the project is for activities in the unincorporated area of the county with a target area of beneficiaries, the population category is based on the unincorporated residents for the entire county. For county applications addressing water and sewer improvements in unincorporated areas, the population category is based on the actual number of beneficiaries to be served by the project activities. The population category under which multi-jurisdiction applications are scored is based on the combined populations of the applicants according to the 2000 Census. Applications that include a housing rehabilitation and/or affordable new permanent housing activity for low- and moderate-income persons as a part of a multi-activity application do not have to provide any matching funds for the housing activity. This exception is for housing activities only. The TCDP does not consider sewer or water service lines and connections as housing activities. The TCDP also does not consider on-site wastewater disposal systems as housing activities. Demolition/clearance and code enforcement, when done in the same target area in conjunction with a housing rehabilitation activity, is counted as part of the housing activity. When demolition/clearance and code enforcement are proposed activities, but are not part of a housing rehabilitation activity, then the demolition/clearance and code enforcement are not considered as housing activities. Any additional activities, other than related housing activities, are scored based on the percentage of match provided for the additional activities.

(A) Applicants with populations equal to or less than 1,500 according to the 2000 census:

(i) match equal to or greater than 5.0% of grant request--20;

(ii) match at least 2.0% but less than 5.0% of grant request--10;

(iii) match less than 2.0% of grant request--0.

(B) Applicants with populations equal to or less than 3,000 but over 1,500 according to the 2000 census:

(i) match equal to or greater than 10% of grant request--20;

(ii) match at least 2.5% but less than 10% of grant request--10;

(iii) match less than 2.5% of grant request--0

(C) Applicants with populations equal to or less than 5,000 but over 3,000 according to the 2000 census:

(i) match equal to or greater than 15% of grant request--20;

(ii) match at least 3.5% but less than 15% of grant request--10;

(iii) match less than 3.5% of grant request--0.

(D) Applicants with populations over 5,000 according to the 2000 census:

(i) match equal to or greater than 20% of grant request--20;

(ii) match at least 5.0% but less than 20% of grant request--10;

(iii) match less than 5.0% of grant request--0.

(5) [~~(4)~~] Project design (total--135 points). Each application is scored based on how the proposed project resolves the identified need and the severity of need within the applying jurisdiction. A more detailed description on the assignment of points under the project design scoring is included in the application guide for this fund and in paragraph (6) of this subsection. Each application is scored by a committee composed of TCDP staff using the following information submitted in the application:

(A) the severity of need within the colonia area(s) and how the proposed project resolves the identified need (additional consideration is given to water activities addressing impacts from drought conditions);

(B) the TCDP cost per low to moderate income beneficiary;

(C) the applicant's past efforts, especially the applicant's most recent efforts, to address water, sewer, and housing needs in colonia areas through applications submitted under the TCDP community development fund or through community development block grant entitlement funds;

(D) the projected water and/or sewer rates after completion of the project based on 3,000 gallons, 5,000 gallons, and 10,000 gallons of usage;

(E) the ability of the applicant to utilize the grant funds in a timely manner;

(F) the availability of grant funds to the applicant for project financing from other sources;

(G) the applicant's past performance on prior TCDP contracts;

(H) whether the applicant, or the service provider, has waived the payment of water or sewer service assessments, capital recovery fees, and other access fees for the proposed low and moderate income project beneficiaries;

(I) whether the applicant's proposed use of TCDP funds is to provide water or sewer connections/yardlines and/or plumbing improvements that provide access to water/sewer systems financed through the Texas Water Development Board Economically Distressed Areas Program;[~~and~~]

(J) whether the applicant provides any local matching funds for project activities;[.]

(K) whether the applicant has already met its basic water and wastewater needs if the application is for activities other than water or wastewater; and

(L) whether the project has provided for future funding necessary to sustain the project.

(6) Project design scoring guidelines. Project design scores are assigned by Office staff using guidelines that first consider the severity of the need for each application activity and how the project resolves the need described in the application. The severity of need and resolution of the need determine the maximum project design score that

can be assigned to an application. After the maximum project design score has been established, points are then deducted from this maximum score through the evaluation of the other project design evaluation factors until the maximum score and the point deductions from that maximum score determine the final assigned project design score. When necessary, a weighted average is used to set the maximum project design score to applications that include activities in the different severity of the need/project resolution maximum scoring levels. Using as a base figure the TCDP funds requested minus the TCDP funds requested for engineering and administration, a percentage of the total TCDP construction dollars for each activity is calculated. The percentage of the total TCDP construction dollars for each activity is then multiplied by the appropriate maximum project design point level. The sum of the calculations determines the maximum project design score that the applicant can be assigned before points are deducted based on the evaluation of the other project design factors.

(A) Maximum project design score that can be assigned based on the severity of the need and resolution of the problem.

(i) Activities providing first-time sewer service to the area--maximum score 135 points.

(ii) Activities providing first-time water service to the area--maximum score 135 points.

(iii) Installation of approved residential on-site wastewater disposal systems--maximum score 135 points.

(iv) Housing rehabilitation and eligible new housing construction--maximum score 130 points.

(v) Water activities addressing and resolving water supply shortage from drought conditions--maximum score 130 points.

(vi) Water or sewer activities expanding or improving existing water or sewer system--maximum score 120 points.

(vii) Street paving activities providing first time surface pavement to the area--maximum score 100 points.

(viii) Installation of designed drainage structures providing first time designed drainage system to the area--maximum score 100 points.

(ix) Reconstruction of streets with existing surface pavement--maximum score 90 points.

(x) Installation of improvements or drainage structures to a designed drainage system--maximum score 90 points.

(xi) All other eligible activities--maximum score 80 points.

(B) TCDP cost per low to moderate income beneficiary. The total amount of TCDP funds requested by the applicant is divided by the total number of low to moderate income persons benefitting from the application activities to determine the TCDP cost per beneficiary.

(i) Cost per low to moderate income beneficiary is equal to or less than $2,000. Deduct zero points from the set maximum project design score.

(ii) Cost per low to moderate income beneficiary is greater than $2,000 but equal to or less than $4,000. Deduct 1 point from the set maximum project design score.

(iii) Cost per low to moderate income beneficiary is greater than $4,000 but equal to or less than $6,000. Deduct 2 points from the set maximum project design score.

(iv) Cost per low to moderate income beneficiary is greater than $6,000 but equal to or less than $8,000. Deduct 3 points from the set maximum project design score.

(v) Cost per low to moderate income beneficiary is greater than $8,000 but equal to or less than $10,000. Deduct 4 points from the set maximum project design score.

(vi) Cost per low to moderate income beneficiary is greater than $10,000. Deduct 5 points from the set maximum project design score.

(C) The applicant's past efforts, especially the applicant's most recent efforts, to address water, sewer, and housing needs in colonia areas through applications submitted under the TCDP community development fund or through community development block grant entitlement funds.

(i) The nonentitlement county submitted an application under the TCDP community development fund 2003/2004 biennial competition that was not addressing water, sewer, and housing needs in colonia areas. Deduct 3 points from the set maximum project design score.

(ii) The nonentitlement county submitted an application under the TCDP community development fund 2001/2002 biennial competition that was not addressing water, sewer, and housing needs in colonia areas. Deduct 3 points from the set maximum project design score.

(iii) The entitlement county did not use 2003 CDBG entitlement funds to address water, sewer, and housing needs in colonia areas. Deduct 3 points from the set maximum project design score.

(iv) The entitlement county did not use 2002 CDBG entitlement funds to address water, sewer, and housing needs in colonia areas. Deduct 3 points from the set maximum project design score.

(D) The projected water and/or sewer rates after completion of the project based on 3,000 gallons, 5,000 gallons, and 10,000 gallons of usage.

(i) The projected water and/or sewer rates may be too high for the application beneficiaries. Deduct 1 point from the set maximum project design score.

(ii) The projected water and/or sewer rates are too low to discourage water conservation by the application beneficiaries. Deduct 1 point from the set maximum project design score.

(E) The ability of the applicant to utilize the grant funds in a timely manner.

(i) The application includes the acquisition of real property, easements or rights-of-way. Deduct 1 point from the set maximum project design score.

(ii) The application includes matching funds that have not been secured by the applicant. Deduct 1 point from the set maximum project design score.

(iii) The proposed application target area is not located in an area where a service provider already has the certificate of convenience and necessity (CCN) needed to provide service to the application beneficiaries. Deduct 1 point from the set maximum project design score.

(F) The availability of grant funds to the applicant for project financing from other sources. Grant funds for any activity included in the application are available from another source. Deduct 1 point from the set maximum project design score.

(G) The applicant's past performance on prior TCDP contracts. The applicant's score will primarily be based on an assessment of the applicant's performance on the applicant's two (2) most recent TCDP contracts that have reached the end of the original contract period stipulated in the contract. TCDP staff may also assess the applicant's performance on existing TCDP contracts that have not reached the end of the original contract period. An applicant that has never received a TCDP grant award does not have any points deducted from the project design final score.

(i) The applicant did not complete the previous TCDP contract activities within the original contract period. Deduct 1 point from the set maximum project design score for each occurrence (maximum of 2 points deducted from the set maximum project design score).

(ii) The applicant did not submit the required close-out documents for the previous TCDP contracts within the period prescribed for such submission. Deduct 1 point from the set maximum project design score for each occurrence (maximum of 2 points deducted from the set maximum project design score).

(iii) The applicant did not provide a timely response to monitoring findings on previous TCDP contracts. Deduct 1 point from the set maximum project design score (maximum of 1 point deducted from the set maximum project design score).

(iv) The applicant did not provide a timely response to audit findings on previous TCDP contracts. Deduct 1 point from the set maximum project design score (maximum of 1 point deducted from the set maximum project design score).

(H) The applicant, or the service provider, has not waived the payment of water or sewer service assessments, capital recovery fees, and other access fees for the proposed low and moderate income project beneficiaries.

(i) Assessments and fees budgeted in the application are equal to or less that $100 per low and moderate income household. Deduct 2 points from the set maximum project design score.

(ii) Assessments and fees budgeted in the application are greater than $100 but equal to or less that $200 per low and moderate income household. Deduct 4 points from the set maximum project design score.

(iii) Assessments and fees budgeted in the application are greater than $200 but equal to or less that $300 per low and moderate income household. Deduct 6 points from the set maximum project design score.

(iv) Assessments and fees budgeted in the application are greater than $300 but equal to or less that $500 per low and moderate income household. Deduct 8 points from the set maximum project design score.

(v) Assessments and fees budgeted in the application are greater than $500 per low and moderate income household. Deduct 10 points from the set maximum project design score.

(I) Applicant's proposed use of TCDP funds does not provide water or sewer connections/yardlines and/or plumbing improvements that provide access to water/sewer systems financed through the Texas Water Development Board Economically Distressed Areas Program. Deduct 2 points from the set maximum project design score.

(J) The application is for activities other than water or wastewater and the applicant has not already met its basic water and wastewater needs. Deduct 3 points from the set maximum project design score.

(K) The applicant has not documented that future funding necessary to sustain the project is available. Deduct 3 points from the set maximum project design score.

(g) Selection criteria (colonia area planning fund). The following is an outline of the selection criteria used by the Office for scoring applications for eligible planning activities under this fund. Three hundred forty [~~fifty~~] points are available.

(1) Community distress (total--40 [~~60~~] points). All community distress factor scores are based on the unincorporated population of the applicant. An applicant that has 125% or more of the average of all applicants in the competition of the rate on any community distress factor, except per capita income, receives the maximum number of points available for that factor. An applicant with less than 125% of the average of all applicants in the competition on a factor will receive a proportionate share of the maximum points available for that factor. An applicant that has 75% or less of the average of all applicants in the competition on the per capita income factor will receive the maximum number of points available for that factor. An applicant with greater than 75% of the average of all applicants in the competition on the per capita income factor will receive a proportionate share of the maximum points available for that factor.

(A) Percentage of persons living in poverty--15

(B) Per capita income--15

(C) Percentage of housing units without complete plumbing--10

[~~(C) Percentage of housing units without public sewer service--15~~]

[~~(D) Percentage of housing units without public water service--15~~]

(2) Benefit to low and moderate income persons (total--30 [~~40~~] points). Points are awarded based on the low and moderate income percentage for all of the [~~entire~~] colonia areas where project activities are located according to the following scale:

(A) 100% to 90% of funds benefitting low to moderate income persons--30 [~~40~~]

(B) 89.99% to 80% of funds benefitting low to moderate income persons--25[~~30~~]

(C) 79.99% to 70% of funds benefitting low to moderate income persons--20

(D) 69.99% to 60% of funds benefitting low to moderate income persons--15 [~~10~~]

(E) Below 60% of funds benefitting low to moderate income persons--5 [~~0~~]

(3) Project design (total--250 points). Each application is scored based on how the proposed planning effort resolves the identified need and the severity of need within the applying jurisdiction. A colonia planning fund application must receive a minimum score for the project design selection factor of at least 70 percent of the maximum number of points available under this factor to be considered for funding. A more detailed description on the assignment of points under the project design scoring is included in the application guide for this fund. Each application is scored by [~~a committee composed of~~] TCDP staff using the following information submitted in the application:

(A) the severity of need within the colonia area(s) (total - 60 points);

(i) Evidence of severity of need as described in originally received application (total - 10 points).

(ii) Primary need within all target area colonia(s) generally as reported in originally received application (total - 20 points):

(I) all target area colonia(s) not platted (20 points)

(II) all target area colonia(s) with no water (20 points)

(III) all target area colonia(s) with no wastewater (20 points)

(IV) all or some target area colonia(s) are partially platted or platted but not recorded (10 points)

(V) target area colonia(s) partial water (10 points)

(VI) target area colonia(s) partial sewer (10 points)

(iii) Population (total - 10 points). The change in county population from 1990 and 2000 is between:

(I) greater than 5% but less than or equal to 10% (2 points)

(II) greater than 10% but less than or equal to 15% (4 points)

(III) greater than 15% but less than or equal to 20% (6 points)

(IV) greater than 20% but less than or equal to 25% (8 points)

(V) greater than 25% (10 points)

(iv) Needs are clearly identified in original application by priority through a community needs assessment (total - 5 points).

(v) Evidence provided in the original application of strong citizen input or known citizen involvement in addressing need (total - 5 points).

(vi) Evidence provided in the original application of effort to notify special groups to solicit information on severity of need (total - 5 points).

(vii) Evidence provided in the original application that the public hearings to solicit input on needs were performed as described in the application guide (total - 5 points).

(B) how clearly the proposed planning effort removes barriers to the provision of public facilities to the colonia area(s) and results in a strategy to resolve the identified needs (total - 60 points);

(i) Proposed planning efforts as described in the application are clear, concise and reasonable (total - 15 points).

(ii) Proposed target area is clearly defined in the application (total - 15 points).

(iii) Proposed planning efforts as described in the application match the needs in the target area (total - 15 points).

(iv) Evidence in the application that the county is organized to implement the plan or would ensure that the plan is implemented (total - 15 points).

(C) the planning activities proposed in the application (total - 60 points);

(i) The description of planning activity in the original application:

(I) Describes eligible activities (total - 6 points).

(II) Describes understanding of plan process (total - 6 points).

(III) Addresses identified needs (total - 6 points).

(IV) Appears to result in solution to problems (total - 6 points).

(V) Indicates a strategy that can be implemented (total - 6 points).

(ii) Considering the applicant's probable capability, the Colonia Questionnaire in the original application indicates an attempt to control problems and the original submission was complete (total - 10 points).

(iii) Applicant has indicated in the application that a capital improvement programming process is routinely accomplished or will be developed as part of the planning project (total - 10 points).

(iv) Applicant's responses to questions in the originally submitted application appear to indicate that the applicant will produce a valid Capital Improvements Program that would draw on local resources and other grant/loan programs (total - 10 points).

(D) whether each proposed planning activity is conducted on a colonia-wide basis (total - 10 points). All proposed activities will be conducted on a colonia-wide basis (10 points);

(E) the extent to which any previous planning efforts for colonia areas have been accomplished (total - 12 points). Applicant was a previous recipient of Colonia Planning Funds and some implementation of previously funded activities or special or extenuating circumstances prohibiting implementation exist. Points will be awarded if applicant is not a previous recipient of a Colonia Planning Fund award. Points will not be awarded if applicant did not implement previously funded activities and no special or extenuating circumstances prohibiting implementation exist;

(F) the TCDP cost per low to moderate income beneficiary;

(i) TCDP cost per low to moderate income beneficiary (total - 15 points):

(I) the TCDP cost per low to moderate income beneficiary is at least 50 percent below the median cost per beneficiary of all eligible applicants (15 points); or

(II) the TCDP cost per low to moderate income beneficiary is at or below the median cost per beneficiary of all eligible applicants (10 points); or

(III) the TCDP cost per low to moderate income beneficiary is below 150 percent of the median cost per beneficiary of all eligible applicants (7 points); or

(IV) the TCDP cost per low to moderate income beneficiary is 150 percent or greater than the median cost per beneficiary of all eligible applicants (5 points).

(ii) Amount requested originally appears to be reasonable and relates to the described needs with respect to the location and characteristics of the proposed target area (up to 15 points).

(G) the availability of grant funds to the applicant for project financing from other sources (total - 6 points) The area would be eligible for funding under the Texas Water Development Board's Economically Distressed Areas Program (EDAP) or other programs as described in the original application; and

~~[(H) whether the applicant provides any local matching funds for project activities; and]~~

(H) [~~(I)~~] the applicant's past performance on prior TCDP contracts. An applicant can receive from zero to twelve (12) points based on the applicant's past performance on previously awarded TCDP contracts. The applicant's score will be primarily based on our assessment of the applicant's performance on the applicant's two (2) most recent TCDP contracts that have reached the end of the original contract period stipulated in the contract. The TCDP may also assess the applicant's performance on existing TCDP contracts that have not reached the end of the original contract period. Applicants that have never received a TCDP grant award will automatically receive these points. The TCDP will assess the applicant's performance on TCDP contracts up to the application deadline date. The applicant's performance after the application deadline date will not be evaluated in this assessment. The evaluation of an applicant's past performance will include, but is not necessarily limited to the following:

(i) The applicant's completion of the previous contract activities within the original contract period (up to 3 points).

(ii) The applicant's submission of the required close-out documents within the period prescribed for such submission (up to 3 points).

(iii) The applicant's timely response to monitoring findings on previous TCDP contracts especially any instances when the monitoring findings included disallowed costs (up to 3 points).

(iv) The applicant's timely response to audit findings on previous TCDP contracts (up to 3 points).

(4) Matching funds (total--20 points). The population category under which county applications are scored is based on the actual number of beneficiaries to be served by the colonia planning activities.

(A) Applicants with populations equal to or less than 1,500 according to the 2000 census:

(i) match equal to or greater than 5.0% of grant request--20;

(ii) match at least 2.0% but less than 5.0% of grant request--10;

(iii) match less than 2.0% of grant request--0.

(B) Applicants with populations equal to or less than 3,000 but over 1,500 according to the 2000 census:

(i) match equal to or greater than 10% of grant request--20;

(ii) match at least 2.5% but less than 10% of grant request--10;

(iii) match less than 2.5% of grant request--0

(C) Applicants with populations equal to or less than 5,000 but over 3,000 according to the 2000 census:

(i) match equal to or greater than 15% of grant request--20;

(ii) match at least 3.5% but less than 15% of grant request--10;

(iii) match less than 3.5% of grant request--0.

(D) Applicants with populations over 5,000 according to the 2000 census:

(i) match equal to or greater than 20% of grant request--20;

(ii) match at least 5.0% but less than 20% of grant request--10;

(iii) match less than 5.0% of grant request--0.

(h) Selection criteria (colonia comprehensive planning fund). The following is an outline of the selection criteria used by the Office for scoring applications for eligible planning activities under this fund. Two hundred points are available.

(1) Community distress (total--25 points). All community distress factor scores are based on the unincorporated population of the applicant. An applicant that has 125% or more of the average of all applicants in the competition of the rate on any community distress factor, except per capita income, receives the maximum number of points available for that factor. An applicant with less than 125% of the average of all applicants in the competition on a factor will receive a proportionate share of the maximum points available for that factor. An applicant that has 75% or less of the average of all applicants in the competition on the per capita income factor will receive the maximum number of points available for that factor. An applicant with greater than 75% of the average of all applicants in the competition on the per capita income factor will receive a proportionate share of the maximum points available for that factor.

(A) Percentage of persons living in poverty--15

(B) Per capita income--10

(2) Project design (total--175 points). A colonia planning fund application must receive a minimum score for the project design selection factor of at least 70 percent of the maximum number of points available under this factor to be considered for funding. A more detailed description on the assignment of points under the project design scoring is included in the application guide for this fund. Each application is scored by [~~a committee composed of~~] the Office staff using the following information submitted in the application:

(A) the severity of need for the comprehensive colonia planning effort and how effectively the proposed comprehensive planning effort will result in a useful assessment of colonia populations, locations, infrastructure conditions, housing conditions, and the development of short-term and long-term strategies to resolve the identified needs (total - 140 points);

(i) Evidence of severity of need as described in originally received application (total - 10 points).

(ii) Population (total - 10 points). The change in county population from 1990 and 2000 is between:

(I) greater than 5% but less than or equal to 10% (2 points).

(II) greater than 10% but less than or equal to 15% (4 points).

(III) greater than 15% but less than or equal to 20% (6 points).

(IV) greater than 20% but less than or equal to 25% (8 points).

(V) greater than 25% (10 points).

(iii) the county population in 2000 (total - 10 points):

(I) the county population is at least 50 percent below the median county population of all eligible applicants (10 points).

(II) the county population is at or below the median county population of all eligible applicants (7 points).

(III) the county population is below 150 percent of the median county population of all eligible applicants (5 points).

(IV) the county population is 150 percent or greater than the median county population of all eligible applicants (2 points).

(iv) Needs are clearly identified in original application by priority through a community needs assessment (total - 5 points);

(v) Evidence provided in the original application of strong citizen input or known citizen involvement in addressing need (total - 5 points);

(vi) Evidence provided in the original application of effort to notify special groups to solicit information on severity of need (total - 5 points);

(vii) Evidence provided in the original application that the public hearings to solicit input on needs were performed as described in the application guide (total - 5 points);

(viii) Proposed planning efforts as described in the application are clear, concise and reasonable (total - 10 points).

(ix) Proposed planning efforts as described in the application match the needs in the target area (total - 25 points).

(x) Evidence in the application that the county is organized to implement the plan or would ensure that the plan is implemented (total - 20 points).

(xi) The description of planning activity in the original application:

(I) Describes eligible activities (total - 5 points).

(II) Describes understanding of plan process (total - 5 points).

(III) Addresses identified needs (total - 5 points).

(IV) Appears to result in solution to problems (total - 5 points).

(V) Indicates a strategy that can be implemented (total - 5 points).

(xii) Considering the applicant's probable capability, the Colonia Questionnaire in the original application indicates an attempt to control problems and the original submission was complete (total - 10 points).

(B) the extent to which any previous planning efforts for colonia areas have been implemented (total - 10 points). Applicant was a previous recipient of Colonia Planning Funds and some implementation of previously funded activities or special or extenuating circumstances prohibiting implementation exist. Points will be awarded if applicant is not a previous recipient of a Colonia Planning Fund award. Points will not be awarded if applicant did not implement previously funded activities and no special or extenuating circumstances prohibiting implementation existed;

(C) whether the applicant provides any local matching funds for project activities. (total - 13 points). The population category under which county applications are scored is based on the actual number of beneficiaries to be served by the colonia planning activities; [~~and~~]

(i) Applicants with populations equal to or less than 1,500 according to the 2000 census:

(I) match equal to or greater than 5.0% of grant request--13;

(II) match at least 2.0% but less than 5.0% of grant request--7;

(III) match less than 2.0% of grant request--0.

(ii) Applicants with populations equal to or less than 3,000 but over 1,500 according to the 2000 census:

(I) match equal to or greater than 10% of grant request--13;

(II) match at least 2.5% but less than 10% of grant request--7;

(III) match less than 2.5% of grant request--0.

(iii) Applicants with populations equal to or less than 5,000 but over 3,000 according to the 2000 census:

(I) match equal to or greater than 15% of grant request--13;

(II) match at least 3.5% but less than 15% of grant request--7;

(III) match less than 3.5% of grant request--0.

(iv) Applicants with populations over 5,000 according to the 2000 census:

(I) match equal to or greater than 20% of grant request--13;

(II) match at least 5.0% but less than 20% of grant request--7;

(III) match less than 5.0% of grant request-0; and

(D) the applicant's past performance on previously awarded TCDP contracts. An applicant can receive from zero to twelve (12) points based on the applicant's past performance on previously awarded TCDP contracts. The applicant's score will be primarily based on our assessment of the applicant's performance on the applicant's two (2) most recent TCDP contracts that have reached the end of the original contract period stipulated in the contract. The TCDP may also assess the applicant's performance on existing TCDP contracts that have not reached the end of the original contract period. Applicants that have never received a TCDP grant award will automatically receive these points. The TCDP will assess the applicant's performance on TCDP contracts up to the application deadline date. The applicant's performance after the application deadline date will not be evaluated in this assessment. The evaluation of an applicant's past performance will include, but is not necessarily limited to the following:

(i) The applicant's completion of the previous contract activities within the original contract period (up to 3 points).

(ii) The applicant's submission of the required close-out documents within the period prescribed for such submission (up to 3 points).

(iii) The applicant's timely response to monitoring findings on previous TCDP contracts especially any instances when the monitoring findings included disallowed costs (up to 3 points).

(iv) The applicant's timely response to audit findings on previous TCDP contracts (up to 3 points).

(i) Program guidelines (colonia self-help centers fund). The colonia self-help centers fund is administered by the Texas Department of Housing and Community Affairs (TDHCA) under an interagency agreement with the Office. The following is an outline of the administrative requirements and eligible activities under this fund.

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

(4) The purpose of each colonia self-help center is to assist low income and very low income individuals and families living in colonias located in the center's designated service area to finance, refinance, construct, improve or maintain a safe, suitable home in the designated service area or in another suitable area. Each self-help center may serve low income and very low income individuals and families by:

(A) providing assistance in obtaining loans or grants to build a home;

(B) teaching construction skills necessary to repair or build a home;

(C) providing model home plans;

(D) operating a program to rent or provide tools for home construction and improvement for the benefit of property owners in colonias who are building or repairing a residence or installing necessary residential infrastructure;

(E) helping to obtain, construct, assess, or improve the service and utility infrastructure designed to service residences in a colonia, including potable water, wastewater disposal, drainage, streets and utilities;

(F) surveying or platting residential property that an individual purchased without the benefit of a legal survey, plat, or record;

(G) providing credit and debt counseling related to home purchase and finance;

(H) applying for grants and loans to provide housing and other needed community improvements;

(I) monthly programs to educate individuals and families on their rights and responsibilities as property owners;

(J) providing other eligible services that the self-help center, with the Office's approval, determines are necessary to assist colonia residents in improving their physical living conditions, including help in obtaining suitable alternative housing outside of a colonia's area; [~~and~~]

(K) providing assistance in obtaining loans or grants to enable an individual or family to acquire fee simple title to property that originally was purchased under a contract for a deed, contract for sale, or other executory contract; and[~~.~~]

(L) providing access to computers, the internet, and computer training.

(5) A self-help center may not provide grants, financing, or mortgage loan services to purchase, build, rehabilitate, or finance construction or improvements to a home in a colonia if water service and suitable wastewater disposal are not available.

(j) (No change.)

§255.10. Housing Fund.

(a) - (g) (No change.)

(h) Selection procedures (housing infrastructure fund).

(1) Each eligible local government may submit one application for funding under the housing infrastructure fund. Two copies of the application must be submitted to the Office and at least one copy of the application must be submitted to the applicant's state planning region.

(2) Upon receipt of an application, the Office staff review the application to determine whether it is complete, if all proposed activities are program eligible, and if the project is financially feasible. If not subject to disqualification, the applicant may correct any deficiencies identified by the Office staff in the timeframe stated in the notification.

(3) After review by Office staff, each application is evaluated by a team of reviewers. Reviewer's scores are averaged for a final team score and applications recommended for funding are forwarded to the executive director of the Office.

(4) The executive director of the Office reviews the funding recommendations for project awards and except for awards exceeding $300,000 announces the contract awards. Awards exceeding $300,000 are submitted to the Executive Committee for approval.

(5) Upon announcement of the contract awards, the Office staff works with recipients to execute the contract agreements. While the award must be based on the information provided in the application, the Office may negotiate any element of the contract with the recipient as long as the contract amount is not increased and the level of benefits described in the application is not decreased.

(i) 2003 program year selection [~~Selection~~] criteria (housing infrastructure fund). The following is an outline of the selection criteria used by the Office for scoring 2003 program year applications under this fund. One hundred seventy points are available.

(1) Financial feasibility (20 points).

(2) Market assessment (30 points).

(3) Affordable housing solutions (30 points).

(4) Organizational capacity (25 points).

(5) Program consideration (35 points).

(6) Project design (10 points).

(7) Community support (10 points).

(8) Rural project (10 points). Project is located in a community with a population of 10,000 persons or less.

(j) (No change.)

§255.11. Small Towns Environment Program Fund.

(a) General provisions. This fund is available to eligible units of general local government to provide financial assistance to cities and communities that are willing to address water and sewer needs through self-help methods that are encouraged and supported by the Small Towns Environment Program (STEP). The self-help method for addressing water and sewer needs is best utilized by cities and communities recognizing that conventional water and sewer financing and construction methods cannot provide an affordable response to the water or sewer needs. By utilizing a city's or community's own resources

(human, material, and financial), the costs for the water or sewer improvements can be reduced significantly from the retail costs of the improvements through conventional construction methods. Participants in the small town environment program fund should attain at least a forty percent reduction in the costs of the water or sewer project by using self-help in lieu of conventional financing and construction methods.

(1) Small towns environment program funds can be used to cover material costs, certain engineering costs, administrative costs, and other necessary project costs that are approved by program staff.

(2) In addition to the threshold requirements of §255.1(h) and §255.1(n) of this title (relating to General Provisions), in order to be eligible to apply for small towns environment program funds, an applicant must document that at least 51% of the persons who would directly benefit from the implementation of each activity proposed in the application are of low to moderate income.

(3) Cities and counties submitting 2003 community development fund applications that do not include water, sewer, or housing activities are not eligible to receive a 2003 grant award from this fund. However, the Office may consider a city's or county's request to transfer funds that are not financing water, sewer, or housing activities under a 2003 community development fund grant award to finance water and sewer activities that will be addressed through self-help methods.

(b) Eligible activities. For the small towns environment program fund eligible activities are limited to the following:

(1) The installation of facilities to provide first-time water or sewer service.

(2) The installation of water or sewer system improvements.

(3) Ancillary repairs related to the installation of water and sewer systems or improvements.

(4) The acquisition of real property related to the installation of water and sewer systems or improvements (easements, rights of way, etc.).

(5) Sewer or water taps and water meters.

(6) Water or sewer yard service lines (for low and moderate income persons).

(7) Water or sewer house service connections (for low and moderate income persons).

(8) Plumbing improvements associated with providing water or sewer service to a housing unit.

(9) Water or sewer connection fees (for low and moderate income persons).

(10) Equipment for installation of water or sewer if justification is provided.

(11) Reasonable associated administrative costs.

(12) Reasonable associated engineering services costs.

(c) Ineligible activities. Any activity not described in subsection (b) of this section is ineligible under this fund unless the activity is approved by the TCDP. Other ineligible activities are temporary solutions, such as emergency inter-connects that are not used on an on-going basis for supply or treatment and back-ups not required by the regulations of the Texas Commission on Environmental Quality.

(d) Funding cycle. Applications are accepted three times a year as long as funds are available. Funds will be divided among the three application periods. After all projects are ranked, only those that can be fully funded will be awarded a grant. There will be no marginally funded grant awards. The TCDP will not accept an application for STEP fund assistance until TCDP staff and representatives of the potential applicant have evaluated the self-help process and TCDP staff determine that self-help is a feasible method for completion of the water or sewer project, the community is committed to self-help as the means to address the problem, and the community is ready and has the capacity to begin and complete a self-help project. If it is determined that the community meets all of the STEP criteria then an invitation to apply for funds will be extended to the community and the application may be submitted.

(e) Threshold criteria. The self-help response to water and sewer needs may not be appropriate in every community. In most cases, the decision by a community to utilize self-help to obtain needed water and sewer facilities is based on the community's realization that it cannot afford even a "no frills" water or sewer system based on the initial construction costs and the operations/maintenance costs (including debt service costs) for water or sewer facilities installed through conventional financing and construction methods. The following are threshold requirements for the STEP framework: Without all these elements the project may not be considered under the STEP fund.

(1) The community receiving benefits from the project must have one or more sparkplugs (preferably three). Sparkplugs are local leaders willing to both lead and sustain the effort to complete the project. While local officials may serve as sparkplugs, at least two of the three sparkplugs must be residents and not local officials. One of the sparkplugs should have the skills necessary to maintain the paperwork needed for the project. One of the sparkplugs should have knowledge or skills necessary to lead the self-help effort. And one sparkplug can have a combination of these skills or just be the motivator and problem solver of the group.

(2) The community receiving benefits from the project should exhibit a readiness to proceed with the project. The community's readiness to proceed is based on a strong local perception of the problem and the willingness to take action to solve the problem. A community's readiness to proceed is shown when the following conditions exist:

(A) A strong local perception of the problem exists.

(B) The community has the perception that local implementation is the best and maybe only solution to the problem.

(C) The residents of the community have confidence that they can adequately complete the project.

(D) The community has no strong competing priority.

(E) The local government is supportive of the effort and understands the urgency.

(F) There exists a public and private willingness to pay additional costs if needed such as fees, hook-ups for churches, and other costs.

(G) Some effort and attention have already been given to local assessment of the problem.

(H) There is enthusiastic, capable support for the community from the county or regional field staff of any regulatory agency involved with solutions to the problem.

(3) The community receiving benefits from the project should have the capacity and manpower with the skills needed to complete the project. The capacity and skills to complete the project include the following:

(A) Skilled workers within the community such as an electrician, plumber, engineer water system operator and persons with experience operating heavy equipment, and persons with construction skills and pipe laying experience.

(B) The community has a list of volunteers that includes the tasks that are assigned to each volunteer.

(C) The community has equipment that will be needed to complete the project.

(D) The community has letters stating support from local businesses in form of donation of supplies or manpower.

(E) The community has letter from the water and/or sewer service provider supporting the project and agreeing to provide service.

(F) A letter from a Certified Public Accountant documenting that applying locality has financial and management capacity to compete project.

(4) The community receiving benefits from the project must be able to show that by completing the proposed project through self-help volunteer methods the community can achieve at least a 40% savings off the retail price of completing the same project through the bid/contract process. The information provided to the TCDP to document the reduced project cost through self-help includes the following:

(A) Two engineering break-outs of cost, one that shows the retail construction cost and another that shows the self-help cost and demonstrates the 40% savings.

(B) Documents containing material prices and pledges of equipment.

(C) A list of the volunteers by project completion task.

(D) A determination of appropriate technology for the project and the feasibility of project through a letter from an engineer.

(f) Selection procedures.

(1) On or before each of the three application deadlines, each eligible applicant may submit one application for the STEP fund. An applicant may not submit an application under this fund and also under any other TCDP fund category if the proposed activity under each application is the same or substantially similar.

(2) Upon receipt of an application, the Office staff performs an initial review to determine whether the application is complete and whether all proposed activities are eligible for funding. The results of this initial review are provided to the applicant. If not subject to disqualification, the applicant may correct any deficiencies identified within ten calendar days of the date of the staff's notification.

(3) The Office then scores the STEP fund applications to determine rankings. Scores on the selection factors are assigned from the information provided by the applicant.

(4) Following a final technical review, the Office staff makes funding recommendations to the executive director of the Office.

(5) The executive director of the Office reviews the final recommendations and except for awards exceeding $300,000 announces the contract awards. Awards exceeding $300,000 are submitted to the Executive Committee for approval.

(6) Upon announcement of contract awards, the Office staff works with recipients to execute the contract agreements. While the award must be based on the information provided in the application, the Office may negotiate any element of the contract with the recipient as long as the contract amount is not increased and the level of benefits described in the application is not decreased. The level of benefits may be negotiated only when the project is partially funded.

(g) Selection criteria. The following is an outline of the selection criteria used by the Office for scoring applications under the STEP fund. One hundred points are available.

(1) Project impact (total--60 points). When necessary, a weighted average is used to assign scores to applications which include activities in the different project impact scoring levels. Using as a base figure the TCDP funds requested minus the TCDP funds requested for engineering and administration, a percentage of the total TCDP construction dollars for each activity will be calculated. The percentage of the total TCDP construction dollars for each activity will then be multiplied by the appropriate project impact point level. The sum of these calculations will determine the composite project impact score. The different project impact scoring levels are:

(A) first time water and/or sewer service--60

(B) water activities addressing drought conditions--60

(C) activities addressing severe impact to a water system (imminent loss of well, transmission line, supply impact)--60

(D) water and/or sewer activities addressing an imminent threat to health as documented by the Texas Commission of Environmental Quality or Texas Department of Health--60

(E) activities addressing documented severe water pressure problems--50

(F) replacement of existing water or sewer lines that are not addressing activities described in subparagraphs (A) through (E) of this paragraph--40

(G) all other proposed water and sewer projects that are not addressing activities described in subparagraphs (A) through (F) of this paragraph--30

(2) Dollar value of volunteer work to total work (total--10 points). This score will be based on the percentage of the dollar value of volunteer work to total dollar value of the work performed in the STEP application based on the following scoring levels:

(A) 80% or more - dollar value of volunteer work to total dollar value of the work performed--10

(B) 70% to 79.99% - dollar value of volunteer work to total dollar value of the work performed--7

(C) 60% to 69.99% - dollar value of volunteer work to total dollar value of the work performed--5

(D) 51% to 59.99% - dollar value of volunteer work to total dollar value of the work performed--2

(3) Past participation and performance (total--15 points). An applicant receives up to 15 points on the following two factors.

(A) Ten of the 15 points available are awarded to applicants that do not have a current TCDP STEP grant.

(B) An applicant can receive from zero to five (5) points based on the applicant's past performance on previously awarded TCDP contracts. The applicant's score will be primarily based on our assessment of the applicant's performance on the applicant's two (2) most recent TCDP contracts that have reached the end of the original contract period stipulated in the contract. The TCDP may also assess the applicant's performance on existing TCDP contracts that have not reached the end of the original contract period. Applicants that

have never received a TCDP grant award will automatically receive these points. The TCDP will assess the applicant's performance on TCDP contracts up to the application deadline date. The applicant's performance after the application deadline date will not be evaluated in this assessment. The evaluation of an applicant's past performance will include, but is not necessarily limited to the following:

(i) The applicant's completion of the previous contract activities within the original contract period (total--2 points).

(ii) The applicant's submission of the required close-out documents within the period prescribed for such submission (total--1 point).

(iii) The applicant's timely response to monitoring findings on previous TCDP contracts especially any instances when the monitoring findings included disallowed costs (total--1 point).

(iv) The applicant's timely response to audit findings on previous TCDP contracts (total--1 point).

(4) Percentage of savings off the retail price (total--10 points). For STEP, the percentage of savings off of the retail price is considered a form of community match for the project. In STEP, a threshold requirement is a minimum of 40% savings off the retail price for construction activities. The population category under which county applications are scored is dependent upon the project type and the beneficiary population served. If the project is for beneficiaries for the entire county, the total population of the county is used. If the project is for activities in the unincorporated area of the county with a target area of beneficiaries, the population category is based on the unincorporated residents for the entire county. For county applications addressing water and sewer improvements in unincorporated areas, the population category is based on the actual number of beneficiaries to be served by the project activities. The population category under which multi-jurisdiction applications are scored is based on the combined populations of the applicants according to the 2000 Census. An applicant can receive from zero to 10 points based on the following population levels and savings percentages:

(A) Communities with populations equal to or less than 1,500 according to the 2000 census:

(i) 55% or more savings--10

(ii) 50% - 54.99% savings--9

(iii) 45% - 49.99% savings--7

(iv) 41% - 44.99% Savings--5

(B) Communities with populations above 1,500 but equal to or less than 3,000 according to the 2000 census:

(i) 55% or more savings--10

(ii) 50% - 54.99% savings--8

(iii) 45% - 49.99% savings--6

(iv) 41% - 44.99% Savings--3

(C) Communities with populations above 3,500 but equal to or less than 5,000 according to the 2000 census:

(i) 55% or more savings--10

(ii) 50% - 54.99% savings--7

(iii) 45% - 49.99% savings--5

(iv) 41% - 44.99% Savings--2

(D) Communities with populations above 5,000 but less than 10,000 according to the 2000 census:

(i) 55% or more savings--10

(ii) 50% - 54.99% savings--8

(iii) 45% - 49.99% savings--3

(iv) 41% - 44.99% Savings--1

(E) Communities with populations that are 10,000 or above 10,000 according to the 2000 census:

(i) 55% or more savings--10

(ii) 50% - 54.99% savings--6

(iii) 45% - 49.99% savings--2

(iv) 41% - 44.99% Savings--0

(5) Benefit to low/moderate income persons (total--5 points). Applicants are required to meet the 51 percent low/moderate-income benefit for each activity as a threshold requirement. Any project where at least 60 percent of the TCDP funds benefit low/moderate-income persons will receive 5 points.

~~[(b) Funding cycle. This fund is available to eligible units of general local government through a direct award basis. There is no application deadline. However, an application for small towns environment program fund assistance is not accepted until TCDP staff, representatives of the potential applicant, and residents from the community needing the financial assistance have discussed the self-help process and TCDP staff determine that self-help is a feasible method for completion of the water or sewer project, the community is committed to self-help as the means to address the problem, and the community is ready and has the capacity to begin and complete a self-help project.]~~

~~[(c) Selection procedures. TCDP staff will provide guidance, assistance, and support to community leaders and residents willing to use self-help to solve their water and sewer problems. Staff will determine a community's readiness to begin a self-help project through evaluation of the following factors:]~~

~~[(1) whether this is a strong local perception of the problem;]~~

~~[(2) community perception that local implementation is the best and may be the only solution;]~~

~~[(3) whether the community residents have confidence that they can do it adequately;]~~

~~[(4) whether the community has any other urgent competing priority;]~~

~~[(5) whether local government representatives are supportive and understand the urgency of the community's needs;]~~

~~[(6) public and private willingness to pay water or sewer service costs;]~~

~~[(7) whether effort and attention have already been given to local assessment of the problem; and]~~

~~[(8) whether the community has received any support from the county or regional field staff of the regulatory agency.]~~

~~[(d) Application review and contract award procedures.]~~

~~[(1) The Office staff review each application to determine whether it is complete, if all proposed activities are program eligible, and if the project is financially feasible. Each application recommended for funding is forwarded to the executive director of the Office.]~~

~~[(2) The executive director of the Office reviews each funding recommendation for a project award and except for any award exceeding $300,000 announces the contract award. Any award exceeding $300,000 is submitted to the Executive Committee for approval.]~~

~~[(3) Upon announcement of a contract award, the Office staff works with the recipient to execute the contract agreement. While the award must be based on the information provided in the application, the Office may negotiate any element of the contract with the recipient as long as the contract amount is not increased and the level of benefits described in the application is not decreased.]~~

§255.12. Microenterprise Fund.

(a) General provisions. This fund is available on an annual basis for funding from available program income through an annual statewide competition. Applications received by the application deadline are eligible to receive grant awards from available program income. An eligible community submits the application and must contract with a non-profit organization (economic development corporation, community development corporation, etc.) for the purpose of establishing a local loan program that directly assists for-profit microenterprise businesses. Proceeds from the repayment of the loans will be retained by the non-profit organization.

(b) Conditions. A microenterprise is a commercial enterprise that has five (5) or fewer employees, one (1) or more of whom owns the enterprise. The microenterprise receiving the loan assistance must commit to creating or retaining jobs that will not exceed a maximum cost of $25,000 per job. The jobs created or retained by the microenterprise must principally benefit low and moderate income persons. The funds cannot be used by the microenterprise for debt service, refinancing, or payment of the business owner's salaries.

(c) Eligible activities. The activities eligible under this fund are:

(1) Working capital (purchase of raw materials, inventory, rent, utilities, salaries, and others needed for business operations);

(2) Machinery and equipment (cars and trucks considered rolling stock would not be an eligible use of funds); and

(3) Real estate improvements.

(d) Selection criteria. The following is an outline of the selection criteria used by the Office for scoring microenterprise fund applications. One hundred twenty (120) points are available. Additional information on the selection criteria may be provided in the application guide.

(1) Community Distress (total - 50 points). All community distress factor scores are based on the population of the applicant. For counties, the population may include the unincorporated county population and the populations of any cities located in the county participating in the application. An applicant that has 125% or more of the average of all applicants in the competition of the rate on any community distress factor, except per capita income, receives the maximum number of points available for that factor. An applicant with less than 125% of the average of all applicants in the competition on a factor will receive a proportionate share of the maximum points available for that factor. An applicant that has 75% or less of the average of all applicants in the competition on the per capita income factor will receive the maximum number of points available for that factor. An applicant with greater than 75% of the average of all applicants in the competition on the per capita income factor will receive a proportionate share of the maximum points available for that factor.

(A) Percentage Of Persons Living In Poverty (total - 15 points).

(B) Per Capita Income (total - 15 points).

(C) Population Loss from 1990 to 2000 (total - 10 points).

(D) Unemployment Rate - (total - 10 points).

(2) Program Design (total - 50 points).

(A) Nonprofit Capacity. The score will be based on evidence in the application of the experience and/or capability of the contracted non-profit organization to administer a local business lending program, including the staff of the non-profit who will operate the fund (total - 10 points).

(B) Overall Program Design. The score will be based on design of the revolving loan program, including the application and selection process, credit analysis procedure, collection process, and other procedures necessary to sustain the long-term viability of the revolving loan fund (total -10 points).

(C) Technical Assistance and Counseling Services. The score will be based on the magnitude and scope of the non-profit's proposed technical assistance and counseling services for microenterprise businesses on operational, financial, marketing, and other business-related matters (total - 5 points).

(D) Citizen Involvement. The score will be based on degree of input on the design of the fund that has been solicited from the citizens in the region who could benefit from the fund (total - 5 points).

(E) Business Involvement. The score will be based on degree of input on the design of the fund from businesses, particularly potential applicants, in the region who could benefit from the fund. Consideration will be given for any business involvement in assisting in reviewing applications or providing technical assistance and counseling services (total - 5 points).

(F) Potential Applicants. If the application includes a list of the names of potential business applicants who met the eligibility requirements (total - 5 points).

(G) Marketing Plan. The score will be based on the plan submitted to market the availability of the revolving loan fund to potential microenterprise businesses in the region to be served (total - 5 points).

(H) Terms. The score will be based on whether the loan terms are consistent with the life of the security and risk factors (total - 5 points).

(3) Leverage Ratio (total - 5 points). Score five (5) points if matching dollars are greater than or equal to grant dollars received under this fund based on the following:

(A) For an applicant with a population in 2000 of less than 5,000 persons, the match is at least equal to 100 percent of the grant.

(B) For an applicant with a population in 2000 equal to or greater than 5,000 persons, the match is 125 percent of the grant.

(4) Previous Participation (total - 10 points).

(A) If no previous Texas Capital Fund participation - 10 points, or

(B) If no open Texas Capital Fund contracts - 5 points.

(5) Rural Projects (total - 5 points). Score five (5) points if:

(A) The applicant is a city with a population in 2000 under 10,000 persons, or

(B) The applicant is a county with a population in 2000 under 100,000 persons.

§255.13. Small Business Fund.

(a) General provisions. This fund is available on an annual basis for funding from available program income through an annual statewide competition. Applications received by the application deadline are eligible to receive grant awards from available program income. An eligible community submits the application for the purpose of supporting for-profit small businesses through loans meeting a gap financing need. Retention of the proceeds from the repayment of the loans will meet the same requirements for program income that apply to Texas Capital Fund contracts.

(b) Conditions. A small business is a for-profit business with less than one hundred (100) employees. The small business receiving the loan assistance must commit to creating or retaining jobs that will not exceed a maximum cost of $25,000 per job. The jobs created or retained by the small business must principally benefit low and moderate income persons. The funds cannot be used by the small business for debt service, refinancing, or payment of the business principal's salaries.

(c) Eligible activities. The activities eligible under this fund are:

(1) Working capital (purchase of raw materials, inventory, rent, utilities, salaries, and others needed for business operations);

(2) Machinery and equipment (cars and trucks considered rolling stock would not be an eligible use of funds); and

(3) Real estate improvements.

(d) Selection criteria. The following is an outline of the selection criteria used by the Office for scoring small business fund applications. One hundred twenty five (125) points are available. Additional information on the selection criteria may be provided in the application guide.

(1) Community Distress (total - 50 points). All community distress factor scores are based on the population of the applicant. For counties, the population may include the unincorporated county population and the populations of any cities located in the county participating in the application. An applicant that has 125% or more of the average of all applicants in the competition of the rate on any community distress factor, except per capita income, receives the maximum number of points available for that factor. An applicant with less than 125% of the average of all applicants in the competition on a factor will receive a proportionate share of the maximum points available for that factor. An applicant that has 75% or less of the average of all applicants in the competition on the per capita income factor will receive the maximum number of points available for that factor. An applicant with greater than 75% of the average of all applicants in the competition on the per capita income factor will receive a proportionate share of the maximum points available for that factor.

(A) Percentage Of Persons Living In Poverty (total - 15 points).

(B) Per Capita Income (total - 15 points).

(C) Population Loss from 1990 to 2000 (total - 10 points).

(D) Unemployment Rate (total - 10 points).

(2) Jobs (total - 20 points).

(A) Below $10,000 per job - 20 points,

(B) Below $15,000 per job - 15 points,

(C) Below $20,000 per job - 10 points, or

(D) Below $25,000 per job - 5 points.

(3) Project Feasibility (total - 30 points). The feasibility of each project is evaluated and scored based on the financial soundness of the project. Factors examined include:

(A) Firm commitments for financial investments. The score will be based on evidence in the application that financing from other sources, including owner equity, has been committed in sufficient amounts for the proposed project (total - 5 points);

(B) The jobs to be created or retained. The score will be based on evidence in the application that the type, skill, and wage of the proposed jobs to be created or retained is appropriate for the overall labor force in the area such as local employment data, surveys, or local, state or federal data (total - 5 points);

(C) The history of the business. The score will be based on either the success of the business over the last five years or, for new businesses, the history of the successful start-up period, including a discussion of the products, facilities, markets, job growth, and financial investments in the business (total - 3 points);

(D) The current financial condition of the business (including a full review of the credit analysis). The score will be based on whether the business has a sound balance sheet, including debt to equity ratios, and is currently profitable as demonstrated by recent income statements (total -5 points);

(E) Cash flow projections. The score will be based on the detail and reasonableness of the projected cash flow statements for the proposed project (total - 5 points);

(F) The business or marketing plan. The score will be based on evidence that the business has the capacity to sustain operations beyond the period of program assistance (total - 5 points); and

(G) Management. The score will be based on the experience and capabilities of the business owners and managers (total - 2 points).

(4) Leverage Ratio (total - 5 Points) A minimum ten percent (10%) equity injection by the assisted business is required. Score five (5) points if matching dollars are greater than or equal to grant dollars received under this fund based on the following:

(A) For an applicant with a population in 2000 of less than 5,000 persons, the match is at least equal to 100 percent of the grant.

(B) For an applicant with a population in 2000 equal to or greater than 5,000 persons, the match is 125 percent of the grant.

(5) Previous Participation (total - 10 points).

(A) If no previous Texas Capital Fund participation - 10 points.

(B) If no open Texas Capital Fund contracts - 5 points.

(6) Innovative Projects (total - 5 points). Projects that support a business addressing a community need or economic/population trend would receive five (5) points.

(7) Rural Projects (total - 5 points). Score five (5) points if:

(A) The applicant is a city with a population in 2000 under 10,000 persons, or

(B) The applicant is a county with a population in 2000 under 100,000 persons.

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 February 11, 2004.

TRD-200400939
Robt. J. "Sam" Tessen
Executive Director
Office of Rural Community Affairs
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 936-6710

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TITLE 13. CULTURAL RESOURCES

PART 2. TEXAS HISTORICAL COMMISSION

CHAPTER 26. PRACTICE AND PROCEDURE

13 TAC §26.14

The Texas Historical Commission proposes the creation of a new §26.14 of Chapter 26 (Title 13, Part II of the Texas Administrative Code) relating to the Memoranda of Understanding between the Texas Historical Commission and the Texas Department of Transportation.

The creation of this new section was undertaken to update, streamline, and renew the memoranda of understanding between Texas Historical Commission and Texas Department of Transportation and the action removes or replaces outdated terms and references.

F. Lawerence Oaks, Executive Director, has determined that for the first five-year period this new section is in effect there will be no new fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Oaks has also determined that for each year of the first five year period the new rule section is in effect the public benefit anticipated will be an increased efficiency and effectiveness in the implementation of the Antiquities Code of Texas. Additionally, Mr. Oaks as determined that there will be no negative effects on small businesses.

Comments on the proposal may be submitted to F. Lawerence Oaks, Executive Director, Texas Historical Commission, P. O. Box 12276, Austin, Texas 78711. Comments will be accepted for 30 days after publication in the *Texas Register*.

This new section is proposed under §442.005(q), Title 4, Chapter 442 of the Texas Government Code and §191.052, Title 9, Chapter 191 of the Texas Natural Resources Code, which provides the Texas Historical Commission with the authority to promulgate rules and conditions to reasonably effect the purposes of these chapters.

§26.14. Memorandum of Understanding with Texas Department of Transportation.

(a) Purpose.

(1) It is the policy of the both the Texas Historical Commission and the Texas Department of Transportation (TxDOT) to:

(A) identify the environmental impacts of TxDOT transportation projects, to coordinate these projects with applicable state and federal agencies, and reflect these investigations and coordination in the environmental documentation for each project;

(B) base project decisions on a balanced consideration of the need for a safe, efficient, economical, and environmentally sound transportation system;

(C) receive input from the public through the public involvement process;

(D) utilize a systematic interdisciplinary approach as an essential part of the development process for transportation projects; and

(E) strive for environmentally sound transportation activities through appropriate avoidance, treatment or mitigation, where feasible and prudent, in coordination with appropriate resource agencies.

(2) In order to pursue this policy, the Texas Department of Transportation and the Texas Historical Commission (THC) have agreed to adopt this new Memorandum of Understanding (MOU), which will supercede the MOU, which became effective on December 13, 1998.

(3) This MOU is entered into by THC and TxDOT pursuant to the Government Code, §§442.005 and 442.007, Natural Resources Code, §191.0525(f), and Transportation Code, §201.607 to adequately provide for coordination of projects with THC. It is the intent of this MOU to provide a formal mechanism for THC review of TxDOT projects that have the potential to adversely affect cultural resources in order to assist TxDOT in making environmentally sound decisions, and to develop with TxDOT a system by which information developed by TxDOT and THC may be exchanged to their mutual benefit. This MOU also provides for an efficient and streamlined review of TxDOT projects in keeping with state and national initiatives for environmental streamlining.

(b) Authority.

(1) Texas Transportation Code, §201.607, directs TxDOT to adopt MOUs with appropriate environmental resource agencies, including THC. The rules for coordination of state-assisted transportation projects found in 43 TAC Subchapter 2, §§2.40-2.51 of the Transportation Code (relating to Environmental Review and Public Involvement for Transportation Projects), underline the need for and importance of comprehensive environmental coordination for transportation projects.

(2) The Texas Transportation Code, §201.607(a)(5) also authorizes and contemplates other agreements necessary for the effective coordination of the review of the historic or archeological effect of highway projects.

(3) Provisions of this MOU may in part be implemented through a Programmatic Agreement (PA) among the Federal Highway Administration (FHWA), the Texas State Historic Preservation Officer (TSHPO), the Advisory Council on Historic Preservation (Council), and TxDOT. TxDOT and THC will seek to revise the existing PA, executed in 1995, to reflect the streamlined procedures contained in this MOU.

(c) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Antiquities Code of Texas (ACT)--The state statute (Natural Resources Code, Chapter 191) that designates the Texas Historical Commission as the legal custodian of all cultural resources,

historic or prehistoric, within the public domain of the state, and as the body that issues antiquities permits, in accordance with this Chapter.

(2) Antiquities permit--A permit issued by the Texas Historical Commission in order to regulate the taking, alteration, damage, destruction, salvage, archeological survey, testing, excavation and study of state archeological landmarks including prehistoric and historic archeological sites, and the preservation, protection, stabilization, conservation, rehabilitation, restoration, reconstruction, or demolition of historic structures and buildings designated as a State Archeological Landmark or listed in the National Register of Historic Places.

(3) Area of potential effects--The geographic area or areas within which an undertaking may cause changes in the character or use of historic properties, as defined in 36 CFR Part 800, if any such properties exist.

(A) The area of potential effects for archeological properties on federal undertakings will be confined to the limits of the proposed project right of way (including permanent and temporary easements), utility relocations, and project-specific locations designated by TxDOT.

(B) Unless TxDOT and THC in consultation determine a need for a wider area of potential effects, the area of potential effects for other properties on federal undertakings will be:

(i) 300 feet beyond the proposed right of way for projects constructed on new location;

(ii) 150 feet beyond the proposed right of way for projects constructed in existing transportation corridors, including abandoned railroad lines.

(C) The area of potential effects for all non-federal undertakings will be confined to the limits of the proposed project right of way (including permanent and temporary easements), utility relocations, and project-specific locations specifically designated by TxDOT.

(4) Cultural resources--A general term referring to buildings, structures, objects, sites, and districts more than 50 years of age with the potential to have significance in local, state, or national history.

(5) Eligibility--A property's eligibility for the National Register of Historic Places as set forth in 36 CFR Part 60 and 36 CFR Part 800, or for designation as a State Archeological Landmark, as set forth in this Chapter (§§26.7-26.10).

(6) Historic property--Any prehistoric or historic district, site, building, structure, or object which is included or eligible for inclusion in the National Register of Historic Places, as defined in 36 CFR Part 800 and 36 CFR Part 60, or meets the requirements for designation as a State Archeological Landmark as set forth in this Chapter (§§26.7-26.10).

(7) Historic-age property--Any site, building, structure, or object that will be 50 years old or older in age at the time of the award of the construction contract.

(8) Impact Evaluation--Field inspection by a qualified archeologist to determine the extent to which physical conditions affect the eligibility of known or unknown archeological deposits within the area of potential effects of the proposed project.

(9) National Register--The National Register of Historic Places (NRHP), which is the nation's inventory of historic places maintained by the U.S. Secretary of the Interior. (Historic properties included in or eligible for inclusion must meet National Register criteria for evaluation, as defined in 36 CFR Part 60.)

(10) Project specific location--The location of specific material sources (base material, borrow, sand pits, etc.) and other sites used by a construction contractor for a specific project.

(11) Quarterly report--A report that TxDOT submits to THC 20 days after the end of each quarter listing all projects for which TxDOT has documented that no historic properties are present in the project's area of potential effect, and those where the projects will have no adverse effects on historic properties as determined by background research and/or, field investigation and project review, as appropriate, that is used to fulfill TxDOT's reporting requirements under this MOU.

(12) State Archeological Landmark (SAL)--Archeological and historic-age properties that are designated or eligible for designation as landmarks as defined in Subchapter D of the Antiquities Code of Texas (ACT) and identified in accordance with this Chapter.

(13) State Historic Bridge Inventory--An ongoing evaluation effort to determine the eligibility of historic-age bridges in the state.

(d) Responsibilities.

(1) Texas Department of Transportation. The responsibilities of TxDOT pertain primarily to its functions as a transportation agency, and include:

(A) planning and designing safe, efficient, effective, and environmentally sensitive transportation facilities while avoiding, minimizing, or compensating for impacts to cultural resources to the fullest extent practicable;

(B) the timely and efficient construction of transportation facilities, in a manner consistent with approved plans, agreements and commitments that TxDOT has executed regarding the protection of historic properties;

(C) ongoing maintenance to provide safe, efficient, and environmentally sound transportation facilities for the traveling public;

(D) coordinating projects with THC through TxDOT's Environmental Affairs Division or its successor as established by TxDOT administration; and

(E) provide funding to THC to enable THC to implement measures to facilitate early coordination, streamlining and expedited review of TxDOT's transportation projects.

(2) Texas Historical Commission. The responsibilities of THC relate primarily to its functions as a cultural resource agency, and include:

(A) serving as the State Historic Preservation Office in Texas with responsibility under 36 CFR Part 800--the regulations implementing Section 106 of the National Historic Preservation Act (16 U.S.C. 470f);

(B) reviewing federally assisted, licensed, or permitted undertakings with the potential to affect properties included in or eligible for inclusion in the National Register of Historic Places;

(C) providing assistance to agencies in their efforts to comply with the Section 106 process;

(D) regulating the identification, disposition and management of State Archeological Landmarks which are affected by non-federal undertakings, as described in the ACT and this Chapter (§§26.17-26.20);

(E) issuing permits for the taking, excavation, restoration, rehabilitation, or study of State Archeological Landmarks as provided in ACT (§§191.054 and 191.091-098); and

(F) applying TxDOT's funding solely to the review of TxDOT's projects in a manner that most efficiently streamlines THC's effective review and early coordination.

(e) Early project planning for cultural resources.

(1) TxDOT and THC agree that routine roadway maintenance projects, by their nature and definition, do not require review by THC under 36 CFR Part 800 or this Chapter. Such projects include, but are not limited to:

(A) installation, repair, or replacement of fencing, signage, traffic signals, railroad warning devices, safety end treatments, cameras and intelligent highway system equipment;

(B) landscaping;

(C) routine structural maintenance and repair of bridges, highways, railroad crossings, and rest areas;

(D) in-kind repair, replacement of non-historic lighting, signals, curb and gutter, sidewalks;

(E) crack seal, overlay, milling, grooving, resurfacing, and restriping;

(F) replacement, upgrade, and repair of safety barriers, ditches, storm drains, and culverts constructed after the depression-era period (i.e. after 1945);

(G) intersection improvements that require no additional right of way;

(H) placement of riprap to prevent erosion of waterway banks and bridge piers provided no ground disturbance is required;

(I) all maintenance work between a highway and an adjacent frontage road;

(J) installation of noise barriers or alterations to existing publicly owned buildings less than 50 years old, to provide for noise reduction except in potential or listed National Register districts;

(K) driveway and street connections;

(L) all work within interchanges and within medians of divided highways;

(M) acquisition of scenic easements unless the acquisition is from a historic property; and

(N) other kinds of undertakings jointly agreed to in writing by THC and TxDOT.

(2) TxDOT is committed to performing early identification efforts for cultural resources located within the area of potential effects of proposed transportation projects and initiating THC coordination during the early planning stages of these projects, when the widest range of alternatives is open for consideration.

(3) TxDOT is committed to implementing, in appropriate cases and as a part of early project planning and coordination, alternative methods, techniques, and other strategies that are reasonable and feasible and that will enhance efficiency in complying with cultural resource laws. These include, but are not limited to, programmatic approaches to coordination of selected types of cultural resources, evaluation of existing conditions affecting the integrity of cultural resources, geoarcheological research to assist in early planning and to reduce archeological liabilities, development of significant eligibility standards with THC, and development and implementation of alternative mitigation strategies. TxDOT may seek to utilize alternative strategies for procedures set forth in this MOU. Upon the written concurrence of THC, TxDOT may implement the alternative strategy in lieu of the procedures specified in this MOU.

(4) TxDOT is also committed to providing the public and interested parties with opportunities to provide input and express their views concerning potential project impacts to historic properties.

(A) TxDOT will ensure that cultural resource issues are incorporated into its regular public participation programs carried out under the National Environmental Policy Act (42 USC 4321-4347 et seq.), and §§2.42-2.43 of the Transportation Code (relating to Highway Construction Projects-Federal Aid, and Highway Construction Projects-State Funds), as far as practicable.

(B) TxDOT will also ensure that federally recognized Indian tribes (as specified in 36 CFR 800) are provided early project information and information on Native American sites that will be affected by TxDOT projects in order to provide comments.

(C) If concerns related to historic and archeological issues arise after the NEPA public involvement process is complete, or if new information about historic or archeological issue is found, TxDOT and THC shall independently re-evaluate their findings

(5) Cultural resource investigations by consultants.

(A) TxDOT has the right to perform cultural resource investigations using staff or consultants who meet the professional standards of this Chapter (§26.5), and as required by 36 CFR Part 800.

(B) Cultural resource surveys, investigations, permit applications, and other work performed by consultants shall be coordinated with THC through TxDOT's Environmental Affairs Division or its successor as established by TxDOT administration.

(f) Procedures for coordination regarding archeological resources. Provided the work is completed in accord with the provisions of this MOU, survey and eligibility testing of archeological resources performed by the archeological staff of TxDOT's Environmental Affairs Division is authorized under this MOU and will not be considered an operation that might require an antiquities permit under ACT, §§191.054 or 191.131. All other archeological investigations shall require an antiquities permit.

(1) Identification.

(A) TxDOT will undertake sufficient background research to determine which proposed projects require archeological surveys. Background research may include a search of records and files at THC and/or the Texas Archeological Research Laboratory (TARL), gathering information on soils, a geomorphic history of the projects, Texas Historic Sites Atlas, and impact evaluations.

(B) Based on the results of background research, TxDOT will identify projects requiring archeological investigation for archeological resources.

(C) TxDOT will prepare a list of projects, which do not require individual coordination for archeological sites, and will provide THC with a list of such projects, including those where impact evaluations were performed, on a quarterly basis or upon request by THC.

(D) Eligibility determinations that TxDOT performs under this MOU may not require field investigations if sufficient background information exists to demonstrate that the portion of the site to be affected does not have potential research value.

(E) Eligibility determinations that TxDOT performed under this MOU may be based on impact evaluations if it can be demonstrated that the portion of the site to be affected does not have sufficient integrity to be eligible.

(2) Archeological surveys.

(A) All projects, and portions of projects, recommended for survey by TxDOT during background research will be subjected to archeological survey using the methods in conformance with 36 CFR Part 800 and THC's Archeological Survey Standards, or with other appropriate methods. TxDOT reserves the right to depart from published survey standards in cases where it deems appropriate. THC reserves the right to review non-standard procedures for their adequacy.

(B) An archeological survey will be conducted by a TxDOT professional archeological staff member or other archeologist who meets the state and federal standards. Surveys may be limited to an evaluation of existing impacts or stratigraphic integrity when these are sufficient to determine that any sites present are unlikely to be eligible.

(C) When the archeological survey has been completed, TxDOT will submit the results of the survey to THC:

(i) as part of a quarterly list of investigations where no sites were found, where sites were found but were not recommended for further work, or upon request by THC; or

(ii) as an individual report when sites are present and recommended for further work; or

(iii) as an individual report when no further work is recommended, but THC comment is a desirable element of TxDOT's NEPA compliance.

(D) All TxDOT survey reports will include:

(i) details of the results of the survey, including project description, anticipated project impact, and existing disturbance in the project area;

(ii) environmental data on topography, soils, land use, survey methodology, survey results, and recommendations;

(iii) the project location plotted on 7.5' Series USGS quadrangle maps;

(iv) descriptions of any sites found;

(v) submission of electronic and paper copies of archeological site survey forms to TARL; and

(vi) recommendations regarding whether the site(s) merit archeological testing or archeological monitoring.

(E) THC will respond within 20 days of receipt of the TxDOT request for review of any survey results and recommendations. The response will include:

(i) a statement of concurrence or non-concurrence with the results of the survey and its recommendations; and

(ii) any other comments relevant to the archeological resources, which could be affected by the project.

(F) TxDOT will summarize the results of the archeological survey and recommendations in the environmental document for the project, as far as practicable.

(3) Archeological eligibility testing phase.

(A) All sites and portions of sites recommended for eligibility testing by THC will be subject to archeological testing, using the methods agreed upon in writing by TxDOT and THC.

(B) THC may send a representative to observe any or all of the testing procedures.

(C) At the completion of testing, TxDOT will prepare a formal report of the results of testing.

(i) For sites affected by federal undertakings, the report will include recommendations regarding eligibility for the NRHP, as described in 36 CFR Part 60 and 36 CFR Part 800.

(ii) For sites affected by non-federal undertakings, the report will include recommendations regarding the eligibility of the site for designation as a State Archeological Landmark, in accordance with ACT, §§191.091-092, and this Chapter (§26.8).

(iii) TxDOT may submit interim reports on testing to expedite project review, provided such reports contain sufficient information on which to base recommendations of eligibility and, if relevant, additional work. Interim reports shall not be substituted for final report.

(D) TxDOT will send the testing report to THC with a request for review.

(E) In accordance with 36 CFR Part 800, THC will respond to the report within 20 days of receipt of TxDOT's request for review and in accordance with 36 CFR Part 800. The response will include:

(i) a statement of concurrence or non-concurrence with the results of the archeological testing and recommendations contained in the TxDOT request for review; and

(ii) a determination of the site's eligibility for listing in the National Register of Historic Places, or for designation as a State Archeological Landmark.

(F) When appropriate, TxDOT will work with THC and Principal Investigators to develop public educational outreach projects associated with significant test level investigations.

(4) Archeological excavation/data recovery.

(A) All sites and portions of sites determined to be eligible for the NRHP (for federal undertakings) or eligible for designation as a State Archeological Landmark (for non-federal undertakings) based on consultation with THC, will be subjected to data recovery in conformance with a data recovery plan that has the concurrence of THC when avoidance is not feasible and provided that they are not eligible for preservation in place.

(B) TxDOT, in consultation with THC, will develop a data recovery plan for each eligible site on a case-by-case basis, in accordance with 36 CFR Part 800 for federal undertakings and ACT for non-federal undertakings. Final data recovery plans must be approved by THC prior to their implementation.

(C) Results of data recovery will be published as required by 36 CFR Part 800 and/or ACT. To expedite transportation project planning, design, and construction, interim reports on data recovery may be used for consultation to determine whether fieldwork commitments have been fulfilled. Interim reports shall not be substituted for final reports.

(D) All data recovery will be performed under an antiquities permit.

(E) When appropriate, TxDOT and THC may agree to substitute alternative mitigation in lieu of data recovery.

(F) When appropriate, TxDOT will work with THC and Principal Investigators to develop public educational outreach projects associated with significant data recovery investigations.

(5) Archeological sites found after award of contract.

(A) When previously unknown archeological remains are encountered after award of contract, TxDOT will immediately suspend construction or any other activities that would affect the site.

(B) TxDOT will inform THC and, if appropriate, federally recognized tribes, of discovery of previously unknown archeological remains and invite them to accompany TxDOT staff (or consultants) to the location within 48 hours of the discovery.

(C) TxDOT will evaluate the need, if any, for further investigations upon visiting the location of the discovery.

(D) If TxDOT determines that the discovery is an unrecorded archeological site, then TxDOT shall complete a State of Texas Archeological Site Data Form.

(E) If TxDOT determines that the site does not warrant further investigations, will write to THC and, if appropriate, federally recognized tribes outlining reasons and requesting their concurrence within one business day of the visit to the discovery location. The THC and, if appropriate, federally recognized tribes will have two business days to respond. No response will be deemed to represent concurrence and construction will resume.

(F) If TxDOT determines that the site warrants further investigation, a scope of work for investigations will be developed within 24 hours of the visit to the site. The scope of work will be submitted to THC and appropriate federally recognized tribes who will have one business day to review and comment on the scope of work. No response will be deemed to represent concurrence and the scope shall be implemented. If comments are received, TxDOT and, if appropriate, FHWA shall take into account those comments and carry out the final scope of work. Upon completion of the approved work, construction may proceed as planned. A report of the investigations will be completed within the timeframe established by the scope of work and copies provided to all consulting parties.

(G) The procedures in this subsection shall be used to satisfy the permit requirements of this Chapter, for emergency permitting under §26.20(13) when conditions of natural or man-made disasters necessitate immediate action.

(6) Artifact recovery and curation.

(A) Artifact recovery.

(i) The type and quantity of artifacts to be recovered during testing and data recovery will be detailed in the scope of work and will be selected to address the research questions.

(ii) Artifacts or analysis samples (such as soil samples) that are recovered from survey, testing, or data recovery investigations by TxDOT or their contracted agents that address the research questions must be cleaned, labeled, and processed in preparation for long-term curation unless the artifacts or samples are approved by THC for discard under this Chapter (§26.27).

(iii) To ensure proper care and curation, recovery methods must conform to 36 CFR Part 800, and this Chapter (§26.27).

(B) Artifact curation.

(i) TxDOT or its permitted contractor may temporarily house artifacts and samples during laboratory analysis and research, but upon completion of the analysis, artifacts and accompanying documentation must be transferred to a permanent curatorial facility in accordance with the terms of the antiquities permit.

(ii) Artifacts and samples will be placed at an appropriate artifact curatorial repository which fulfills 36 CFR Part 79, or the ACT, as approved by THC. When appropriate, TxDOT will consult with THC to identify for disposal collections or portions of collections that do not have identifiable value for future research or public interpretation. Final approval regarding the disposition of collections will be made by THC.

(iii) TxDOT is responsible for the curatorial preparation of all artifacts to be submitted for curation so that they are acceptable to the receiving curatorial repository and fulfill 36 CFR Part 79 and this Chapter (§26.27), as approved by THC.

(g) Early project development procedures for coordination regarding non-archeological historic properties. For purposes of this subsection and subsections (h), (i) and (j) of this section, the term historic properties will refer only to non-archeological historic properties.

(1) TxDOT and THC agree (for federal and non-federal projects) that certain types of undertakings do not require individual coordination. These undertakings are projects where no historic properties are present, or where the undertakings will have a minimal potential to affect historic properties if such are present in the area of potential effects. TxDOT will document these undertakings and include them in a quarterly report to THC unless they are the subjects of individual coordination with THC.

(A) Examples of such undertakings include:

(i) construction of bicycle and pedestrian lanes, paths and facilities if not located in a listed or eligible National Register historic district;

(ii) road widening within existing or minimal new right of way if not located in a listed or eligible National Register historic district;

(iii) correction of roadway geometric and intersections within existing or minimal new right of way;

(iv) bridge deck rehabilitation and stabilization; and

(v) other classes of undertakings jointly agreed to in writing by THC and TxDOT.

(2) Early in the project development process, TxDOT will determine whether federally assisted, licensed, or permitted transportation projects (federal projects) constitute undertakings with the potential to affect historic properties. In consultation with THC, it has been determined that individual coordination with THC is not necessary for projects where background research indicates that no historic properties are present or where they are present but the project will not have the potential to affect them. TxDOT will maintain documentation of efforts taken to reach this conclusion, and will include these projects in the quarterly report, or provide documentation upon request by THC.

(3) Early in the project development process, TxDOT will review its non-federal transportation improvements occurring on any lands of the State of Texas (non-federal projects) to determine whether they have the potential to affect historic properties under the terms of ACT and this Chapter. Effects include the removal, alteration, or renovation of one or more contributing elements to a historic property. TxDOT and THC agree that individual coordination with THC is not necessary when no historic properties are present or when the project

does not have the potential to adversely affect historic properties, provided TxDOT has complied with the provisions of this MOU. TxDOT will maintain documentation of efforts taken to reach this conclusion, and will include these projects in the quarterly report or provide documentation upon request by THC.

(4) If TxDOT determines that a project has the potential to affect a historic property, TxDOT will then individually coordinate the project with THC, in accordance with the provisions provided in this MOU.

(h) Identification and evaluation of historic properties.

(1) For non-federal and federal projects requiring individual THC coordination, TxDOT will identify historic properties within the project's area of potential effects. TxDOT will conduct a search of available records, including listings of the Texas Historic Sites Atlas, Recorded Texas Historic Landmarks, State Archeological Landmarks, and properties listed in the National Register. THC will render all reasonable assistance to TxDOT in performing record searches on historic properties.

(2) TxDOT will conduct field surveys for all projects that may have historic-age properties within their area of potential effects. These surveys will be conducted in order to determine if historic properties are present.

(3) If the identification efforts reveal historic-age properties, TxDOT will evaluate the eligibility of each property to determine if the property:

(A) qualifies as a SAL as defined by ACT (§191.092) for non-federal projects; or

(B) is eligible for inclusion or listed in the National Register, for federal projects.

(4) If a non-federal or federal project has the potential to affect a historic-age bridge-class structure the following procedures apply unless the structure is of a categorically excluded type as defined by SHBI criteria. Categorically excluded structures are generally not eligible bridges that have been widened, non-depression era simple span concrete box culverts and timber stringer bridges. There are exceptions to these exclusions and other categorically excluded structures may be added by written agreement between TxDOT and THC in the future.

(A) If a non-federal or federal project has the potential to affect a historic-age bridge-class structure that has not been included in the SHBI, as formally accepted by THC, TxDOT will assess the eligibility of the structure in consultation with THC.

(B) If a historic-age bridge-class structure has been determined not eligible, either under the SHBI or in individual consultation with THC, TxDOT will coordinate with appropriate local entities to determine if the structure has local interest or significance.

(i) If no local interest or significance is identified, TxDOT will add the project to the quarterly report.

(ii) If TxDOT or THC identifies local interest or significance in a structure, TxDOT will re-assess the eligibility with THC. If TxDOT and THC concur that the bridge-class structure is still not eligible, TxDOT will document the project in the quarterly report.

(C) If a historic-age bridge-class structure has been determined eligible, either under the SHBI or in individual consultation with THC, TxDOT shall follow the procedures outlined in subsection (i) below, regarding assessing and mitigating effects on historic properties.

(D) If TxDOT has reason to believe that a bridge-class structure is no longer eligible, TxDOT will consult with THC to re-assess the eligibility.

(E) If TxDOT and THC concur that the bridge-class structure is no longer eligible, TxDOT will document the project in the quarterly report.

(i) Assessing and mitigating effects on historic properties. TxDOT will assess the effects of projects on properties that qualify as SALs for non-federal projects and on properties determined to be listed or eligible for inclusion in the National Register for federal projects. TxDOT will then consult with THC using the following procedures.

(1) For a non-federal project, TxDOT will consult with THC to determine if a historic structures permit is required for any proposed removals, alterations, or renovations to SALs or to properties for which THC will initiate an SAL nomination in accordance with this Chapter (§26.12) and ACT (§191.098).

(2) For a federal project, TxDOT will apply the criteria of effect and in cases of a determination of adverse effects, will consult with THC in accordance with the provisions set forth in 36 CFR Part 800.

(3) For a project involving a bridge-class structure that TxDOT and THC concur is eligible, TxDOT shall evaluate the preservation options in the following order of preference: full vehicular use; reduced level of vehicular use, non-vehicular use at original site; relocation for vehicular use; relocation for non-vehicular use; or demolition. TxDOT will document the evaluation of each preservation option including identification of the preferred option with supportive reasoning, and will submit the documentation to THC.

(A) When an eligible bridge-class structure will be retained for non-vehicular use at the original site or relocated, TxDOT will provide THC with an agreement signed by the bridge-class structure owner that includes language that ensures maintenance of the bridge-class structure, and provides THC the opportunity to review and concur that current and future proposed work on the bridge-class structure, beyond normal maintenance, complies with the Secretary of the Interior's Standards for Rehabilitation.

(B) Upon receipt of complete documentation THC shall have 20 days to review and comment on the project. TxDOT shall take THC comments into account in making decisions on the project involving the bridge-class structure.

(4) TxDOT will, to the maximum extent practicable, provide an early opportunity for the public and interested parties to receive information and to express their views on projects when a historic property may be negatively affected by a transportation project.

(5) TxDOT will also consult with THC to seek ways to avoid, minimize, or mitigate any negative effects on historic properties caused by federal and non-federal projects in accordance with the following procedures.

(A) Non-federal project. TxDOT shall take THC comments into account when projects will have an adverse effect on historic properties.

(B) Federal project. TxDOT will follow the consultation procedures set out in 36 CFR Part 800.

(j) Project documentation by TxDOT.

(1) THC may audit TxDOT project file for specific undertakings submitted in the quarterly report. Projects involving non-archeological properties that are submitted individually to THC or included in the quarterly report, will be documented by TxDOT and will include:

(A) a project description and scope, including project drawings, photographs, reports and other information where needed to clearly describe the proposed project;

(B) a map showing the location of the project and all historic-age properties within the APE of the project;

(C) a statement of the efforts and methodology used to identify historic-age properties in the project area;

(D) documentation on each identified property, including at least one photograph of the property, the address if known, an architectural description, date of construction (estimated or known), an integrity assessment, and any known local, state or national historical designations;

(E) the results of any coordination with interested parties concerning the eligibility of identified historic-age properties; and

(F) the results of TxDOT's determination of eligibility for each identified historic-age property.

(G) TxDOT's assessment of potential project effects on historic properties, including evaluations, reports and other documentation relevant to the determination of effect.

(2) If the project is submitted to THC for review of non-archeological properties, THC will respond within 20 days of receipt of complete documentation and TxDOT's request for review as follows.

(A) For a non-federal project, THC's response will indicate whether the project will require a historic structures permit for an SAL, whether THC intends to initiate SAL nomination of a property not previously designated as an SAL, or if THC has knowledge that another party intends to initiate SAL nomination in accordance with §§26.11, 26.12 and §26.22 of this Chapter, and ACT, §191.098. If THC does not respond within 20 days, TxDOT will assume that THC concurs with TxDOT's determination regarding historic-age property eligibility or project effects, and TxDOT will proceed with the project in accordance with the procedures required in this MOU.

(B) For a federal project, all coordination with THC will follow the provisions of 36 CFR Part 800 and the PA between TxDOT, FHWA and THC.

(3) Projects involving archeological properties that are submitted individually to THC or included in the quarterly report will be documented by TxDOT in the manner described in this subsection. THC may audit TxDOT project files for specific undertakings submitted in the quarterly report. For archeology, project documentation will consist of a statement for "no survey" or a report of an archeological impact evaluation or an archeological survey report. Each project file at a minimum will include:

(A) a description of the project;

(B) project location map;

(C) information about soils and geology in project location, as appropriate;

(D) information on previously recorded archeological sites in project location;

(E) level of effort for identification of archeological sites; and

(F) results and recommendations.

(k) Environmental document and public involvement. TxDOT will summarize information on its efforts to identify archeological sites and historic properties, to determine the effects of projects on archeological sites and historic properties, and to mitigate any negative effect on these sites or properties in the environmental document, if one is prepared, and will include this information in public involvement activities to the maximum extent practicable.

(l) Denial of access. In cases where access to private land for conducting archeological survey is denied prior to the approval of the environmental document, TxDOT will make a commitment to complete testing, evaluation of site eligibility, or data recovery prior to any construction related impacts.

(m) MOU to govern TxDOT procedures. TxDOT satisfies applicable THC requirements if it utilizes the procedures of this MOU in lieu of other THC procedures. In cases where TxDOT is utilizing this MOU in lieu of other THC procedures, TxDOT must follow the requirements of this MOU.

(n) THC audit. THC may audit TxDOT project files for specific undertakings carried out under this MOU.

(o) Annual meeting. TxDOT and THC staff will meet annually to discuss topics of mutual interest.

(p) Dispute Resolution.

(1) If THC and TxDOT cannot reach agreement on any plans or actions carried out pursuant to this MOU, THC and TxDOT will consult to resolve the objection.

(2) If THC and TxDOT cannot reach a compromise solution or otherwise resolve the objection through consultation, either TxDOT or THC may choose to invoke the dispute resolution provisions which are set forth in paragraph (3) of this subsection.

(3) When these dispute resolution provisions are invoked, if TxDOT and THC cannot resolve their disagreement, the two agencies will resolve their dispute in accordance with the procedures established under state and federal rules.

(A) Federal undertakings will follow the dispute resolution procedures as stipulated in 36 CFR Part 800.

(B) Non-federal projects will follow the appeal procedures provided in Title 13, Part 2, Chapter 27 of the Texas Administrative Code.

(q) Review of MOU. This memorandum shall be reviewed and updated as provided by law or by agreement between the parties.

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 February 13, 2004.

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F. Lawerence Oaks
Executive Director
Texas Historical Commission
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For further information, please call: (512) 463-5711

13 TAC §26.15

(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 Historical Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Historical Commission (THC) proposes the repeal of §26.15 of Chapter 26 (Title 13, Part II of the Texas Administrative Code) relating to Memoranda of Understanding and Agreement.

The repeal implement changes made to:

F. Lawerence Oaks, Executive Director, has determined that for the first five-year period the subsection repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Oaks has also determined that the public benefit anticipated as a result of the repeal will be an increased efficiency and effectiveness in the implementation of the Antiquities Code of Texas. Additionally, Mr. Oaks as determined that there will be no effect on small businesses.

Comments on the proposal may be submitted to F. Lawerence Oaks, Executive Director, Texas Historical Commission, P. O. Box 12276, Austin, Texas 78711. Comments will be accepted for 30 days after publication in the *Texas Register*.

Repeal of this subsection is proposed under §442.005(q), Title 13 Part II of the Texas Government Code, which provides the Texas Historical Commission with the authority to promulgate rules and conditions to reasonably effect the purposes of this chapter.

§26.15. Memoranda of Understanding and Agreement.

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 February 13, 2004.

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F. Lawerence Oaks
Executive Director
Texas Historical Commission
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13 TAC §26.15

The Texas Historical Commission proposes the creation of a new §26.15 of Chapter 26 (Title 13, Part II of the Texas Administrative Code) relating to the Memoranda of Understanding between the Texas Historical Commission and the Texas Water Development Board.

The creation of this new section was undertaken to update and renew the memoranda of understanding between Texas Historical Commission and Texas Water Development Board and the action removes or replaces outdated terms and references.

F. Lawerence Oaks, Executive Director, has determined that for the first five-year period this new section is in effect there will be no new fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Oaks has also determined that for each year of the first five year period the new rule section is in effect the public benefit anticipated will be an increased efficiency and effectiveness in the implementation of the Antiquities Code of Texas. Additionally, Mr. Oaks as determined that there will be no effect on small businesses.

Comments on the proposal may be submitted to F. Lawerence Oaks, Executive Director, Texas Historical Commission, P. O. Box 12276, Austin, Texas 78711. Comments will be accepted for 30 days after publication in the *Texas Register*.

This new section is proposed under §442.005(q), Title 4, Chapter 442 of the Texas Government Code and §191.052, Title 9, Chapter 191 of the Texas Natural Resources Code, which provides the Texas Historical Commission with the authority to promulgate rules and conditions to reasonably effect the purposes of this chapter.

§26.15. Memorandum of Understanding Between Texas Historical Commission and Texas Water Development Board.

(a) Introduction.

(1) Whereas, the Texas Water Development Board (hereinafter TWDB) and the Texas Historical Commission (hereafter Commission) desire to enter into a memorandum of understanding (MOU) under which TWDB is granted permission under the Antiquities Code of Texas for ongoing, long-term surveys by TWDB staff archeologists for all types of archeological sites which relate to proposed development projects funded by the TWDB; and

(2) Whereas, under the provisions of the Texas Natural Resources Code, the Commission is charged with the responsibility of the protection and preservation of the archeological and historical resources of Texas; and

(3) Whereas, under the provisions of Texas Natural Resources Code, Chapter 191, Subchapter C, §191.051, §191.053, and §191.054, Commission may contract with or issue permits to other state agencies for the discovery and scientific investigation of archeological deposits; and

(4) Whereas, under the provisions of Texas Water Code, Chapter 6, §6.104, TWDB may enter into a MOU with any other state agency and may adopt by rule any MOU between TWDB and any other state agency; and

(5) Whereas, under the provisions of this MOU, an Antiquities Permit is to be issued by Commission to TWDB for each calendar year that this agreement is in effect, subject to fulfillment of certain stipulated conditions discussed within this section;

(6) Now, therefore, the Commission and TWDB agree to enter into this memorandum of understanding to provide archeological surveys of all projects to be constructed with financial assistance from the TWDB.

(b) Responsibilities. The TWDB will conduct surveys in a systematic manner for all types of archeological sites on lands belonging to or controlled by any county, city or other political subdivision of the State of Texas, which may be impacted by proposed development projects that are funded in whole or in part by TWDB. Where appropriate, all surveys must consist of pedestrian surveys and sample subsurface probing (either shovel or mechanical testing, as appropriate) of proposed construction or development areas that may yield evidence of cultural resources (both historic and prehistoric), including areas that may receive direct impact from construction traffic.

(1) TWDB will comply with Texas Administrative Code requirements for a principal investigator as listed in §26.5 of this chapter. Each individual, as principal investigator, must be involved in at least 25% of the field investigation performed under the agreement.

(2) TWDB's staff archeologists will send the Commission advance written notification of the following activities: proposed reconnaissance, 100% pedestrian surveys and/or sample subsurface probing investigations. The notification letters must include information on

the type of project development proposed to receive TWDB financial assistance, the kind of archeological investigation proposed, the principal investigator or co-principal investigators intending to conduct the investigation, and the expected dates of the field work.

(3) TWDB staff archeologists will send the Commission a report within 45 days of the completion of each investigation, notifying the Commission of the findings of the investigation. The report must contain information on the basic scope of the work, findings, a project map showing any cultural site locations recorded, copies of all state site survey forms, a project development clearance request where appropriate, and any recommendations for further work. The report should conform to the guidelines for report preparation of the Council of Texas Archeologists. In cases where the scope and/or results of a particular investigation warrant a comparatively lengthy report requiring more than 45 days to prepare, TWDB staff archeologists will send a brief interim report notifying the Commission of the findings of the investigation and proposed dates for the completion and submittal of the final report to the Commission.

(4) The Commission is responsible for responding in writing to the report or the interim report, as appropriate, within 30 days of receipt of such report.

(5) For projects involving federal funds, TWDB field investigations will be conducted, where applicable, consistent with the National Historic Preservation Act, Section 106, the Secretary of the Interior's Guidelines on Archeology and Historic Preservation, the Regulations of the Advisory Council on Historic Preservation (36 Code of Federal Regulations Part 800), and the Texas Antiquities Code.

(6) A draft annual report summarizing the past calendar year's investigations under each yearly permit will be submitted to the Commission by April 1 of the following year. Each project investigation report within the annual report will be concise, but informative, and include the same levels of data required under the rule provisions of §26.24 of this chapter.

(7) Once the draft annual report is approved by the Commission, TWDB will submit 20 copies of the final annual report to the Commission no later than 90 days after TWDB has received Commission's approval of the draft report. The final annual report should be in a form that conforms to §26.24 of this chapter, pertaining to Archeological Permit Reports.

(8) When requested by the Commission, copies of field notes, maps, sketches, and daily logs, as appropriate, will be submitted to the Commission along with the annual report. Where duplicates are impractical, originals may be submitted for scanning. Upon completion of scanning, originals will be returned to TWDB.

(9) During preservation, analysis, and report preparation or until further notice by the Commission, artifacts, field notes, and other data gathered during investigations will be kept temporarily at the TWDB. Upon completion of annual reports, the same artifacts, field notes, and other data will be placed in a permanent curatorial repository at the Texas Archeological Research Laboratory, the University of Texas at Austin, or other Commission approved repository.

(10) Should the staff archeologist positions at the TWDB be eliminated, TWDB remains responsible for contracting with an individual who meets the requirements of subsection (b)(1) of this Section to serve as principal investigator to complete the year-end report to the Commission.

(11) The TWDB and/or its applicants for financial assistance may find that a particular project is so extensive or under such constraints of time and need that it is more efficient and effective for the archeological or related investigations to be conducted by a qualified archeologist under contract to the applicant. In such instances, the investigations will require a project specific antiquities permit to be obtained by the contracting archeologist.

(12) The following general procedures shall apply for investigation of all projects, including but not limited to the construction of water treatment and storage facilities, wastewater and sludge treatment and disposal facilities, water distribution and wastewater collection facilities, flood control modifications, municipal solid waste facilities, and reservoirs proposed to receive financial assistance from TWDB. Subject to those exceptions outlined below, the complete project will be investigated.

(A) Archival research will be conducted at the Texas Archeological Research Laboratory, the University of Texas at Austin, and other facilities, as appropriate; to determine what cultural resources have been previously recorded in the vicinity of all proposed project construction areas. If the project can be shown to be in areas which have been extensively disturbed by previous development and/or unlikely to contain intact or significant cultural resources, then, based upon this initial review and information provided by the applicant for financial assistance, TWDB may request the Commission to allow the project to proceed to construction without further investigation.

(B) When field investigations are determined to be necessary by TWDB or stipulated by the Commission's review, the field methodology shall include pedestrian survey of all project areas unless preliminary inspection determines that a particular project area has been substantially altered or is physiographically situated such that it appears highly unlikely that significant cultural resources occur in the area. Appropriate to the type of project and location, TWDB archeologists may undertake limited subsurface probing in the form of mechanical or limited manual excavations in order to identify and/or evaluate buried cultural remains. When field investigations reveal that no significant cultural resources are located in the proposed project areas and, in the opinion of the principal investigator, no damage to significant cultural resources is anticipated, as reflected in a written report to the Commission, the project implementation will be allowed to proceed, subject to the Commission's concurrence with the recommendation under subsection (b)(4) of this section. In cases where historic and/or prehistoric cultural resources are found in the vicinity of proposed construction areas, the principal investigator will assess the significance of the resources and make recommendations for avoidance, testing, or mitigation of potentially significant resources, as appropriate, in the reports on the investigations. Decisions will be based upon the need to conserve cultural resources without unduly delaying the progress of project implementation.

(C) TWDB will ensure that it does not release funds for political subdivision construction prior to disposition, or formally agreed to disposition, of archeological and/or historical resources in accordance with the Commission approved reports referenced in paragraphs (3), (4), (5), and (11) of this subsection. Conditions of the TWDB financial assistance will provide, consistent with §26.11(4) of this chapter, that if an archeological site is discovered during project implementation, work will cease in the area of the discovery, the site will be protected, and the discovery will be reported immediately to the Texas Historical Commission.

(13) Any member or agent of the Commission may, with timely notice to TWDB, inspect TWDB investigations in progress subject to the provisions of the MOU and the yearly permit issued to TWDB by the Commission.

(14) Said yearly permit is authorization for reconnaissance and 100% pedestrian survey and/or limited subsurface probing of areas

of less than 300 acres when one TWDB staff archeologist is to conduct the investigation. When investigations of areas greater than 300 acres are proposed, TWDB shall consult with the Commission regarding the need for a project specific permit. The investigation of tracts larger than specified above may require project-specific antiquities permits regardless of whether the TWDB has them performed by staff archeologists or by contract with other qualified archeologists. The above limitations do not apply to proposed pipeline or other linear construction projects wherein the total area to be examined may cumulatively exceed the acreage limitations.

(15) Advanced archeological investigations such as archeological testing or mitigative archeological excavations are not covered under the yearly permits, and any such investigation deemed necessary by the Commission will require a project-specific antiquities permit.

(16) All conditions listed in the permit form remain unaltered by these guidelines.

(c) Permits. An antiquities permit is to be issued for each calendar year that this agreement is in effect with the stipulation that the responsibilities as outlined above are to be observed. Failure to comply with the provisions of this MOU could result in cancellation of the yearly permits at the discretion of the Commission. The results of the investigations will be evaluated at the end of each permit period. A new permit will be automatically issued to TWDB by the Commission by January 15 of each calendar year, assuming all conditions of the previous permit and this MOU have been met.

(d) Term. This memorandum of understanding will remain in full force and effect until canceled by the written notice of either party. The MOU may be amended by mutual written agreement between TWDB and the Commission.

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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F. Lawerence Oaks
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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

SUBCHAPTER B. CUSTOMER SERVICE AND PROTECTION

The Public Utility Commission of Texas (commission) proposes the repeal of old §26.32, relating to Protection Against Unauthorized Billing Charges ("Cramming"), and the adoption of new §26.32, relating to Protection Against Unauthorized Billing Charges ("Cramming"). The proposed new §26.32 is intended to ensure that all customers in this state are protected from unauthorized charges on their telecommunications utility bill. The proposed new §26.32, compared to the existing §26.32, establishes and clarifies the requirements necessary to obtain (1) customer authorization for charges for any product or service, and (2) verification of that authorization. Project Number 28324 is assigned to this proceeding. Proposed changes to §26.130 are also assigned to this project, but those changes were approved by the commission for publication during a public hearing conducted on October 23, 2003, and, therefore, precede the changes proposed to §26.32.

This rulemaking was instituted by the commission to address the following:

1. Updates to rule references in both FCC and commission rule citations;

2. Clarification of the definition of "customer;"

3. Modification and clarification of the customer authorization and verification of authorization requirements for telecommunications products or services;

4. Reorganization of the customer authorization and verification of authorization requirements creating two separate sections for these requirements;

5. Establishment of specific requirement to obtain customer consent to being recorded during all authorization and verification of authorization conversations;

6. Establishment of certification requirements for telecommunications utilities that are unable to have their sales agents disconnect from the verification portion of a telemarketing call when the verification portion of the call commences;

7. Requirement that any electronically signed authorization or verification of authorization include the disclosures required by the *Electronic Signatures in Global and National Commerce Act* §101(c);

8. Requirement that a telecommunications utility obtain new customer authorization and verification of authorization if the service or product ordered is not provisioned within 60 days of the date of authorization;

9. Establishment of proscription of post-termination billing without obtaining new customer authorization and verification of authorization;

10. Establishment of a specific time period for telecommunications utilities to provide records of customer authorization and verification of authorization after commission staff request;

11. Proscription against including incentives of any kind during the verification of authorization portion of a sales call;

12. Establishment of requirements relating to complaints made to the commission;

13. Establishment of consequences for a telecommunications utility's failure to respond to customer complaints made to the commission within the prescribed time period;

14. Notice of the standard of proof imposed upon telecommunications utilities in enforcement actions.

Mr. Jaime Slaughter, Enforcement Attorney, Legal and Enforcement Division, has determined that for each year of the first five-year period the proposed section is in effect there will be

no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Slaughter determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be increased clarification of the rights and responsibilities for telecommunication utilities and enhanced protection for Texas customers from unauthorized billing. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section.

Mr. Slaughter has also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking under 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 Tuesday, April 6, 2004, at 1:30 p.m.

Comments on the proposed new section (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, within 30 days after publication. Reply comments may be submitted within 45 days after publication. 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 refer to Project Number 28324.

16 TAC §26.32

(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 Public Utility Commission of Texas or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

This repeal is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2004) (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, including Chapter 17, Customer Protection, Subchapter D, Protection Against Unauthorized Charges, §§17.151, *et seq.*; Chapter 64, Customer Protection, Subchapter A, Customer Protection Policy, §64.001 which confers on the commission authority to adopt and enforce rules to protect customers from fraudulent, unfair, misleading, deceptive, or anticompetitive practices, and Subchapter D, Protection Against Unauthorized Charges, §§64.151, *et seq.* Further, PURA §52.002, grants the commission "exclusive original jurisdiction over the business and property of a telecommunications utility in this state subject to the limitations imposed by this title."

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 17.151-17.158; 52.001, 52.002, 64.001, and 64.151-64.158.

§26.32. Protection Against Unauthorized Billing Charges ("Cramming").

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 February 12, 2004.

TRD-200400972
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 936-7223

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16 TAC §26.32

This new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2004) (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, including Chapter 17, Customer Protection, Subchapter D, Protection Against Unauthorized Charges, §§17.151, *et seq.*; Chapter 64, Customer Protection, Subchapter A, Customer Protection Policy, §64.001 which confers on the commission authority to adopt and enforce rules to protect customers from fraudulent, unfair, misleading, deceptive, or anticompetitive practices, and Subchapter D, Protection Against Unauthorized Charges, §§64.151, *et seq.* Further, PURA §52.002, grants the commission "exclusive original jurisdiction over the business and property of a telecommunications utility in this state subject to the limitations imposed by this title."

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 17.151-17.158; 52.001, 52.002, 64.001, and 64.151-64.158.

§26.32. Protection Against Unauthorized Billing Charges ("Cramming").

(a) Purpose. The provisions of this section are intended to ensure that all customers in this state are protected from unauthorized charges on a customer's telecommunications utility bill. This section establishes the requirements necessary to obtain:

(1) customer authorization for charges for any product or service; and

(2) verification of that authorization.

(b) Application. This section applies to all "billing agents," "billing telecommunications utilities," and "service providers" as those terms are defined in §26.5 of this title (relating to Definitions) or the Public Utility Regulatory Act (PURA). This section does not apply to:

(1) an unauthorized change in a customer's local or long distance service provider, which is addressed in §26.130 of this title (relating to Selection of Telecommunications Utilities); and,

(2) message telecommunications charges that are initiated by dialing 1+, 0+, 0-, 1010XXX, or collect calls and charges for video services, if the service provider has the necessary call record detail to establish the billing for the call or service.

(c) Definition. The term "customer," when used in this section, shall mean the account holder, including the account holder's spouse, in whose name telephone service is billed, including individuals, governmental units at all levels of government, corporate entities, and any other entity or person with legal capacity to request to be billed for telephone service.

(d) Requirements for billing authorized charges. No service provider or billing agent shall submit charges for any product or service

for billing on a customer's telephone bill before complying with all of the following requirements:

(1) Inform the customer. The service provider offering the product or service shall thoroughly inform the customer of the product or service being offered, including all associated charges for the product or service, and shall inform the customer that the associated charges for the product or service will appear on the customer's telephone bill.

(2) Obtain customer authorization. The service provider shall obtain clear and explicit authorization, pursuant to subsection (f) of this section, from the customer to obtain the product or service being offered and to have the associated charges appear on the customer's telephone bill. A record of the authorization shall be maintained by the service provider offering the product or service for at least 24 months immediately after the authorization was obtained.

(3) Obtain customer verification. The customer's authorization shall be verified by the service provider in accordance with subsection (g) of this section. Customer-initiated calls must comply with each of the authorization requirements of subsection (f) of this section but are exempt from the verification requirements of subsection (g) of this section.

(4) Combining customer authorization and verification of authorization. Customer authorization and verification of that authorization may be obtained in a single transaction provided the service provider complies with each requirement specified in subsections (f) and (g) of this section.

(5) Provide contact information. The service provider offering the product or service, and any billing agent for the service, shall provide the customer with a toll-free telephone number that the customer may call, and an address to which the customer may write, to resolve any billing dispute and to obtain answers to any questions.

(6) Provide business information. The service provider (other than the billing telecommunications utility) and its billing agent shall provide the billing telecommunications utility with its name, business address, and business telephone number.

(7) Obtain billing telecommunications utility authorization. The service provider and its billing agent shall execute a written agreement with the billing telecommunications utility to bill for products or services on the billing telecommunications utility's telephone bill. Record of this agreement shall be maintained by:

(A) the service provider;

(B) any billing agent for the service provider; and

(C) the billing telecommunications utility for as long as the billing for the product or service continues and for the 24 months immediately following the permanent discontinuation of the billing.

(e) Post-termination billing. A service provider shall not continue to bill for a product or service beyond the termination date for that product or service unless the service provider subsequently obtains customer authorization and verification of authorization pursuant to this section.

(f) Authorization requirements.

(1) All of the following information shall be provided in a clear and conspicuous manner in any communication with a customer to obtain authorization from that customer for an order of a product or service:

(A) the date of customer authorization;

(B) the name and telephone number of the customer;

(C) the exact name of the service provider as it will appear on the customer's bill;

(D) an explanation of each product or service offered;

(E) an explanation of all applicable charges;

(F) an explanation of how a product or service can be cancelled, including any charges associated with terminating the product or service;

(G) a description of how the charge will appear on the customer's telephone bill; and

(H) information on whom to call and a working, toll-free telephone number for customer disputes and inquiries.

(2) During any communication with a customer to obtain that customer's authorization for a product or service, after a sufficient inquiry to ensure that the customer is qualified to order the product or service and to authorize the billing, the service provider shall obtain the explicit customer acknowledgment that the charges will be assessed on the customer's telephone bill.

(3) Authorization from a customer, including that obtained from any customer-initiated conversation, for an order for a product or service shall be obtained by one or more of the following methods:

(A) Written or electronically signed documentation.

(i) Written or electronically signed authorization shall be a separate document containing only the information required by paragraph (1) and (2) of this subsection for the sole purpose of authorizing the charges for a product or service on the customer's telephone bill. A customer shall be provided the option of using another form of authorization in lieu of an electronically signed authorization.

(ii) The document shall be signed and dated by the customer. If the person who signs the document is an employee or agent with legal capacity to sign the document on behalf of the customer, the document shall include that person's printed name, and job title or other description of their relationship to the customer. Any electronically signed authorization shall include the customer disclosures required by the *Electronic Signatures in Global and National Commerce Act* §101(c).

(iii) The document shall not be combined with inducements of any kind on the same document, screen or webpage.

(iv) If any portion of the document, screen or webpage is translated into another language, then all portions of the document shall be translated into that language. Every document shall be translated into the same language as any promotional materials, oral descriptions, or instructions provided with the document, screen or webpage.

(B) Toll-free electronic authorization placed from the telephone number that is the subject of the order for the product or service, except in exchanges where automatic number identification (ANI) from the local switching system is not technically possible. The service provider must:

(i) ensure that the electronic authorization confirms the information required by paragraphs (1) and (2) of this subsection for the sole purpose of authorizing the charges for a product or service on the customer's telephone bill; and

(ii) Automated systems shall provide customers the option of speaking with a live person at any time during the call.

(C) Voice recording by service provider.

(i) The recorded conversation with a customer shall be in a clear, easy-to-understand, slow, and deliberate manner and shall contain the information required by paragraphs (1) and (2) of this subsection.

(ii) The recording shall be clearly audible.

(iii) The recording shall include the entire and actual conversation with the customer on audio tape, a wave sound file, or other recording device that is compatible with the commission's equipment.

(iv) The recording shall be dated and include clear and conspicuous confirmation that the customer consented to recording the conversation and authorized the charges for a product or service on the customer's telephone bill.

(D) Any other method of authorization approved by the FCC.

(g) Verification requirements.

(1) Verification of a customer's authorization for an order of a product or service must include:

(A) the date of customer authorization;

(B) the date of customer verification of authorization;

(C) the name and telephone number of the customer; and

(D) the exact name of the service provider as it will appear on the customer's bill.

(2) Verification of a customer's authorization for an order of a product or service shall not include:

(A) an explanation of each offered product or service;

(B) an explanation of applicable charges;

(C) an explanation of how a product or service can be cancelled, including any charges associated with terminating the product or service;

(D) a description of how the charge will appear on the customer's telephone bill; or

(E) any discussion by the third party verifier of any incentives that were or may have been offered by the service provider.

(3) During any communication with a customer to verify that customer's authorization for a product or service, the independent third party verifier, or, as appropriate pursuant to subsection (d)(4) of this section, the sales representative, shall, after sufficient inquiry to ensure that the customer is authorized to order the product or service, obtain the explicit customer acknowledgment that charges for the product or service ordered by the customer will be assessed on the customer's telephone bill.

(4) Verification of authorization from a customer for an order for a product or service shall be obtained by one or more of the following methods:

(A) Written or electronically signed documentation.

(i) Written or electronically signed verification of authorization shall be a separate document containing only the information required by paragraphs (1) and (2) of this subsection for the sole purpose of verifying the authorization for a product or service on the customer's telephone bill. A customer shall be provided the option of using another form of verification in lieu of an electronically signed verification.

(ii) The document shall be signed and dated by the customer. Any electronically signed verification shall include the customer disclosures required by the *Electronic Signatures in Global and National Commerce Act* §101(c).

(iii) The document shall not be combined with inducements of any kind on the same document, screen or webpage.

(iv) If any portion of the document, screen or webpage is translated into another language, then all portions of the document shall be translated into that language. Every document shall be translated into the same language as any promotional materials, oral descriptions, or instructions provided with the document, screen or webpage.

(B) Toll-free electronic verification placed from the telephone number that is the subject of the product or service, except in exchanges where automatic number identification (ANI) from the local switching system is not technically possible. The service provider must:

(i) ensure that the electronic verification confirms the information required by paragraphs (1) and (2) of this subsection for the sole purpose of verifying the customer's authorization for a product or service on the customer's telephone bill; and

(ii) establish one or more toll-free telephone numbers exclusively for the purpose of verifying the customer authorization of charges for the product(s) or service(s) so that the customer calling the toll-free number(s) will reach a voice response unit or similar mechanism regarding the customer authorization for the product(s) or service(s) and automatically records the ANI from the local switching system.

(iii) Automated systems shall provide customers the option of speaking with a live person at any time during the call.

(C) Voice recording by service provider.

(i) The recorded conversation with a customer shall be in a clear, easy-to-understand, slow, and deliberate manner and shall contain the information required by paragraphs (1) and (2) of this subsection.

(ii) The recording shall be clearly audible.

(iii) The recording shall include the entire and actual conversation with the customer on audio tape, a wave sound file, or other recording device that is compatible with the commission's equipment.

(iv) The recording shall be dated and include clear and conspicuous confirmation that the customer consented to recording the conversation and authorized the charges for a product or service on the customer's telephone bill.

(D) Independent Third Party Verification. Unless the customer's authorization was obtained in a customer-initiated transaction with a certificated telecommunications utility for which the service provider has the appropriate documentation obtained pursuant to subsection (f) of this section:

(i) Verification shall be given to an independent and appropriately qualified third party with no participation by a service provider, except as provided in clause (vii) of this subparagraph.

(ii) Verification shall be recorded.

(iii) The recorded conversation with a customer shall contain explicit customer consent to record the conversation, be in a clear, easy-to-understand, slow, and deliberate manner and shall comply with each of the requirements of paragraphs (1) and (2)

of this subsection for the sole purpose of verifying the customer's authorization of the charges for a product or service on the customer's telephone bill.

(iv) The recording shall be clearly audible.

(v) The independent third party verification shall be conducted in the same language used in the sales transaction.

(vi) Automated systems shall provide customers the option of speaking with a live person at any time during the call.

(vii) A service provider or its sales representative initiating a three-way call or a call through an automated verification system shall disconnect from the call once a three-way connection with the third party verifier has been established unless the service provider meets the following requirements:

(I) the service provider files sworn written certification with the commission that the sales representative is unable to disconnect from the sales call after initiating a third party verification. Such certification should provide sufficient information describing the reason(s) for the inability of the sales agent to disconnect from the line after the third party verification is initiated. The service provider shall be exempt from this requirement for a period of two years from the date the certification was filed with the commission;

(II) the service provider seeking to extend its exemption from this clause must, before the end of the two-year period, and every two years thereafter, recertify to the commission its continued inability to comply with this clause.

(III) The independent third party verification shall immediately terminate if the sales agent of an exempt service provider, pursuant to subclause (I) of this clause, responds to a customer inquiry, speaks after third party verification has begun, or in any manner prompts one or more of the customer's responses.

(viii) The independent third party shall:

(I) not be owned, managed, directed or directly controlled by the service provider or the service provider's marketing agent;

(II) not have financial incentive to verify the authorization of charges; and

(III) operate in a location physically separate from the service provider or the service provider's marketing agent.

(ix) The recording shall include the entire and actual conversation with the customer on audio tape, a wave sound file, or other recording device that is compatible with the commission's equipment.

(x) The recording shall be dated and include clear and conspicuous confirmation that the customer authorized the charges for a product or service on the customer's telephone bill.

(5) Any other verification method approved by the FCC.

(6) A record of the verification required by subsection (d) of this section shall be maintained by the service provider offering the product or service for at least 24 months immediately after the verification was obtained from the customer.

(h) Expiration of authorization and verification of authorization. If a product or service is authorized and verified, but that product or service is not provisioned within 60 calendar days from the date of authorization, then both the authorization and verification of authorization are null and void. Accordingly, before the change may appear on the customer's bill, the service provider must obtain new authorization and verification of that new authorization in accordance with this section.

(i) Unauthorized charges.

(1) Responsibilities of the billing telecommunications utility for unauthorized charges. If a customer's telephone bill is charged for any product or service without both proper customer authorization and verification of authorization in compliance with this section, the telecommunications utility that billed the customer, on its knowledge or notification of any unauthorized charge, shall promptly, but not later than 45 calendar days after the date of the knowledge or notification of an unauthorized charge meet the following requirements:

(A) A billing utility shall:

(i) notify the service provider to immediately cease charging the customer for the unauthorized product or service;

(ii) remove the unauthorized charge from the customer's bill;

(iii) refund or credit to the customer all money that has been paid by the customer for any unauthorized charge, and if any unauthorized charge that has been paid is not refunded or credited within three billing cycles, shall pay interest at an annual rate established by the commission pursuant to §26.27 of this title (relating to Bill Payment and Adjustments) on the amount of any unauthorized charge until it is refunded or credited;

(iv) on the customer's request, provide the customer with all billing records under its control related to any unauthorized charge within 15 business days after the date of the removal from the customer's telephone bill;

(v) provide the service provider with the date the customer requested that the unauthorized charge be removed from the customer's bill and the dates of the actions required by clauses (ii) and (iii) of this subparagraph, and

(vi) maintain for at least 24 months a record of every customer who has experienced any unauthorized charge for a product or service on the customer's telephone bill and has notified the billing telecommunications utility of the unauthorized charge. The record shall contain for each alleged unauthorized charge and unauthorized charge:

(I) the name of the service provider that offered the product or service;

(II) the affected telephone number(s) and addresses;

(III) the date each customer requested that the billing telecommunications utility remove the unauthorized charge from the customer's telephone bill;

(IV) the date the unauthorized charge was removed from the customer's telephone bill; and

(V) the date the customer was refunded or credited any money that the customer paid for the unauthorized charges.

(B) A billing telecommunications utility shall not:

(i) suspend or disconnect telecommunications service to any customer for nonpayment of an unauthorized charge; or

(ii) file an unfavorable credit report against a customer who has not paid charges that the customer has alleged were unauthorized unless the dispute regarding the unauthorized charges is ultimately resolved against the customer. The customer shall remain

obligated to pay any charges that are not in dispute, and this paragraph does not apply to those undisputed charges.

(2) Responsibilities of the service provider for unauthorized charges. The service provider responsible for placing any unauthorized charge on a customer's telephone bill shall:

(A) immediately cease billing upon notice from the customer or the billing telecommunications utility for a product or service that a charge for such product or service has not been authorized by the customer;

(B) for at least 24 months following the completion of all of the steps required by paragraph (1)(A) of this subsection, maintain a record for every disputed charge for a product or service on the customer's telephone bill. Each record shall contain:

(i) the affected telephone number(s) and addresses;

(ii) the date the customer requested that the billing telecommunications utility remove the unauthorized charge from the customer's telephone bill;

(iii) the date the unauthorized charge was removed from the customer's telephone bill; and

(iv) the date that action was taken to refund or credit to the customer any money that the customer paid for the unauthorized charges; and

(C) not resubmit any unauthorized charge to the billing telecommunications utility for any past or future period.

(j) Notice of customer rights.

(1) Each notice provided as set out in paragraph (2) of this subsection shall also contain the billing telecommunications utility's name, address, and a working, toll-free telephone number for customer contacts.

(2) Every billing telecommunications utility shall provide the following notice, verbatim, to each of the utility's customers:
Figure: 16 TAC §26.32(j)(2)

(3) Distribution and timing of notice.

(A) Each billing telecommunications utility shall mail the notice as set out in paragraph (2) of this subsection to each of its residential and business customers within 60 calendar days after the effective date of this section, or by inclusion in the next publication of the utility's telephone directory following 60 calendar days after the effective date of this section. In addition, each billing telecommunications utility shall send the notice to new customers at the time service is initiated and on any customer's request.

(B) Every telecommunications utility that prints its own telephone directories shall print the notice in the white pages of such directories, in nine point print or larger, beginning with the first publication of the directories after 60 calendar days following the effective date of this section; thereafter, the notice must appear in the white pages of each telephone directory published by or for the telecommunications utility.

(4) Any bill sent to a customer from a telecommunications utility must include a statement, prominently located in the bill, that if the customer believes the bill includes unauthorized charges, the customer may contact: Public Utility Commission of Texas, PO Box 13326, Austin, Texas 78711-3326, (512) 936-7120 or toll-free in Texas at (888) 782-8477. Hearing and speech- impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

(5) Each billing telecommunications utility shall make available to its customers the notice as set out in paragraph (2) of this subsection in both English and Spanish as necessary to adequately inform the customer; however, the commission may exempt a billing telecommunications utility from the requirement that the information be provided in Spanish upon application and a showing that 10% or fewer of its customers are exclusively Spanish-speaking, and that the billing telecommunications utility will notify all customers through a statement in both English and Spanish, as an addendum to the notice, that the information is available in Spanish from the telecommunications utility, both by mail and at the utility's offices.

(6) The customer notice requirements in paragraphs (1) and (2) of this subsection may be combined with the notice requirements of §26.130(g)(3) of this title if all of the information required by each is in the combined notice.

(7) The customer notice requirements in paragraph (4) of this subsection may be combined with the notice requirements of §26.130(i)(4) of this title if all of the information required by each is in the combined notice.

(k) Complaints to the commission. A customer may file a complaint with the commission's Customer Protection Division (CPD) against a telecommunications utility for any reasons related to the provisions of this section.

(1) Customer complaint information. CPD may request, at a minimum, the following information:

(A) the customer's name, address, and telephone number;

(B) a brief description of the facts of the complaint;

(C) a copy of the customer's and spouse's legal signature; and

(D) a copy of the most recent phone bill and any prior phone bill that shows the alleged unauthorized product or service.

(2) Telecommunications utility's response to complaint. After review of a customer's complaint, CPD shall forward the complaint to the telecommunications utility. The telecommunications utility shall respond to CPD within 21 calendar days after CPD forwards the complaint. The telecommunications utility's response shall include the following:

(A) all documentation related to the authorization and verification of authorization used to charge the customer for the product or service; and

(B) all corrective actions taken as required by subsection (i) of this section, if the switch in service was not authorized and verified in accordance with subsections (f) and (g) of this section.

(3) Failure to provide thorough response. The proof of authorization and verification of authorization as required from the alleged unauthorized telecommunications utility pursuant to paragraph (2)(A) of this subsection must establish a valid authorized telecommunication utility charge as defined by subsections (f) and (g) of this section. Failure by the alleged unauthorized telecommunication utility to timely submit a response that addresses the complainant's assertions within the time specified in subsections (l)(1) and (2) and (k)(2) of this section establishes a violation of this rule.

(4) CPD investigation. CPD shall review all of the information related to the complaint and make a determination on whether or not the telecommunications utility complied with the requirements

of this section. CPD shall inform the complainant and the telecommunications utility of the results of the investigation and identify any additional corrective actions that may be required.

(l) Compliance and enforcement.

(1) Records of customer authorizations and verifications. A billing telecommunications utility or a service provider shall provide a copy of records maintained under the requirements of subsections (d),(f) and (g) of this section to the commission staff within 21 calendar days of a request for such records.

(2) Records of disputed charges. A billing telecommunications utility or a service provider shall provide a copy of records maintained under the requirements of subsection (i) of this section to the commission staff within 21 calendar days of a request for such records.

(3) Administrative penalties. If the commission finds that a billing telecommunications utility has violated any provision of this section, the commission shall order the utility to take corrective action, as necessary, and the utility may be subject to administrative penalties and other enforcement actions pursuant to PURA, Chapter 15 and § 22.246 of this title (relating to Administrative Penalties).

(4) Evidence. The rules of evidence as applied in a nonjury civil case in district court govern contested case hearings, including enforcement proceedings to enforce the provisions of this section, conducted by the State Office of Administrative Hearings, except that evidence inadmissible under those rules may be admitted if it meets the standards set out in Texas Government Code §2001.081. Such evidence may include, but is not limited to, one or more affidavits from a customer challenging the charge.

(5) If the commission finds that any other service provider or billing agent subject to PURA, Chapter 17, Subchapter D, or Chapter 64, Subchapter D, has violated any provision of this section or has knowingly provided false information to the commission on matters subject to PURA, Chapter 17, Subchapter D, or Chapter 64, Subchapter D, the commission shall order the service provider or billing agent to take corrective action, as appropriate, and the commission may enforce the provisions of PURA, Chapter 15 and §22.246 of this title, against the service provider or billing agent as if the service provider or billing agent were regulated by the commission.

(6) Certificate suspension, restriction or revocation. If the commission finds that a billing telecommunications utility or a service provider has repeatedly violated this section, and if consistent with the public interest, the commission may suspend, restrict, or revoke the registration or certificate of the telecommunications service provider, thereby denying the service provider the right to provide service in this state. The commission may not revoke a certificate of convenience and necessity of a telecommunications utility except as provided by PURA §54.008.

(7) Termination of billing and collection services. If the commission finds that a service provider or billing agent has repeatedly violated any provision of PURA, Chapter 17, Subchapter D, or Chapter 64, Subchapter D, the commission may order the billing utility to terminate billing and collection services for that service provider or billing agent.

(8) Coordination with Office of Attorney General. The commission shall coordinate its enforcement efforts regarding the prosecution of fraudulent, unfair, misleading, deceptive, and anticompetitive business practices with the Office of the Attorney General in order to ensure consistent treatment of specific alleged violations.

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 February 12, 2004.

TRD-200400973
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 936-7223

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 4. RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER D. DUAL CREDIT PARTNERSHIPS BETWEEN SECONDARY SCHOOLS AND TEXAS PUBLIC COLLEGES

19 TAC §4.83

The Texas Higher Education Coordinating Board proposes amendments to §4.83 concerning student eligibility requirements for dual credit courses. Specifically, proposed amendments to would add a definition of the Texas Assessment of Knowledge and Skills (TAKS).

Dr. Glenda O. Barron has determined that for each year of the first five years this section is in effect, there will not be any fiscal implication to state or local government as a result of enforcing or administering the rules.

Dr. Barron has also determined that for each year of the first five years this section is in effect, the public benefit anticipated as a result of administering these sections will be to update appropriate college readiness assessment requirements for dual credit students. There is no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Glenda O. Barron, Texas Higher Education Coordinating Board, 1200 East Anderson Lane, Austin, Texas 78752; Glenda.Barron@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under Texas Education Code, §§29.182, 29.184, 61.027, 61.076(J), 130.001(b)(3) - (4), 130.008, 130.090, and 135.06(d) which provides the Coordinating Board with the authority to regulate dual credit partnerships between secondary schools and public colleges.

The amendments affect Texas Education Code, §§61.05129.182, 29.184, 61.027, 1.076(J), 130.001(b)(3) - (4), 130.008, 130.090, and 135.06(d).

§4.83. Definitions.

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

(1) - (5) (No change.)

(6) Texas Assessment of Knowledge and Skills-The criterion-referenced assessment instruments required under Texas Education Code, §39.023, designed to assess essential knowledge and skills in reading, writing, mathematics, social studies, and science in grades three through twelve.

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 February 10, 2004.

TRD-200400901
Jan Greenberg
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: April 22, 2004
For further information, please call: (512) 427-6114

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PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 230. PROFESSIONAL EDUCATOR PREPARATION AND CERTIFICATION

SUBCHAPTER G. CERTIFICATION REQUIREMENTS FOR CLASSROOM TEACHERS

19 TAC §§230.191 - 230.194, 230.197, 230.199

The State Board for Educator Certification proposes amendments to the following sections of 19 TAC Chapter 230, Subchapter G: §230.191, relating to educator preparation required in all programs; §230.192, relating to the teacher certificate - elementary; §230.193, relating to the teacher certificate - secondary; §230.194, relating to the all-level teacher certificate in art, music, physical education, speech communications-theatre arts and theatre arts; §230.197, relating to vocational home economic certificates; and §230.199, relating to endorsements.

The proposed amendments to §§230.191-230.194, 230.197 and 230.199 and reflect new standards-based certificates approved by the State Board for Educator Certification (SBEC) and scheduled for implementation in fall 2004 and the replacement or elimination of certain certificates on or about September 1, 2005. Specifically, the new standards-based certificates are designed replace or eliminate the following certificates on or about September 1, 2005: Secondary Industrial Technology (grades 6-12), Vocational Home Economics (grades 6-12), Secondary Health (grades 6-12), Secondary Music (grades 6-12), All-Level Music (pre-kindergarten - grade 12), the Gifted and Talented Endorsement and the Vocational Occupation Orientation (grades 6-12). However, these certificates will remain valid and SBEC will not require holders of these certificates to obtain the corresponding new certificate(s). Educators who hold standard certificates in the areas slated for elimination on September 1, 2005 may renew the certificate upon completion of the requirements specified in 19 TAC Chapter 232, Subchapter R, Certificate Renewal and Continuing Professional Education Requirements. The proposed amendments allow for a one-year overlap of the superseded certificates and the new standards-based certificates, thus providing for the limited availability of current ExCET tests and certificates during the overlap period, 2004-2005.

The proposed amendments to §230.191-230.194, 230.197 and 230.199 delete from these sections those certificates replaced by new categories of classroom certificates beginning on September 1, 2003.

Steve Wright, Chief Financial Officer, State Board for Educator Certification, has determined for the first five-year period the proposed amendments are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments.

Lisa Patterson, Acting General Counsel, State Board for Educator Certification, has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the proposed amendments will be efficient and updated rules governing the assignment of public school educators. The purpose of the proposed amendments are to establish new standards-based certificates scheduled for implementation in fall 2004..

In accordance with Section 2001.022, Government Code, SBEC has determined that the proposed amendments will not impact local economies and, therefore, has not filed a request for a local employment impact statement with the Texas Workforce Commission.

There will be no affect to small or micro businesses.

If adopted, the proposed amendments would be a governmental action providing for the certification of a public school educator and regulating a school district's assignment of a holder of an educator certificate, which is a state-granted privilege, in accordance with Chapter 21, Subchapter B, Education Code, and therefore would not affect private real property under the Private Real Property Preservation Act in Government Code, Chapter 2007.

Comments regarding the proposed amendments may be submitted to Lisa Patterson, Acting General Counsel, State Board for Educator Certification, 4616 West Howard Lane, Suite 120, Austin, Texas 78728, or by e-mail at "lisa.patterson@sbec.state.tx.us."

The proposed amendments to §§230.191-230.194, 230.197 and 230.199 are proposed under the statutory authority of the following Education Code sections: Section 21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; and Section 21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; and Section 21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued.

No other statutes, articles, or codes are affected by the proposed amendments.

§230.191. Preparation Required in All Programs.

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

(c) The teacher education program shall include academic specializations and teaching fields in subjects approved to be taught in the public schools of Texas or delivery systems authorized by the State Board of Education (SBOE) under the Texas Education Code (TEC) §28.002(b), for use in the public schools of Texas.

(1) In addition to the teaching certificates specified in this subchapter and Chapter 233 of this title, educator preparation entities operating as alternative certification programs under Texas Education Code (TEC) §21.049, relating to alternative certification, may recommend candidates for certification in the following areas: [~~Grades prekindergarten-6 elementary education, Grades prekindergarten-6 elementary bilingual,~~]Grades prekindergarten-12 English as a second language (ESL), and Grades prekindergarten-12 generic special education. The provisions of this paragraph expire on September 1, 2004. [~~The provisions of this paragraph related to the Grades prekindergarden-6 elementary education and the Grades prekindergarten-6 elementary bilingual certificates expire September 1, 2003.~~]

(2) For the teacher certificates, each academic specialization, teaching field, and delivery system shall comply with one or more of the options in this paragraph. In accordance with the Texas Education Code (TEC) §21.050(b), additional semester hours in education are permissible for certification in bilingual education, English as a second language, early childhood education, and special education.[~~For the teacher certificate-elementary, six semester hours of upper-division courses in reading shall be included in each option unless reading is selected as an academic specialization.~~] For all other certificates based on college-approved teacher education programs, reading shall be included in the approved program. Reading instruction shall be developmental and corrective and include study relating to the phonetic structure of the English language; knowledge of reading instruction such as language-based, phonics-based, and meaning-based instruction; demonstration and application of reading theories; and identification of and teaching strategies and resources for dyslexia and other reading disorders. Reading courses that fulfill these requirements may be offered beyond the 18 semester hours of professional development courses.

[~~(A) The options for teacher certificate-elementary include the following.~~]

~~*[(i)* Option I (Grades 1-6) requires:]~~

~~*[(I)* two 12-semester-hour (including six semester hours of upper-division courses in each area) academic specializations; and]~~

~~*[(II)* 12 semester hours in a combination of subjects taught in elementary grades. Six semester hours of upper-division courses in reading must be included unless reading is selected as an academic specialization.]~~

~~*[(ii)* Option II (Grades 1-8) requires:]~~

~~*[(I)* one 18-semester-hour (including nine semester hours of upper-division courses) academic specialization; and]~~

~~*[(II)* 18 semester hours in a combination of subjects taught in elementary grades. Six semester hours of upper-division courses in reading must be included unless reading is selected as the academic specialization.]~~

~~*[(iii)* Option III (Grades 1-8, except for the delivery system in generic special education that is valid for assignment to school settings with students identified as having special needs in prekindergarten - Grade 12) requires:]~~

~~*[(I)* one 24-semester-hour (including 12 semester hours of upper-division courses) delivery system or academic specialization in life-earth science, physical science, or social studies; and]~~

~~*[(II)* six semester hours in a combination of subjects taught in elementary grades and six semester hours of upper-division courses in reading.]~~

~~*[(iv)* Option IV (prekindergarten-Grade 6) requires:]~~

~~*[(I)* one 24-semester-hour (including 12 semester hours of upper-division courses) delivery system emphasizing instructional areas designed for early childhood education; and]~~

~~*(II)* six semester hours in a combination of subjects taught in elementary grades and six semester hours of upper-division courses in reading.~~

~~*[(v)* The provisions of this subparagraph expire on September 1, 2003.]~~

(A) [~~(B)~~] The options for teacher certificate-secondary include the following.

(i) Option I (Grades 6-12) requires one 36-semester-hour (including 21 semester hours of upper-division courses) teaching field, with an additional 12 semester hours in a directly supporting field(s).

(ii) Option II (Grades 6-12) requires two 24-semester-hour (including 12 semester hours of upper-division courses in each) teaching fields, delivery systems, or a combination of a teaching field and a delivery system.

(iii) Option III (Grades 6-12) requires one 48-semester-hour (including 24 semester hours of upper-division courses) broad teaching field.

(iv) Option IV (Grades 6-12) requires one 48-semester-hour (including 24 semester hours of upper-division courses, 12 of which are in a single area) composite teaching field. A minimum of six semester hours shall be required in each area.

(B) [~~(C)~~] The options for teacher certificate-all-level include the following.

(i) Option I (prekindergarten-Grade 12) requires one 48-semester-hour (including 24 semester hours of upper-division courses) academic specialization, which includes six semester hours designed for elementary level and six semester hours designed for secondary level.

(ii) Option II (prekindergarten-Grade 12) requires one 36-semester-hour (including 18 semester hours of upper-division courses) academic specialization, which includes six semester hours designed for elementary level and six semester hours designed for secondary level. Option II is only available for the physical education academic specialization.

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

§230.192. Teacher Certificate-Elementary.

The provisions of this section relating to the generic special education delivery system expire on September 1, 2004

Figure: 19 TAC §230.192

[~~(a) The teacher certificate-elementary shall be based upon completion of a teacher education program as described in §230.191 of this title (relating to Preparation Required in All Programs).~~]

[~~(b) Approved academic specializations and delivery systems are listed in the table in this subsection.~~]

[Figure:19 TAC §230.192(b)]

[(c) The provisions of this section expire on September 1, 2003, with the exception of the delivery system of generic special education.]

§230.193. Teacher Certificate-Secondary.

(a) The teacher certificate-secondary shall be based on completion of a teacher education program as described in §230.191 of this title (relating to Preparation Required in All Programs).

(b) Approved teaching fields and delivery systems are listed in the table in this subsection.
Figure: 19 TAC §230.193(b)

(c) The provisions of this section relating to the generic special education delivery system expire on September 1, 2004.

[(c) The provisions of this section expire on September 1, 2003, with the exception of the teaching fields and delivery systems in Art, Business, Dance, Generic Special Education, Health Education, Industrial Technology (formerly Industrial Arts), Journalism, Music, Other Languages, Physical Education, Speech Communications, and Theatre Arts.]

(d) The provisions of this section expire on September 1, 2005, with the exceptions of teaching fields in Art, Business, Dance, Journalism, Other Languages, Physical Education, Speech Communications and Theatre Arts

§230.194. Teacher Certificate-All-Level.

(a) The teacher certificate-all-level shall be based upon completion of a teacher education program as described in §230.191 of this title (relating to Preparation Required in All Programs). Areas of academic specialization for the teacher certificate-all-level shall be:

(1) art;

(2) music;

(3) physical education;

(4) speech communications-theatre arts; and

(5) theatre arts.

(b) The provisions in paragraph (2) of this section expire on September 1, 2005.

§230.197. Vocational Home Economics Certificates.

(a) - (e) (No change.)

(f) The provisions of this section expire on September 1, 2005.

§230.199. Endorsements.

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

(c) Program requirements for endorsement in delivery system areas.

[(1) Bilingual education.]

[(A) Certificate requirements. The bilingual education endorsement may be added to valid teacher certificates, special education certificates, or vocational certificates that require a college degree.]

[(B) Professional development. The professional development sequence for the bilingual education endorsement shall consist of:]

[(i) 12 semester hours at the graduate or undergraduate level earned after the bachelor's degree in the following areas:]

[(I) language acquisition and development in childhood (psycholinguistics);]

[(II) teaching language arts and reading in the language of the target population;]

[(III) teaching English as a second language, including reading and oral communication; and]

[(IV) teaching mathematics, science, and social studies in the language of the target population; and]

[(ii) one creditable year of successful classroom teaching experience on a permit in an approved bilingual education program.]

[(C) The provisions of this paragraph expire on September 1, 2003.]

[(2) Early childhood education (prekindergarten - kindergarten).]

[(A) Certificate requirements. The early childhood education endorsement may be added to valid elementary teacher certificates, special education certificates, or vocational home economics certificates that require a college degree.]

[(B) Professional development. The professional development sequence for the early childhood education endorsement shall consist of an integrated sequence of 12 semester hours, including studies of:]

[(i) child development including both normal and exceptional development;]

[(ii) communication skills emphasizing oral language development and literacy;]

[(iii) cultural diversity of learners and families;]

[(iv) organization of the classroom and management of the learning environment;]

[(v) management of student behavior;]

[(vi) organization of the curriculum and implementation of the essential knowledge and skills, adopted by the State Board of Education under the Texas Education Code (TEC), §28.002(c)-(d), at the appropriate level for the target population;]

[(vii) diagnosis and evaluation of learning needs, affective, cognitive, and motor; and]

[(viii) parental involvement.]

[(C) The provisions of this paragraph expire on September 1, 2003.]

[(3) Early childhood--handicapped.]

[(A) Certificate requirements. The early childhood-handicapped endorsement may be added to a valid Texas elementary certificate, teacher of young children certificate, special education certificate, all-level certificate, vocational home economics certificate that requires a bachelor's degree, or early childhood education or kindergarten endorsement.]

[(B) Professional development. The professional development sequence for the early childhood-handicapped endorsement shall consist of:]

[(i) nine semester hours including, but not limited to, studies of:]

[(I) infant/child development including both normal and exceptional development;]

~~[(II) communication skills emphasizing oral language development and literacy;~~]

~~[(III) cultural diversity of learners and families;~~]

~~[(IV) organization of the classroom and management of the learning environment;~~]

~~[(V) behavior management;~~]

~~[(VI) organization of the curriculum and implementation of the essential knowledge and skills at the appropriate level;~~]

~~[(VII) diagnosis and evaluation of learning needs, affective, cognitive, and motor; and~~]

~~[(VIII) parental involvement;~~]

~~[(ii) nine semester hours directly related to teaching students (ages 0-eight) with handicaps including, but not limited to:~~]

~~[(I) general orientation to special education;~~]

~~[(II) medical aspects of serving young children with handicaps;~~]

~~[(III) methods and technology;~~]

~~[(IV) transition from infant to early childhood programs; and~~]

~~[(V) interagency coordination~~]

~~[(C) ExCET requirement; Early Childhood (14).~~]

(1) [~~(4)~~] Generic special education.

(A) Certificate requirements. The generic special education endorsement may be added to any valid Texas elementary, secondary, all-level, special education, or vocational education certificate based on a bachelor's degree.

(B) Professional development. The professional development sequence for the generic special education endorsement shall consist of 18 semester hours directly related to teaching students with handicaps, including, but not limited to:

(i) infant/child and adolescent development;

(ii) task analysis;

(iii) motor development/adaptive physical education;

(iv) parent training;

(v) oral language development;

(vi) adaptation; modification of instructional methods and materials;

(vii) behavior management;

(viii) classroom management;

(ix) survey of special education;

(x) assessment, diagnosis, and remediation;

(xi) vocational, transition, and related secondary issues, such as interagency coordination;

(xii) concepts of integration and least restrictive environment;

(xiii) consultation techniques; and

(xiv) classroom observation

(C) ExCET requirement; Generic Special Education (37).

(D) The provisions of this paragraph expire on September 1, 2005.

(2) [~~(5)~~] Seriously emotionally disturbed and autistic.

(A) Certificate requirements. The seriously emotionally disturbed and autistic endorsement may be added to any valid Texas elementary, secondary, all-level, special education, or vocational education certificate based on a bachelor's degree.

(B) Professional development. The professional development sequence for the severely emotionally disturbed and autistic endorsement shall consist of:

(i) nine semester hours, including, but not limited to, studies of the following (Note: Personnel having a generic special education endorsement or delivery system are exempt from the nine semester hours described in this clause):

(I) infant/child and adolescent development;

(II) diagnosis and classroom assessment;

(III) behavior management;

(IV) parent training;

(V) consultation procedures;

(VI) communication/language development;

(VII) classroom management;

(VIII) survey of special education;

(IX) task analysis;

(X) motor development and adaptive physical education;

(XI) vocational, transition, and related secondary issues; and

(XII) crisis intervention and management of violent behavior;

(ii) nine semester hours directly related to teaching the seriously emotionally disturbed and autistic, including, but not limited to:

(I) medical aspects;

(II) interdisciplinary coordination;

(III) curriculum development;

(IV) systematic instruction; and

(V) classroom observation

(C) ExCET requirement: Severely Emotionally Disturbed and Autistic (38).

(D) The provisions of this paragraph expire on September 1, 2005.

(3) [~~(6)~~] Severely and profoundly handicapped.

(A) Certificate requirements. The severely and profoundly handicapped endorsement may be added to any valid Texas elementary, secondary, all-level, special education, or vocational education certificate based on a bachelor's degree.

(B) Professional development. The professional development sequence for the severely and profoundly handicapped endorsement shall consist of:

(i) nine semester hours, including, but not limited to studies of the following (Note: Personnel having a generic special education endorsement or delivery system are exempt from the nine semester hours described in this clause):

(I) infant/child and adolescent development;

(II) task analysis;

(III) parent training;

(IV) motor development/adaptive physical education;

(V) oral language development;

(VI) behavior management;

(VII) classroom management;

(VIII) assessment/diagnosis;

(IX) secondary issues such as vocation preparation and transition, such as collaboration with other agencies;

(X) crisis intervention and management of violent behavior;

(XI) consultation techniques;

(XII) concepts of integration and least restrictive environment; and

(XIII) use of adaptive/assistance devices;

(ii) nine semester hours directly related to teaching the severely and profoundly handicapped, including, but not limited to:

(I) medical aspects;

(II) interdisciplinary coordination;

(III) curriculum development;

(IV) systematic instruction; and

(V) classroom observation

(C) ExCET requirement: Severely and Profoundly Handicapped (37).

(D) The provisions of this paragraph expire on September 1, 2005.

(4) [~~(7)~~] Visually handicapped.

(A) Certificate requirement. The visually handicapped endorsement may be added only to special education certificates or to elementary or secondary teacher certificates.

(B) Professional development. The professional development sequence for the visually handicapped endorsement shall consist of: 21 semester hours directly related to teaching the visually handicapped that must include, but need not be limited to:

(i) physiological, psychological, and social factors of blindness;

(ii) literary braille (grade II);

(iii) special braille notations (including nemeth code, braille music, scientific notation, formal and foreign language);

(iv) media, materials, and adaptations;

(v) methods of instruction (including low vision, orientation and mobility, vocational and career exploration, and mulitihandicapped);

(vi) assessment and programming;

(vii) intervention and parent training; and

(viii) survey of exceptional children

(C) ExCET requirement: Visually Handicapped.

(5) [~~(8)~~] Gifted and talented.

(A) Certificate requirement. The all-level gifted and talented endorsement may be added to a valid initial teacher certificate that requires a college degree.

(B) Professional development. The professional development sequence for the gifted and talented endorsement shall consist of 12 semester hours to include, but not limited to, the following areas:

(i) nature and needs of the gifted and talented;

(ii) identification and assessment of gifted and talented students;

(iii) methods, materials, and curriculum for gifted and talented students;

(iv) counseling and guidance of gifted and talented students; and

(v) creativity: theories, models, and applications; and

(C) The provisions of this paragraph expire on September 1, 2005.

(d) Program requirements for endorsements in special service areas.

(1) English as a second language (ESL).

(A) Certificate requirement. The ESL endorsement may be added to valid teacher certificates, special education certificates, or vocational education certificates that require a college degree.

(B) Professional development. The professional development sequence for the ESL endorsement shall consist of 12 semester hours, including:

(i) language acquisition and development (psycholinguistics);

(ii) methods of teaching ESL; and

(iii) descriptive/contrastive linguistics.

(C) The provisions of this paragraph expire on September 1, 2005.

[~~(2) Learning resources.~~]

[~~(A) Certificate requirement. The learning resources endorsement may be added to valid teacher certificates, special education certificates, or vocational education certificates that require a college degree.~~]

[~~(B) Professional development. The professional development sequence for the learning resources endorsement shall consist of 18 semester hours (including 12 semester hours of upper-division courses) that include the following areas:~~]

[~~(i)~~ ~~selection, evaluation, and acquisition of materials in all formats, including multicultural, multiethnic, and multimedia materials;~~]

[*(ii)* processing and organization of a unified collection of materials;]

[*(iii)* instructional design and development;]

[*(iv)* learning resources center organization and administration;]

[*(v)* local production of instructional materials;]

[*(vi)* instructional materials for children and young adults and utilization practices including computer hardware and software; and]

[*(vii)* reference and bibliography.]

[(C) The provisions of this paragraph expire on September 1, 2003.]

[(3) Information processing technologies.]

[(A) Certification requirement. The information processing technologies endorsement may be added to valid teacher certificates, special education certificates, or vocational education certificates that require a college degree.]

[(B) Professional development, level one. The professional development sequence for the information processing technologies, level one endorsement shall:]

[*(i)* consist of at least nine semester hours (six semester hours upper-division courses) directly related to information processing; and]

[*(ii)* include, but not be limited to, the following content:]

[*(I)* background information concerning information processing technology and its use in education (including at least terminology, applications, ethics, impact on society and education, hardware configurations, future trends, historical development, and basic system architecture);]

[*(II)* operational skills and familiarity with current information processing tools (including at least tools used for word processing; information storage, retrieval and display; numerical computation, analysis, planning and reporting; transmission of information; graphics production and display; design and manufacturing; and emerging information processing tasks);]

[*(III)* methodology for instruction in concepts and skills of information processing (including at least strategies for delivery of concepts and skills, mastery evaluation techniques, methods of modifying curriculum for special students, automated management strategies, teaching methods for keyboarding instruction, techniques for evaluation of software and courseware, and facility management and maintenance); and]

[*(IV)* modern programming with experience in at least one language (including at least experience in solving problems using computer programming; application of a program development cycle; program structure, modular design and style; and in-depth coverage of syntax, format, and common use of one primary high-level programming language).]

[(C) Professional development, level two. The professional development sequence for the information processing technologies, level two endorsement shall:]

[*(i)* consist of at least 15 semester hours (six semester hours upper-division courses) directly related to information processing; and]

[*(ii)* include, but not be limited to, the following content:]

[*(I)* background information concerning information processing technology and its use in education (including at least terminology, applications, ethics, impact on society and education, hardware configurations, future trends, historical development, and basic system architecture);]

[*(II)* operational skills and familiarity with current information processing tools (including at least tools used for word processing; information storage, retrieval and display, numerical computation, analysis, planning and reporting; transmission of information; graphics production and display; design and manufacturing; and emerging information processing tasks);]

[*(III)* methodology for instruction in concepts and skills of information processing (including at least strategies for delivery of concepts and skills, mastery evaluation techniques, methods of modifying curriculum for special students, automated management strategies, teaching methods for keyboarding instruction, techniques for evaluation of software and courseware, and facility management and maintenance);]

[*(IV)* modern programming with experience in at least two languages (including at least experience solving problems using computer programming; application of a program development cycle; program structure, modular design and style; in-depth coverage of syntax, format and common uses of one primary high-level programming language; and contrast of a second programming language with the first); and]

[*(V)* technology-based delivery and management of instruction (including at least techniques and concepts of technology-based instruction, systems for automated management of instruction, comprehensive systems, involving both delivery and management, educational applications of artificial intelligence, authoring systems, multitechnology instructional systems, and survey of other promising technology-based systems).]

[(D) The provisions of this paragraph expire on September 1, 2003.]

(2) [(4)] Driver education. An endorsement will be issued upon evidence of completion of requirements specified in 19 TAC Chapter 75, Subchapter AA, Commissioners Rules Concerning Driver Education, §75.1002 Driver Education Teachers.

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 February 12, 2004.

TRD-200400989
Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 238-3280

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SUBCHAPTER M. CERTIFICATION OF EDUCATORS IN GENERAL

19 TAC §230.413

The State Board for Educator Certification proposes an amendment to 19 TAC §230.413, relating to the general requirements for certificates issued by the State Board for Educator Certification.

The proposed amendment to §230.413 provides that qualification for a new credential, the temporary teacher certificate, satisfies one element of the general requirements for certification as a Texas educator.

Steve Wright, Chief Financial Officer, State Board for Educator Certification, has determined for the first five-year period the proposed amendment is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendment.

Lisa Patterson, Acting General Counsel, State Board for Educator Certification, has determined that for each year of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the proposed amendment will be the elimination of barriers to certification and an increase in the number of individuals eligible for employment as Texas public school educators.

In accordance with Section 2001.022, Government Code, SBEC has determined that the proposed amendment will not impact local economies and, therefore, has not filed a request for a local employment impact statement with the Texas Workforce Commission.

There will be no affect to small or micro businesses.

If adopted, the proposed amendment would be a governmental action providing for the certification of a public school educator and regulating a school district's assignment of a holder of an educator certificate, which is a state-granted privilege, in accordance with Chapter 21, Subchapter B, Education Code, and therefore would not affect private real property under the Private Real Property Preservation Act in Government Code, Chapter 2007.

Comments regarding the proposed amendment may be submitted to Lisa Patterson, Acting General Counsel, State Board for Educator Certification, 4616 West Howard Lane, Suite 120, Austin, Texas 78728, or by e-mail at "lisa.patterson@sbec.state.tx.us."

The proposed amendment to §230.413 is proposed under the statutory authority of the following Education Code sections: Section 21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; and Section 21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; and Section 21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued.

No other statutes, articles, or codes are affected by the proposed amendments.

§230.413. General Requirements.

(a) (No change.)

(b) An applicant for a Texas educator certificate must:

(1) be at least 18 years of age;

(2) not be disqualified or the subject of a pending proceeding under Chapter 249 of this title, (relating to Disciplinary Proceedings, Sanctions, and Contested Cases, Including Enforcement of the Educator's Code of Ethics;

(3) not be disqualified by federal law;

(4) be willing to support and defend the constitutions of the United States and Texas;

(5) be able to speak and understand the English language sufficiently to use it easily and readily in conversation and teaching. English language proficiency may be evidenced by one of the following:

(A) completion of an undergraduate or graduate degree at an institution of higher education in the United States;

(B) if an undergraduate or graduate degree was earned at an institution of higher education outside of the United States, evidence must be provided under procedures approved by the executive director that the primary language of instruction was English;

(C) completion of a state-approved educator preparation program within the United States;

(D) verification of three creditable years of teaching experience as defined in Subchapter Y of this title (relating to Definitions), in an educational setting within the United States or, if the experience was earned in an educational setting outside of the United States, evidence under procedures approved by the executive director that the primary language of instruction was English; or

(E) verification of satisfactory scores on an English language proficiency exam(s) approved by the executive director of SBEC;

(6) successfully complete all appropriate examinations prescribed in §230.5 of this chapter (relating to Educator Assessment) for the educator certificate sought; and

(7) satisfy one or more of the following requirements:

(A) complete all academic requirements specified in Subchapters G, J, or S of this chapter (relating to Certification Requirements for Classroom Teachers, Certification Requirements for Educators Other Than Classroom Teachers and Educational Aides, and Educational Aide Certificate) or complete all requirements for the certificates specified in Chapter 233 of this title (relating to Categories of Classroom Teaching Certificates) and be recommended for certification through an approved educator preparation program;

(B) qualify under Subchapter O of this chapter (relating to Texas Educator Certificates Based on Certification and College Credentials from Other States or Territories of the United States;

(C) qualify under §230.437 of this title (relating to Issuance of Certificates Based on Examination);

(D) qualify for vocational education certificates based on skill and experience specified in Subchapter P of this chapter (relating to Requirements for Standard Certificates and Specialized Assignments or Programs); or

(E) qualify under Chapter 245 of this title (relating to Certification of Educators from Other Countries).

(F) qualify for certification under §232.5 of this title (relating to General Requirements Applicable to all certificates issued, types and classes of certificates).

(c) - (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 February 12, 2004.

TRD-200400990
Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 238-3280

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SUBCHAPTER N. CERTIFICATE ISSUANCE PROCEDURES

19 TAC §230.435

The State Board for Educator Certification (SBEC) proposes an amendment to §230.435, relating to fees for certification services. The proposed amendments to §230.435 would place an educator on inactive status for failure to pay all related certification fees or for submitting a check that is not honored by the educator's financial institution. The amendments would further establish a 60 day timeline by which the educator must pay the full certification fee and any related processing fees or face having the certificate placed on inactive status. The inactive status would be reflected on the Official Record of Educator Certificates on the SBEC website and would render the certificate holder ineligible for employment in Texas public schools. The certificate would be reactivated after receipt of full payment of all applicable fees.

The proposed amendments to §230.435 is based on the fiscal impact to the agency and the State of Texas that applicants' failure to pay for certification services has on the revenues collected by SBEC.

Steve Wright, Chief Financial Officer, State Board for Educator Certification, has determined that, for the first five-year period the proposed amendment is in effect, enforcing or administering the proposed amendments could assist in the collection of as much as $40,000 worth of dishonored check fees over the five year period, based on historical trends.

Lisa Patterson, Acting General Counsel, State Board for Educator Certification, has determined that, for each year of the first five years the proposed amendment is in effect, the public benefits by requiring applicants for certification to pay for certification services rendered by SBEC, thereby reducing the financial losses experienced by the state due to the nonpayment of required fees.

In accordance with Section 2001.022, Government Code, SBEC has determined that the proposed amendment will not impact local economies and, therefore, the agency has not filed a request for a local employment impact statement with the Texas Workforce Commission.

Implementation of the proposed amendment will not affect small or micro businesses.

If adopted, the proposed amendment would be a governmental action regulating issuance of an educator certificate, a statutory privilege, and a governmental action regulating a permit fee paid by a public school to SBEC for a certificate issued by SBEC under Chapter 21, Subchapter B, Education Code, and therefore would not affect private real property under the Private Real Property Preservation Act (Chapter 2007, Government Code).

Comments regarding the proposed amendments may be submitted to Lisa Patterson, Acting General Counsel, State Board for Educator Certification, 4616 West Howard Lane, Suite 120, Austin, Texas 78728, by facsimile transmission at (512) 238-3201, or by e-mail at "lisa.patterson@sbec.state.tx.us."

The amendment is proposed under the statutory authority of the following sections of the Education Code: §21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; §21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued; §21.041(b)(3), which requires SBEC to specify the period for which each class of educator certificate is valid; §21.041(b)(4), which requires SBEC to specify the requirements for the issuance and renewal of an educator certificate; and §21.042, which requires SBEC to submit proposed rules to the State Board of Education for review prior to adoption.

No other statutes, articles, or codes are affected by the proposed amendments.

§230.435. Fees for Certification Services.

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

(c) The certificate of an applicant who does not pay the applicable certification fee, either by failing to remit full payment or by sending a check that is dishonored, shall be placed on inactive status if the applicant does not pay the full certification fee and any related processing fees within 60 calendar days from the date the notice of payment deficiency is sent to the applicant. The inactive status of a certificate will render the certificate holder ineligible for employment in Texas public schools. A certificate placed on inactive status in accordance with the provisions of this subsection will be returned to active status upon receipt of full payment of all applicable fees.

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 February 12, 2004.

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Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 238-3280

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19 TAC §230.436

The State Board for Educator Certification proposes amendments to 19 TAC §230.436, relating to the schedule of fees for certification services provided by the State Board for Educator Certification.

The proposed amendment to §230.436 establishes a fee of $50 for a temporary certificate based on a recommendation by an

approved teacher preparation entity or a Texas public school district. The proposed amendment also establishes a $175 fee for the review of credentials requiring the analysis and research of college and university transcripts and degrees for the issuance of a new credential, the temporary teacher certificate.

Steve Wright, Chief Financial Officer, State Board for Educator Certification, has determined that for the first five year period the proposed amendments are in effect, there could be significant fiscal impact to state government as a result of enforcing or administering the rule.

While this proposed amendment may appear to be self-funded at the state level with respect to generating revenue to administer this rule at SBEC, the "hard cap" of SBEC's expenditure budget set by the legislature does not currently allow for the flexibility to pay for testing candidates above the number of historical test takers. Similarly, additional certification revenue, if any, generated by this proposal, does not translate into additional expenditure flexibility by this agency, if there are additional costs with respect to issuing certificates to the population served by this rule. There fore, any additional revenue generated by this bill would benefit of the state as a whole, and not necessarily benefit the teaching community to pay the bills of the agency tasked with administering the rule, unless budget flexibility was granted through other means.

Another potential financial risk to the state is that permit revenue could decline significantly, if school districts utilize this alternate route to certification en masse. Mr. Wright has not made an assessment of the potential number of candidates that this proposal will generate.

Mr. Wright has not attempted to poll or analyze local governments, such as school districts with respect to impact to those units of government. School districts and other parties may offer separate testimony on such issues such as the cost of providing extra mentoring and other services for this population.

Lisa Patterson, Acting General Counsel, State Board for Educator Certification, has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the proposed amendments will be the elimination of barriers to certification and an increase in the number of individuals eligible for employment as Texas public school educators.

In accordance with Section 2001.022, Government Code, SBEC has determined that the proposed amendments rule will not impact local economies and, therefore, has not filed a request for a local employment impact statement with the Texas Workforce Commission.

There will be no affect to small or micro businesses.

If adopted, the proposed rule would be a governmental action regulating a permit fee paid by a public school to SBEC, in accordance with Chapter 21, Subchapter B, Education Code, and therefore would not affect private real property under the Private Real Property Preservation Act in Government Code, Chapter 2007.

Comments regarding the proposed amendments may be submitted to Lisa Patterson, Acting General Counsel, State Board for Educator Certification, 4616 West Howard Lane, Suite 120, Austin, Texas 78728, or by e-mail at "lisa.patterson@sbec.state.tx.us."

The proposed amendment to §230.436 is proposed under the statutory authority of Section 21.041(c), Education Code, which provides that SBEC shall propose rules adopting a fee for the issuance and maintenance of an educator certificate, including an emergency permit, that is adequate to cover the costs of administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter.

No other statutes, articles, or codes are affected by the proposed amendments.

§230.436. Schedule of Fees for Certification Services.

An applicant for a certificate or a school district requesting a permit shall pay the applicable fee from the following list.

(1) Standard Educational Aide certificate--$30.

(2) Standard certificate, additional specialization, teaching field, or endorsement/delivery system, based on recommendation by an approved teacher preparation entity or State Board for Educator Certification authorization; or extension or conversion of certificate--$75.

(3) Probationary certificate based on recommendation by an approved teacher preparation entity or Texas public school district--$50.

(4) Duplicate of certificate or change of name on certificate--$45.

(5) Addition of certification based on completion of appropriate examination--$75.

(6) Review of a credential issued by a jurisdiction other than Texas (nonrefundable)--$175.

(7) Temporary credential based on a credential issued by a jurisdiction other than Texas--$50.

(8) Initial permit, reassignment on permit with a change in assignment or school district, renewal is for nonconsecutive years, or renewal of permit on a hardship basis (nonrefundable)--$55.

(9) Renewal in the school district of a permit at the same target certificate level and initial activation, or renewal in the same school district of a temporary classroom assignment permit--no fee.

(10) National criminal history check for all first-time applicants for credentials--$45.

(11) Temporary certificate based on recommendation by an approved teacher preparation entity or Texas public school district--$50.

(12) Review of an credentials requiring analysis and research of college or university transcript and degrees for issuance of a temporary certificate (nonrefundable)--$175.

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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SUBCHAPTER P. REQUIREMENTS FOR STANDARD CERTIFICATES AND SPECIALIZED ASSIGNMENTS OR PROGRAMS

19 TAC §§230.482 - 230.484

The State Board for Educator Certification proposes amendments to the following section of 19 TAC Chapter 230, Subchapter P: §230.482, relating to specific requirements for standard certificates and endorsements; §230.483, relating to specific requirements for standard career and technology certificates based on experience and preparation in skill areas; §230.484, relating to eligibility requirements for specialized assignments or programs.

The proposed amendments to §§230.482 - 230.484 reflect new standards-based certificates approved by the State Board for Educator Certification (SBEC) and scheduled for implementation in fall 2004, and the replacement or elimination of certain certificates on or about September 1, 2005. Specifically, the new standards-based certificates are designed replace or eliminate the following certificates on or about September 1, 2005: Secondary Industrial Technology (grades 6-12), Vocational Home Economics (grades 6-12), Secondary Health (grades 6-12), Secondary Music (grades 6-12), All-Level Music (pre-kindergarten-grade 12), the Gifted and Talented Endorsement and the Vocational Occupation Orientation (grades 6-12). However, these certificates will remain valid and SBEC will not require holders of these certificates to obtain the corresponding new certificate(s). Educators who hold standard certificates in the areas slated for elimination on September 1, 2005 may renew the certificate upon completion of the requirements specified in 19 TAC Chapter 232, Subchapter R, Certificate Renewal and Continuing Professional Education Requirements. The proposed amendments allow for a one-year overlap of the superseded certificates and the new standards-based certificates, thus providing for the limited availability of current ExCET tests and certificates during the overlap period, 2004-2005.

The proposed amendments to §§230.482 - 230.484 delete from these sections those requirements for certificates replaced by new categories of classroom certificates beginning on September 1, 2003 and add language to allow holders of any Career and Technology Education certificate to be assigned to teach Career Investigation/Career Connections courses upon completion of additional training.

Steve Wright, Chief Financial Officer, State Board for Educator Certification, has determined for the first five-year period the proposed amendments are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments.

Lisa Patterson, Acting General Counsel, State Board for Educator Certification, has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the proposed amendment will be efficient and updated rules governing the assignment of public school educators. The purpose of the proposed amendment is to establish new standards-based certificates scheduled for implementation in fall 2004.

In accordance with Section 2001.022, Government Code, SBEC has determined that the adopted rule will not impact local economies and, therefore, has not filed a request for a local employment impact statement with the Texas Workforce Commission.

There will be no affect to small or micro businesses.

If adopted, the proposed amendments would be a governmental action providing for the certification of a public school educator and regulating a school district's assignment of a holder of an educator certificate, which is a state-granted privilege, in accordance with Chapter 21, Subchapter B, Education Code, and therefore would not affect private real property under the Private Real Property Preservation Act in Government Code, Chapter 2007.

Comments regarding the proposed amendments may be submitted to Lisa Patterson, Acting General Counsel, State Board for Educator Certification, 4616 West Howard Lane, Suite 120, Austin, Texas 78728, or by e-mail at "lisa.patterson@sbec.state.tx.us."

The proposed amendments to §§230.482 - 230.484 are proposed under the statutory authority of the following Education Code sections: Section 21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; and Section 21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; and Section 21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued.

No other statutes, articles, or codes are affected by the proposed amendments.

§230.482. Specific Requirements for Standard Certificates and Endorsements.

(a) The following certificates require completion of an approved educator preparation program offered under Subchapter G of this chapter (relating to Program Requirements for Preparation of School Personnel for Initial Certificates and Endorsements):

~~[(1) standard classroom teacher certificate--elementary;]~~

(1) [~~(2)~~] standard classroom teacher certificate--secondary;

(2) [~~(3)~~] standard classroom teacher certificate--all level;

(3) [~~(4)~~] standard special education certificates;

(4) [~~(5)~~] standard agricultural science and standard horticultural science certificates; and

(5) [~~(6)~~] standard home economics certificate.

(b) - (c) (No change.)

(d) The provisions of subsection (a), paragraph (5) of this section shall expire on September 1, 2005.

§230.483. Specific Requirements for Standard Career and Technology Certificates Based on Experience and Preparation in Skill Areas.

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

(d) Standard occupational orientation certificate.

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

(4) The provisions of this subsection expire on September 1, 2005

(e) - (g) (No change.)

(h) Teachers assigned to Career Investigations and Career Connections

(1) Teachers assigned to Career Investigations/Career Connections must hold a teacher certificate in any of the Career and Technology program areas, and shall participate in a Texas Education Agency approved two-hour workshop for beginning Career Investigation/Career Connections teachers prior to teaching the course.

(2) Teachers assigned to Career Investigations/Career Connections must also attend and participate in a Texas Education Agency sponsored Career and Technology Education Professional Development Conference prior to assignment.

§230.484. Eligibility Requirements for Specialized Assignments or Programs.

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

(d) Requirements for eligibility to teach in specialized assignments or programs shall be as follows.

(1) Vocational adjustment class.

(A) An individual must hold a valid Texas teaching certificate with special education endorsement, special education certificate, or a generic special education delivery system.

(B) An individual must have completed 60 clock hours of in-service training resulting in a certificate of completion and attendance from the in-service provider. The 60 clock hours of in-service training must include the following.

(i) Job development and job analysis.

(I) Job development. This session will include methods for screening the community job market, contacting employers, developing agreements with employers, developing training and employment sites for on-campus work experience and community-based employment (full- and part-time), and information about current employment laws.

(II) Job analysis. This session will include methods for conducting a detailed analysis of the requirements for a specific job. The analysis will include interviewing the employer and coworkers, observing someone performing the job, and possibly performing the job.

(ii) Student assessment and job match.

(I) Student assessment. This session will include introducing, selecting, and appropriately using available test instruments.

(II) Formal and informal approaches. This session will present methods of interpreting comprehensive vocational assessment data and alternative methods of evaluation, both formal and informal.

(III) Job match. This session will include techniques for matching a potential employee to the appropriate job. Using vocational assessment data, related student information, student behavior, employer expectations, and job requirements (job analysis) will be included. Related issues, such as location of the job site, training, and transportation will be addressed.

(iii) Job placement and job site training.

(I) Job placement. This session will include preparing the student and the employer/coworkers for introductions, interviews, and work place orientation. Related issues, such as services from other agencies, employer benefits, and tax credits will be addressed.

(II) Job site training. This session will include the techniques of indirect and direct instruction provided to a student placed on the job. Methods will include working with the employer during the training period, performing as or supervising a job coach, task analyzing the requirements of the job, developing a job site training plan, and managing behavior.

(iv) Sustaining employment. This session will include the skills and behaviors necessary for sustaining employment, methods of reducing direct instruction by school personnel, and transferring training responsibilities to an adult service provided for extended services. Special attention will be given to the generic work-related behaviors critical to getting and keeping a job.

(v) Follow-along and transition.

(I) Follow-along. This session will include the methods for ongoing evaluation of student progress, problem solving and intervention strategies, planning for graduation, follow-up of students who no longer receive direct instruction, and identifying effective procedures for long term follow-up of program graduates to evaluate the program's effectiveness.

(II) Transition. This session will include the process of helping a student make a smooth transition from school to adult life. Individual transition plans (ITP), parental involvement, and information about the services and responsibilities of other agencies that provide services to persons with disabilities will be included.

(C) Teachers assigned to this instructional arrangement before September 1, 1990, will not be required to satisfy the new criteria.

(D) Teachers assigned to this instructional arrangement after September 1, 1990, will have three years from the date of assignment to complete the new criteria.

(2) Agricultural science and technology.

(A) Horticulture. Eligibility to teach horticulture shall require a valid standard certificate for horticultural sciences. No additional course or workshop shall be required for assignment to preemployment laboratory education (PELE) or vocational education for the handicapped programs (VEH) in horticulture.

(B) Cooperative training programs. Eligibility to teach cooperative training programs shall require a valid provisional certificate for agricultural science and one of the following:

(i) a workshop sponsored by the Texas Education Agency (TEA) that is designed to provide specialized training for teachers assigned to implement and conduct cooperative training programs; or

(ii) three semester hours of agriculture education in the area of the special agricultural science and technology program.

(C) Preemployment laboratory education and VEH. Eligibility to teach PELE or VEH shall require a valid Texas certificate for agricultural science and one of the following:

(i) a workshop sponsored by the TEA that is designed to provide specialized training for teachers assigned to teach preemployment; or

(ii) six semester hours of technical agriculture in the area of the special agricultural science and technology program.

(D) Courses and workshops. Agriculture education course work and workshops sponsored by the TEA shall be conducted by institutions approved for the preparation of agricultural science and technology teachers.

(E) Teachers assigned to Career Investigation and Career Connections must hold a teacher certification in any of the Career and Technology (CATE) program areas, and shall participate in a Texas Education Agency (TEA) approved two hour workshop for beginning Career Investigation / Career Connections teachers prior to teaching the course. Teachers must also attend and participate in a TEA sponsored CATE Professional Development Conference prior to assignment.

(3) Occupational home economics.

(A) Eligibility to teach occupational home economics shall require a valid certificate in home economics with an effective date of May 1, 1987, or later or a valid certificate in home economics plus one of the following:

(i) six semester hours of home economics education, emphasizing an all industry approach, to build instructional competencies in occupational home economics; or

(ii) current eligibility to teach specialized areas of home economics through cooperative, preemployment, coordinated-vocational academic education (CVAE) or VEH instructional settings, plus three semester hours of home economics education, emphasizing an all industry approach, to build instructional competencies in occupational home economics.

(B) All courses in home economics education must be completed in an institution approved for professional educator preparation.

(C) Teachers assigned to Career Investigation and Career Connections must hold a teacher certification in any of the Career and Technology (CATE) program areas, and shall participate in a Texas Education Agency (TEA) approved two hour workshop for beginning Career Investigation / Career Connections teachers prior to teaching the course. Teachers must also attend and participate in a TEA sponsored CATE Professional Development Conference prior to assignment.

(D) The provisions of this paragraph expire on September 1, 2005.

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 232. GENERAL REQUIREMENTS APPLICABLE TO ALL CERTIFICATES ISSUED SUBCHAPTER A. TYPES AND CLASSES OF CERTIFICATES ISSUED

19 TAC §232.1, §232.5

The State Board for Educator Certification proposes amendments to 19 TAC §232.1, relating to the types of certificates issued by the State Board for Educator Certification. The State Board for Educator Certification adopts the following new section to Chapter 232: §232.5, relating to the creation of a temporary teacher certificate for grades 8 through 12.

The proposed amendments to §232.1 clarify the effective periods for certificates issued by the State Board for Educator Certification (SBEC).

The proposed §232.5 creates a new certificate to be issued by SBEC: the temporary teacher certificate. Specifically, the proposed new §232.5 creates an alternate route to certification for individuals meeting the following three (3) criteria:

(1.) The individual must possess a baccalaureate degree or advanced degree from an accredited institution of higher education with an academic major or interdisciplinary academic major, including reading, other than education, that is related to at least one area of the curriculum prescribed by Subchapter A, Chapter 28 of the Texas Education Code;

(2.) performs satisfactorily on the appropriate certification examinations prescribed under §21.048 of the Texas Education Code; and

(3.) passes a criminal history background check.

Proposed new §232.5 provides that an individual seeking to obtain a temporary teacher certificate shall pay a fee equal to that required of applicants for a probationary certificate issued by SBEC.

The holder of the temporary teacher certificate proposed in §232.5 may teach only grades 8-12 in a subject area of the curriculum in which the individual possesses an academic major. The temporary teacher certificate is valid for a term not to exceed two (2) academic years.

As proposed, §232.5 states that individuals possessing the temporary teacher credential may only be employed by a Texas public school district under a probationary contract, and employing school districts must provide holders of this credential with intensive support, mentoring and pre-service training during the individual's employment with the district, with guidelines for the support to be promulgated by SBEC's Executive Director.

Upon completion of two years of employment under the temporary teacher certificate, the holder of this credential may apply for a standard certificate issued by SBEC. In order to obtain the standard teaching certificate, the individual must meet the following requirements:

(1.) The individual held a temporary teacher certificate;

(2.) The individual was continuously employed as a teacher of record in a public school district for two academic years; and

(3.) The employing district must favorably review the person's performance and must base the review of the person's performance on the increase in achievement of those students which the person has had charge.

(4.) The employing school district is required to recommend the individual and provide evidence of intensive support to that person; however, the proposed rule §232.5 stipulates that the employing school district may require the holder of a temporary teacher certificate to complete a teacher training program.

Steve Wright, Chief Financial Officer, State Board for Educator Certification, has determined that for the first five year period the proposed amendments and new rules are in effect, that there could be significant fiscal impact to state government as a result

of enforcing or administering the proposed amendment and new rule.

While this proposed rule may appear to be self-funded at the state level with respect to the cost to the administrative costs to administer this rule at SBEC, the "hard cap" of SBEC's expenditure budget set by the legislature does not currently allow for the flexibility to pay for testing candidates above historical test takers. Similarly, additional certification revenue, if any, generated by this proposal, does not translate into additional expenditure flexibility by this agency, if there are additional costs with respect to issuing certificates to the population served by this rule.

Another potential financial risk to the state is that permit revenue could decline significantly, if school districts utilize this alternate route to certification en masse. Mr. Wright has not made an assessment of the potential number of candidates that this proposal will generate.

Mr. Wright has not attempted to poll or analyze local governments, such as school districts with respect to impact to those units of government. School districts and other parties may offer separate testimony on such issues such as the cost of providing extra mentoring and other services for this population.

Lisa Patterson, Acting General Counsel, State Board for Educator Certification, has determined that for each year of the first five years the proposed amendments and new rule are in effect, the public benefit anticipated as a result of enforcing the rules will be the elimination of barriers to certification and an increase in the number of individuals eligible for employment as Texas public school educators.

In accordance with Section 2001.022, Government Code, SBEC has determined that the proposed amendments and new rule will not impact local economies and, therefore, has not filed a request for a local employment impact statement with the Texas Workforce Commission.

There will be no affect to small or micro businesses.

If adopted, the proposed amendment and new rule would be a governmental action providing for the certification of a public school educator and regulating a school district's assignment of a holder of an educator certificate, which is a state-granted privilege, in accordance with Chapter 21, Subchapter B, Education Code, and therefore would not affect private real property under the Private Real Property Preservation Act in Government Code, Chapter 2007.

Comments regarding the proposed amendments may be submitted to Lisa Patterson, Acting General Counsel, State Board for Educator Certification, 4616 West Howard Lane, Suite 120, Austin, Texas 78728, or by e-mail at "lisa.patterson@sbec.state.tx.us."

The proposed amendments to §232.1 and the proposed new rule §232.5 are proposed under the statutory authority of the following Education Code sections: Section 21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; and Section 21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; and Section 21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued.

No other statutes, articles, or codes are affected by the proposed amendments.

§232.1. Types of Certificates.

(a) "Type of certificate" means a designation of the period of validity for a certificate and includes the following certificate designations:

(1) standard, as specified in §232.1(c) ;

(2) provisional, as specified in §232.1(b);

(3) professional, as specified in §232.1(b);

(4) one-year, as specified in §230 Subchapter O and §245;

(5) probationary, as specified in §232 Subchapter A and §232.4;

(6) temporary as specified in §232.5 and §230.305; and

(7) emergency, as specified in §230 Subchapter Q.

(b) - (c) (No change.)

§232.5. Temporary Teacher Certificates.

(a) A person may be temporarily certified to teach only in grade levels 8-12 if the person:

(1) holds a baccalaureate or advanced degree from an accredited institution of higher education received with an academic major or interdisciplinary academic major, including reading, other than education, that is related to at least one area of the curriculum as prescribed under Subchapter A, Chapter 28, Texas Education Code; and

(2) performs satisfactorily on the appropriate examinations prescribed under Section 21.048, Texas Education Code; and

(3) passes a criminal history background check by submitted fingerprints for review.

(b) A certificate issued under this section is valid for a term not to exceed two academic years.

(c) A person may receive a certificate to teach only in a subject area of the curriculum prescribed under Subchapter A, Chapter 28, in which the person holds a baccalaureate or advanced degree from an institution of higher education with an academic major related to that area of the curriculum. Guidelines for determining the academic major related to the current grades 8-12 certificate structure will be developed by the Executive Director.

(d) A person who applies for a temporary teaching certificate under this section shall pay a fee equal to that required of applicants for a probationary certificate.

(e) A person who holds a certificate under this section may be employed by a school district only if the person and the school district agree that the person will be employed under a probationary contract for each year of the person's employment with the district.

(f) A school district employing a person who holds a certificate issued under this section must provide the board with evidence that it will provide the person with intensive support during the person's employment with the district, including:

(1) mentoring in which the mentoring program is modeled on research-based mentoring and induction programs;

(2) pre-service training that addresses the following areas before the first day of the start of the student academic year and ongoing appropriate professional development must include, but not be limited to, the following areas:

(A) school policies and relevant state and federal law;

(B) instructional methods and strategies that emphasize practical applications of the teaching-learning processes,

(C) curriculum organization, planning, and evaluation, including the scope and sequence of the Texas Essential Knowledge and Skills in the subject area in which the teacher holds a certificate, and

(D) basic principles and procedures of classroom management with emphasis on classroom discipline, using group and individual processes.

(g) Districts delivering the required intensive support for an educator holding the temporary teacher certificate must follow guidelines established by the Executive Director with evidence indicating the ability to comply with the provisions of this chapter.

(h) A school district may require that a person who will be employed by the district and who holds a temporary teacher certificate issued under this section complete a teacher training program.

(i) At the end of the two years of employment, the person must apply to the State Board for Educator Certification for a standard certificate. The person must also be recommended by the current employing school district for certification. All employing school districts must provide evidence to the board that each district provided the aforementioned intensive support.

(j) A standard teaching certificate shall be issued to a person under this section if:

(1) the person held a temporary teacher certificate issued under this section;

(2) the person has been continuously employed as a teacher of record in a public school district for two academic years; and

(3) the employing district(s) has (have) favorably reviewed the person's performance, including classroom performance and performance in any teacher training program(s). Each school district must predominately base the review of a person's performance on the increase in achievement of the students over which the person has had charge.

(k) At the end of the two years of employment, if a person is granted a standard certificate, the person may not apply for or receive another temporary certificate under this rule.

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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Ron Kettler, Ph.D.
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CHAPTER 233. CATEGORIES OF CLASSROOM TEACHING CERTIFICATES

19 TAC §§233.4, 233.9 - 233.12

The State Board for Educator Certification proposes amendments to the following section of 19 TAC Chapter 233: §233.4, relating to the mathematics and science certificates for teaching in grades 4-8 and 8-12. The State Board for Educator Certification proposes the following new sections to Chapter 233: §233.9, relating to the supplemental certificate for teaching gifted and talented students in the same grade levels and in the same content areas of the holder's base certificate; §233.10, relating to the certificates for teaching fine arts in all levels, from early childhood programs through grade 12; §233.11, relating to certificates for teaching health in all levels, from early childhood programs through grade 12; and §233.12, relating to certificates for teaching career and technology education in grades 6-12.

The proposed amendments to §233.4 and the new §§233.9-233.12 reflect the new standards-based certificates approved by the State Board for Educator Certification (SBEC) and scheduled for implementation in fall 2004. Specifically, the SBEC approved new certificates in the following areas: Technology Education (grades 6-12), Family and Consumer Science Composite (grades 8-12), Human Development and Family Studies (grades 8-12), Hospitality, Nutrition and Food Sciences (grades 8-12), Physics/Mathematics (grades 8-12), Health (early childhood - grade 12), Music (early childhood - grade 12) and a supplemental certificate in Gifted and Talented. These new certificates are designed replace or eliminate the following certificates on or about September 1, 2005: Secondary Industrial Technology (grades 6-12), Vocational Home Economics (grades 6-12), Secondary Health (grades 6-12), Secondary Music (grades 6-12), All-Level Music (pre-kindergarten - grade 12), the Gifted and Talented Endorsement and the Vocational Occupation Orientation (grades 6-12). However, these certificates will remain valid and SBEC will not require holders of these certificates to obtain the corresponding new certificate(s). Educators who hold standard certificates in the areas slated for elimination on September 1, 2005 may renew the certificate upon completion of the requirements specified in 19 TAC Chapter 232, Subchapter R, Certificate Renewal and Continuing Professional Education Requirements. The proposed amendments and new rules allow for a one-year overlap of the superseded certificates and the new standards-based certificates, thus providing for the limited availability of current ExCET tests and certificates during the overlap period, 2004-2005.

The proposed amendments to §233.4 and the new §§233.9 - 233.12 would allow SBEC to issue new categories of teaching certificates beginning no earlier than September 1, 2004.

The proposed amendments to §233.4 add to the existing rule the requirement of additional training for teachers of Principals of Technology I and II courses. As proposed, teachers of Principles of Technology courses will participate in workshops sponsored by the Texas Education Agency in order to receive the necessary supplemental training.

Proposed new §233.9 creates the supplemental certificate in Gifted and Talented which permits the holder to teach students in a Gifted and Talented program at the same grade levels and in the same content area(s) of the holder's base certificate.

Proposed new §233.10 creates a Music certificate which allows the holder to teach music in a pre-kindergarten program, in kindergarten and in grades 1-12.

Proposed new §233.11 creates a Health certificate which allows the holder to teach health in a pre-kindergarten program, in kindergarten and in grades 1-12.

Proposed new §233.12 creates a new certificates in Technology Education for teaching grades 6-12. Holders of this new certificate assigned to teach Principles of Technology I and II are required to participate in a Texas Education Agency approved workshop for beginning principles of technology teachers prior to teaching the course. Technology education teachers must also complete six (6) semester hours of college physics prior to assignment to teach Principles of Technology I and II.

Proposed new §233.12 also creates a Family and Consumer Sciences Composite certificate for teaching grades 6-12, and provides that educators holding a Family and Consumer Sciences Composite certificate for grades 8-12 may teach all Family and Consumer Sciences courses, including Skills for Living, in grades 6-12.

Proposed new §233.12 also creates the Human Development and Family Studies and the Hospitality, Nutrition and Food Sciences certificates for grades 8-12.

Proposed new §233.12 also provides that educators assigned to teach Career Investigation and Career Connections courses must hold a teacher certification in any of the Career and Technology program areas and must participate in a Texas Education Agency approved two hour workshop for beginning Career Investigation and Career Connections teachers prior to teaching the course. These teachers are also required to attend and participate in a Texas Education Agency sponsored Career and Technology Education Professional Development Conference prior to the assignment.

Steve Wright, Chief Financial Officer, State Board for Educator Certification, has determined for the first five-year period the proposed amendments and new rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed amendments and new rules.

Lisa Patterson, Acting General Counsel, State Board for Educator Certification, has determined that for each year of the first five years the proposed amendments and new rules are in effect, the public benefit anticipated as a result of enforcing the proposed amendments and new rules will be efficient and updated rules governing the assignment of public school educators. The purpose of the proposed amendments and new rules are to establish new standards-based certificates scheduled for implementation in fall 2004..

In accordance with Section 2001.022, Government Code, SBEC has determined that the proposed amendments and new rules will not impact local economies and, therefore, has not filed a request for a local employment impact statement with the Texas Workforce Commission.

There will be no affect to small or micro businesses.

If adopted, the proposed amendments and rules would be governmental action providing for the certification of a public school educator and regulating a school district's assignment of a holder of an educator certificate, which is a state-granted privilege, in accordance with Chapter 21, Subchapter B, Education Code, and therefore would not affect private real property under the Private Real Property Preservation Act in Government Code, Chapter 2007.

Comments regarding the proposed amendments and new rules may be submitted to Lisa Patterson, Acting General Counsel, State Board for Educator Certification, 4616 West Howard Lane, Suite 120, Austin, Texas 78728, or by e-mail at "lisa.patterson@sbec.state.tx.us."

The proposed amendments to §233.4 and the proposed new rules §§233.9-233.12 are proposed under the statutory authority of the following Education Code sections: Section 21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; and Section 21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; and Section 21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued.

No other statutes, articles, or codes are affected by the proposed amendments and new rules.

§233.4. Mathematics; Science.

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

(e) Science: Grades 8-12. The Science: 8-12 certificate may be issued no earlier than September 1, 2002. The holder of the Science: 8-12 certificate may teach science in Grade 8 and all science courses, including Principles of Technology I and II, and all Health Science Technology courses for which science credit is given in Grades 9 through 12. All teachers assigned to teach Principles of Technology I and II shall participate in a Texas Education Agency approved workshop for beginning principles of technology teachers prior to teaching the course.

(f) (No change.)

(g) Physical Science: Grades 8-12. The Physical Science: 8-12 certificate may be issued no earlier than September 1, 2002. The holder of the Physical Science: 8-12 certificate may teach science in Grade 8 and all physics and chemistry courses, including Integrated Physics and Chemistry, Principles of Technology I and II, and Scientific Research and Design in Grades 9 through 12. All teachers assigned to teach Principles of Technology I and II shall participate in a Texas Education Agency approved workshop for beginning principles of technology teachers prior to teaching the course.

(h) Physics/Mathematics: Grades 8-12. The Physics/Mathematics: 8-12 certificate may be issued no earlier that September 1, 2004. The holder of the Physics/Mathematics: 8-12 certificate may teach mathematics in grade 8 and all mathematics courses in grades 9-12. The holder may also teach science in grade 8, and all physics courses, Principles of Technology I and II, and Scientific Research and Design in grades 9-12. All teachers assigned to teach Principles of Technology I and II shall participate in a Texas Education Agency approved workshop for beginning principles of technology teachers prior to teaching the course.

§233.9. Gifted and Talented.

Gifted and Talented Supplemental. The Gifted and Talented Supplemental certificate may be issued no earlier than September 1, 2004. The holder of the Gifted and Talented Supplemental certificate may teach students in a Gifted and Talented program at the same grade levels and in the same content area(s) of the holder's base certificate.

§233.10. Fine Arts.

Music: Early Childhood-Grade 12. The Music: EC-Grade 12 certificate may be issued no earlier than September 1, 2004. The holder of the Music: EC-Grade 12 certificate may teach music in a pre-kindergarten program, in kindergarten, and in grades 1-12.

§233.11. Health.

Health: Early Childhood-Grade 12. The Health: EC-Grade 12 certificate may be issued no earlier than September 1, 2004. The holder of the Health: EC-Grade 12 certificate may teach health in a pre-kindergarten program, in kindergarten, and in grades 1-12.

§233.12. Career and Technology Education. (Certificates not requiring experience and preparation in skills areas.)

(a) Technology Education, Grades 6-12. The Technology Education: 6-12 certificate may be issued no earlier than September 1, 2004. The holder of the Technology Education: 6-12 certificate may teach all of the Technology Education courses, including Principles of Technology I and II, in grades 6-12. All teachers assigned to teach Principals of Technology I and II shall participate in a Texas Education Agency approved workshop for beginning principles of technology teachers prior to teaching the course. Technology education teachers must also complete six semester hours of college physics prior to assignment to teach Principles of Technology I and II.

(b) Family and Consumer Sciences, Composite, grades 6-12. The Family and Consumer Sciences, Composite: 6-12certificate may be issued no earlier than September 1, 2004. The holder of the Family and Consumer Sciences, Composite: 8-12 certificate may teach all Family and Consumer Sciences courses, including Skills for Living, in grades 6-12.

(c) Human Development and Family Studies, grades 8-12. The Human Development and Family Studies: 8-12 certificate may be issued no earlier than September 1, 2004. The holder of the Human Development and Family Studies: 8-12 certificate may teach the following Family and Consumer Science courses in grades 8-12: Individual and Family Life, Family Health Needs, Services for Older Adults, Child Development, Preparation for Parenting, Child Care and Guidance, Management, and Services.

(d) Hospitality, Nutrition, and Food Sciences, grades 8-12. The Hospitality, Nutrition, and Food Sciences: 8-12 certificate may be issued no earlier than September 1, 2004. The holder of the Hospitality, Nutrition, and Food Sciences: 8-12 certificate may teach the following Family and Consumer Science courses in grades 8-12: Nutrition and Food Science, Food Science and Technology, Institutional Maintenance Management and Services, Hospitality Services, Food Production, Management, and Services.

(e) Teachers assigned to Career Investigation and Career Connections courses must hold teacher certification in any of the Career and Technology Education program areas, and shall participate in a Texas Education Agency approved two hour workshop for beginning Career Investigation and Career Connections teachers prior to teaching the course. Teachers must also attend and participate in a Texas Education Agency sponsored Career and Technology Education Professional Development Conference prior to assignment.

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 February 12, 2004.

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Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 238-3280

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CHAPTER 239. STUDENT SERVICES CERTIFICATES

SUBCHAPTER A. SCHOOL COUNSELOR CERTIFICATE

19 TAC §239.1

The State Board for Educator Certification (SBEC) proposes an amendment to 19 TAC §239.1, relating to certification as a school counselor. The proposed amendment to 19 TAC §239.1 would clarify the assignment criteria for individuals holding a School Counselor certificate by adding language specifying that these educators may provide counseling services to students in regular education programs, career and technology education programs and special education programs in pre-kindergarten through grade 12.

Steve Wright, Chief Financial Officer, State Board for Educator Certification, has determined that, for the first five-year period the proposed amendment is in effect, enforcing or administering the proposed amendments would not have foreseeable implications relating to cost or revenues of state or local governments.

Lisa Patterson, Acting General Counsel, State Board for Educator Certification, has determined that, for each year of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the proposed amendment will be greater clarity regarding the assignment possibilities for holders of this student services certificate.

In accordance with Section 2001.022, Government Code, SBEC has determined that the proposed amendment will not impact local economies and, therefore, has not filed a request for a local employment impact statement with the Texas Workforce Commission.

There will be no affect to small or micro businesses.

If adopted, the proposed amendment would be a governmental action regulating issuance of an educator certificate, a statutory privilege, issued by SBEC under Chapter 21, Subchapter B, Education Code, and therefore would not affect private real property under the Private Real Property Preservation Act (Chapter 2007, Government Code).

Comments regarding the proposed amendments may be submitted to Lisa Patterson, Acting General Counsel, State Board for Educator Certification, 4616 West Howard Lane, Suite 120, Austin, Texas 78728, or by e-mail at "lisa.patterson@sbec.state.tx.us."

The amendment to §239.1 is proposed under the statutory authority of the following sections of the Education Code: §21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; §21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued; §21.041(b)(3), which requires SBEC to specify the period for which each class of educator certificate is valid; §21.041(b)(4), which requires SBEC to specify the requirements for the issuance and renewal of an educator certificate; and §21.042, which requires SBEC to submit proposed rules to the State Board of Education for review prior to adoption.

No other statutes, articles, or codes are affected by the proposed amendments.

§239.1. General Provisions.

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

(c) The holder of a school counselor certificate issued under the provisions of this chapter may provide counseling services to students in regular education programs, career and technology education programs and special education programs in pre-kindergarten through grade 12.

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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Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
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For further information, please call: (512) 238-3280

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SUBCHAPTER B. SCHOOL LIBRARIAN CERTIFICATE

19 TAC §239.40

The State Board for Educator Certification (SBEC) proposes an amendment to 19 TAC §239.40, relating to certification as a school librarian. The proposed amendment to 19 TAC §239.40 would clarify the assignment criteria for individuals holding a School Librarian certificate by adding language specifying that these educators may serve as a librarian in a Texas public elementary, middle or secondary school.

Steve Wright, Chief Financial Officer, State Board for Educator Certification, has determined that, for the first five-year period the proposed amendment is in effect, enforcing or administering the proposed amendment would not have foreseeable implications relating to cost or revenues of state or local governments.

Lisa Patterson, Acting General Counsel, State Board for Educator Certification, has determined that, for each year of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the proposed amendment will be greater clarity regarding the assignment possibilities for holders of this student services certificate.

In accordance with Section 2001.022, Government Code, SBEC has determined that the proposed amendment will not impact local economies and, therefore, has not filed a request for a local employment impact statement with the Texas Workforce Commission.

There will be no affect to small or micro businesses.

If adopted, the proposed rule would be a governmental action regulating issuance of an educator certificate, a statutory privilege, issued by SBEC under Chapter 21, Subchapter B, Education Code, and therefore would not affect private real property under the Private Real Property Preservation Act (Chapter 2007, Government Code).

Comments regarding the proposed amendment may be submitted to Lisa Patterson, Acting General Counsel, State Board for Educator Certification, 4616 West Howard Lane, Suite 120, Austin, Texas 78728, or by e-mail at "lisa.patterson@sbec.state.tx.us."

The amendment to §239.40 is proposed under the statutory authority of the following sections of the Education Code: §21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; §21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued; §21.041(b)(3), which requires SBEC to specify the period for which each class of educator certificate is valid; §21.041(b)(4), which requires SBEC to specify the requirements for the issuance and renewal of an educator certificate; and §21.042, which requires SBEC to submit proposed rules to the State Board of Education for review prior to adoption.

No other statutes, articles, or codes are affected by the proposed amendment.

§239.40. General Provisions.

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

(c) The holder of a school librarian certificate issued under the provisions of this chapter may serve as a librarian in a Texas public elementary, middle or secondary school.

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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Ron Kettler, Ph.D.
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SUBCHAPTER C. EDUCATIONAL DIAGNOSTICIAN CERTIFICATE

19 TAC §239.80

The State Board for Educator Certification (SBEC) proposes an amendment to 19 TAC §239.80, relating to certification as an educational diagnostician. The proposed amendment to 19 TAC §239.80 would clarify the assignment criteria for individuals holding a Educational Diagnostician certificate by adding language specifying that these educators may serve as an educational diagnostician, including providing educational assessment and evaluation, for students in early childhood programs through grade 12.

Steve Wright, Chief Financial Officer, State Board for Educator Certification, has determined that, for the first five-year period the proposed amendment is in effect, enforcing or administering the

proposed amendment would not have foreseeable implications relating to cost or revenues of state or local governments.

Lisa Patterson, Acting General Counsel, State Board for Educator Certification, has determined that, for each year of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the proposed amendment will be greater clarity regarding the assignment possibilities for holders of this student services certificate.

In accordance with Section 2001.022, Government Code, SBEC has determined that the proposed amendment will not impact local economies and, therefore, has not filed a request for a local employment impact statement with the Texas Workforce Commission.

There will be no affect to small or micro businesses.

If adopted, the proposed amendment would be a governmental action regulating issuance of an educator certificate, a statutory privilege, issued by SBEC under Chapter 21, Subchapter B, Education Code, and therefore would not affect private real property under the Private Real Property Preservation Act (Chapter 2007, Government Code).

Comments regarding the proposed amendment may be submitted to Lisa Patterson, Acting General Counsel, State Board for Educator Certification, 4616 West Howard Lane, Suite 120, Austin, Texas 78728, or by e-mail at "lisa.patterson@sbec.state.tx.us."

The amendment to §239.80 is proposed under the statutory authority of the following sections of the Education Code: §21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; §21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued; §21.041(b)(3), which requires SBEC to specify the period for which each class of educator certificate is valid; §21.041(b)(4), which requires SBEC to specify the requirements for the issuance and renewal of an educator certificate; and §21.042, which requires SBEC to submit proposed rules to the State Board of Education for review prior to adoption.

No other statutes, articles, or codes are affected by the proposed amendments.

§239.80. General Provisions.

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

(c) The holder of an educational diagnostician certificate issued under the provisions of this chapter may serve as an educational diagnostician, including providing educational; assessment and evaluation, for students in early childhood programs through grade 12.

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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Ron Kettler, Ph.D.
Interim Executive Director
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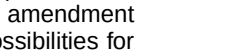

SUBCHAPTER D. READING SPECIALIST CERTIFICATE

19 TAC §239.90

The State Board for Educator Certification (SBEC) proposes an amendment to 19 TAC §239.90, relating to certification as a reading specialist. The proposed amendment to 19 TAC §239.90 would clarify the assignment criteria for individuals holding a Reading Specialist certificate by adding language specifying that these educators may teach reading to students in early childhood programs through grade 12.

Steve Wright, Chief Financial Officer, State Board for Educator Certification, has determined that, for the first five-year period the proposed amendment is in effect, enforcing or administering the proposed amendments would not have foreseeable implications relating to cost or revenues of state or local governments.

Lisa Patterson, Acting General Counsel, State Board for Educator Certification, has determined that, for each year of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the proposed amendment will be greater clarity regarding the assignment possibilities for holders of this student services certificate.

In accordance with Section 2001.022, Government Code, SBEC has determined that the adopted rule will not impact local economies and, therefore, has not filed a request for a local employment impact statement with the Texas Workforce Commission.

There will be no affect to small or micro businesses.

If adopted, the proposed amendment would be a governmental action regulating issuance of an educator certificate, a statutory privilege, issued by SBEC under Chapter 21, Subchapter B, Education Code, and therefore would not affect private real property under the Private Real Property Preservation Act (Chapter 2007, Government Code).

Comments regarding the proposed amendment may be submitted to Lisa Patterson, Acting General Counsel, State Board for Educator Certification, 4616 West Howard Lane, Suite 120, Austin, Texas 78728, or by e-mail at "lisa.patterson@sbec.state.tx.us."

The amendment to §239.90 is proposed under the statutory authority of the following sections of the Education Code: §21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; §21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued; §21.041(b)(3), which requires SBEC to specify the period for which each class of educator certificate is valid; §21.041(b)(4), which requires SBEC to specify the requirements for the issuance and renewal

of an educator certificate; and §21.042, which requires SBEC to submit proposed rules to the State Board of Education for review prior to adoption.

No other statutes, articles, or codes are affected by the proposed amendments.

§239.90. General Provisions.

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

(c) The holder of a reading specialist certificate issued under the provisions of this chapter may teach reading to students in early childhood programs through grade 12.

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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Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
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For further information, please call: (512) 238-3280

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CHAPTER 241. PRINCIPAL CERTIFICATE

19 TAC §241.1

The State Board for Educator Certification (SBEC) proposes an amendment to 19 TAC §241.1, relating to certification as a principal. The proposed amendment to 19 TAC §241.1 would clarify the assignment criteria for individuals holding a Principal certificate by adding language specifying that these educators may serve as a principal or assistant principal in a Texas public elementary, middle or secondary school.

Steve Wright, Chief Financial Officer, State Board for Educator Certification, has determined that, for the first five-year period the proposed amendment is in effect, enforcing or administering the proposed amendments would not have foreseeable implications relating to cost or revenues of state or local governments.

Lisa Patterson, Acting General Counsel, State Board for Educator Certification, has determined that, for each year of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the proposed amendment will be greater clarity regarding the assignment possibilities for holders of this administrative certificate.

In accordance with Section 2001.022, Government Code, SBEC has determined that the proposed amendment will not impact local economies and, therefore, has not filed a request for a local employment impact statement with the Texas Workforce Commission.

There will be no affect to small or micro businesses.

If adopted, the proposed amendment would be a governmental action regulating issuance of an educator certificate, a statutory privilege, issued by SBEC under Chapter 21, Subchapter B, Education Code, and therefore would not affect private real property under the Private Real Property Preservation Act (Chapter 2007, Government Code).

Comments regarding the proposed amendment may be submitted to Lisa Patterson, Acting General Counsel, State Board for Educator Certification, 4616 West Howard Lane, Suite 120, Austin, Texas 78728, or by e-mail at "lisa.patterson@sbec.state.tx.us."

The amendment to §241.1 is proposed under the statutory authority of the following sections of the Education Code: §21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; §21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued; §21.041(b)(3), which requires SBEC to specify the period for which each class of educator certificate is valid; §21.041(b)(4), which requires SBEC to specify the requirements for the issuance and renewal of an educator certificate; and §21.042, which requires SBEC to submit proposed rules to the State Board of Education for review prior to adoption.

No other statutes, articles, or codes are affected by the proposed amendments.

§241.1. General Provisions.

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

(d) The holder of the Principal Certificate issued under the provisions of this chapter may serve as a principal or assistant principal in a Texas public elementary, middle, or secondary school.

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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Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
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For further information, please call: (512) 238-3280

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CHAPTER 242. SUPERINTENDENT CERTIFICATE

19 TAC §242.20

The State Board for Educator Certification (SBEC) proposes an amendment to 19 TAC §242.20, relating to certification as a superintendent. The proposed amendment to 19 TAC §242.20 would clarify the assignment criteria for individuals holding a Superintendent certificate by adding language specifying that these educators may serve as a superintendent in a Texas public school district.

Steve Wright, Chief Financial Officer, State Board for Educator Certification, has determined that, for the first five-year period the proposed amendment is in effect, enforcing or administering the proposed amendments would not have foreseeable implications relating to cost or revenues of state or local governments.

Lisa Patterson, Acting General Counsel, State Board for Educator Certification, has determined that, for each year of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the proposed amendment will be greater clarity regarding the assignment possibilities for holders of this administrative certificate.

In accordance with Section 2001.022, Government Code, SBEC has determined that the proposed amendment will not impact local economies and, therefore, has not filed a request for a local employment impact statement with the Texas Workforce Commission.

There will be no affect to small or micro businesses.

If adopted, the proposed rule would be a governmental action regulating issuance of an educator certificate, a statutory privilege, issued by SBEC under Chapter 21, Subchapter B, Education Code, and therefore would not affect private real property under the Private Real Property Preservation Act (Chapter 2007, Government Code).

Comments regarding the proposed amendments may be submitted to Lisa Patterson, Acting General Counsel, State Board for Educator Certification, 4616 West Howard Lane, Suite 120, Austin, Texas 78728, or by e-mail at "lisa.patterson@sbec.state.tx.us."

The amendment to §242.20 is proposed under the statutory authority of the following sections of the Education Code: §21.031(a), which vests SBEC with the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(1), Education Code, which requires SBEC to propose rules that provide for the regulation of educators and the general administration of Chapter 21, Subchapter B, in a manner consistent with that subchapter; §21.041(b)(2), which requires SBEC to specify the classes of certificates to be issued; §21.041(b)(3), which requires SBEC to specify the period for which each class of educator certificate is valid; §21.041(b)(4), which requires SBEC to specify the requirements for the issuance and renewal of an educator certificate; and §21.042, which requires SBEC to submit proposed rules to the State Board of Education for review prior to adoption.

No other statutes, articles, or codes are affected by the proposed amendments.

§242.20. Requirements for the Standard Superintendent Certificate.

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

(d) The holder of the Superintendent Certificate issued under the provisions of this chapter may serve as a superintendent in a Texas public school district.

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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Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
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For further information, please call: (512) 238-3280

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TITLE 22. EXAMINING BOARDS

PART 5. STATE BOARD OF DENTAL EXAMINERS

CHAPTER 107. DENTAL BOARD PROCEDURES

SUBCHAPTER A. PROCEDURES GOVERNING GRIEVANCES, HEARINGS, AND APPEALS

22 TAC §107.63

The Texas State Board of Dental Examiners (Board) proposes amendments to 22 TAC Chapter 107, §107.63, concerning the Board's use of informal and alternative dispute resolution processes. The amendments are proposed to enact certain requirements imposed by Senate Bill 263, §10 and §19, 78th Legislature. The section as amended also contains revisions to clarify and standardize language, and to improve organization.

Section 107.63(c)(2) has been added to detail the procedures for staff settlement conferences, pursuant to Senate Bill 263, §19, 78th Legislature. These proposed amendments allow cases to be resolved via an informal settlement conference presided over by board staff, with the allowance for participation by a board member on cases involving standard of care issues.

Section 107.63(d) has been added to specifically allow contested disciplinary matters to be referred to an alternative dispute resolution process, pursuant to Senate Bill 263, §10, 78th Legislature.

Section 107.63(f) has been added to specifically allow the board to award restitution in certain disciplinary matters, pursuant to Senate Bill 263, §19, 78th Legislature.

There are no other substantive changes to the section.

Mr. Bobby D. Schmidt, Executive Director, Texas State Board of Dental Examiners has determined that for each year of the first five-year period the section is in effect, there will be no fiscal implications for local or state government as a result of enforcing or administering the section.

Mr. Bobby D. Schmidt, Executive Director, Texas State Board of Dental Examiners has determined that for each year of the first five-year period the section is in effect, the public benefit anticipated as a result of enforcing or administering the section will be significant. The use of staff settlement conferences will expedite the resolution of many cases, allowing for quicker and more appropriate response to complaints. The use of informal processes to resolve contested matters will expand the Board's ability to encourage cooperation, rather than conflict, in the Board's relationship with licensees. Finally, the ability to order restitution in some matters will not only help restore complainants to their original status in some measure, but will likely de-escalate some conflicts between complainants and licensees.

The impact on large, small or micro-businesses will be negligible, except that the more expeditious resolution of contested cases will undoubtedly save licensees from incurring legal and other associated expenses.

The anticipated economic cost to persons as a result of enforcing or administering the section is negligible, and would only arise from the imposition of orders for restitution.

Comments on the proposal may be submitted to Bobby D. Schmidt, M.Ed. Executive Director, Texas State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 475-1660. To be considered, all written comments must be received by the Texas State Board of Dental Examiners no later than 30 days from the date that this amended section is published in the *Texas Register*.

The section is proposed under Texas Government Code §2001.021 et seq., Texas Civil Statutes; the Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties; the Government Code, Chapter 2009, which allows for and promotes the use of alternative dispute resolution processes; and Senate Bill 263, §10 and §19, 78th Legislature, 2003, as previously discussed.

The proposed section affects Title 3, Subtitle D of the Occupations Code and Title 22, Texas Administrative Code, Chapter 101-125.

§107.63. Informal Disposition and Alternative Dispute Resolution.

(a) Policy. It is the Board's policy to encourage, where appropriate, the resolution and early settlement of contested disciplinary matters and internal disputes through informal and alternative dispute resolution procedures. [~~Pursuant to the Government Code, Chapter 2001 et seq., ultimate disposition of any complaint or matter pending before the Board may be made by stipulation, agreed settlement, or consent order. Such informal dispositions will facilitate the expeditious change or correction of dental practice patterns which constitute violations of the Dental Practice Act or the rules of the Board.~~]

(b) [~~(1)~~] Approval. The Board Secretary [~~secretary~~] or executive director shall determine if the public interest would be served by offering to resolve a complaint or other matter pending before the Board by either informal disposition as described in Chapter 2001 *et. seq.*, of the Government Code, or by a method of alternative dispute resolution under Chapter 2009 of the Government Code, [~~stipulation, settlement agreement, or consent order~~] in lieu of a formal disciplinary proceeding described in the [~~Texas Civil Statutes,~~] Occupations Code, [~~Chapter 263,~~] §263.003. [~~If the secretary or executive director approves the matter for possible resolution by stipulation, agreed settlement, or consent order, the licensee and other persons shall be notified as provided in this section.~~]

[~~(2) Procedure. Upon referral by the secretary or executive director of a complaint or other matter for possible resolution by stipulation, agreed settlement, or consent order, the following procedure shall be followed.~~]

(c) Informal Disposition. Pursuant to the Government Code, Chapter 2001 *et. seq.*, ultimate disposition of any complaint or matter pending before the Board may be made by stipulation, agreed settlement, or consent order. Under the Occupations Code, §263.007 and §263.0075, such a disposition may be reached through review at an informal settlement conference, which may take the form of a staff settlement conference or a Board settlement conference.

(1) Board Settlement Conference

(A) The Board Secretary or executive director may approve a matter for review at a Board settlement conference.

(B) [~~(A)~~] One or more members of the Board [~~board~~] shall represent the full Board [~~board~~] at the Board settlement conference.

(C) [~~(B)~~] The Board [~~board~~] will provide the licensee notice in writing of the time, date, and place of the settlement conference. Such notification shall inform the licensee: of the nature of the alleged violation; [~~,~~] that he or she may be represented by legal counsel; [~~,~~] that the licensee may offer the testimony of such witnesses as he or she may desire; [~~,~~] that the Board [~~board~~] will be represented by one or more of its members and by legal counsel; [~~,~~] and that he or she may request that the matter be considered by the Board [~~board~~] according to procedures described in [~~Texas Civil Statutes,~~] Occupations Code, [~~Chapter 263,~~] §263.007. A copy of the Board's [~~board's~~] rules relating to the informal disposition of cases shall be enclosed with the notice of the settlement conference. Notice of the settlement conference, with enclosures, shall be sent by certified mail, return receipt requested, to the current address of the licensee on file with the Board.

(D) [~~(C)~~] The settlement conference shall be informal and will not follow the procedure established in State Office of Administrative Hearing (SOAH) rules for contested cases. The licensee, his or her attorney, and representative(s) of the Board [~~board~~] and Board [~~board~~] staff may question witnesses, make relevant statements, present affidavits or statements of persons not in attendance, and may present such other evidence as may be appropriate. Any documentary evidence received by the Board [~~board~~] less than 10 days before the scheduled dates of the settlement conference will not be considered by the panel.

(E) [~~(D)~~] The settlement conference will be conducted by a representative(s) of the Board [~~board~~]. The Board's [~~board's~~] representative may call upon the Board's [~~board's~~] attorney at any time for assistance in conducting the settlement conference. The Board's [~~board's~~] representative(s) may question any witness, and shall afford each participant in the settlement conference the opportunity to make such statements as are material and relevant.

(F) [~~(E)~~] The Board's [~~board's~~] representative(s) may prohibit or limit access to the Board's investigative file by the licensee, his or her attorney, and the complainant and his or her representative.

(G) [~~(F)~~] The Board's [~~board's~~] representative(s) shall exclude from the settlement conference all persons except witnesses during their testimony, the licensee, his or her attorney, the complainant, Board [~~board~~] members, and board staff.

(H) [~~(G)~~] At the conclusion of the settlement conference, the Board's [~~board's~~] representative(s) shall make recommendations to the licensee and consultant for resolution or correction of any alleged violations of the Dental Practice Act or of the Board rules. Such recommendations may include any disciplinary actions authorized by the Occupations Code, [~~Chapter 263,~~] §263.002 [~~, Texas Civil Statutes~~]. The Board's [~~board's~~] representative(s) may, on the basis that a violation of the Dental Practice Act or the Board's rules has not been established , either close the case [~~recommend that the case be closed~~], or refer the case to Board staff [~~the case may be referred to the Board Secretary~~] for further investigation.Closure of a case by the Board's representative(s) shall be given effect immediately without the necessity of presentation to the full Board.

(I) [~~(H)~~] [~~The~~] Board staff shall draft a proposed settlement agreement reflecting the settlement recommendations, which the licensee shall either accept or reject [~~the settlement recommendations proposed by the board representative(s)~~]. To accept the settlement recommendations [~~recommendation~~], the licensee must sign the proposed agreed settlement order [~~agreement~~] and return it to the Board within 30 days from receipt. Inaction by the licensee shall constitute rejection. If the licensee rejects the proposed agreed settlement order [~~agreement~~],

the matter shall be referred to the Board Secretary [~~secretary~~] and executive director for other appropriate disposition.

(J) [~~(I)~~] Following acceptance and execution of the proposed agreed settlement order[~~agreement~~] by the licensee, said proposed order [~~agreement~~] shall be submitted to the Board's [~~board's~~] legal counsel, and /or executive director for review.

(K) [~~(J)~~] The settlement proposal will then be submitted to the entire Board [~~board~~] for approval.

(L) [~~(K)~~] A recommendation to close a case requires no further action by the Respondent [~~prior to its presentation to the Board~~].

(2) Staff Settlement Conference.

(A) The Board Secretary or executive director may approve a matter for review at a staff settlement conference.

(B) Staff settlement conferences shall be held by a panel of board employees consisting, at a minimum, of an attorney of the Board, and either the investigator responsible for the case or the Director of Enforcement. A Board member who is able to advise on standard of care issues must participate in any case involving such issues.

(C) At the conclusion of the staff settlement conference, the panel shall make recommendations for resolution or correction of any alleged violations of the Dental Practice Act or of the Board rules. Such recommendations may include any disciplinary actions authorized by the Occupations Code, §263.002. The panel may, on the basis that a violation of the Dental Practice Act or the Board's rules has not been established, either close the case, or refer the case to Board staff for further investigation. Closure of a case by a staff settlement conference shall be given effect immediately without the necessity of presentation to the full Board.

(D) Board staff shall draft a proposed settlement agreement reflecting the settlement recommendations, which the licensee shall either accept or reject. To accept the settlement recommendations, the licensee must sign a proposed settlement agreement and return it to the Board within 30 days from receipt. Inaction by the licensee shall constitute rejection. If the licensee rejects the proposed agreed settlement order, the matter shall be referred to the Board Secretary and executive director for other appropriate disposition.

(E) Following acceptance and execution of the proposed agreed settlement order by the licensee, said proposed order shall be submitted to the Board's legal counsel, and/or executive director for review.

(F) A recommendation to close a case requires no further action by the Respondent.

(G) A complainant may appeal the decision to close a case by the staff in accordance with Rule 107.102(h).

(d) Alternative Dispute Resolution (ADR).

(1) Any ADR procedure used to resolve an internal or external dispute before the Board shall comply with the requirements of Chapter 2009, Government Code, and shall, to the extent possible, comply with any model guidelines issued by the State Office of Administrative Hearings for the use of ADR by state agencies.

(2) Use of ADR In Contested Disciplinary Matters.

(A) The Board Secretary or the executive director may refer a contested disciplinary matter to an ADR process to seek resolution or correction of any alleged violations of the Dental Practice Act or of the Board rules. Such ADR processes may include:

(i) any procedure described by Chapter 154, Civil Practice and Remedies Code; or,

(ii) a combination of the procedures described by Chapter 154, Civil Practice and Remedies Code.

(B) Any agreement or recommendation resulting from the application of an ADR process to a contested disciplinary matter shall be documented in written form and signed by the licensee, and legal counsel for the Board and/or the executive director or Board Secretary. Such an agreement or recommendation may include any disciplinary actions authorized by the Occupations Code, §263.002.

(C) If the ADR process results in no agreement or recommendation, the matter shall be referred to the Board Secretary and executive director for other appropriate disposition.

(e) [~~(3)~~] Consideration by the Board.

(1) All proposed agreed settlement orders, agreements or other recommendations shall be reviewed by the full Board for approval.

(2) [~~(A)~~] The name and license number of the licensee will not be made available to the board until after the board has reviewed and made a decision on the proposed agreed settlement order, agreement or recommendation.

(3) [~~(B)~~] Upon an affirmative majority vote, the Board shall [~~either~~] enter an order approving the proposed agreed settlement order, agreement, or recommendation [~~agreements, or without entry of an order, approve the recommendation to close.~~] Said order shall bear the signature of the presiding officer and Board Secretary [~~president and secretary of the Board~~], or of the officer presiding at such meeting and shall be included in the minutes of the Board.

(4) [~~(C)~~] If the board does not approve a proposed settlement order, agreement, or recommendation, the licensee shall be so informed. The matter shall be referred by the Board [~~board~~] to the Board Secretary [~~secretary~~] and executive director for consideration of appropriate action.

(f) Restitution.

(1) Pursuant to the Occupations Code, §263.0075, the board may order a licensee to pay restitution to a patient as provided in a proposed agreed settlement order or other agreement or recommendation, instead of or in addition to any administrative penalty.

(2) The amount of restitution ordered may not exceed the amount the patient paid to the licensee for the service or services from which the complaint arose. The board shall not require payment of other damages or make an estimation of harm in any order for restitution.

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 February 13, 2004.

TRD-200401006
Bobby D. Schmidt, M.Ed.
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 475-0972

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SUBCHAPTER C. ADMINISTRATIVE PENALTIES

22 TAC §107.202

The Texas State Board of Dental Examiners (Board) proposes an amendment to Rule 107.202, concerning the Board's disciplinary guidelines and administrative penalty schedule. Specifically, the amendment is proposed to remove the words "and address" from §107.202(d)(6)(B), as required by Senate Bill 1571, §4, 78th Legislature.

There are no other changes to the section.

Mr. Bobby D. Schmidt, Executive Director, Texas State Board of Dental Examiners has determined that for each year of the first five year period the section is in effect, there will be no fiscal implications for local or state government as a result of enforcing or administering the section. The public benefit anticipated as a result of enforcing or administering the section will be negligible. There will be no effect on large, small or micro-businesses. There is no anticipated economic cost to persons as a result of enforcing or administering the section, and there is no impact on local employment.

Comments on the proposal may be submitted to Bobby D. Schmidt, M.Ed. Executive Director, Texas State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 475-1660. To be considered, all written comments must be received by the Texas State Board of Dental Examiners no later than 30 days from the date that this amended section is published in the *Texas Register*.

The section has been reviewed by legal counsel, who found that it is proposed under Texas Government Code §2001.021 et seq., Texas Civil Statutes; the Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties; and Senate Bill 1571, §4, 78th Legislature, 2003, as previously discussed.

The proposed section affects Title 3, Subtitle D of the Occupations Code and Title 22, Texas Administrative Code, Chapter 101-125.

§107.202. Disciplinary Guidelines and Administrative Penalty Schedule.

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

(d) Administrative penalties may be imposed for the following violation categories as set forth in Rule 107.101 of this title (relating to Guidelines for the Conduct of Investigations) and the amount of penalty imposed shall be in accordance with this schedule as set forth:

(1) - (5) (No change.)

(6) Dental Laboratory violations may include, but are not limited to:

(A) Failure to comply with the requirements for registration of a commercial dental laboratory;

(B) Failure to obtain written work order(s) or prescription(s) from a licensed dentist, containing signature and dental license number, date of signature, name [~~and address~~] of patient, and description of kind and type of act, service or material ordered;

(C) - (E) (No change.)

(7) (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.

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CHAPTER 108. PROFESSIONAL CONDUCT
SUBCHAPTER A. PROFESSIONAL RESPONSIBILITY

22 TAC §108.7

The Texas State Board of Dental Examiners (Board) proposes amendments to 22 TAC, Chapter 108, §108.7, concerning the minimum standard of care in dentistry. The amendments clarify that blood pressure and heart rate measurements must be taken as part of the required initial medical examination of any patient, except that such measurements are not required for patients 12 years of age or younger, unless the patient's medical condition or history indicate such a need.

Mr. Bobby D. Schmidt, Executive Director, Texas State Board of Dental Examiners has determined for the first five year period the section as proposed is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the section.

There is no anticipated economic cost to persons who are required to comply with the section, and there is no anticipated local employment impact as a result of enforcing the section.

Mr. Schmidt has 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 an increase in the prevention of complications from treatment due to medical conditions that may manifest themselves in vital sign measurements.

The fiscal implications for small or large businesses will be minimal or none at all. Therefore, the Board has determined that compliance with the section will not have an adverse economic impact on small business when compared to large businesses.

Comments on the proposal may be submitted to Bobby D. Schmidt, M.Ed. Executive Director, Texas State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 475-1660. To be considered, all written comments must be received by the Texas State Board of Dental Examiners no later than 30 days from the date that this section is published in the *Texas Register*.

The section is proposed under Texas Government Code §2001.021 et seq; Texas Civil Statutes, the Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The proposed section affects Title 3, Subtitle D of the Occupations Code and Title 22, Texas Administrative Code, Chapter 101-125.

§108.7. Minimum Standard of Care, General.

Each dentist licensed by the State Board of Dental Examiners and practicing in Texas shall conduct his/her practice in a manner consistent with that of a reasonable and prudent dentist under the same or similar circumstance. Further, each dentist:

(1) Shall maintain patient records that meet the requirements set forth in §108.8 of this title (relating to Records of the Dentist).

(2) Shall maintain and review an initial medical history and perform limited physical evaluation for all dental patients to wit:

(A) The initial medical history shall include, but shall not necessarily be limited to, known allergies to drugs, serious illness, current medications, previous hospitalizations and significant surgery, and a review of the physiologic systems obtained by patient history. A "check list", for consistency, may be utilized in obtaining initial information. The dentist shall review the medical history with the patient at any time a reasonable and prudent dentist in the same or similar circumstances would so do.

(B) The initial limited physical examination shall [~~should~~] include, but shall not necessarily be limited to, measurement of blood pressure and pulse/heart rate [~~as may be indicated for each patient~~]. Blood pressure and pulse/heart rate measurements are not required to be taken on any patient twelve (12) years of age or younger, unless the patient's medical condition or history indicate such a need.

(3) - (6) (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.

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Bobby D. Schmidt, M.Ed.
Executive Director
State Board of Dental Examiners
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For further information, please call: (512) 475-0972

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SUBCHAPTER C. ANESTHESIA AND ANESTHETIC AGENTS

22 TAC §108.33

The Texas State Board of Dental Examiners (Board) proposes amendments to 22 TAC, Chapter 108, §108.33, concerning sedation and anesthesia permits. The proposed amendment adds §108.33(c), which creates a process and requirements for a provisional permit that would allow a licensed dentist with appropriate qualifications to administer parenteral conscious sedation and/or deep sedation and general anesthesia. Currently, permits require the approval of the Board, which only meets four times per year.

Language has also been added to §108.33(h)(1)(A)(i) to impose a five-year limit on the amount of time certain training will be considered current for the purpose of acquiring a nitrous oxide/oxygen inhalation conscious sedation permit.

All other proposed amendments are for grammatical or organizational purposes.

Mr. Bobby D. Schmidt, Executive Director, Texas State Board of Dental Examiners has determined for the first five year period the section as proposed is in effect there will be limited fiscal implications for local or state government as a result of enforcing or administering the section.

There is no anticipated economic cost to persons who are required to comply with the section, and there is no anticipated local employment impact as a result of enforcing the section.

Mr. Schmidt has 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 allow qualified dentists to begin administration of certain anesthetic agents in their practice without having to wait for the formal approval process by the Board. Furthermore, the public will benefit from the assurance that certain required training will be current.

The fiscal implications for small or large businesses will be minimal or none at all. Therefore, the Board has determined that compliance with the section will not have an adverse economic impact on small business when compared to large businesses.

Comments on the proposal may be submitted to Bobby D. Schmidt, M.Ed. Executive Director, Texas State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 475-1660. To be considered, all written comments must be received by the Texas State Board of Dental Examiners no later than 30 days from the date that this section is published in the *Texas Register*.

The section is proposed under Texas Government Code §2001.021 et seq; Texas Civil Statutes, the Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The proposed section affects Title 3, Subtitle D of the Occupations Code and Title 22, Texas Administrative Code, Chapter 101-125.

§108.33. Sedation/Anesthesia Permit.

(a) The State Board of Dental Examiners shall appoint advisory consultants for advice and recommendations to the Board on permit requirements, applicant and facility approval.

(b) A dentist licensed by the State Board of Dental Examiners and practicing in Texas, who desires to administer[~~utilize~~] nitrous oxide/oxygen inhalation conscious sedation, parenteral conscious sedation, and/or deep sedation and general anesthesia, must obtain a permit from the State Board of Dental Examiners for the requested procedure.

(1) - (4) (No change.)

(c) Provisional Permit. A dentist licensed by the State Board of Dental Examiners, who is enrolled and approaching graduation in a specialty program as detailed in Rule 108.33(g)(2)(A)(ii) and/or 108.33(g)(3)(A)(ii), may, upon approval of the Board or its designees, obtain a provisional permit from the State Board of Dental Examiners to administer parenteral conscious sedation and/or deep sedation and general anesthesia.

(1) The applicant must meet all requirements under §108.33(b).

(2) A letter shall be submitted on behalf of the applicant:

(A) on the letterhead of the school administering the program;

(B) signed by the director of the program;

(C) specifying the specific training completed; and,

(D) confirming imminent graduation as a result of successful completion of all requirements in the program.

(3) For the purposes of Rules 108.30 through 108.34, "completion" means the successful conclusion of all requirements of the program in question, but not including the formal graduation process.

(4) Any provisional permit issued under this subsection shall remain in effect until the next-scheduled regular board meeting, at which time the Board will consider ratifying the provisional permit.

(5) On ratification of a provisional permit, the status of the permit will be changed to that of a regular permit under this section.

(d) [~~(c)~~] Any dentist approved by the State Board of Dental Examiners under previous rules prior to the effective date of this section for the utilization of nitrous oxide/oxygen inhalation conscious sedation, parenteral conscious sedation, or deep sedation/general anesthesia, except as described in subsection (e)[~~(d)~~] of this section, shall remain permitted provided that the appropriate fees have been paid and that the dentist has a current license.

(e) [~~(d)~~] Once a permit is issued, the State Board of Dental Examiners upon payment of required fees shall automatically renew the permit annually unless after notice and opportunity for hearing the Board finds the permit holder has, or is likely to provide anesthesia services in a manner that does not meet the minimum standard of care. At such hearing the Board shall consider factors including patient complaints, morbidity, mortality, and anesthesia consultant recommendations.

(f) [~~(e)~~] Annual dental license renewal certificates shall include the annual permit renewal, except as provided for in subsection (e)[~~(d)~~] of this section and shall be assessed an annual renewal fee of $5.00 payable with the license renewal. New permit fees are $28.75 payable with the application for permit.

(g) [~~(f)~~] Permit Restrictions:

(1) A sedation/anesthesia permit is valid for the dentist's facility, if any, as well as any satellite facility.

(2) Portability of a sedation/anesthesia permit will be granted to a dentist who, after September 1, 2000, applies for portability if the dentist is granted:

(A) a deep sedation/general anesthesia permit; or

(B) an intravenous parenteral conscious sedation permit if training for the permit was obtained on the basis of completion of

(i) a specialty program approved by the Commission on Dental Accreditation of the American Dental Association, or

(ii) a general practice residency, approved by the Commission on Dental Accreditation of the American Dental Association, or

(iii) an advanced education in general dentistry program, approved by the Commission on Dental Accreditation of the American Dental Association, or

(iv) a Continuing Education (CE) program specifically approved by the SBDE. The board may approve a graduate of a CE program under this subsection only if the applicant can demonstrate administration of intravenous parenteral conscious sedation in at least 30 cases that are documented showing provision of anesthesia services in keeping with the standard of care as determined by one or more of the SBDE's anesthesia consultants; and the applicant establishes that the program consisted of:

(I) sixty hours of didactic courses; and,

(II) administration of intravenous parenteral conscious sedation in at least 20 cases where the applicant was the anesthesia provider.

(3) When anesthesia services are provided by a dentist at a location other than a facility or a satellite facility, the dentist shall strictly adhere to all rules of the State Board of Dental Examiners which may apply. The dentist shall ascertain that the location is supplied, equipped, staffed and maintained in a condition to support provision of anesthesia services that meet the standard of care.

(4) A dentist holding a permit to administer parenteral conscious sedation on the effective date of this rule who is qualified by training or experience to administer intravenous parenteral conscious sedation anesthesia on a portable basis, and who desires to do so must file with the State Board of Dental Examiners proof of completion of:

(A) a specialty program approved by the Commission on Dental Accreditation of the American Dental Association, or

(B) a general practice residency approved by the Commission on Dental Accreditation of the American Dental Association, or

(C) an advanced education in a general dentistry program approved by the Commission on Dental Accreditation of the American Dental Association, or

(D) a Continuing Education program and administration of intravenous parenteral conscious sedation in at least 30 cases that are documented showing provision of anesthesia services in keeping with the standard of care as determined by one or more of the SBDE's anesthesia consultants.

(E) The records of all dentists permitted to administer parenteral conscious sedation will be annotated showing whether portability status is granted.

(F) Any applicant whose request for portability is not granted on the basis of the application will be provided an opportunity for hearing pursuant to Texas Government Code, Section 2001 et.seq.

(5) A dentist holding a permit to administer deep sedation/general anesthesia on the effective date of this rule who desires to provide anesthesia on a portable basis must file with the State Board of Dental Examiners a request for a portability designation.

(A) The records of all dentists permitted to administer deep sedation/general anesthesia will be annotated showing whether portability status is granted.

(B) Any applicant whose request for portability status is not granted on the basis of the application will be provided an opportunity for hearing pursuant to Texas Government Code, Section 2001 et.seq.

(6) The Board may elect to issue a temporary sedation/anesthesia permit which will expire on a date certain. A full sedation/anesthesia permit may be issued after the dentist has complied with requests of the Board which may include, but shall not be limited to, review of the dentist's anesthetic technique, facility inspection and/or review of patient records to ascertain that the minimum standard of care is being met. If a full permit is not issued, the temporary permit will expire on the stated date, and no further action by the State Board of Dental Examiners will be required, and no hearing will be conducted.

(h) [~~(g)~~] Educational/Professional requirements for sedation/anesthesia permits:

(1) Nitrous Oxide/Oxygen Inhalation Conscious Sedation

(A) To administer nitrous oxide/oxygen inhalation conscious sedation, the dentist must satisfy one of the following criteria:

(i) must have completed, within the last five (5) years, training consistent with that described in Part I or Part III of the American Dental Association (ADA) Guidelines for Teaching the Comprehensive Control of Pain and Anxiety in Dentistry; or

(ii) must have completed an ADA accredited post-doctoral training program which affords comprehensive and appropriate training necessary to administer and manage nitrous oxide/oxygen inhalation conscious sedation.

(B) The following shall apply to the administration of nitrous oxide/oxygen inhalation conscious sedation in the dental office:

(i) provision of nitrous oxide/oxygen inhalation conscious sedation by another duly qualified dentist or physician anesthesiologist requires the operating dentist and his/her clinical staff to maintain current expertise in Basic Life Support (BLS);

(ii) when a Certified Registered Nurse Anesthetist (CRNA) is permitted to function under the supervision of a dentist, in the dental office, provision of nitrous oxide/oxygen inhalation conscious sedation by a CRNA shall require the operating dentist to have completed training in nitrous oxide/oxygen inhalation conscious sedation, and to be permitted for its utilization.

(2) Parenteral Conscious Sedation

(A) To administer parenteral conscious sedation, the dentist must satisfy one of the following criteria:

(i) completion of a comprehensive training program for the parenteral conscious sedation technique requested that satisfies the requirement described in Part III of the American Dental Association (ADA) Guidelines for Teaching the Comprehensive Control of Pain and Anxiety in Dentistry at the time training was commenced; or

(ii) completion of an ADA accredited post-doctoral training program which affords comprehensive and appropriate training necessary to administer and manage the parenteral conscious sedation technique requested.

(B) The following shall apply to the administration of parenteral conscious sedation in the dental office:

(i) provision of parenteral conscious sedation by another duly qualified dentist or physician anesthesiologist requires the operating dentist and his/her clinical staff to maintain current expertise in Basic Life Support (BLS);

(ii) when a Certified Registered Nurse Anesthetist (CRNA) is permitted to function under the supervision of a dentist, in the dental office, provision of parenteral conscious sedation by a CRNA shall require the operating dentist to have completed training in parenteral conscious sedation, and to be permitted for its utilization;

(iii) a dentist administering parenteral conscious sedation must document current, successful completion every three years of an advanced emergency procedures course approved by the State Board of Dental Examiners or an Advanced Cardiac Life Support (ACLS) course, or a Pediatric Advanced Life Support (PALS) or age appropriate equivalent course.

(3) Deep Sedation/General Anesthesia

(A) To administer deep sedation/general anesthesia, the dentist must satisfy one of the following criteria:

(i) completion of an advanced training program in anesthesia and related subjects beyond the undergraduate dental curriculum that satisfies the requirements described in Part II of the American Dental Association (ADA) Guidelines for Teaching the Comprehensive Control of Pain and Anxiety in Dentistry at the time training was commenced; or,

(ii) completion of an ADA accredited post-doctoral training program which affords comprehensive and appropriate training necessary to administer and manage deep sedation/general anesthesia.

(B) The following shall apply to the administration of deep sedation/general anesthesia in the dental office:

(i) provision of deep sedation/general anesthesia by another duly qualified dentist or physician anesthesiologist requires the operating dentist and his/her clinical staff to maintain current expertise in Basic Life Support (BLS);

(ii) when a Certified Registered Nurse Anesthetist (CRNA) is permitted to function under the supervision of a dentist, in the dental office, provision of deep sedation/general anesthesia by a CRNA shall require the operating dentist to have completed training in deep sedation/general anesthesia, and to be permitted for its utilization;

(iii) a dentist administering deep sedation/general anesthesia must document current, successful completion every three years of an advanced emergency procedures course approved by the State Board of Dental Examiners or an Advanced Cardiac Life Support (ACLS) course, or a Pediatric Advanced Life Support (PALS) or age appropriate equivalent course.

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 February 13, 2004.

TRD-200401053
Bobby D. Schmidt, M.Ed.
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 475-0972

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22 TAC §108.34

The Texas State Board of Dental Examiners (Board) proposes amendments to 22 TAC, Chapter 108, §108.34, concerning permit requirements and clinical provisions for the administration of sedation and anesthesia. The amendments proposed are made necessary by proposed amendments to §108.33, and only change three citations to subsections of §108.33 that would changed should the proposed amendments be approved.

Mr. Bobby D. Schmidt, Executive Director, Texas State Board of Dental Examiners has determined for the first five year period the section as proposed is in effect there will be no fiscal implications for local or state government as a result of enforcing or administering the section.

There is no anticipated economic cost to persons who are required to comply with the section, and there is no anticipated local employment impact as a result of enforcing the section.

Mr. Schmidt has determined that for each year of the first five years the section is in effect, no public benefit is anticipated.

The fiscal implications for small or large businesses will be minimal or none at all. Therefore, the Board has determined that compliance with the section will not have an adverse economic impact on small business when compared to large businesses.

Comments on the proposal may be submitted to Bobby D. Schmidt, M.Ed. Executive Director, Texas State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 475-1660. To be considered, all written comments must be received by the Texas State Board of Dental Examiners no later than 30 days from the date that this section is published in the *Texas Register*.

The section is proposed under Texas Government Code §2001.021 et seq; Texas Civil Statutes, the Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The proposed section affects Title 3, Subtitle D of the Occupations Code and Title 22, Texas Administrative Code, Chapter 101-125.

§108.34. Permit Requirements and Clinical Provisions.

(a) Nitrous Oxide/oxygen inhalation conscious sedation. To induce and maintain this type of conscious sedation on patients having dental/oral and maxillofacial surgical procedures in the State of Texas, the following requirements must be met:

(1) Professional requirements.

(A) Each dentist wishing to utilize this technique must be permitted by the State Board of Dental Examiners (SBDE) to deliver nitrous oxide/oxygen conscious sedation after having met the Education Requirements as detailed in rule 108.33 (h)(1)[~~(g)(1)~~] of this title (relating to Sedation/Anesthesia Permit).

(B) (No change.)

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

(b) Parenteral conscious sedation intravenous (IV), intramuscular (IM), subcutaneous (SC), submucosal (SM), intranasal (IN). To induce and maintain this type of conscious sedation on patients having dental/oral and maxillofacial surgical procedures in the State of Texas, the following requirements must be met:

(1) Professional Requirements:

(A) each dentist wishing to utilize these techniques must be permitted by the State Board of Dental Examiners (SBDE) to deliver parenteral conscious sedation after having met the educational requirements as detailed in Rule 108.33 (h)(2)[~~(g)(2)~~] of this title (relating to Sedation/Anesthesia Permit).

(B) (No change.)

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

(c) Deep sedation and/or general anesthesia. To induce and maintain deep sedation/general anesthesia on patients having dental/oral and maxillofacial surgical procedures in the State of Texas, the following requirements must be met:

(1) Professional Requirements:

(A) Each dentist wishing to utilize either of these techniques must be permitted by the State Board of Dental Examiners (SBDE) to deliver deep sedation and/or general anesthesia after having met the education requirements as detailed in rule 108.33 (g)(3) of this title (relating to Sedation/Anesthesia Permit).

(B) (No change.)

(2) - (3) (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.

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Bobby D. Schmidt, M.Ed.
Executive Director
State Board of Dental Examiners
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For further information, please call: (512) 475-0972

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CHAPTER 114. EXTENSION OF DUTIES OF AUXILIARY PERSONNEL--DENTAL ASSISTANTS

The Texas State Board of Dental Examiners (Board) proposes amendments to 22 TAC, Chapter 114, §114.1 and §114.3, the repeal of §114.2, and new §114.2 and §114.10, all of which concern dental assistants. These sections contain extensive revisions to clarify and standardize language, as well as new language to enact the provisions of Senate Bill 263, §25, 78th Legislature, requiring that dental assistants that make x-rays be registered to do so.

Proposed amendments to §114.1 incorporate the definition of a "reversible" procedure, and specific examples of "irreversible" procedures that were previously contained in §114.2.

§114.2, which contains definitions, is proposed for repeal, with those definitions reduced and redistributed to the proposed amendments in other sections.

A new §114.2 is proposed to detail the requirements and process for the registration of dental assistants who perform x-ray procedures.

Proposed amendments to §114.3 incorporate some of the definitions previously found in §114.2, and clarify and organize the remainder of its language.

§114.10 is proposed for addition as a new section, relocating language from §115.10, which details the currently existing x-ray certification process for dental assistants. That language currently resides in Chapter 115, which relates to dental hygienists. Accordingly, §115.10 is concurrently being proposed for repeal. Language clarifying the dates for transition between the two registration schemes, pursuant to Senate Bill 263, §34, 78th Legislature has also been added, as §114.10(a).

Mr. Bobby D. Schmidt, Executive Director, Texas State Board of Dental Examiners has determined for the first five year period the sections are in effect there will be limited fiscal implications for local or state government as a result of enforcing or administering those sections.

There is an anticipated economic cost to persons who are required to comply with the sections as proposed. Those dental assistants required to comply with the sections will have to take and complete a one-time examination process in three parts, all

of which may be taken in one sitting, as well as complete a minimum of six hours of continuing education in each one-year license period. There is no anticipated local employment impact as a result of enforcing the sections as proposed.

Mr. Schmidt has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing them will be the increase in education and regulation of dental assistants who perform radiographic procedures on patients in the State of Texas.

The fiscal implications for small or large businesses will be minimal or none at all. Therefore, the Board has determined that compliance with the proposed sections will not have an adverse economic impact on small business when compared to large businesses. The requirements of Chapter 114 will impact individuals who make application for registration, and would only impact small businesses who choose to pay examination and registration fees for their dental assistant employees. Sites for the examination will be sufficiently numerous and well-distributed to minimize loss of employee time.

Comments on the proposal may be submitted to Bobby D. Schmidt, M.Ed. Executive Director, Texas State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 475-1660. To be considered, all written comments must be received by the Texas State Board of Dental Examiners no later than 30 days from the date that these sections are published in the *Texas Register*.

22 TAC §§114.1 - 114.3, 114.10

The sections are proposed under Texas Government Code §2001.021 et seq; Texas Civil Statutes, the Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties, and Senate Bill 263, §25, 78th Legislature, 2003, which requires the Board to establish rules for the registration of dental assistants who make x-rays.

The proposed sections affect Title 3, Subtitle D of the Occupations Code and Title 22, Texas Administrative Code, Chapter 101-125.

§114.1. Permitted Duties.

(a) A dentist may delegate to a dental assistant the authority to perform only acts or procedures that are reversible. The employing dentist or dentist in charge must be physically present in the dental office when the delegated act is performed, and the dentist shall remain responsible for any delegated act.

(b) An act or procedure that is reversible is capable of being reversed or corrected. Acts or procedures that are irreversible include, but are not limited to, the result of intra-oral use of any laser for any purpose, including all or part of a whitening process.

§114.2. Registration of Dental Assistants.

(a) Beginning September 1, 2004, a dental assistant may not position or expose dental x-rays unless the dental assistant holds a certificate of registration issued by the State Board of Dental Examiners under this section, except that any dental assistant certified under former Rule 115.10 (now recodified as Rule 114.10) prior to September 1, 2004 shall not be required to register for certification under Rule 114.2 until September 1, 2006, and shall continue to be governed by Rule 114.10 until September 1, 2006.

(b) To be eligible for a certificate of registration as a dental assistant under this section, an applicant must present on or accompanying an application form approved by the State Board of Dental Examiners proof satisfactory to the Board that the applicant has:

(1) Paid all application, examination and licensing fees required by law and Board rules and regulations;

(2) Successfully completed a current course in basic life support; and,

(3) Either:

(A) taken and passed an examination administered by the State Board of Dental Examiners or its designated agent, that covers:

(i) procedures for positioning and examining dental x-rays;

(ii) jurisprudence; and,

(iii) infection control; or,

(B) if the applicant is certified as a dental assistant by the Dental Assisting National Board, taken and passed a jurisprudence examination administered by the State Board of Dental Examiners or its designated agent.

(c) The State Board of Dental Examiners has established a staggered license registration system comprised of initial dental license registration periods followed by annual registrations (i.e., renewals). The initial, staggered dental assistant registration periods will range from 6 months to 17 months. Each dental assistant for whom an initial certificate of registration is issued will be assigned a computer-generated check digit. The length of the initial registration period will be according to the assigned check digit as follows:

(1) a dental assistant assigned to check digit 1 will be registered for 6 months;

(2) a dental assistant assigned to check digit 2 will be registered for 7 months;

(3) a dental assistant assigned to check digit 3 will be registered for 8 months;

(4) a dental assistant assigned to check digit 4 will be registered for 9 months;

(5) a dental assistant assigned to check digit 5 will be registered for 11 months;

(6) a dental assistant assigned to check digit 6 will be registered for 12 months;

(7) a dental assistant assigned to check digit 7 will be registered for 13 months;

(8) a dental assistant assigned to check digit 8 will be registered for 14 months;

(9) a dental assistant assigned to check digit 9 will be registered for 15 months; and

(10) a dental assistant assigned to check digit 10 will be registered for 17 months.

(11) Initial dental assistant registration fees will be prorated according to the number of months in the initial registration period.

(d) Subsequent to the initial registration period, a registered dental assistant's annual renewal will occur on the first day of the month

that follows the last month of the dental assistant initial registration period.

(1) Approximately 60 days prior to the expiration date of the initial dental assistant registration period, renewal notices will be mailed to all registered dental assistants who have that expiration date.

(2) A dental assistant registered under this section who wishes to renew his or her registration must:

(A) Pay a renewal fee set by Board rule;

(B) Submit proof that applicant has successfully completed a current course in basic life support; and,

(C) Provide proof of completion of at least six (6) hours of continuing education in the previous registration year.

(i) The continuing education curriculum must cover standards of care, infection control, and the applicable requirements of the Dental Practices Act and Board Rules.

(ii) Dental assistants shall select and participate in continuing education courses offered by or endorsed by continuing education providers listed in 22 TAC §104.2.

(iii) No more than three hours of the required continuing education coursework may be in self-study.

(3) A registration expired for one year or more may not be renewed.

(e) Applications for registration or for renewal of registration must be submitted to the office of the State Board of Dental Examiners.

(f) An application for registration is filed with the State Board of Dental Examiners when it is actually received, date-stamped, and logged-in by the State Board of Dental Examiners along with all required documentation and fees. An incomplete application for registration and fee will be returned to applicant within three working days with an explanation of additional documentation or information needed.

(g) A dental assistant shall display a current registration certificate in each office where the dental assistant provides services for which registration is required by this chapter. When a dental assistant provides such services at more than one location, a duplicate registration certificate issued by the Board may be displayed. Photocopies are not acceptable. The duplicate may be obtained from the State Board of Dental Examiners for a fee set by the Board.

§114.3. Application of Pit and Fissure Sealants.

(a) The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise:

(1) "Didactic education" requires the presentation and instruction of theory and scientific principles.

(2) "Clinical education" requires providing care to patient(s) under the direct supervision of a dentist or dental hygienist instructor.

(3) "Direct Supervision" requires that the instructor responsible for the procedure shall be physically present during patient care and shall be aware of the patient's physical status and well-being.

(b) [~~(a)~~] A Texas-licensed dentist who is enrolled as a Medicaid Provider with appropriate state agencies, or who practices in an area determined to be underserved by the Texas Department of Health, may delegate the application of a pit and fissure sealant to a dental assistant, if the dental assistant:

(1) is employed by and works under the direct supervision of the licensed dentist; and

(2) is certified pursuant to subsection (e)[~~(d)~~] of this section.

(c) [~~(b)~~] In addition to application of pit and fissure sealants a dental assistant certified in this section may use a rubber prophylaxis cup and appropriate polishing materials to cleanse the occlusal and smooth surfaces of teeth that will be sealed or to prepare teeth for application of orthodontic bonding resins Cleansing is intended only to prepare the teeth for the application of sealants or bonding resins and should not exceed the amount needed to do so.

(d) [~~(c)~~] The dentist may not bill for a cleansing provided hereunder as a prophylaxis.

(e) [~~(d)~~] A dental assistant wishing to obtain certification under this subsection must:

(1) Pay [~~pay~~] an application fee set by Board rule;

(2) And [~~and~~] on a form prescribed by the Board [~~must~~] provide proof that the applicant has [~~of the following~~]:

(A) [~~(1)~~] At [~~at~~] least two years of experience as a dental assistant;

(B) Successfully completed a current course in basic life support; and,

(C) [~~(2)~~] Completed [~~completion of~~] a minimum of 16 hours of clinical and didactic education in pit and fissure sealants taken through a CODA accredited dental hygiene program approved by the Board whose course of instruction includes:

(i) [~~(A)~~] infection control;

(ii) [~~(B)~~] cardiopulmonary resuscitation;

(iii) [~~(C)~~] treatment of medical emergencies;

(iv) [~~(D)~~] microbiology;

(v) [~~(E)~~] chemistry;

(vi) [~~(F)~~] dental anatomy;

(vii) [~~(G)~~] ethics related to pit and fissure sealants;

(viii) [~~(H)~~] jurisprudence related to pit and fissure sealants; and

(ix) [~~(I)~~] the correct application of sealants, including the actual clinical application of sealants; and

~~[(3) Submit proof that applicant has successfully completed a current course in basic life support given by the American Heart Association or the American Red Cross.]~~

(f) [~~(e)~~] Before January 1 of each year, a dental assistant registered under this section who wishes to renew that registration must[~~assistants certified hereunder who wish to renew their certifications must pay a renewal fee set by Board rule and must provide proof of the following~~]:

(1) Pay a renewal fee set by Board rule;

(2) Submit proof that the applicant has successfully completed a current course in basic life support; and,

(3) [~~(1)~~] Provide proof of completion of at least six (6) hours of continuing education in technical and scientific coursework in the previous calendar year. [~~annually. The terms technical and scientific as applied to continuing education shall mean that courses have significant intellectual or practical content and are designed to directly~~

~~enhance the practitioner's knowledge and skill in providing clinical care to the individual patient.~~]

(A) The terms "technical" and "scientific", as applied to continuing education, shall mean that courses have significant intellectual or practical content and are designed to directly enhance the practitioner's knowledge and skill in providing clinical care to the individual patient.

(B) [~~(A)~~] Dental assistants shall select and participate in continuing education courses offered by or endorsed by:[~~dental schools, dental hygiene schools, or dental assisting schools that have been accredited by the Commission on Dental Accreditation of the American Dental Association; or~~]

(i) dental schools, dental hygiene schools, or dental assisting schools that have been accredited by the Commission on Dental Accreditation of the American Dental Association; or,

(ii) [~~(B) by~~] nationally recognized dental, dental hygiene or dental assisting organizations.

(C) No more than three (3) hours of the required continuing education coursework may be in self-study.[~~; and~~]

[~~(2) Submit proof that applicant has successfully completed a current course in basic life support given by the American Heart Association or the American Red Cross.~~]

§114.10. Radiologic Procedures.

(a) Pursuant to S.B. 263, 78th Regular Session, former Rule 115.10, relating to the issuance of a certificate of registration has been superseded by Rule 114.2, relating to Registration of Dental Assistants. Accordingly:

(1) Beginning September 1, 2004, a dental assistant may not position or expose dental x-rays unless the dental assistant holds a certificate of registration issued pursuant to Rule 114.2;

(2) Notwithstanding the requirement of subsection (a)(1) of this section, any dental assistant certified under this section (formerly codified as Rule 115.10) prior to September 1, 2004 shall not be required to register for certification under Rule 114.2 until September 1, 2006, and shall continue to be governed by this Rule 114.10, until September 1, 2006; and,

(3) This section shall expire in its entirety on September 1, 2006. Dental assistants may not continue to position or expose dental x-rays pursuant to subsection (g) of this section after August 31, 2006.

(b) Any person performing radiologic procedures under the supervision of a Texas licensed dentist must register with the Texas State Board of Dental Examiners (TSBDE). A registrant may perform, by the direct oral or written order(s) of the supervising dentist, any radiologic procedures required for the diagnosis of the maxillofacial complex.

(c) This section does not apply to registered nurses or persons certified under the Medical Radiologic Technologist Certification Act.

(d) A dental hygienist who is licensed and currently registered in this state, shall be deemed to be registered for the purpose of performing radiologic procedures.

(e) A dental assistant is qualified to perform radiographic procedures if any one of the following criteria is met:

(1) current certification as a certified dental assistant by the Dental Assisting National Board, Inc.;

(2) successful completion of the dental radiation health and safety examination administered by the Dental Assisting National Board, Inc.; or

(3) successful completion of an examination specified by the TSBDE.

(f) Dental assistants who are not qualified under the provisions of this section, may be allowed to perform necessary diagnostic radiographs under the direct supervision of the dentist for a period of six months as a part of their training and as a part of their examination, provided the dental assistant is personally supervised by a person authorized to perform radiologic procedures.

(g) All dental radiologic procedures can be performed by any person qualified and certified under this section.

(h) Registration may be revoked, for the following reasons:

(1) violation of the rules of the Texas State Board of Dental Examiners;

(2) violation of the Texas Dental Practice Act; and

(3) violation of all other applicable rules and statutes affecting radiologic procedures in Texas.

(i) All registrants must comply with the rules and regulations of the Texas Department of Health for control of radiation.

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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Bobby D. Schmidt, M.Ed
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 475-0972

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22 TAC §114.2

(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 State Board of Dental Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under Texas Government Code §2001.021 et seq; Texas Civil Statutes, the Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties, and Senate Bill 263, §25, 78th Legislature, 2003, which requires the Board to establish rules for the registration of dental assistants who make x-rays.

The proposed repeal affects Title 3, Subtitle D of the Occupations Code and Title 22, Texas Administrative Code, Chapter 101-125.

§114.2. Definitions.

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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Bobby D. Schmidt, M.Ed
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CHAPTER 115. EXTENSION OF DUTIES OF AUXILIARY PERSONNEL--DENTAL HYGIENE

22 TAC §115.10

(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 State Board of Dental Examiners or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas State Board of Dental Examiners (Board) proposes the repeal of 22 TAC Chapter 115, §115.10, concerning the registration of dental assistants performing radiological procedures.

The repeal is necessary because the language in this section is being relocated to new §114.10, which is published contemporaneously as a proposed rule in this issue of the *Texas Register*. Although Chapter 115 pertains to dental hygienists, the provisions of §115.10 were only relevant to dental assistants.

Mr. Bobby D. Schmidt, Executive Director, Texas State Board of Dental Examiners has determined that for each year of the first five year period after the repeal of the section, the public benefit anticipated as a result of repealing the rule will be negligible. There will be no effect on large, small or micro-businesses. There is no anticipated economic cost to persons as a result of the repeal and there is no impact on local employment.

Comments on the proposal may be submitted to Bobby D. Schmidt, M.Ed. Executive Director, Texas State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, (512) 475-1660. To be considered, all written comments must be received by the Texas State Board of Dental Examiners no later than 30 days from the date that this amended rule is published in the *Texas Register*.

The repeal is proposed under Texas Government Code §2001.021 et seq; Texas Civil Statutes, the Occupations Code §254.001 which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The proposed repeal affects Title 3, Subtitle D of the Occupations Code and Title 22, Texas Administrative Code, Chapter 101-125.

§115.10. Radiological Procedures.

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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Bobby D. Schmidt, M.Ed.
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State Board of Dental Examiners
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For further information, please call: (512) 475-0972

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PART 9. TEXAS STATE BOARD OF MEDICAL EXAMINERS

CHAPTER 163. LICENSURE

22 TAC §§163.1 - 163.7, 163.11, 163.12

The Texas State Board of Medical Examiners proposes amendments to §§163.1-163.7, 163.11 and 163.12, concerning Licensure. The proposal concerns eligibility for licensure and general clean up of the rules.

Elsewhere in this issue of the *Texas Register*, the Texas State Board of Medical Examiners proposes the rule review of Chapter 163.

Michele Shackelford, General Counsel, Texas State Board of Medical Examiners, has determined that for the first five-year period the proposed rules are in effect physician applicants will be responsible for paying for the cost of the medical jurisprudence examination. Although applicants will be required to pay to take the examination online, it is anticipated that this cost will be offset because they will not be required to travel to Austin for the examination. There will be no fiscal implications to state or local government as a result of enforcing the rules as proposed.

Ms. Shackelford also has determined that for each year of the first five years the rules as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be updated rules. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Pat Wood, P.O. Box 2018, MC-901, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The following are affected by the proposed rules: Texas Occupations Code Annotated, §§155.001, 155.002, 155.003, 155.0031, 155.004, 155.005, 155.007, 155.008, 155.051, 155.0511, 155.052, 155.053, 155.054, 155.055, 155.056, 155.057, 155.058, 155.104.

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

(1) Acceptable approved medical school - A medical school or college located in the United States or Canada that has been accredited by the Liaison Committee on Medical Education or the American Osteopathic Association Bureau of Professional Education.

(2) Acceptable unapproved medical school - A school or college located outside the United States or Canada that:

(A) is substantially equivalent to a Texas medical school; and

(B) has not been disapproved by another state physician licensing agency unless the applicant can provide evidence that the disapproval was unfounded.

(3) [~~(2)~~] Affiliated hospital - Affiliation status of a hospital with a medical school as defined by the Liaison Committee on Medical

Education and documented by the medical school in its application for accreditation.

(4) [~~(3)~~] Applicant - One who files an application as defined in this section.

(5) [~~(4)~~] Application - An application is all documents and information necessary to complete an applicant's request for licensure including the following:

(A) forms furnished by the board, completed by the applicant:

(i) all forms and addenda requiring a written response must be typed or printed in ink;

(ii) photographs must meet United States Government passport standards;

(B) all documents required under section 163.5 of this title (relating to Licensure Documentation); and

(C) the required fee, payable by check through a United States bank.

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(7) [~~(5)~~] Continuous - 12 month periods of uninterrupted postgraduate training with no absences greater than 21 days, unless such absences have been approved by the training program.

(8) [~~(6)~~] Eligible for licensure in country of graduation - An applicant must be eligible for licensure in the country in which the medical school is located except for any citizenship requirements.

(9) [~~(7)~~] Examinations accepted by the board for licensure.

(A) United States Medical Licensing Examination (USMLE), with a score of 75 or better, or a passing grade if applicable, on each step, with all steps [~~must be~~] passed within seven years;

(B) Federation Licensing Examination (FLEX), on or after July 1, 1985, passage of both components within seven years with a score of 75 or better on each component;

(C) Federation Licensing Examination (FLEX), before July 1, [~~prior to June 30,~~] 1985, with a FLEX weighted average of 75 or better in one sitting;

(D) National Board of Medical Examiners Examination (NBME) or its successor with all steps [~~must be~~] passed within seven years;

(E) National Board of Osteopathic Medical Examiners Examination (NBOME) or its successor with all steps [~~must be~~] passed within seven years;

(F) Medical Council of Canada Examination (LMCC) or its successor, with all steps [~~must be~~] passed within seven years;

(G) State board licensing examination, passed before January 1, 1977, (with the exception of Virgin Islands, Guam, Tennessee Osteopathic Board or Puerto Rico then the exams must be passed before July 1, 1963 [~~after June 30, 1963~~]); or

(H) One of the following examination combinations with a score of 75 or better on each part, level, component, or step, all parts, levels, components, or steps must be passed within seven years:

(i) FLEX I plus USMLE 3;

(ii) USMLE 1 and USMLE 2 (including passage of the clinical skills component if applicable), plus FLEX II;

(iii) NBME I or USMLE 1, plus NBME II or USMLE 2 (including passage of the clinical skills component if applicable), plus NBME III or USMLE 3;

(iv) NBME I or USMLE 1, plus NBME II or USMLE 2 (including passage of the clinical skills component if applicable), plus FLEX II;

(v) NBOME I, plus NBOME II, plus FLEX II;

(vi) the NBOME Part I or COMLEX Level I and NBOME Part II or COMLEX Level II and NBOME Part III or COMLEX Level III.

(I) An applicant must pass each part of an examination within three attempts, except that an applicant who has passed all but one part of an examination within three attempts may take the remaining part of the examination one additional time.

(J) Notwithstanding subparagraph (I) of this paragraph, an applicant is considered to have satisfied the requirements of this section if the applicant:

(i) passed all but one part of an examination approved by the board within three attempts and passed the remaining part of the examination within five attempts;

(ii) is specialty board certified by a specialty board that:

(I) is a member of the American Board of Medical Specialties; or

(II) is a member of the Bureau of Osteopathic Specialists; and

(iii) completed in this state an additional two years of postgraduate medical training approved by the board.

(K) An applicant who has not passed an examination for licensure in a ten-year period prior to the filing date of the application must:

(i) pass a monitored specialty certification examination or formal evaluation, a monitored recertification examination or formal evaluation, or a monitored [~~an~~] examination of continued demonstration of qualifications by a board that is a member of the American Board of Medical Specialties or the Bureau of Osteopathic Specialists within the preceding ten years;

(ii) obtain through extraordinary circumstances, unique training equal to the training required for specialty certification as determined by a committee of the board and approved by the board, including but not limited to participation for at least six months in a training program approved by the board within twelve months prior to the application for licensure; or

(iii) pass the Special Purpose Examination (SPEX) within the preceding ten years.

~~[(8) Examinations administered by the board for licensure - To be eligible for licensure an applicant must sit for and pass the Texas medical jurisprudence examination administered by the board. A passing score is 75 or better on the Texas medical jurisprudence examinations. The board shall administer the Texas medical jurisprudence examination in writing at times and places designated by the board.]~~

(10) [~~(9)~~] Good professional character - An applicant for licensure must not be in violation of or committed any act described in the Medical Practice Act, Tex. Occ. Code Ann. §§164.051-.053.

[(10) Graduate of an acceptable unapproved foreign medical school - An applicant who is a graduate of a school or college located outside the United States or Canada whose school or college:]

[(A) is not currently undergoing the approval process of the Medical Board of California; and,]

[(B) is either:]

[(i) substantially equivalent to a Texas medical school; or]

[(ii) has not been disapproved by the Medical Board of California.]

(11) One-year training program - [Applicants who are graduates of acceptable approved medical schools must successfully complete] a program that is one continuous year of postgraduate training approved by the board that is:

(A) accepted for certification by a specialty [an American Specialty] board that is a member of the American Board of Medical Specialties or the Bureau of Osteopathic Specialists; or

(B) accredited by one of the following:

(i) the Accreditation Council for Graduate Medical Education, or its predecessor;

(ii) the American Osteopathic Association;

(iii) the Committee on Accreditation of Preregistration Physician Training Programs, Federation of Provincial Medical Licensing Authorities of Canada;

(iv) the Royal College of Physicians and Surgeons of Canada; or

(v) the College of Family Physicians of Canada; or

(C) a postresidency program, usually called a fellowship, performed in the U.S. or Canada and approved by the board for additional training in a medical specialty or subspecialty [in a program approved by the Texas State Board of Medical Examiners].

(12) Sixty (60) semester hours of college courses - 60 semester hours of college courses other than in medical school that are acceptable to The University of Texas at Austin for credit on a bachelor of arts degree or a bachelor of science degree; the entire primary, secondary, and premedical education required in the country of medical school graduation, if the medical school is located outside the United States or Canada; or substantially equivalent courses as determined by the board.

[(13) Studied medicine in an acceptable unapproved foreign medical school - An applicant who has studied at a school or college located outside the United States or Canada whose school or college:]

[(A) is not currently undergoing the approval process of the Medical Board of California; and,]

[(B) is either:]

[(i) substantially equivalent to a Texas medical school; or]

[(ii) has not been disapproved by the Medical Board of California.]

(13) [(14)] Substantially equivalent to a Texas medical school - A medical school or college that is an institution of higher learning designed to select and educate medical students; provide students with the opportunity to acquire a sound basic medical education through training in basic sciences and clinical sciences; provide advancement of knowledge through research; develop programs of graduate medical education to produce practitioners, teachers, and researchers; and afford opportunity for postgraduate and continuing medical education. The school must provide resources, including faculty and facilities, sufficient to support a curriculum offered in an intellectual environment that enables the program to meet these standards. The faculty of the school shall actively contribute to the development and transmission of new knowledge. The medical school shall contribute to the advancement of knowledge and to the intellectual growth of its students and faculty through scholarly activity, including research. The medical school shall include, but not be limited to, the following characteristics:

(A) The facilities for basic sciences and clinical training (i.e., laboratories, hospitals, library, etc.) shall be adequate to ensure opportunity for proper education.

(B) The admissions standards shall be substantially equivalent to a Texas medical school.

(C) The basic sciences curriculum shall include the contemporary content of those expanded disciplines that have been traditionally titled gross anatomy, biochemistry, biology, histology, physiology, microbiology, immunology, pathology, pharmacology and neuroscience, as defined by the Texas Higher Education Coordinating Board.

(D) The fundamental clinical subjects, which shall be offered in the form of required patient-related clerkships, are internal medicine, obstetrics and gynecology, pediatrics, psychiatry, neurology, family practice, introduction to patient/physical examination, and surgery, as defined by the Texas Higher Education Coordinating Board.

(E) The curriculum shall be of at least 130 weeks in duration.

(F) The school shall provide advancement of knowledge through research.

(G) The school shall develop programs of graduate medical education to produce practitioners, teachers, and researchers.

(H) The school shall provide opportunity for postgraduate and continuing medical education.

(I) Medical education courses must be centrally organized, integrated and controlled into a continuous program which was conducted, monitored and approved by the medical school which issues the degree.

[(J) All medical or osteopathic medical education received by the applicant in the United States must be obtained while enrolled as a visiting student at a medical school that is accredited by an accrediting body officially recognized by the United States Department of Education as the accrediting body for medical education leading to the doctor of medicine degree or the doctor of osteopathy degree in the United States. This subsection does not apply to postgraduate medical education or training.]

[(K) An applicant who is unable to comply with the requirements of subparagraph (J) of this paragraph is eligible for an unrestricted license if the applicant:]

[(i) received such medical education in a hospital or teaching institution Sponsoring or participating in a program of graduate medical education accredited by the Accrediting Council for Graduate Medical Education, the American Osteopathic Association, or the Texas State Board of Medical Examiners in the same subject as the

medical or osteopathic medical education if the hospital or teaching institution has an agreement with the applicant's school; or]

[(ii) is specialty board certified by a board approved by the Bureau of Osteopathic Specialists or the American Board of Medical Specialties.]

(14) Texas Medical Jurisprudence Examination (JP exam): the ethics examination administered by the board for licensure that must be passed by an applicant for licensure within three attempts with a score 75 or better.

(15) Three-year training program - [Applicants who are graduates of, or have studied at an acceptable unapproved foreign medical school must successfully complete] three continuous years of postgraduate training in the United States or Canada, progressive in nature and acceptable for specialty board certification in one specialty area that is:

(A) accredited by one of the following:

(i) the Accreditation Council for Graduate Medical Education;

(ii) the American Osteopathic Association;

(iii) the Committee on Accreditation of Preregistration Physician Training Programs, Federation of Provincial Medical Licensing Authorities of Canada;

(iv) the Royal College of Physicians and Surgeons of Canada;

(v) the College of Family Physicians of Canada; or [and]

(vi) all programs approved by the board after August 25, 1984; or

(B) a board-approved program for which a Faculty Temporary Permit was issued; or

(C) a postresidency program, usually called a fellowship, for additional training in a medical specialty or subspecialty, approved by the Texas State Board of Medical Examiners.

§163.2. Licensure for United States/Canadian Medical School Graduates.

To be eligible for licensure, an applicant who is a graduate from a school in the United States or Canada must [An applicant, to be eligible for licensure must]:

(1) be 21 years of age;

(2) be of good professional character as defined under §163.1(10) of this title;

(3) have completed 60 semester hours of college courses as defined under §163.1(12) of this title [other than in medical school];

(4) be a graduate of an acceptable approved medical school as defined under §163.1(2) of this title;

(5) have successfully completed a one-year training program of graduate medical training in the United States or Canada as defined under §163.1(11) of this title [approved by the board];

(6) submit evidence of passing [,] an examination [,] accepted [acceptable] by the board for licensure as defined under §163.1(9) of this title; and,

(7) pass the Texas Medical Jurisprudence Examination with a score of 75 or better.

§163.3. Licensure for Graduates of Acceptable Unapproved [Foreign] Medical Schools.

To be eligible for licensure, an applicant who is a graduate from a school outside the United States or Canada must [An applicant, to be eligible for licensure must]:

(1) be 21 years of age;

(2) be of good professional character as defined under §163.1(10) of this title;

(3) have completed 60 semester hours of college courses as defined under §163.1(12) of this title [other than in medical school or have completed the entire primary, secondary, and premedical education required in the country of medical school graduation, if the medical school is located outside the United States or Canada];

(4) be a graduate of an acceptable unapproved [foreign] medical school as defined under §163.1(2) of this title [that is substantially equivalent to a Texas medical school];

(5) have successfully completed a three-year training program of graduate medical training in the United States or Canada as defined under §163.1(15) of this title [that was approved by the board on the date the training was completed];

(6) submit evidence of passing [,] an examination [,] accepted [acceptable] by the board for licensure as defined under §163.1(9) of this title;

(7) pass the Texas Medical Jurisprudence Examination with a score of 75 or better;

(8) be eligible for licensure in country of graduation as defined under §163.1(8) of this title;

(9) possess a valid certificate issued by the Educational Commission for Foreign Medical Graduates (ECFMG);

(10) have the ability to communicate in the English language; and

(11) have supplied all additional information that the board may require concerning the applicant's medical school.

§163.4. Procedural Rules for Licensure Applicants.

(a) All applicants [Applicants] for licensure:

(1) if appropriate, are encouraged [recommended] to use the Federation Credentials Verification Service (FCVS) offered by the Federation of State Medical Boards of the United States (FSMB) to verify medical education, postgraduate training, licensure examination history, board action history and identity;

(2) whose applications have [application has] been filed with the board [office] in excess of one year will be considered expired. Any fee previously submitted with that application shall be forfeited. Any further request [application procedure] for licensure will require submission of a new application and inclusion of the current licensure fee;

[(3) will be allowed to sit for the Texas medical jurisprudence examination only three times. After the third failure of the Texas medical jurisprudence examination, and after each subsequent failure, an applicant for licensure shall be required to appear before a committee of the board to address the applicant's inability to pass the Texas medical jurisprudence examination and to re-evaluate the applicant's eligibility for licensure;]

(3) [(4)] who in any way submit a false or misleading statement, document, or certificate in an [falsify the] application may be

required to appear before the board. It will be at the discretion of the board whether or not the applicant will be issued a Texas license;

(4) [~~(5)~~] on whom adverse information is received by the board may be required to appear before the board. It will be at the discretion of the board whether or not the applicant will be issued a Texas license;

(5) [~~(6)~~] shall be required to comply with the board's rules and regulations which are in effect at the time the [~~completed~~] application form and fee are filed with the board;

[~~(7) who have not passed an examination for licensure in a ten-year period prior to the filing date of the application must:~~]

[~~(A) pass a specialty certification examination or formal evaluation, recertification examination or formal evaluation, or an examination of continued demonstration of qualifications by a board that is a member of the American Board of Medical Specialties or the Bureau of Osteopathic Specialists within the preceding ten years;~~]

[~~(B) obtain through extraordinary circumstances, unique training equal to the training required for specialty certification as determined by a committee of the board and approved by the board, including but not limited to participation for at least six months in a training program approved by the board within twelve months prior to the application for licensure; or~~]

[~~(C) pass SPEX within the preceding ten years;~~]

(6) [~~(8)~~] may be required to sit for additional oral, written, mental or physical examinations that, in the opinion of the board, are necessary to determine competency and ability of the applicant;

(7) [~~(9)~~] must have the application for licensure complete in every detail 20 days prior to the board meeting in which they are considered for licensure. Applicants with complete applications may qualify for a Temporary License prior to being considered by the board for licensure, as required by section §163.7 of this title (relating to Temporary Licensure - Regular); and

(8) that receive any medical or osteopathic medical education in the United States must have obtained such education while enrolled as a full-time or visiting student at a medical school that is accredited by an accrediting body officially recognized by the United States Department of Education as the accrediting body for medical education leading to the doctor of medicine degree or the doctor of osteopathy degree in the United States. This subsection does not apply to postgraduate medical education or training. An applicant who is unable to comply with this requirement must demonstrate that the applicant either:

(A) received such medical education in a hospital or teaching institution sponsoring or participating in a program of graduate medical education accredited by the Accrediting Council for Graduate Medical Education, the American Osteopathic Association, or the Texas State Board of Medical Examiners in the same subject as the medical or osteopathic medical education if the hospital or teaching institution has an agreement with the applicant's school; or

(B) is specialty board certified by a board approved by the Bureau of Osteopathic Specialists or the American Board of Medical Specialties.

[~~(10) must pass, within seven years all parts of all examinations required for licensure. The board may consider for licensure graduates of simultaneous MD-PhD or DO-PhD programs who have passed all parts of their required examinations no later than two years after their MD or DO degree was awarded.~~]

[~~(b) Applicants for licensure who wish to request reasonable accommodations for the Texas jurisprudence examination, due to a disability, must submit the request upon filing the Application.~~]

(b) [~~(c)~~] Applicants for a license must subscribe to an oath in writing [~~before an officer authorized by law to administer oaths~~]. The written oath is part of the application.

(c) [~~(d)~~] An applicant is not eligible for a license if:

(1) the applicant holds a medical license that is currently restricted for cause, canceled for cause, suspended for cause, or revoked by a state of the United States, a province of Canada, or a uniformed service of the United States;

(2) an investigation or a proceeding is instituted against the applicant for the restriction, cancellation, suspension, or revocation of the applicant's medical license in a state of the United States, a province of Canada, or a uniformed service of the United States; or

(3) a prosecution is pending against the applicant in any state, federal, or Canadian court for any offense that under the laws of this state is a felony or a misdemeanor that involves moral turpitude.

§163.5. Licensure Documentation.

(a) An applicant must appear for a personal interview at the board offices and present original documents to a representative of the board for inspection. Original documents may include, but are not limited to, those listed in subsections (b)-(e) of this section.

(b) Documentation required of all applicants for licensure.

(1) Birth Certificate/Proof of Age. Each applicant for licensure must provide a copy of a [~~current state driver's license, current state identification card,~~] valid passport or birth certificate and translation if necessary to prove that the applicant is at least 21 years of age. In instances where such documentation [~~a birth certificate~~] is not available the applicant must provide copies of [~~a passport or~~] other suitable alternate documentation.

(2) Name Change. Any applicant who submits documentation showing a name other than the name under which the applicant has applied must present copies of marriage licenses, divorce decrees, or court orders stating the name change. In cases where the applicant's name has been changed by naturalization, the applicant should send the original naturalization certificate by certified mail to the board office for inspection.

(3) Examination Scores. Each applicant for licensure must have a certified transcript of grades submitted directly from the appropriate testing service to the [~~this~~] board for all examinations accepted by the board [~~used in Texas or another state~~] for licensure.

(4) Dean's Certification. Each applicant for licensure must have a certificate of graduation submitted directly from the medical school on a form provided to the applicant by the board. The applicant shall attach a recent photograph, meeting United States Government passport standards, to the form before submitting to the medical school. The school shall have the Dean of the medical school or designated appointee sign the form attesting to the information on the form and placing the school seal over the photograph.

(5) Evaluations. All applicants must provide evaluations completed by an appropriate supervisor, on a form provided by the board, of their professional affiliations for the past ten years or since graduation from medical school, whichever is the shorter period.

(6) Medical School Transcript. Each applicant must have his or her medical school submit a transcript of courses taken and grades obtained.

(7) National Practitioner Data Bank [~~(NPDB)~~] /Health Integrity and Protection Data Bank (NPDB-HIPDB). Each applicant must contact the NPDB-HIPDB and have a report of action submitted directly to the board on the applicant's behalf.

(8) Graduate Training Verification. Each applicant must have [~~submit an evaluation from~~] each of the training programs in which they have participated in submit verification on a form provided by the board. The evaluation must show the beginning and ending dates of the program and state that the program was successfully completed.

(9) Specialty Board Certification. Each applicant who has obtained certification by a board that is a member of the American Board of Medical Specialties or the Bureau of Osteopathic Specialists must submit a copy of the certificate issued by the member showing board certification.

(10) Medical License Verifications. Each applicant must [~~will~~] have every state [~~,~~] in which he or she has ever been licensed, regardless of the current status of the license, submit [~~on his or her behalf,~~] directly to this board a letter verifying the status of the license and a description of any sanctions or pending disciplinary matters.

(c) Applicants for licensure who are graduates of [~~unapproved~~] medical schools outside the United States or Canada must furnish all appropriate documentation listed in this subsection, as well as that listed in subsections (a) and (b) of this section.

(1) Educational Commission for Foreign Medical Graduates (ECFMG) Status Report. Each applicant must submit an ECFMG status report.

(2) Unique Documentation. The board may request documentation unique to an individual unapproved medical school and additional documentation as needed to verify completion of medical education that is substantially equivalent to a Texas medical school education. This may include but is not limited to:

(A) a copy of the applicant's ECFMG file;

(B) a copy of other states' licensing files;

(C) copies of the applicant's clinical clerkship evaluations; and

(D) a copy of the applicant's medical school file.

(3) Certificate of Registration. Each applicant must provide a copy of his or her certificate to practice in the country in which his or her medical school is located. If a certificate is unavailable, a letter submitted directly to this board from the body governing licensure of physicians in the country in which the school is located, will be accepted. The letter must state that the applicant has met all the requirements for licensure in the country in which the school is located. If an applicant is not licensed in the country of graduation due to a citizenship requirement, a letter attesting to this, submitted directly to this board, will be required.

(4) Clinical Clerkship Affidavit. A form, supplied by the board, to be completed by the applicant, is required listing each clinical clerkship that was completed as part of an applicant's medical education. The form will require the name of the clerkship, where the clerkship was located (name [~~of hospital~~] and location of hospital) and dates of the clerkship.

(5) " Substantially equivalent " documentation. An applicant who is a graduate of a medical school that is located outside the United States and Canada must present satisfactory proof to the board that each medical school attended was substantially equivalent to a Texas medical school at the time of attendance as defined under §163.1(13) of this title. This may include but is not limited to:

(A) a Foreign Educational Credentials Evaluation from the Office of International Education Services of the American Association of Collegiate Registrars and Admissions Officers (AACRAO);

(B) a board questionnaire, to be completed by the medical school and returned directly to board;

(C) a copy of the medical school's catalog;

(D) verification from the country's educational agency confirming the validity of school and licensure of applicant;

(E) proof of written agreements between the medical school and all hospitals that are not located in the same country as the medical school, where medical education was obtained [~~proof of affiliation agreements between the medical school and the hospitals where clinical clerkships were taught~~];

[~~(F) proof that the institutions had written contracts with the medical school if the institutions were not located in a country where the medical school was located;~~]

(F) [~~(G)~~] proof that the faculty members of the medical school had written contracts with the school if they taught a course outside the country where the medical school was located;

(G) [~~(H)~~] proof that the medical education courses taught in the United States complied with the higher education laws of the state in which the courses were taught;

(H) [~~(I)~~] proof that the faculty members of the medical school who taught courses in the United States were on the faculty of the program of graduate medical education when the courses were [~~course was~~] taught [~~in the United States~~]; and

(I) [~~(J)~~] proof that all education completed in the United States or Canada was while the applicant was enrolled as a visiting student as evidenced by a letter of verification from the U.S. or Canadian medical school.

(6) Medical Diploma. Each applicant must submit a copy of his or her [~~their~~] medical diploma, and translation if necessary.

(d) Applicants may be required to submit other documentation, which may include the following: [~~.~~]

(1) Translations. Any document that is in a language other than the English language will need to have a certified translation prepared and a copy of the translation will have to be submitted along with the translated document.

(A) An official translation from the medical school (or appropriate agency) attached to the foreign language transcript or other document is acceptable.

(B) If a foreign document is received without a translation, the board will send the applicant a copy of the document to be translated and returned to the board.

(C) Documents must be translated by a translation agency that [~~who~~] is a member of the American Translations Association or a United States college or university official.

(D) The translation must be on the translator's letterhead, and the translator must verify that it is a "true word for word translation" to the best of his/her knowledge, and that he/she is fluent in the language translated, and is qualified to translate the document.

(E) The translation must be signed in the presence of a notary public and then notarized. The translator's name must be printed

below his/her signature. The notary public must use this phrase: "Subscribed and Sworn to this _____ day of _____, 20___." The notary must then sign and date the translation, and affix his/her Notary Seal to the document.

(2) Arrest Records. If an Applicant has ever been arrested, a copy of the arrest and arrest disposition need to be requested from the arresting authority and said authority must submit copies directly to this board.

(3) Malpractice. If an applicant has ever been named in a malpractice claim filed with any medical liability carrier or if an applicant has ever been named in a malpractice suit, the applicant must do the following [~~have the following submitted~~]:

(A) have each medical liability carrier complete a form furnished by this board regarding each claim filed against the applicant's insurance;

(B) for each claim that becomes a malpractice suit, have the attorney representing the applicant in each suit submit a letter directly to this board explaining the allegation, dates of the allegation, and current status of the suit. If the suit has been closed, the attorney must state the disposition of the suit, and if any money was paid, the amount of the settlement. The letter should include supporting court records. If such letter is not available, the Applicant will be required to furnish a notarized affidavit explaining why this letter cannot be provided; and

(C) provide a statement, composed by the applicant, explaining the circumstances pertaining to patient care in defense of the allegations.

(4) Inpatient Treatment for Alcohol/Substance Abuse or Mental Illness. Each applicant that has been admitted to an inpatient facility within the last five years for the treatment of alcohol/substance abuse or mental illness shall submit documentation to include, but not limited to [~~must submit the following~~]:

(A) an applicant's statement explaining the circumstances of the hospitalization;

(B) all records, submitted directly from the inpatient facility;

(C) a statement from the applicant's treating physician/psychotherapist as to diagnosis, prognosis, medications prescribed, and follow-up treatment recommended; and

(D) a copy of any contracts signed with any licensing authority or medical society or impaired physician's committee.

(5) Outpatient Treatment for Alcohol/Substance Abuse or Mental Illness. Each applicant that has been treated on an outpatient basis within the last five years for alcohol/substance abuse or mental illness shall submit documentation to include, but not limited to [~~must submit the following~~]:

(A) an applicant's statement explaining the circumstances of the outpatient treatment;

(B) a statement from the applicant's treating physician/psychotherapist as to diagnosis, prognosis, medications prescribed, and follow-up treatment recommended; and

(C) a copy of any contracts signed with any licensing authority or medical society or impaired physician's committee.

~~[(6) Additional Documentation. Additional documentation as is deemed necessary to facilitate the investigation of any application for medical licensure.]~~

(6) [~~(7)~~] DD214. A copy of the DD214, indicating separation from any branch of the United States military.

(7) [~~(8)~~] Premedical School Transcript. Applicants , upon request, may be required to submit a copy of the record of their undergraduate education. Transcripts must show courses taken and grades obtained. If determined that the documentation submitted by the applicant is not sufficient to show proof of the completion of 60 semester hours of college courses other than in medical school or education required for country of graduation, the applicant may be requested to contact the Office of Admissions at The University of Texas at Austin for course work verification.

(8) [~~(9)~~] Fingerprint Card. Upon request, applicants must complete a fingerprint card and return to the board as part of the application.

(9) Additional Documentation. Additional documentation as is deemed necessary to facilitate the investigation of any application for medical licensure.

(e) The board may, in unusual circumstances, allow substitute documents where proof of exhaustive efforts on the applicant's part to secure the required documents is presented. These exceptions are reviewed by the board's executive director on a case-by-case basis.

§163.6. Examinations Accepted for Licensure [~~Administration of Examinations~~] .

(a) Licensing Examinations Accepted by the Board for Licensure. The following examinations are acceptable for licensure:

(1) United States Medical Licensing Examination (USMLE), with a score of 75 or better, or a passing grade if applicable, on each step, with all steps passed within seven years;

(2) Federation Licensing Examination (FLEX), on or after July 1, 1985, passage of both components within seven years with a score of 75 or better on each component;

(3) Federation Licensing Examination (FLEX), before July 1, 1985, with a FLEX weighted average of 75 or better in one sitting;

(4) National Board of Medical Examiners Examination (NBME) or its successor all steps passed within seven years;

(5) National Board of Osteopathic Medical Examiners Examination (NBOME) or its successor with all steps passed within seven years;

(6) Medical Council of Canada Examination (LMCC) or its successor, with all steps passed within seven years;

(7) State board licensing examination, passed before January 1, 1977, (with the exception of Virgin Islands, Guam, Tennessee Osteopathic Board or Puerto Rico then the exams must be passed before July 1, 1963); or

(8) One of the following examination combinations with a score of 75 or better on each part, level, component, or step, all parts, levels, components, or steps must be passed within seven years:

(A) FLEX I plus USMLE 3;

(B) USMLE 1 and USMLE 2 (including passage of the clinical skills component if applicable), plus FLEX II;

(C) NBME I or USMLE 1, plus NBME II or USMLE 2 (including passage of the clinical skills component if applicable), plus NBME III or USMLE 3;

(D) NBME I or USMLE 1, plus NBME II or USMLE 2 (including passage of the clinical skills component if applicable), plus FLEX II;

(E) NBOME I, plus NBOME II, plus FLEX II;

(F) the NBOME Part I or COMLEX Level I and NBOME Part II or COMLEX Level II and NBOME Part III or COMLEX Level III.

(b) An applicant must pass each part of an examination listed in subsection (a) of this section within three attempts, except that an applicant who has passed all but one part of an examination within three attempts may take the remaining part of the examination one additional time.

(c) Notwithstanding subsection (c) of this section, an applicant is considered to have satisfied the requirements of this section if the applicant:

(1) passed all but one part of an examination approved by the board within three attempts and passed the remaining part of the examination within five attempts;

(2) is specialty board certified by a specialty board that:

(A) is a member of the American Board of Medical Specialties; or

(B) is a member of the Bureau of Osteopathic Specialists; and

(C) completed in this state an additional two years of postgraduate medical training approved by the board.

(d) An applicant who has not passed an examination listed in subsection (a) for licensure in a ten-year period prior to the filing date of the application must:

(1) pass a monitored specialty certification examination or formal evaluation, a monitored recertification examination or formal evaluation, or a monitored examination of continued demonstration of qualifications by a board that is a member of the American Board of Medical Specialties or the Bureau of Osteopathic Specialists within the preceding ten years;

(2) obtain through extraordinary circumstances, unique training equal to the training required for specialty certification as determined by a committee of the board and approved by the board, including but not limited to participation for at least six months in a training program approved by the board within twelve months prior to the application for licensure; or

(3) pass the Special Purpose Examination (SPEX) within the preceding ten years.

(4) For those applicants who do no pass all parts of all examinations required for licensure within a seven-year period, the board may consider for licensure graduates of simultaneous MD-PhD or DO-PhD programs who have passed all parts of their required examinations no later than two years after their MD or DO degree was awarded.

(e) JP Exam.

(1) In addition to the licensing examinations required for licensure under subsection (a) of this section, applicants must pass the JP exam with a score of 75 or better.

(2) [~~(a)~~] The board shall provide for the administration of the JP exam. [~~administer the Texas medical jurisprudence examination in writing or by electronic means, at times and places as designated by the board~~].

(3) [~~(b)~~] An examinee shall not be permitted to bring medical books, compends, notes, medical journals, calculators or other help into the examination room, nor be allowed to communicate by word or sign with another examinee while the examination is in progress without permission of the presiding examiner, nor be allowed to leave the examination room except when so permitted by the presiding examiner.

(4) [~~(c)~~] Irregularities during an examination such as giving or obtaining unauthorized information or aid as evidenced by observation or subsequent statistical analysis of answer sheets, shall be sufficient cause to terminate an applicant's participation in an examination , [~~or to~~] invalidate the applicant's examination results, or [~~to~~] take other appropriate action.

(5) An applicant who is unable to pass the JP exam within three attempts must appear before a committee of the board to address the applicant's inability to pass the examination and to re-evaluate the applicant's eligibility for licensure. It is at the discretion of the committee to allow an applicant additional attempts to take the JP exam.

(6) Applicants for licensure who wish to request reasonable accommodations for the JP exam due to a disability must submit the request upon filing the Application.

§163.7. Temporary Licensure - Regular.

(a) The executive director of the board may issue a temporary license to an applicant:

(1) who has passed the Texas medical jurisprudence examination;

(2) whose completed application has been filed, processed, and found to be in order; and

(3) who has met all other requirements for licensure.

(b) Each applicant shall receive only one temporary license prior to the issuance of a permanent license. The board [~~Board~~], in unusual circumstances, may allow the issuance of one additional temporary license if it finds it is in the best interest of the public [~~and that the~~] health and welfare [~~of the public would not be endangered, but would be served~~]. These exceptions are reviewed by the executive director on a case-by-case basis.

§163.11. Active Practice of Medicine.

(a) All applicants for licensure shall provide sufficient documentation to the board that the applicant has, on a full-time basis, actively diagnosed or treated persons or has been on the active teaching faculty of an acceptable approved medical school, within either [~~each~~] of the last two years preceding receipt of an Application for licensure.

(b) The term "full-time basis," for purposes of this section, shall mean at least 20 hours per week for 40 weeks duration during a given year.

(c) Applicants who do not meet the requirements of subsections (a) and (b) of this section may, in the discretion of the executive director or board, be eligible for an unrestricted license or a restricted license subject to one or more of the following conditions or restrictions:

(1) current certification or recertification by the American Board of Medical Specialties or Bureau of Osteopathic Specialists obtained by passing a monitored specialty certification or recertification examination or forma evaluation;

(2) passage of the SPEX examination;

[~~(3) completion of specified continuing medical education hours approved for Category I credits by the American Medical Association or the American Osteopathic Association;~~]

(3) [~~(4)~~] limitation of the practice of the applicant to specified activities of medicine and/or exclusion of specified activities of medicine;

(4) [~~(5)~~] remedial education, including but not limited to a mini-residency, fellowship or other structured program;

(5) [~~(6)~~] such other remedial or restrictive conditions or requirements that [~~which~~], in the discretion of the board are necessary to ensure protection of the public and minimal competency of the applicant to safely practice medicine.

§163.12. Licensure for the Fifth Pathway.

An applicant who has completed a Fifth Pathway Program to be eligible for licensure must:

(1) be at least 21 years of age;

(2) be of good professional character as defined under §163.1(10) of this title;

(3) have completed 60 semester hours of college courses as defined under §163.1(12) of this title [~~other than in medical school, which courses would be acceptable, at the time of completion, to The University of Texas at Austin for credit on a bachelor of arts or a bachelor of science degree~~];

(4) have completed all of the didactic work of the foreign medical school, whose curriculum meets the requirements for an acceptable unapproved medical school as determined by a committee of experts selected by the Texas Higher Education Coordinating Board, but has not graduated from an acceptable unapproved [~~unapproved acceptable~~] medical school;

(5) have completed all of the didactic work of the foreign medical school, that is substantially equivalent to a Texas medical school as defined under §163.1(13) of this title, but has not graduated from an acceptable unapproved medical school;

(6) have successfully completed a three-year training program of graduate medical education in the United States or Canada that was approved by the board on the date the training was completed;

(7) submit evidence of passing an examination, , that is acceptable to the board for [~~of~~] licensure;

(8) pass the Texas Medical Jurisprudence Examination with a score of 75 or better;

(9) submit a sworn affidavit that no proceedings, past or current, have been instituted against the applicant before any state medical board, provincial medical board, in any military jurisdiction or federal facility;

(10) have attained a passing score on the ECFMG examination;

(11) have the ability to communicate in the English language;

(12) have attained a satisfactory score on a qualifying examination and have completed one academic year of supervised clinical training for foreign medical students as defined by the American Medical Association Council on Medical Education (Fifth Pathway Program) in a United States medical school; and

(13) have supplied all additional information that the board may require, concerning the applicant's medical school, before approving the applicant.

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 February 13, 2004.

TRD-200401011
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 305-7016

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CHAPTER 164. PHYSICIAN ADVERTISING

22 TAC §164.4

The Texas State Board of Medical Examiners proposes an amendment to §164.4, concerning advertising board certification. The amendment will provide a method for informing the public of the physician's interest and expertise, as well as identify those physicians possessing board certification.

Michele Shackelford, General Counsel, Texas State Board of Medical Examiners, has determined that for the first five-year period the proposed rule is in effect there will be no effect to individuals required to comply with the rule as proposed. There will be no fiscal implications to state or local government as a result of enforcing the rule as proposed.

Ms. Shackelford also has determined that for each year of the first five years the rule as proposed is in effect the public benefit anticipated as a result of enforcing the section will be an updated method for informing the public of the physician's interest and expertise, as well as identify those physicians possessing board certification. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Pat Wood, P.O. Box 2018, MC-901, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The following are affected by the proposed rule: Texas Occupations Code Annotated, §§153.002, 101.201.

§164.4. Board Certification.

(a) A physician is authorized to use [~~physician's authorization of or use of~~] the term "board certified," or any similar words or phrase calculated to convey the same meaning in any advertising for his or her practice [~~shall constitute misleading or deceptive advertising unless the physician discloses the complete name of~~] if the specialty board which conferred the certification and the certifying organization meets the requirements in paragraphs (1)-(2) of this subsection:

(1) The certifying organization is a member board of the American Board of Medical Specialties, or the Bureau of Osteopathic Specialists, or is the American Board of Oral and Maxillofacial Surgery; or

(2) The certifying organization requires that its applicants be certified by a separate certifying organization that is a member board of the American Board of Medical Specialties or the Bureau of Osteopathic Specialists, or appropriate Royal College of Physicians and Surgeons, and the certifying organization meets the criteria set forth in subsection (b) of this section.

(b) Each certifying organization that is not a member board of the American Board of Medical Specialties or the Bureau of Osteopathic Specialists must meet each of the requirements set forth in paragraphs (1)-(5) of this subsection:

(1) the certifying organization requires all physicians who are seeking certification to successfully pass a written or an oral examination or both, which tests the applicant's knowledge and skills in the specialty or subspecialty area of medicine. All or part of the examination may be delegated to a testing organization. All examinations require a psychometric evaluation for validation;

(2) the certifying organization has written proof of a determination by the Internal Revenue Service that the certifying board is tax exempt under the Internal Revenue Code pursuant to Section 501(c);

(3) the certifying board has a permanent headquarters and staff;

(4) the certifying board has at least 100 duly licensed certificants from at least one-third of the states; and

(5) the certifying organization requires all physicians who are seeking certification to have satisfactorily completed identifiable and substantial training in the specialty or subspecialty area of medicine in which the physician is seeking certification, and the certifying organization utilizes appropriate peer review. This identifiable training shall be deemed acceptable unless determined by the Board of Medical Examiners to be inadequate in scope, content, and duration in that specialty or subspecialty area of medicine in order to protect the public health and safety.

(c) A physician may not authorize the use of or use the term "board certified" or any similar words or phrase calculated to convey the same meaning if the claimed board certification has expired and has not been renewed at the time the advertising in question was published or broadcast.

(d) The terms "board eligible," "board qualified," or any similar words or phrase calculated to convey the same meaning shall not be used in physician advertising.

(e) A physician's authorization of or use of the term "board certified", or any similar words or phrase calculated to convey the same meaning in any advertising for his or her practice shall constitute misleading or deceptive advertising unless the specialty board which conferred the certification and the certifying organization meet the requirements in subsections (a) and (b) of this section.

(f) A physician who is board certified by an organization that does not meet the requirements set out in subsections (a) and (b) of this section, or otherwise has a special interest in a particular field of medicine, may include in advertisements the physician's field of interest. For each area of interest advertised the physician must clearly state in the advertising "Not certified by an organization recognized by the Texas State Board of Medical Examiners." This statement must be separate and apart from other statements and shall be displayed conspicuously with no abbreviations, changes, or additions in the quoted language so as to be easily seen or understood by an ordinary consumer.

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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TRD-200401010

Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
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For further information, please call: (512) 305-7016

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CHAPTER 175. FEES, PENALTIES, AND APPLICATIONS

22 TAC §175.1, §175.4

The Texas State Board of Medical Examiners proposes amendments to §175.1 and §175.4, concerning Fees, Penalties and Applications. The proposal concerns increases in application and registration fees for licenses and permits issued by the Board and mandated by Texas Online Authority.

Michele Shackelford, General Counsel, Texas State Board of Medical Examiners, has determined that for the first five-year period the proposed rules are in effect, the following fiscal implications will apply:

Increase revenue for state government:

FY04 (partial year - effective date of rule anticipated May 2004)

$2 increase for postgraduate training permits X 1,713 permits = $3,425

$2 increase for non-certified radiologic technicians X 355 permits = $711

$30 increase for non-profit health organization biennial certification X 33 permits = $1,000

$5 increase for acupuncturist registration X 182 permits = $911

FY05 - FY08 (calculated for each year)

$2 increase for postgraduate training permits X 5,138 permits = $10,276

$2 increase for non-certified radiologic technicians X 1,066 permits = $2,132

$30 increase for non-profit health organization biennial certification X 100 permits = $3,000

$5 increase for acupuncturist registration X 547 permits = $2,735

The impact to those required to comply with the rule change is negligible as indicated by the small fee increase and is offset by the convenience of online applications and the ability to pay with a credit card.

There will be some setup cost for implementing the online renewal, but should be offset by reduced paperwork.

Ms. Shackelford also has determined that for each year of the first five years the rules as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be compliance with the Texas Online Authority. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Pat Wood, P.O. Box 2018, MC-901, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as

necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The following are affected by the proposed rules: Texas Occupations Code Annotated, §153.051, Texas Government Code, §2054.252(g).

§175.1. Fees.

The board shall charge the following fees.

(1) Physicians:

(A) processing an application for licensure examination (includes surcharges of $200 [a ~~$200 surcharge and one jurisprudence examination sitting~~]) -$800;

~~[(B) Jurisprudence examination fees (required and payable each time applicant is scheduled for a repeat of examination) - $50;]~~

(B) [~~(C)~~] processing an application for a special purpose license for practice of medicine across state lines (includes surcharges of $200 [~~a $200 surcharge and one jurisprudence examination sitting~~]) - $800;

(C) [~~(D)~~] temporary license:

(i) regular - $50;

(ii) distinguished professor - $50;

(iii) state health agency - $50;

(iv) rural/underserved areas - $50;

(v) continuing medical education - $55;

(D) [~~(E)~~] Registration permits:

(i) permits issued to license holders with an expiration date before December 30, 2003;

(I) initial permit (includes surcharges of $209 [~~a $209 surcharge~~]) - $339;

(II) subsequent permit (includes surcharges of $205 [~~a $205 surcharge~~]) - $335;

(ii) permits issued to license holders with an expiration date between January 1, 2004 and December 31, 2004;

(I) initial permit (includes surcharges of $289 [~~a $289 surcharge~~]) - $419;

(II) subsequent permit (includes surcharges of $285 [~~a $285 surcharge~~]) - $415;

(iii) permits issued to license holders with an expiration date on or after January 1, 2005;

(I) initial permit (includes surcharges of $494 [~~a $494 surcharge~~]) - $754 [~~$753~~];

(II) subsequent permit (includes surcharges of $490 [~~a $490 surcharge~~]) - $750;

~~[(F) duplicate wall certificate - $45;]~~

(E) [~~(G)~~] processing an application for reissuance of license following revocation (includes surcharges of $200 [~~a surcharge of $200 and one jurisprudence examination sitting~~]) - $800;

(F) [~~(H)~~] office-based anesthesia site registration - $600.

(2) Physicians in Training:

(A) institutional permit (began training program prior to 6-1-2000) - $45;

(B) postgraduate resident permit (includes surcharges of $2) - $62 [~~$60~~];

(C) temporary postgraduate resident permit - $50;

(D) faculty temporary permit - $110;

(E) visiting professor permit - $110;

(F) evaluation or re-evaluation of postgraduate training program -$250.

(3) Physician Assistants:

(A) processing application for licensure as a physician assistant - $200;

(B) temporary license - $50;

(C) annual renewal:

(i) initial permit (includes surcharges of $10 [~~a $5 surcharge~~]) - $160;

(ii) subsequent permit (includes surcharges of $1 [~~a $1 surcharge~~]) - $156;

(D) processing application for reissuance of license following revocation - $200.

(4) Acupuncturists/Acudetox Specialists:

(A) processing an application for licensure as an acupuncturist - $300;

(B) temporary license for an acupuncturist - $50;

(C) annual renewal for an acupuncturist:

(i) initial permit (includes surcharges of $10 [~~a $5 surcharge~~]) - $260 [~~$255~~];

(ii) subsequent permit (includes surcharges of $6 [~~a $1 surcharge~~]) - $256 [~~$251~~];

(D) acupuncturist distinguished professor - $50;

(E) processing an application for acudetox specialist - $50;

(F) annual renewal for acudetox specialist - $25;

(G) review of continuing acupuncture education courses - $50;

(H) review of application for continuing acupuncture education provider - $50;

(I) review of continuing acudetox acupuncture education courses - $50.

(5) Non-Certified Radiologic Technicians:

(A) processing an application - $50;

(B) annual renewal (includes surcharges of $2) - $52 [~~$50~~].

(6) Certification as a Non-Profit Health Organization:

(A) processing an application for new or initial certification - $2,500;

(B) processing an application for biennial recertification (includes surcharges of $30) - $1,030 [~~$1,000~~];

(C) fee for a late application for biennial recertification - $1,000.

(7) Surgical Assistants:

(A) processing licensure application fee - $300;

(B) temporary license - $50;

(C) biennial registration fee:

(i) initial permit (includes surcharges of $6 [~~a $5 surcharge~~]) - $406 [~~$405~~];

(ii) subsequent permit (includes surcharges of $2 [~~a $1 surcharge~~]) - $402. [~~$401;~~]

~~[(D) duplicate license - $45.]~~

§175.4. Applications.

(a) All information required on applications used by this board will conform to the Medical Practice Act and rules promulgated by this board. The board hereby adopts by reference the following forms:

(1) Physicians:

(A) application for licensure;

(B) application for a special purpose license for practice of medicine across state lines;

(C) application for registration of physician's permit;

(D) application for a duplicate wall certificate;

(E) application for reissuance of license following revocation;

(F) physician designation of prescriptive delegation;

(G) application for office-based anesthesia registration.

(2) Physicians in Training:

(A) application for institutional permit (physician began program prior to 5-31-2000);

(B) application for basic postgraduate resident permit;

(C) application for advanced postgraduate resident permit;

(D) application for renewal of basic postgraduate resident permit;

(E) application for renewal of advanced postgraduate resident permit;

(F) application for faculty temporary permit;

(G) application for visiting professor permit;

(H) application for National Health Service Corps Permit.

(3) Physician Assistants:

(A) licensure application;

(B) application for temporary license;

(C) notice of intent to supervise a physician assistant;

(D) notice of intent to practice as a physician assistant;

(E) application for annual renewal of license;

(F) application for reissuance of license following revocation.

(4) Acupuncturists/Acudetox Specialists:

(A) licensure application for acupuncturist;

(B) application for acupuncture distinguished professor temporary license;

(C) application for annual renewal of acupuncturist license;

(D) application for acudetox specialist certification;

(E) application for annual renewal of acudetox specialist certification;

(F) application for approval of continuing acupuncture education courses;

(G) application for approval of continuing acupuncture education provider;

(H) application for approval of continuing acudetox acupuncture education courses.

(5) Non-Certified Radiologic Technicians:

(A) application for initial non-certified radiologic technician permit;

(B) application for annual renewal of non-certified radiologic technician permit;

(C) application for supervision of a non-certified radiologic technician.

(6) Certification as a Non-Profit Health Organization:

(A) application for initial certification;

(B) application for biennial recertification; [.]

(7) Surgical Assistants:

(A) licensure application;

(B) application for temporary license;

(C) application for biennial renewal of license;

(D) application for reissuance of license following revocation.

(b) These forms may be examined and copies may be obtained at the offices of the Texas State Board of Medical Examiners, 333 Guadalupe, Tower 3, Suite 610, Austin, Texas.

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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Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
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For further information, please call: (512) 305-7016

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CHAPTER 183. ACUPUNCTURE

22 TAC §183.15

The Texas State Board of Medical Examiners proposes an amendment to §183.15, concerning Acupuncture. The amendment will require licensed acupuncturists to provide information to the public indicating they are licensed by the Texas State Board of Medical Examiners and that acupuncture is their primary field of practice.

Michele Shackelford, General Counsel, Texas State Board of Medical Examiners, has determined that for the first five-year period the proposed rule is in effect there will be no effect to individuals required to comply with the rule as proposed. There will be no fiscal implications to state or local government as a result of enforcing the rule as proposed.

Ms. Shackelford also has determined that for each year of the first five years the rule as proposed is in effect the public benefit anticipated as a result of enforcing the section will be providing information to the public. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Pat Wood, P.O. Box 2018, MC-901, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

The following are affected by the proposed rule: Texas Occupations Code Annotated, §104.003 and Chapter 205.

§183.15. Use of Professional Titles.

(a) A licensee shall use the title "Texas Licensed Acupuncturist," "Tx. Lic.Ac.," or "Tx.L.Ac.," immediately following [~~alongside~~] his/her name on any advertising or other materials visible to the public, which pertain to the licensee's practice of acupuncture. Only persons licensed as an acupuncturist may use these titles. A licensee who is also licensed in Texas as a physician, dentist, chiropractor, optometrist, podiatrist, and/or veterinarian is exempt from the requirement that the licensee's acupuncture title immediately follow his/her name.

(b) If a licensee uses any additional title or designation, it shall be the responsibility of the licensee to comply with the provisions of the Healing Art Identification Act, Tex. Occ. Code Ann., Chapter 104.

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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Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 305-7016

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 1. GENERAL ADMINISTRATION SUBCHAPTER D. EFFECT OF CRIMINAL CONDUCT ON LICENSES

28 TAC §1.501, §1.502

(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 Department of Insurance or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Insurance proposes the repeal of Subchapter D, §1.501 and §1.502, concerning the effect of criminal conduct on licenses. Repeal of these sections is necessary to allow the department to adopt new rules that address the department's determination of a person's fitness for holding a license, authorization, or registration, or a person's fitness to have the ability to control licensed and authorized entities. Simultaneous to this proposed repeal, proposed new Subchapter D, §1.501 and §1.502, are published elsewhere in this issue of the *Texas Register*.

Matt Ray, Deputy Commissioner, Licensing Division, has determined that during the first five years that the proposed repeal is in effect, there will be no fiscal impact on state or local government as a result of enforcing or administering the sections. There will be no measurable effect on local employment or the local economy as a result of the proposal.

Mr. Ray has also determined that for each year of the first five years the repeal of the sections is in effect, the department will benefit from the streamlining of the agent application process and the reduction of record-keeping and storage. There is no anticipated economic cost to persons who are required to comply with the proposed repeal. There will be no effect on small or micro businesses.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on March 29, 2004 to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-1C, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Matt Ray, Deputy Commissioner, Licensing Division, Mail Code 107-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any requests for a public hearing should be submitted separately to the Office of the Chief Clerk.

These repeals are proposed under the Occupations Code, Government Code, and Insurance Code. Insurance Code §§801.101, 801.102, and 801.151 - 801.155 authorize the commissioner to review the fitness and reputation of officers, directors and persons in control of insurance companies and to refuse or revoke a certificate of authority to any company based on a determination that such officer, director or controlling person is not worthy of public confidence. Articles 9.37 (B), 9.44 §2, and 9.56 §8 authorize the commissioner to deny or revoke the license of a title insurance agent or direct operation, escrow officer, or title attorney if the person has been guilty of fraudulent or dishonest practices. Article 21.01 §§3 and 4 provide that, except as otherwise provided by the Insurance Code, the provisions of Insurance Code, Chapter 21, Subchapter A, apply to the persons licensed under the provisions listed in Section (3) and authorize the commissioner to adopt rules necessary to implement Insurance Code, Chapter 21, Subchapter A. The listed provisions include the following Insurance Code license, certificate and registration types: surplus lines agent, Section

981.202; general life, accident, and heath agent, Article 21.07-1 §2; limited life, accident, and health agent, Article 21.07-1 §4; funeral prearrangement life insurance agent, Article 21.07-1 §5; life insurance not exceeding $15,000 agent, Article 21.07-1 §6; life and health insurance counselor, Article 21.07-2; managing general agent, Article 21.07-3; adjuster, Article 21.07-4; public insurance adjuster, Article 21.07-5; third party administrator, Article 21.07-6; reinsurance intermediary manager and broker, Article 21.07-7; specialty license, Article 21.09; nonresident agent applicants, Article 21.11; general property and casualty agent, Article 21.14 §2; limited property and casualty agent, Article 21.14 §6; insurance service representative, Article 21.14 §8; full-time home office employee, Article 21.14 §7; county mutual agent, Article 21.14 §9; risk manager, Article 21.14-1; agricultural agent, Article 21.14-2. Each of these license, certification and registration types is subject, in addition to the provisions of Insurance Code Chapter 82, to the provisions of Article 21.01-2 §3A (a) and (c), which provide that the department may revoke or deny a license or registration subject to that article of a person who has been convicted of a felony or engaged in fraudulent or dishonest activities. Further, Article 21.07 §2(f), (i), (n), (o), and (s) require the department to find that an applicant for an agent's license or the applicant's officers, directors, partners and other persons with a right to control the applicant have not committed an act for which licensure can be denied or revoked under Article 21.01-2 §3A. Article 21.07-2 §5(a) states that life and health insurance counselors are subject to the same licensing requirements as are applicable to agents under Insurance Code, Chapter 21, Subchapter A. Article 21.07-4 §§7 and 17 also require adjusters to be trustworthy and authorize the department to discipline licensed adjusters and deny adjuster license applications under the applicable insurance laws of this state, which includes Article 21.01-2 §3A. Article 21.07-5 §§5, 5A, 15, 15A, 16, and 30 authorize the department to deny public insurance adjuster license and training certificate applications and revoke issued licenses and certificates based on a felony conviction or engaging in fraudulent of dishonest activities. Article 21.11 §1(e) authorizes the department to use the criminal history records of nonresident license applicants to determine eligibility for licensure in accordance with Texas law. Section 1111.005(a) (1), (5) and (8) provide that the commissioner may deny or revoke a viatical or life settlement registration if the commissioner finds the applicant, individually or through any officer, director, or shareholder of the registrant or applicant, has been convicted of a felony or has been convicted of a misdemeanor involving moral turpitude or fraud. Article 21.58A §§3 and 13 authorize the commissioner to adopt rules regarding the certification of utilization review agents. Article 21.58C §2(a)(1) authorizes the commissioner to adopt rules and standards for the certification, suspension and revocation of independent review organizations. Article 5.43-1 §8(a) and (b) authorizes the commissioner to establish rules and evaluate the qualifications of persons and firms applying for licensure and permits for the design, installation and testing of fire extinguishing equipment. Article 5.43-2 §6(a) provides that the commissioner may adopt rules for licensees involved with fire alarm or fire detection devices or systems. Article 5.43-3 §7(a)(2) provides that the commissioner may establish the qualifications of applicants for certificates of registration and licenses regarding fire sprinkler systems. Occupations Code §2154.051(1) and (3) authorizes the commissioner to establish qualifications for fireworks licenses and permits and pyrotechnic operators. Government Code §417.005 provides that the Commissioner of Insurance may adopt rules to guide the State Fire Marshal in the performance of duties for the commissioner. Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

The following statutes are affected by the proposal: Occupations Code §2154.051 and §2154.052; Government Code §417.005; Insurance Code Articles 5.43-1, 5.43-2, 5.43-3, 9.36, 9.37, 9.42 9.44, 9.56, 21.01, 21.01-1, 21.01-2, 21.07, 21.07-1, 21.07-2, 21.07-3, 21.07-4, 21.07-5, 21.07-6, 21.07-7, 21.09, 21.11, 21.14, 21.14-1, 21.14-2, 21.58A, 21.58C; and §§801.001, 801.002, 801.101, 801.102, 801.151, 801.152, 801.153, 801.154, 801.155, 981.202, and 1111.005.

§1.501. Purpose and Scope.

§1.502. Effect of Criminal Conduct of Applicants, Licensees, and Corporate Officials on Licensure.

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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TRD-200401046
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 463-6327

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SUBCHAPTER D. EFFECT OF CRIMINAL CONDUCT

28 TAC §1.501, §1.502

The Texas Department of Insurance proposes new Subchapter D, §1.501 and §1.502, concerning the effect of criminal conduct. The proposed sections address the consequences prior criminal conduct and fraudulent and dishonest activity will have on persons seeking or holding licenses, registrations, or authorizations issued by the department under the Texas Insurance Code and Occupations Code, including agents; adjusters; those persons regulated by the State Fire Marshal's Office; the officers, directors, partners, and controlling shareholders of licensed insurance agencies and entities engaging in licensed and authorized activities; and officers and directors of insurance companies subject to Insurance Code Chapter 801. The department is proposing the repeal of existing Subchapter D, §1.501 and §1.502, elsewhere in this issue of the *Texas Register*.

The proposed sections are necessary to maintain effective regulation of the insurance industry by identifying to whom the provisions apply; the types of criminal offenses that the department considers to be of such a serious nature as to be of prime importance in determining a person's fitness for licensure or authorization or fitness for control of a licensed or authorized entity; the standards the department will use in evaluating criminal histories; and the procedures that will apply to persons affected

by these criteria. These proposed sections will also work to further ensure that those persons receiving licensure and authorizations, the officers, directors, partners, and controlling shareholders of insurance agencies and other entities, and the officers and directors of insurance companies, are honest, trustworthy, reliable, and fit to hold those positions. The proposed sections update references and restate existing rules and department policy and procedure and, as such, should not affect the current license status of any person who has made a full disclosure of all past criminal conduct.

Proposed §1.501 identifies the persons to whom these sections apply. Proposed §1.502 identifies: the special relationship that persons engaging in licensed and authorized insurance and related activities have with the public; the criminal offenses the department considers to be of such a serious nature that they are of prime importance in determining a person's fitness to be licensed or authorized, or to control a licensed or authorized entity; the factors the department will consider in determining whether to permit the affected person to engage in the insurance industry in Texas; and the procedure the department will use to revoke, suspend or deny the license, registration or authorization of any person or entity affected by these proposed sections.

Matt Ray, deputy commissioner, licensing division, has determined that for each year of the first five years the proposed sections will be in effect, there will be no increased fiscal impact to state and local governments as a result of the enforcement or administration of the proposed rule. There will be no effect on local employment or the local economy as a result of the proposal.

Mr. Ray has determined that for each year of the first five years the proposed sections are in effect, the anticipated public benefit will be clarifying the criminal offenses the department considers of prime importance in determining the fitness of persons engaging in or controlling licensed or authorized insurance activities in Texas as well as the procedures that the department will use in determining the effect of these criminal offenses, resulting in a consistent evaluation of these persons. Because the proposed sections clarify current procedures under existing rules, it is anticipated that the proposed sections will create no new costs. Any economic cost to comply with the proposed sections results from the provisions of the Occupations Code, the Government Code, and the Insurance Code, and are not as a result of the adoption, enforcement, or administration of the proposed sections. There would be no difference in the costs of compliance between a large and small business as a result of the proposed sections. In addition, the proposed sections do not affect the cost of labor per hour and thus there is no disproportionate economic impact on small or micro businesses. Even if the proposed sections would have an adverse effect on small or micro businesses, it is neither legal nor feasible to waive the provisions of the proposed sections for small or micro businesses since the Occupations Code, Government Code, and Insurance Code require equal application of these provisions to all affected persons.

To be considered, written comments on the proposal must be submitted no later than 5 p.m. on March 29, 2004 to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be simultaneously submitted to Matt Ray, Deputy Commissioner, Licensing Division, Mail Code 107-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any requests for a public hearing should be submitted separately to the Office of the Chief Clerk.

These new sections are proposed under the Occupations Code, Government Code, and Insurance Code. Occupations Code Chapter 53 states the general procedure a licensing authority must employ when considering the consequences of a criminal record on granting or continuing a person's license, registration or authorization. Occupations Code §53.025 authorizes a licensing authority to issue guidelines relating to its practice under Chapter 53. Insurance Code §§801.101, 801.102, and 801.151 - 801.155 authorize the commissioner to review the fitness and reputation of officers, directors and persons in control of insurance companies and to refuse or revoke a certificate of authority to any company based on a determination that such officer, director or controlling person is not worthy of public confidence. Articles 9.37 (B), 9.44 §2, and 9.56 §8 authorize the commissioner to deny or revoke the license of a title insurance agent or direct operation, escrow officer, or title attorney if the person has been guilty of fraudulent or dishonest practices. Article 21.01 §§3 and 4 provide that, except as otherwise provided by the Insurance Code, the provisions of Insurance Code, Chapter 21, Subchapter A, apply to the persons licensed under the provisions listed in Article 21.01 §3 and authorize the commissioner to adopt rules necessary to implement Insurance Code, Chapter 21, Subchapter A. The listed provisions include the following Insurance Code license, certificate and registration types: surplus lines agent, §981.202; general life, accident, and heath agent, Article 21.07-1 §2; limited life, accident, and health agent, Article 21.07-1 §4; funeral prearrangement life insurance agent, Article 21.07-1 §5; life insurance not exceeding $15,000 agent, Article 21.07-1 §6; life and health insurance counselor, Article 21.07-2; managing general agent, Article 21.07-3; adjuster, Article 21.07-4; public insurance adjuster, Article 21.07-5; third party administrator, Article 21.07-6; reinsurance intermediary manager and broker, Article 21.07-7; specialty license, Article 21.09; nonresident agent applicants, Article 21.11; general property and casualty agent, Article 21.14 §2; limited property and casualty agent, Article 21.14 §6; insurance service representative, Article 21.14 §8; full-time home office employee, Article 21.14 §7; county mutual agent, Article 21.14 §9; risk manager, Article 21.14-1; agricultural agent, Article 21.14-2. Each of these license, certification and registration types is subject, in addition to the provisions of Insurance Code Chapter 82, to the provisions of Article 21.01-2 §3A (a) and (c), which provide that the department may revoke or deny a license or registration subject to that article of a person who has committed a felony or misdemeanor, or engaged in fraudulent or dishonest activities. Further, Article 21.07 §2(f), (i), (n), (o), and (s) require the department to find that an applicant for an agent's license or the applicant's officers, directors, partners and other persons with a right to control the applicant have not committed an act for which licensure can be denied or revoked under Article 21.01-2 §3A. Article 21.07-2 §5(a) states that life and health insurance counselors are subject to the same licensing requirements as are applicable to agents under Insurance Code, Chapter 21, Subchapter A. Article 21.07-4 §§7 and 17 also require adjusters to be trustworthy and authorize the department to discipline licensed adjusters and deny adjuster license applications under the applicable insurance laws of this state, which includes Article 21.01-2 §3A. Article 21.07-5 §§5, 5A, 15, 15A, 16, and 30 authorize the department to deny public insurance adjuster license and training certificate applications and revoke issued licenses and certificates based on a felony conviction or engaging in fraudulent of dishonest activities. Article 21.11 §1(e) authorizes the department to use the criminal history records of nonresident license applicants to determine eligibility for licensure in accordance with

Texas law. Section 1111.005(a) (1), (5) and (8) provide that the commissioner may deny or revoke a viatical or life settlement registration if the commissioner finds the applicant, individually or through any officer, director, or shareholder of the registrant or applicant, has been convicted of a felony or has been convicted of a misdemeanor involving moral turpitude or fraud. Article 21.58A §§3 and 13 authorize the commissioner to adopt rules regarding the certification of utilization review agents. Article 21.58C §2(a)(1) authorizes the commissioner to adopt rules and standards for the certification, suspension and revocation of independent review organizations. Article 5.43-1 §8(a) and (b) authorizes the commissioner to establish rules and evaluate the qualifications of persons and firms applying for licensure and permits for the design, installation and testing of fire extinguishing equipment. Article 5.43-2 §6(a) provides that the commissioner may adopt rules for licensees involved with fire alarm or fire detection devices or systems. Article 5.43-3 §7(a)(2) provides that the commissioner may establish the qualifications of applicants for certificates of registration and licenses regarding fire sprinkler systems. Occupations Code §2154.051(1) and (3) authorizes the commissioner to establish qualifications for fireworks licenses and permits and pyrotechnic operators. Government Code §417.005 provides that the Commissioner of Insurance may adopt rules to guide the State Fire Marshal in the performance of duties for the commissioner. Insurance Code §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

The following statutes are affected by the proposal: Occupations Code Chapter 53; and §2154.051 and §2154.052; Government Code §417.005; Insurance Code Articles 5.43-1, 5.43-2, 5.43-3, 9.36, 9.37, 9.42 9.44, 9.56, 21.01, 21.01-1, 21.01-2, 21.07, 21.07-1, 21.07-2, 21.07-3, 21.07-4, 21.07-5, 21.07-6, 21.07-7, 21.09, 21.11, 21.14, 21.14-1, 21.14-2, 21.58A, 21.58C; and §§801.001, 801.002, 801.101, 801.102, 801.151, 801.152, 801.153, 801.154, 801.155, 981.202, and 1111.005.

§1.501. Purpose and Application.

(a) The purpose of this subchapter is to implement Chapter 53, Occupations Code and sections and articles of the Insurance Code and Occupations Code that require and authorize the department to determine a person's fitness for holding a license, authorization, or registration, or a person's fitness to have the ability to control licensed and authorized entities, when that person has committed a criminal offense or engaged in fraudulent or dishonest activity. To effect this implementation the department has developed guidelines in §1.502 of this subchapter (relating to Licensing Persons with Criminal Backgrounds) identifying the types of criminal offenses that directly relate to the duties and responsibilities of licensed and authorized insurance activities which are of such a serious nature that they are of prime importance in determining the person's fitness for licensure, authorization or control of a licensed or authorized entity.

(b) This subchapter applies to the following persons:

(1) applicants for, or holders of, any license, registration, or certification, including temporary or training licenses or certificates, as agents, adjusters, public insurance adjusters, counselors, risk managers, reinsurance intermediaries, title agents, title escrow officers, title attorneys, utilization review agents, independent review organizations, and viatical or life settlement registrants, under the following Insurance Code provisions:

(A) Article 9.36;

(B) Article 9.42;

(C) Article 9.56;

(D) Article 21.07;

(E) Article 21.07-1;

(F) Article 21.07-2;

(G) Article 21.07-3;

(H) Article 21.07-4;

(I) Article 21.07-5;

(J) Article 21.07-6;

(K) Article 21.07-7;

(L) Article 21.09;

(M) Article 21.11;

(N) Article 21.14;

(O) Article 21.14-1;

(P) Article 21.14-2;

(Q) Article 21.58A;

(R) Article 21.58C;

(S) Chapter 981;

(T) Chapter 1111; or

(U) any other type of license, registration, or authorization that the department may deny or revoke because of a criminal offense of the applicant or license holder;

(2) applicants for, or holders of, a license, registration, permit or authorization issued by the State Fire Marshal's Office, including the following provisions:

(A) Insurance Code Article 5.43-1;

(B) Insurance Code Article 5.43-2;

(C) Insurance Code Article 5.43-3;

(D) Occupations Code Chapter 2154; or

(E) any other type of license, registration, or authorization that the State Fire Marshal's Office may deny or revoke because of a criminal offense of the applicant or license holder;

(3) those who are or become officers, directors, members, managers, partners and controlling shareholders of entities that are applicants for, or holders of, a license, authorization, permit, certification or registration under provisions specified in paragraphs (1) and (2) of this subsection and from whom biographical information is required; and

(4) officers and directors of insurance companies subject to Insurance Code Chapter 801.

(c) As used in §1.502 of this subchapter, the terms "license holder," "licensee," and "authorization holder" shall include all persons listed in subsection (b) of this section.

(d) As used in §1.502 of this subchapter, the terms "license" and "authorization" shall include all types of licenses, registrations, certificates, permits, or authorizations listed in subsection (b) of this section.

§1.502. Licensing Persons with Criminal Backgrounds.

(a) The special nature of the relationship between licensees, insurance companies, other insurance-related entities and the public with respect to insurance and related businesses regulated by the department requires that the public place trust in and reliance upon such persons due to the complex and varied nature of insurance and insurance-related products.

(b) Fire protection systems and equipment are often technically sophisticated beyond the knowledge or understanding of the average consumer. During times of imminent personal danger, the public relies on licensees to have correctly designed, installed and serviced fire protection systems and equipment to operate the first time and each time they are needed. Additionally, licensees are often permitted to service these systems unescorted in nursing homes, schools, day care centers, and commercial facilities where children and those unable to protect themselves are present and valuables are located. Finally, the manufacturing, storing, selling and discharge of fireworks requires numerous special precautions to maintain a safe environment for the licensees and the public. Each of these factors requires the public to place trust in and reliance upon these individuals.

(c) The department considers it very important that license and authorization holders and applicants, including those regulated under the state fire marshal's office, the officers, directors, members, managers, partners and any other persons who have the right to control a license or authorization holder or applicant, and the members of boards of directors of insurance companies, be honest, trustworthy, and reliable.

(d) The department may refuse to issue an original license or authorization and may revoke, suspend or refuse to renew a license or authorization if the department determines that the applicant or holder, or any partner, officer, director, member, manager, or any other person who has the right to control the applicant or holder, has committed a felony or misdemeanor, or has engaged in fraudulent or dishonest activity that directly relates to the duties and responsibilities of the licensed occupation.

(e) In accordance with the requirements of Texas Occupations Code §53.025, the department has developed guidelines relating to the matters which the department will consider in determining whether to grant, deny, suspend, or revoke any license or authorization under its jurisdiction. Those crimes which the department considers to be of such serious nature that they are of prime importance in determining fitness for licensure or authorization include but are not limited to:

(1) any offense for which fraud, dishonesty, or deceit is an essential element;

(2) any criminal violation of the Texas Insurance Code or any state or federal insurance or security law regulating or pertaining to the business of insurance;

(3) any felony involving moral turpitude or breach of fiduciary duty; or

(4) an offense with the essential elements of:

(A) a criminal homicide offense, as described by Penal Code, Chapter 19;

(B) a felony offense of assault, as described by Penal Code, Chapter 22;

(C) an arson offense, as described by Penal Code, Chapter 28;

(D) a robbery offense, as described by Penal Code, Chapter 29;

(E) a burglary offense, as described by Penal Code, Chapter 30;

(F) a theft offense, as described by Penal Code, Chapter 31;

(G) an offense relating to the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance or a dangerous drug; and

(H) an offense against the person as described by Penal Code §§20.03, 20.04, 21.07, 21.08, or 21.11;

(I) an offense against the family as described by Penal Code §§25.02 or 25.07;

(J) a stalking offense as described by Penal Code §42.072; or

(K) an offense against public order and decency as described by Penal Code §§43.25 or 43.26.

(f) The department shall not issue a license or authorization if an applicant has committed a felony or misdemeanor, or engaged in fraudulent or dishonest activity that directly relates to the duties and responsibilities of the licensed occupation unless the commissioner finds that the matters set out in subsection (h) of this section outweigh the serious nature of the criminal offense when viewed in light of the occupation being licensed.

(g) The department may, after notice and opportunity for hearing, revoke a license or authorization if the holder has committed a felony or misdemeanor, or engaged in fraudulent or dishonest activity that directly relates to the duties and responsibilities of the licensed occupation unless the commissioner finds that the matters set out in subsection (h) of this section outweigh the serious nature of the criminal offense when viewed in light of the occupation being licensed.

(h) The department will consider the factors specified in Texas Occupations Code §§53.022 and 53.023 in determining whether to grant, deny, suspend, or revoke any license or authorization under its jurisdiction.

(1) In determining whether a criminal offense directly relates to the duties and responsibilities of the licensed occupation, the department shall consider the following factors:

(A) the nature and seriousness of the crime;

(B) the relationship of the crime to the purposes for requiring a license to engage in the occupation;

(C) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; and

(D) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of the licensed occupation.

(2) In addition to the factors listed in paragraph (1) of this subsection, the department shall consider the following evidence in determining the fitness to perform the duties and discharge the responsibilities of the licensed occupation of a person who has committed a crime:

(A) the extent and nature of the person's past criminal activity;

(B) the age of the person when the crime was committed;

(C) the amount of time that has elapsed since the person's last criminal activity;

(D) the conduct and work activity of the person prior to and following the criminal activity;

(E) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or following release; and

(F) other evidence of the person's present fitness, including letters of recommendation from:

(i) prosecutor, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for the person;

(ii) the sheriff or chief of police in the community where the person resides; and

(iii) any other persons in contact with the person.

(G) In addition to the factors and evidence listed in paragraphs (1) and (2) of this subsection, an applicant or license or authorization holder shall also furnish proof that the applicant or holder has:

(i) maintained a record of steady employment;

(ii) supported the applicant's or holder's dependents where applicable;

(iii) otherwise maintained a record of good conduct; and

(iv) paid all outstanding court costs, supervision fees, fines, and restitution as may have been ordered in all criminal cases in which the applicant or holder has been convicted.

(3) It shall be the responsibility of the applicant or holder to the extent possible to secure and provide to the commissioner the information required by paragraph (2) of this subsection.

(i) The department shall consider any specific criteria the legislature has set out for any license or authorization in considering whether to grant, deny, suspend, or revoke such license or authorization.

(j) The department shall revoke a license or authorization on the holder's imprisonment following a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision.

(k) No person currently serving in prison for conviction of a felony under any state or federal law is eligible to obtain a license or authorization issued by the department.

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 February 13, 2004.

TRD-200401047
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 463-6327

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 15. COASTAL AREA PLANNING
SUBCHAPTER A. MANAGEMENT OF THE BEACH/DUNE SYSTEM

31 TAC §15.36

The General Land Office (GLO) proposes amendments to §15.36 relating to Certification Status of City of Galveston Dune Protection and Beach Access Plan. The GLO proposes an amendment to §15.36 which documents the status of the certification of the Dune Protection and Beach Access Plan for the City of Galveston (City). On January 29, 2004, the City passed Ordinance No. 04-020, which amended the City's plan to adjust the boundaries of the Seawall Beach Urban Park to remove all properties north of the right-of-way of Seawall Boulevard and expand the eastern and western boundaries of the Seawall Beach Urban Park to 1st Street and 103rd Street, respectively. In addition, on January 29, 2004, the City passed Ordinance No. 04-021, which amended the City's plan to establish a beach user fees to be collected at the Seawall Beach Urban Park. The ordinance establishes a maximum fee of $8.00 per vehicle per day with an optional $25.00 annual pass available. Specifically, the ordinance provides for a fee structure for the south side of the Seawall Beach Urban Park not to exceed $8.00 per vehicle daily and a fee structure for the north side of the Seawall Beach Urban Park as follows: the first one-half hour free, then $1.00 per hour in specified zones, and $2.00 per hour in beach access zones, not to exceed $8.00 per vehicle per day. The City has committed to implementing this plan in a manner that provides free parking at a minimum of thirty percent (30%) of the parking spaces within the Seawall Beach Urban Park and to ensure that all areas of the public beach adjacent to the Seawall Beach Urban Park are within one-quarter of a mile of free parking spaces. The fees were established because the City needs additional funds to pay for the cost of beach-related services and facilities provided by the City and to help fund beach nourishment projects. The GLO has determined the increased fees are reasonable and necessary for the City to continue to fund and provide adequate beach-related services and facilities to the public. The GLO is proposing, therefore, to certify as consistent with state law the amendments to the City's plan that adjust the boundaries of the Seawall Beach Urban Park and establish a beach user fees to be collected at the Seawall Beach Urban Park. The GLO is not proposing any other changes to the certification status of the City of Galveston plan, as currently summarized in §15.36.

Bill Peacock, Deputy Commissioner for the GLO's Coastal Resources Division, has determined that for each year of the first five years the amended section as proposed is in effect there will be no fiscal implications for the state government as a result of enforcing or administering the amended or new sections. There will be a fiscal impact on the City as a result of enforcing or administering the amended section. The City will experience an increase in net revenue estimated at between $600,000 and $800,000 for each year of the first five years the amended section as proposed is in effect as a result of the new beach user fees to be collected at the Seawall Beach Urban Park.

Mr. Peacock has determined that the proposed rule changes will have an affect on the costs of compliance for small businesses or persons required to comply with the regulations. The beach user fees to be collected at the Seawall Beach Urban Park may increase the cost per employee of small business that do not have private parking by an amount of $25 per year per employee based on the cost of a $25 annual parking pass. In contrast, the largest business affected by the amended rule may experience no increased costs of compliance due to the availability of private parking at such large businesses. The City has mitigated or reduced this adverse economic impact by providing, for a limited time, free annual passes to any interested person.

Individuals required to comply with the City's amended plan establishing a beach user fee to be collected at the Seawall Beach Urban Park will experience increased costs for parking of up to $8.00 per day, depending on the location and length of time parked, with the option of a $25.00 annual pass.

Mr. Peacock has also determined the public will benefit from the increase in the beach user fees collected by the City because the increased fees are necessary for the City of Galveston to continue to fund and provide adequate and improved beach-related services to the public including funding for beach nourishment, additional beach patrol towers, expanded beach cleaning, enhanced and additional portable restroom facilities, additional off duty police officers in high need areas, and customer service zones with permanent restrooms, waste cans, and concessionaires.

The GLO has determined a local employment impact statement on these proposed regulations is not required, because the proposed regulations will not adversely affect any local economy in a material manner for the first five years they will be in effect.

The proposal to amend §15.36 concerning Certification Status of City of Galveston Dune Protection and Beach Access Plan is subject to the Coastal Management Program (CMP), 31 TAC §505.11(a)(1)(J), relating to the Actions and Rules Subject to the CMP. The Land Office has reviewed these proposed actions for consistency with the CMP's goals and policies in accordance with the regulations of the Coastal Coordination Council (Council). The proposed actions are consistent with the Land Office's beach/dune rules that the Council has determined to be consistent with the CMP. Consequently, the Land Office has determined that the proposed actions are consistent with applicable CMP goals and policies. The proposed amendments will be distributed to council members in order to provide them an opportunity to provide comment on the consistency of the proposed new rules during the comment period.

The GLO has evaluated the proposed amendment to determine whether Texas Government Code, chapter 2007, is applicable and a detailed takings impact assessment required. The GLO has determined the proposed rule does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, Sections 17 and 19, of the Texas Constitution. Furthermore, the GLO has determined the proposed rule changes would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the rule amendments or new rules being proposed.

Comments may be submitted to Ms. Debbie Cantu, Texas Register Liaison, Texas General Land Office, Legal Services Division, P.O. Box 12873, Austin, TX 78711-2873; facsimile number (512) 463-6311; email address debbie.cantu@glo.state.tx.us. Comments must be received no later than 5:00 p.m., 30 (thirty) days after the proposed amendments are published. Copies of the local government dune protection and beach access plans and any amendments to those plans are available from the local governments and from the General Land Office's Archives Division, Texas General Land Office, P.O. Box 12873, Austin, TX 78711-2873, phone number (512) 463-5277.

These amendments are proposed under Texas Natural Resources Code, Chapter 61, §61.011(d), which authorizes the GLO to adopt rules related to the certification of beach access and use plans; §61.015(b), which provides that certification of local government plans shall be by adoption into the beach/dune rules; and §61.022(c), which requires the GLO to certify the consistency of vehicular plans and fees by adoption into the beach/dune rules.

Texas Natural Resources Code §§61.011, 61.015, 61.022, and 61.070 are affected by the proposed amendments.

§15.36. Certification Status of City of Galveston Dune Protection and Beach Access Plan.

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

(e) The General Land Office certifies as consistent with state law the amendment to the City of Galveston's plan that was adopted by the City Council of the City of Galveston on January 29, 2004, Ordinance No. 04-020. The ordinance amended the plan to adjust the boundaries of the Seawall Beach Urban Park to remove all properties north of the right-of-way of Seawall Boulevard and expand the eastern and western boundaries of the Seawall Beach Urban Park.

(f) The General Land Office certifies as consistent with state law the amendment to the City of Galveston's plan that was adopted by the City Council of the City of Galveston on January 29, 2004, Ordinance No. 04-021. The ordinance amended the plan to establish beach user fees to be collected at the Seawall Beach Urban Park.

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 February 13, 2004.

TRD-200401013
Larry L. Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 305-8598

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 3. TEXAS YOUTH COMMISSION

CHAPTER 85. ADMISSION AND PLACEMENT

SUBCHAPTER A. COMMITMENT AND RECEPTION

37 TAC §85.3

The Texas Youth Commission (TYC) proposes an amendment to §85.3, concerning Admission Process. The amendment to the section reflects a terminology change relating to documentation used to track each youth's progress through TYC.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough also has 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 the availability of clear, accurate, and current policy. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted within 30 days of the publication of this notice to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The amendment is proposed under the Human Resources Code, §61.0364, which provides the Texas Youth Commission with the authority to make rules appropriate to the proper accomplishment of its functions.

The proposed rule affects the Human Resources Code, §61.034.

§85.3. Admission Process.

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

(d) Youth are not allowed to have personal possessions while at the assessment unit. Personal items are inventoried and returned to the county transporter. The transporter and youth are asked to sign an inventory/receipt for property items returned to the transporter's care. Items a youth may be allowed to keep are inventoried [~~on the Personal Property and Clothing Inventory form,~~ ~~CCF-510,~~] and a copy is given to the youth.

(e) Parents are notified:

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

(4) that TYC will use chemical agents as necessary to control conduct if certain behavior criteria are [~~is~~] met.

(f) (No change.)

(g) Routine admission procedures include, but are not limited to the following:[~~.~~]

(1) - (6) (No change.)

(7) Each youth may be photographed and fingerprinted. The photograph and fingerprints are filed in the youth's casework subfile[~~masterfile~~].

(8) - (10) (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 February 13, 2004.

TRD-200401014

Dwight Harris
Executive Director
Texas Youth Commission
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 424-6014

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SUBCHAPTER B. PLACEMENT PLANNING

37 TAC §85.43, §85.45

The Texas Youth Commission (TYC) proposes amendments to §85.43, concerning Home Placement, and §85.45, concerning Parole of Undocumented Foreign Nationals. The amendment §85.43 revises the schedule for the follow-up home placement assessment for youth classified as Type A-Violent to be tied more closely to the youth's progress through TYC. Terminology changes are also made. The amendment to §85.45 replaces references to the U.S. Immigration and Naturalization Service (INS) with the U.S. Immigration and Customs Enforcement Agency (ICE).

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. McCullough also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be the availability of clear, accurate, and current policy. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. No private real property rights are affected by adoption of these rules.

Comments on the proposal may be submitted within 30 days of the publication of this notice to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The amendments are proposed under the Human Resources Code, §61.034, which provides the Texas Youth Commission with the authority to make rules appropriate to the proper accomplishment of its functions.

The proposed rules affect the Human Resources Code, §61.034.

§85.43. Home Placement.

(a) Purpose. The purpose of this rule is to establish criteria and procedures used by Texas Youth Commission (TYC) staff to determine whether a youth in TYC jurisdiction will be allowed to return to his/her home on completion of program requirements or whether alternative living arrangements must be sought.

(b) - (c) (No change.)

(d) Home Placement Assessment.

(1) The assigned parole officer shall assess the home of each youth in his/her [~~their~~] jurisdiction and shall determine whether the home is approved or disapproved for placement. The assigned parole officer will also determine whether the youth will be returned to his/her home upon release from residential placement. Each home assessment will be completed in the home of the youth's legal parent(s), guardian, or relative who has volunteered to have the youth placed in his/her home. The home assessment process is also applicable to all

youth properly referred to parole officers through the Texas Interstate Compact on Juveniles (ICJ) Office.

(2) Within 90 days of admission to TYC, all homes shall be either approved or disapproved as a result of a completed home placement assessment.

(3) The home placement assessment status may be changed but only as a result of a follow-up home placement assessment by the assigned parole officer.

(4) A completed home placement assessment shall be considered current for any youth released to his/her home within 12 months of the first day counted on the minimum length of stay. Home placement assessment follow-ups will be conducted annually thereafter.

(5) For Type A violent [~~Violent A~~] offenders who have a minimum length of stay of 24 months, the follow-up home assessment is to be conducted within 45 days after completion of phase A2B2C3[~~no later than 90 days from the minimum length of stay of release date,~~] and be incorporated into the transition [~~formal release~~] plan.

(6) Any time new evidence or special circumstances warrant, a follow-up home placement assessment may be conducted.

(e) Home Approval/Disapproval Criteria. A youth's home shall be considered approved unless one or more of the following disapproval criteria exists, and can be documented:

(1) - (6) (No change.)

(7) the youth is an undocumented foreign national and a copy of the notice from TYC to the Immigration and Customs Enforcement Agency (ICE) [~~Naturalization Service (INS)~~] has not been received by the parole officer as outlined in (GAP) §85.45 of this title (relating to Parole of Undocumented Foreign Nationals).

(f) (No change.)

§85.45. Parole of Undocumented Foreign Nationals.

(a) Purpose. The purpose of this rule is to establish a procedure whereby Texas Youth Commission (TYC) works with the United States Immigration and Customs Enforcement (ICE) [~~Naturalization Service (INS)~~] for parole release of youth who are undocumented foreign nationals. No youth who are undocumented foreign nationals shall be detained in a secure facility for the sole purpose of deportation.

(b) (No change.)

(c) Explanation of Terms Used. Undocumented Foreign Nationals - youth who do not have legal residence in the United States as determined by the ICE [~~INS~~].

(d) All residential programs are required to notify the ICE [~~INS~~] of the presence of an undocumented foreign national youth at the facility.

(e) Undocumented foreign nationals will not be placed in a minimum restriction parole location (home or home substitute) until a copy of the referral letter from the residential program to ICE [~~INS~~] is received by the assigned parole officer.

(f) In anticipation of completion of required release criteria and not less than 45 days prior to anticipated release, the releasing authority shall inform ICE [~~INS~~] of the pending release of any undocumented foreign national youth and request a residency and deportation status determination within 15 days of receipt of notification. Forty-five (45) days before parole release the TYC staff of the releasing program shall:

(1) (No change.)

(2) send to the ICE [~~INS~~] in the region, written notice of the release date, request for confirmation of the date and of transportation within 15 days of receipt of notification, and request that ICE [~~INS~~] meet with the youth prior to the date and send a copy of the notice to the assigned parole officer;

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

(g) On the day of parole release, ICE [~~INS~~] is responsible for transporting the youth to a port of entry.

(h) If the release of a youth is canceled for any reason, the releasing program shall immediately notify ICE [~~INS~~], parole officer, and other affected parties.

(i) If the youth is not deported by ICE [~~INS~~] or if ICE [~~INS~~] fails to confirm the transportation date at least 30 days prior to expected release, the parole office and institutional placement coordinator will proceed with placement options.

(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 February 13, 2004.

TRD-200401015
Dwight Harris
Executive Director
Texas Youth Commission
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 424-6014

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CHAPTER 87. TREATMENT
SUBCHAPTER A. PROGRAM PLANNING

37 TAC §87.1

The Texas Youth Commission (TYC) proposes an amendment to §87.1, concerning Case Planning. The amendment to the section will establish that the Individual Case Plan will be updated and reviewed monthly, include adaptations for youth with identified special needs, and include a plan for transitioning the youth back into the community. Definitions of certain terms are also revised.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough also has 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 facilitate individualized case management for each youth, based on the youth's need for services, to the extent possible within agency resources. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted within 30 days of the publication of this notice to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The amendment is proposed under the Human Resources Code, §61.076, which provides the Texas Youth Commission with the authority to require youth committed to its care to participate in moral, academic, vocational, physical, and correctional training and activities, and §61.034, which provides the Commission with the authority to make rules appropriate to the proper accomplishment of its functions.

The proposed rule affects the Human Resources Code, §61.034.

§87.1. Case Planning.

(a) Purpose. The purpose of this rule is to ensure the case management of each youth is individualized to the extent possible and is based on the youth's need for services. Youth needs are identified and corresponding long-term and short-term objectives are developed within the agency's resources to facilitate the youth's progress in the Resocialization program. The resulting case plan is reviewed regularly and revised when necessary.

(b) Definitions.

(1) Case Management Standards (CMS) [~~System~~]--the [~~The~~] standardized process used throughout the Texas Youth Commission (TYC) to ensure that each youth receives fair and appropriate attention and that each youth experiences treatment based on individually identified needs and strengths and that each youth is transitioned to the community in a timely manner.

(2) Individual Case Plan (ICP)--the [~~The~~] individualized plan for each youth that assesses a youth's needs and strengths, identifies objectives with specific strategies to address both needs and strengths, identifies a transition plan to the community and is reviewed and adjusted as the youth progresses or as new needs are identified. [~~A document by the same title is used to record and maintain the plan.~~]

(3) Primary Service Worker (PSW)--the [~~The~~] generic title given to persons at each TYC program who are assigned the primary responsibility for the case work for individual youth and for the administration of the case management standards [~~system~~]. The three (3) types of PSW are:

(A) Institutional Primary Service Worker (PSW)--person assigned the primary responsibility for casework and administration of the case management standards in a high restriction TYC operated facility or contract placement.

(B) Transitional Primary Service Worker (PSW)--person assigned the primary responsibility for casework and administration of the case management standards in a TYC operated halfway house or a medium restriction residential contract facility.

(C) Parole Officer--person assigned the primary responsibility for casework and administration of the case management standards for youth on parole in the community.

(4) Phase Assessment Team (PAT)--a team of staff consisting of the PSW, an educator and the juvenile correctional officer supervisor to facilitate, assess and document each youth's progress through the Resocialization program.

(c) Case Planning.

(1) An ICP will be developed with and for each youth by the PSW. The plan will be [~~periodically~~] updated monthly. The plan will be developed in accordance with the Resocialization [~~resocialization~~] program and identified needs and strengths and must specify measurable objectives, expected outcomes and a means to evaluate progress. See (GAP) §87.3 of this title (relating to Resocialization Program).

(2) The ICP will be developed with adaptations and modifications for youth identified with specialized needs to facilitate youth progress through the Resocialization program.

(3) Case planning will be initiated during the assessment process.

(4) The ICP development shall include a review of youth progress and monthly objectives and shall be developed with the youth and family when possible.

[~~(d) The ICP will be initiated during the assessment process.~~]

[~~(e) the ICP development shall include long and short-term objectives and shall be developed with the youth and family when possible.~~]

[~~(f) Objectives must be written so that they may be achieved within a period of time no longer than the required minimum length of stay or the expected length of stay at each 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 February 13, 2004.

TRD-200401016
Dwight Harris
Executive Director
Texas Youth Commission
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 424-6014

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SUBCHAPTER B. SPECIAL NEEDS OFFENDER PROGRAMS

37 TAC §§87.87, 87.89, 87.91

The Texas Youth Commission (TYC) proposes amendments to §87.87, concerning Sex Offender Risk Assessment, §87.89, concerning Use of Clinical Polygraph in the Sex Offender Treatment Program, and §87.91, concerning Family Reintegration of Sex Offenders.

The amendments to the sections reflect the updated name of the Sexual Behavior Treatment Program (SBTP). The amendment to §87.87 also includes a terminology change relating to documentation used to track each youth's progress through TYC.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. McCullough also has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be the availability of clear, accurate, and current policy. There will be no effect on

small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. No private real property rights are affected by adoption of these rules.

Comments on the proposal may be submitted within 30 days of the publication of this notice to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The amendments are proposed under the Human Resources Code, §61.034, which provides the Texas Youth Commission with the authority to make rules appropriate to the proper accomplishment of its functions.

The proposed rules affect the Human Resources Code, §61.034.

§87.87. Sex Offender Risk Assessment.

(a) - (f) (No change.)

(g) Override Procedures.

(1) (No change.)

(2) The central office override committee will review youth when one of the following applies:

(A) (No change.)

(B) Youth having a score of four (4) or above on the Static-99 or a six (6) and above on the JSORAI after successfully completing a TYC sexual behavior [~~sex offender~~] treatment program.

(C) (No change.)

(3) (No change.)

(4) Documentation.

(A) The central office override committee will document all decisions and the criteria used for each override on the appropriate TYC [~~child care~~] forms.

(B) - (D) (No change.)

(E) The PSW at the referring facility will ensure that the decision is filed in the appropriate section of the youth's casework subfile [~~masterfile~~].

§87.89. Use of Clinical Polygraph in the Sexual Behavior [~~Sex Offender~~] Treatment Program.

(a) The purpose of this rule is to provide clinical oversight for use of the clinical polygraph in the treatment of sex offenders.

(b) The Texas Youth Commission approves the use of a polygraph for certain selected youth involved in treatment in the agency's approved Sexual Behavior Treatment Program (SBTP) [~~Sex Offender Treatment Program (SOTP)~~]. Use of the clinical polygraph is strictly controlled and must be approved in each instance by qualified clinical professionals.

(c) (No change.)

(d) A youth may be considered a candidate for a polygraph if the youth:

(1) (No change.)

(2) has been admitted to the SBTP [~~sex offender treatment program~~] and has completed the initial SBTP [~~SOPT~~] evaluation; and

(3) (No change.)

(e) (No change.)

§87.91. Family Reintegration of Sex Offenders.

(a) (No change.)

(b) Explanation of Terms Used.

(1) Family--as [~~As~~] used herein, shall refer to the family members who live in the designated home placement, including the victim or potential victim(s).

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

(c) Requirements for Family Reintegration.

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

(4) The offender has demonstrated sufficient progress in treatment to be ready to return home as evidenced by completion of Phase 4 of the Resocialization Program and/or completion of the Sexual Behavior Treatment Program (SBTP)[~~Sex Offender Treatment Program (SOTP)~~].

(5) - (9) (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 February 13, 2004.

TRD-200401017
Dwight Harris
Executive Director
Texas Youth Commission
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 424-6014

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CHAPTER 91. PROGRAM SERVICES
SUBCHAPTER D. HEALTH CARE SERVICES

37 TAC §§91.83, 91.85, 91.97, 91.99

The Texas Youth Commission (TYC) proposes amendments to §91.83, concerning Criteria for Health Care, §91.85, concerning Medical Care, §91.97, concerning Acquired Immune Deficiency Syndrome/HIV, and §91.99, concerning Medical Admissions for Al Price State Juvenile Correctional Facility.

The amendment to §91.83 will establish that physicians and dentists responsible for providing care to TYC youth must be licensed to practice in Texas. The amendment to §91.85 will clarify the types of routine medical and dental examinations and treatment plans provided to TYC youth. The amendment to §91.97 reflects updated titles for certain health services staff. The amendment to §91.99 updates terminology relating to the documentation used by the treatment team to review a youth's progress in the program.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. McCullough also has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the section will be the availability of accurate, clear, and current policy. There will be no effect on

small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. No private real property rights are affected by adoption of these rules.

Comments on the proposal may be submitted to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The amendments are proposed under the Human Resources Code, §61.034, which provides the Texas Youth Commission with the authority to establish rules appropriate to the proper accomplishment of its functions.

The proposed rules affect the Human Resources Code, §61.034.

§91.83. Criteria for Health Care.

(a) Purpose. The purpose of this rule is to establish the criteria for providing medical care to Texas Youth Commission (TYC) [~~TYC~~] youth while they are under TYC jurisdiction.

(b) Explanation of Terms Used.

(1) Responsible Physician--An individual licensed to practice medicine in Texas and provide [~~and providing~~] health services to the TYC youth population through a contractual arrangement.

(2) Responsible Dentist--An individual licensed to practice dentistry in Texas and provide [~~and providing~~] dentistry services to the TYC youth population through a contractual arrangement.

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

§91.85. Medical Care.

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

(c) Services.

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

(4) All youth in residential care will receive a physical and dental screening and examination upon admission to TYC, and a health screening and dental examination annually thereafter [~~and annually thereafter~~].

(5) - (7) (No change.)

(d) General Procedural Requirements.

(1) Facility nurses will [~~, for each TYC youth,~~] develop an individual treatment plan for each TYC youth with chronic care or special medical needs [~~medical plan, which documents current health status and availability of medical insurance~~].

(2) - (5) (No change.)

(6) All efforts are made by TYC and contracted healthcare professionals to utilize third party reimbursement if available.

(7) (No change.)

(e) Limitation of Services.

(1) TYC is not responsible for medical costs incurred by youth:

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

(C) for injuries/illnesses sustained while on escape/abscond [~~escape/abscondence~~] status; or

(D) (No change.)

(2) Pharmaceutical, cosmetic, and medical experiments are prohibited. This policy does not preclude individual treatment of a youth based on the [~~his or her~~] need for a specific medical procedure which is not generally available.

(f) (No change.)

§91.97. Acquired Immune Deficiency Syndrome/HIV.

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

(c) Testing.

(1) Routine screening and/or testing for the HIV antibody is prohibited by law unless it is to be performed as a blind study for statistical purposes initiated by the TYC medical director or health services administrator [~~coordinator~~] and with the approval of the executive director. There shall be no form of identifying information in the study.

(2) (No change.)

(3) HIV/AIDS testing may be done on youth under the following circumstances only:

(A) A youth signs a written consent form indicating his/her willingness to be tested voluntarily[~~, Consent Form, HLS-755~~]; or

(B) - (C) (No change.)

(4) (No change.)

(5) Pre-test [~~Pretest~~] counseling regarding HIV/AIDS shall be provided prior to youth giving consent. Post-test [~~Post test~~] counseling is provided regarding the result.

(d) Confidentiality.

(1) Strict confidentiality shall be upheld regarding any HIV/AIDS testing or test results. All medical information, including information about HIV/AIDS infection, counseling, testing or test results is confidential and may not be released or disclosed except to facility physicians and nurses, the agency's medical director and health services administrator [~~coordinator~~].

(2) (No change.)

(e) - (h) (No change.)

(i) Education. TYC provides ongoing training regarding AIDS [~~acquired immune deficiency syndrome (AIDS)~~] to youth.

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

(4) Education of youth includes basic information about:

(A) - (E) (No change.)

(F) potential HIV transmission behaviors [~~behavior~~] that are in violation of Texas criminal [~~Criminal~~] laws;

(G) - (L) (No change.)

§91.99. Medical Admissions for Al Price State Juvenile Correctional Facility.

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

(c) Admissions.

(1) (No change.)

(2) Admission Process.

(A) Referrals. Youth may be placed at the MRD from the MOAU or may be referred from another facility. If referred from another facility, the action is considered an administrative transfer under (GAP) §85.29 of this title (relating to Program Completion and Movement Other Than Sentenced Offenders). Youth may contest such a transfer by filing a complaint under (GAP) §93.31 of this title (relating to Complaints Resolution System).

(i) A referral packet is completed and forwarded under the sending superintendent's signature to the MRD admissions review team at APSJCF.

(ii) (No change.)

(B) Emergency Referrals. If an emergency exists, staff may request of the APSJCF superintendent immediate placement in the MRD. The admission is subject to review and approval by the admission review team, which occurs within seven (7) days of the youth's arrival.

(d) Program Requirements.

(1) - (4) (No change.)

(5) The treatment team shall review the youth's progress on the ICP and Patient Summary [~~IMP objectives~~] at least every 30 days. The treatment team consists of the program administrator or designee, the director of nurses or designee, PSW, juvenile correctional officers (JCO) and designated education staff.

(e) Release and Transition Options.

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

(4) If a youth has been assigned to the MRD as a transitional care youth, he/she [~~he~~] would be returned to his/her [~~his~~] original assigned facility.

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 February 13, 2004.

TRD-200401018
Dwight Harris
Executive Director
Texas Youth Commission
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 424-6014

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CHAPTER 99. GENERAL PROVISIONS
SUBCHAPTER A. YOUTH RECORDS

37 TAC §99.11

The Texas Youth Commission (TYC) proposes an amendment to §99.11, concerning Youth Masterfile Records. The amendment to the section will provide additional controls to ensure that only approved documents are placed in a youth's official record.

Don McCullough, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. McCullough also has 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 the efficient use of and resources and time related to filing and retaining documents. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted within 30 days of the publication of this notice to DeAnna Lloyd, Policy Coordinator, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or email to deanna.lloyd@tyc.state.tx.us.

The amendment is proposed under the Human Resources Code, §61.034, which provides the Texas Youth Commission with the authority to make rules appropriate to the proper accomplishment of its functions.

The proposed rule affects the Human Resources Code, §61.034.

§99.11. Youth Masterfile Records.

(a) Purpose. The purpose of this rule is to ensure that youth records contain [~~establish a system for youth records containing~~] accurate and complete records of commitment documents, assessment reports, and significant decisions and events regarding the youth.

(b) (No change.)

(c) Masterfile Description. The official record [~~records~~] maintained for each youth is called the masterfile. It physically consists of four (4) separate subfiles called the casework subfile, the education subfile, the security subfile, [~~file folders called the security subfile, the incident subfile, the casework subfile,~~] and the medical subfile.

(1) Only documents identified in the contents of each subfile of the masterfile may be filed in the subfile.

(2) Any proposed new or revised policies or operational procedures that include the filing of additional documents in a subfile of the masterfile must include submission of the filing proposal to the Data Integrity Task Force in central office for approval.

(3) See (GAP) §99.19 of this title for the retention schedule of the masterfile.

(d) Masterfile Confidentiality. Masterfile subfiles [~~Files~~] shall be stored and transported in a manner that ensures security and confidentiality.

(e) Masterfile Custody. Masterfile subfiles [~~Youth masterfiles~~] shall remain in the custody and control of authorized personnel at all times. Authorized personnel are Texas Youth Commission (TYC) staff or staff under contract with TYC to provide medical or parole services.

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 February 13, 2004.

TRD-200401019
Dwight Harris
Executive Director
Texas Youth Commission
Earliest possible date of adoption: March 28, 2004
For further information, please call: (512) 424-6014

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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 21. INTERCONNECTION AGREEMENTS FOR TELECOMMUNICATIONS SERVICE PROVIDERS

SUBCHAPTER A. GENERAL PROVISIONS AND DEFINITIONS

16 TAC §21.10

The Public Utility Commission of Texas has withdrawn from consideration the proposed new §21.10 which appeared in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8739).

Filed with the Office of the Secretary of State on February 10, 2004.

TRD-200400907
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: February 10, 2004
For further information, please call: (512) 936-7223

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SUBCHAPTER D. DISPUTE RESOLUTION

16 TAC §21.105

The Public Utility Commission of Texas has withdrawn from consideration the proposed new §21.105 which appeared in the October 10, 2003, issue of the *Texas Register* (28 TexReg 8739).

Filed with the Office of the Secretary of State on February 10, 2004.

TRD-200400908
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: February 10, 2004
For further information, please call: (512) 936-7223

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TITLE 19. EDUCATION

PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 250. AGENCY ADMINISTRATION

SUBCHAPTER A. PURCHASING

19 TAC §§250.1 - 250.3

The State Board for Educator Certification has withdrawn from consideration the proposed amendments to §§250.1 - 250.3 which appeared in the September 5, 2003, issue of the *Texas Register* (28 TexReg 7559).

Filed with the Office of the Secretary of State on February 9, 2004.

TRD-200400892
Ron Kettler, Ph.D.
Interim Executive Director
State Board for Educator Certification
Effective date: February 9, 2004
For further information, please call: (512) 238-3280

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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 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 55. CHILD SUPPORT ENFORCEMENT

The Office of the Attorney General (OAG) adopts the repeal of Subchapter B, Locate Services, §55.31 without changes and adopts new Subchapter B, Locate-Only Services, §55.31 with changes to the proposed text as published in the August 15, 2003, issue of the *Texas Register* (28 TexReg 6444).

Texas Family Code §231.103 was amended by the 78th Legislature Regular Session (2003), House Bill 2588, effective September 1, 2003. Texas Family Code §231.103(g) requires the State's Title IV-D agency to establish new procedures by rule for the payment of authorized costs and fees. A decision was made to not implement a processing fee at this time; therefore, changes to the rule were made accordingly.

Section 55.31 explains the availability of the service.

One comment was received from Supportkids Inc. regarding the adoption of this rule. The OAG agreed that a processing fee will not be implemented at this time.

SUBCHAPTER B. LOCATE SERVICES

1 TAC §55.31

The repeal of this section is adopted under Texas Family Code §231.103.

The repeal affects 45 C.F.R. §303.70(d)

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 February 12, 2004.

TRD-200400966
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Effective date: March 3, 2004
Proposal publication date: August 15, 2003
For information regarding this publication, you may contact A. G. Younger, Agency Liaison, at (512) 463-2110.

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SUBCHAPTER B. LOCATE-ONLY SERVICES

1 TAC §55.31

The new rule is adopted under Texas Family Code §231.103.

The new rule affects 45 C.F.R. §303.70(d)

§55.31. Application.

An "authorized person" as defined in 42 U.S.C. §653(c) or an attorney or other agent with authority to act on behalf of an "authorized person" may apply to the Title IV-D agency for locate-only services.

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 February 12, 2004.

TRD-200400965
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
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Proposal publication date: August 15, 2003
For information regarding this publication, you may contact A. G. Younger, Agency Liaison, at (512) 463-2110.

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PART 7. STATE OFFICE OF ADMINISTRATIVE HEARINGS

CHAPTER 155. RULES OF PROCEDURES

1 TAC §§155.1, 155.3, 155.5, 155.15, 155.23, 155.35, 155.37, 155.43, 155.45, 155.55 - 155.57, 155.59

The State Office of Administrative Hearings (SOAH) adopts amendments to §155.1, Purpose and Scope; §155.3, Application and Construction of this Chapter; §155.5, Definitions; §155.15, Powers and Duties of Judges; §155.23, Filing Documents or Serving Documents on the Judge; §155.35, Certification of Questions to Referring Agency; §155.37, Settlement Conferences; §155.43, Making a Record of Contested Case; §155.45, Participation by Telephone; §155.55, Failure to Attend Hearing and Default; §155.57, Summary Disposition and Dismissal; and §155.59, Proposal for Decision; and adopts new §155.56, Dismissal Proceedings, concerning procedures at SOAH. Sections 155.15, 155.23, 155.43, 155.45, and 155.59 are adopted *with changes* to the proposed text as published in the October 17, 2003, issue of the *Texas Register* (28 TexReg 9019). Sections 155.1, 155.3, 155.5, 155.35, 155.37, and 155.55 - 155.57 are adopted *without changes* to the proposed text, and will not be republished.

SUMMARY OF THE BASIS FOR THE ADOPTED RULES

SOAH's adopted amendments update, streamline, and improve the uniform procedural rules it promulgated pursuant to Texas Government Code §2003.050. The adopted amendments will further enhance SOAH's ability to provide for an efficient, just, fair, and impartial adjudication of the rights of the parties under a consistent set of procedures.

GENERAL SECTIONS DISCUSSION

Adopted (*without changes to the proposed text*) §§155.1, 155.3, and 155.5 are amended to delete references to the Railroad Commission of Texas (RRC), because RRC cases will no longer be referred to SOAH.

Adopted (*without changes to the proposed text*) §§155.1, 155.3, 155.5, 155.35 and 155.37 are amended to change references in them from the Texas Natural Resources Commission (TNRCC) to reflect the Commission's new name, the Texas Commission on Environmental Quality (TCEQ).

SECTION BY SECTION DISCUSSION

Adopted (*without changes to the proposed text*) §155.1 is amended to change the effective date from 2001 to 2003 of the Public Utility Commission of Texas (PUC) and TCEQ procedural rules adopted by reference.

Adopted (*with changes to the proposed text*) §155.15 is amended to add subsection (a)(4), which clarifies an existing and necessary practice the judge's authority to reopen the record when justice requires. In response to comments described below, the proposed rule has been changed to clarify that such action can only be taken if a dismissal, proposal for decision, or final order has not been issued. Additionally, subsection (b)(11) is amended to change its reference to the Texas Natural Resources Commission (TNRCC) to reflect the Commission's new name, the Texas Commission on Environmental Quality (TCEQ).

Adopted (*with changes to the proposed text*) §155.23 is amended to delete references to the Railroad Commission of Texas (RRC), because RRC cases will no longer be referred to SOAH; and to change its references from the Texas Natural Resources Commission (TNRCC) to reflect the Commission's new name, the Texas Commission on Environmental Quality (TCEQ). For the same reasons, adopted paragraph (1)(A) has also been changed to delete the RRC reference and to change the reference from the TNRCC to TCEQ changes that were inadvertently left out of the proposed amendments. Additionally, the last sentence in proposed paragraph (1)(A) has been deleted from the adopted paragraph (1)(A), because the deleted sentence referenced procedural requirements no longer applicable to SOAH practice.

Adopted (*without changes to the proposed text*) §155.37 is amended so that paragraph (3) specifies when a SOAH mediator will conduct mediated settlement conferences in cases referred by TCEQ.

Adopted (*with changes to the proposed text*) §155.43 is amended: (1) to require that statements about stenographic recordings be filed with the SOAH docket clerk, because the position of "Director of Hearings" has been eliminated from SOAH; and (2) to comport with the new statutory requirement in Texas Government Code §2003.057 that SOAH provide and pay for interpreters for hearings. Adopted subsection (g) has been changed to correct an inadvertent dropping of the word "provide" from the proposed language, to assure that SOAH meets the full requirements of Texas Government Code §2003.057.

Adopted (*with changes to the proposed text*) §155.45 is amended: (1) to comply with the new statutory requirement in Texas Government Code §2003.050(c) that SOAH include in its rules procedures to verify the identity of telephonic witnesses; (2) to require that requests for videoconferencing include the city of residence of the party or witness; and (3) to clarify that the judge has discretion to grant or deny such requests depending upon the availability of videoconferencing facilities at the time of the hearing. Adopted subsection (c) has been changed from its proposed language to correct grammar by placing an "a" before the words "party motion" found near the end of the sentence.

Adopted (*without changes to the proposed text*) §155.55 is amended to simplify the rule's language.

Adopted (*without changes to the proposed text*) §155.56 creates a separate rule describing SOAH's procedures for dismissals for failure to prosecute and other dismissal actions. Subsections (b) and (c) have merely been moved from §155.57 (concerning Summary Disposition and Dismissal) the substance of those subsections has not changed.

Adopted (*without changes to the proposed text*) §155.57 is amended so that it relates only to Summary Disposition, and deletes references to dismissal actions.

Adopted (*with changes to the proposed text*) §155.59 is amended to add subsection (c), which creates one deadline for exceptions and replies for all SOAH cases, to eliminate the confusion attendant to the present situation in which every referring agency has different exceptions and replies deadlines. The adopted rule has been changed from the proposed language to clarify that only one copy of exceptions and replies should be filed at SOAH, and to give referring agencies a deadline by which the judge will inform them whether changes will be made to the Proposal for Decision (PFD). Furthermore, the adopted rule clarifies that the judge has discretion to shorten or extend the time for filing exceptions and replies. Parties are required to file requests for extension of time for filing exceptions and replies with the judge instead of the referring agency, because the judge is responsible for considering them.

HEARINGS AND COMMENTS

A public hearing was not held. Written comments were filed by the Railroad Commission of Texas (RRC), the Texas Lottery Commission (TLC), and TXU Energy Companies & Oncor Electric Delivery Company (TXU/Oncor).

RESPONSES TO COMMENTS

COMMENTS RELATING TO §§155.1, 155.3, 155.5, and 155.23. The RRC supported the amendments deleting references to the RRC in the rules, because RRC cases will no longer be referred to SOAH.

COMMENTS RELATING TO §155.15. Powers and Duties of Judges: In response to proposed §155.15(a)(4), the TLC commented that the proposed rule left unclear what limitations, if any, would exist to a judge's authority to reopen the record in a contested case. In particular, the TLC wondered whether a judge could reopen the record after an agency had adopted the judge's PFD, or whether an agency might adopt a PFD on the same day the judge decided to reopen the record. With these possible conflicts in mind, the TLC suggested that SOAH include a time limitation on this authority. Additionally, the TLC suggested that SOAH

provide examples of when it would be appropriate for a judge to reopen the record. TXU/Oncor commented that the rule should be amended to clarify that the judge could not reopen the record once the case has been returned to the referring agency.

SOAH agrees that the rule's language should be limited to clarify that such action can only be taken if a dismissal, PFD, or final order has not been issued. The following is a list of examples of situations in which a judge might find that justice required reopening the record:

(1) When the party who did not have the burden of proof failed to appear at a hearing in which a default proceeding under §155.55 (concerning Default Proceedings) was not possible (*e.g.*, in a medical necessity dispute referred by the Texas Workers' Compensation Commission), and the party with the burden of proof proceeded with its case. In such an instance, if the absent party then filed a motion explaining good cause for its absence, the judge could reopen the record and accept additional evidence before issuing a decision.

(2) When the judge had sorted through the evidence in a case and found that a vital part of the evidence was missing or a critical legal issue had not been addressed, the judge could notify the parties of the need to reopen the record to fill in the gap.

(3) When new law addressing an issue in a case arose after the record had closed, the judge could reopen the record and give the parties an opportunity to address issues in the case in light of the new law before the PFD or final order issued.

(4) When new evidence was discovered by a party that then filed a motion explaining good cause why the record should be reopened, the judge could grant the motion. The foregoing list is not meant as a limitation on the judges' discretion in this area; nor should it be construed as a direction on how the judges should rule in these or similar circumstances.

COMMENTS RELATING TO §155.59. Proposal for Decision: In response to proposed §155.59(c), the TLC explained that the language made it unclear whether two copies of exceptions and replies to a PFD were required to be filed one to the judge, and one to the SOAH docket clerk. SOAH agrees and has clarified the rule so the parties will know to file only one copy at SOAH.

The TLC also commented on §155.59(c)(3), suggesting that the rule require the judge to notify the referring agency within seven days after the last day for filing replies to exceptions whether changes would be made to the PFD. TLC explained that without such a deadline, the referring agency's ability to consider PFDs and issue final orders is compromised. SOAH finds that request reasonable and has changed the proposed language accordingly; however, in order to assure that the judges have adequate time to consider exceptions and replies, the amended subsection creates a 15-day deadline instead of a 7-day deadline.

TXU/Oncor commented that standardizing the exceptions and replies deadline would be beneficial. TXU/Oncor was concerned, however, that the proposed rule did not adequately account for unusual situations in which the period for exceptions and replies either needs to be shortened or extended beyond the proposed deadlines. It suggested that a provision be added recognizing the judges' discretion to take such action when the needs of the case dictate. SOAH agrees and has added new subsection (c)(2) based on language suggested by TXU/Oncor.

STATUTORY AUTHORITY

The amended and new sections are adopted under Texas Government Code §2003.050, which authorizes SOAH to conduct contested case hearings and requires adoption of hearings procedure rules, and Texas Government Code §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The adopted amendments and new section affect Texas Government Code Chapters 2001 and 2003.

§155.15. Powers and Duties of Judges.

(a) The judge shall have the authority and duty to:

(1) conduct a full, fair, and impartial hearing;

(2) take action to avoid unnecessary delay in the disposition of the proceeding;

(3) maintain order; and

(4) reopen the record when justice requires, if a dismissal, proposal for decision, or final order has not been issued.

(b) The judge shall have the power to regulate prehearing matters, the hearing, and the conduct of the parties and authorized representatives, including the power to:

(1) administer oaths;

(2) take testimony, including the power to question witnesses;

(3) rule on questions of evidence;

(4) rule on discovery issues;

(5) issue orders relating to hearing and prehearing matters, including orders imposing sanctions;

(6) admit or deny party status;

(7) limit irrelevant, immaterial, and unduly repetitious testimony and reasonably limit the time for presentations;

(8) rule on motions of parties or the judge's own motion, including granting or denying continuance;

(9) request parties to submit legal memoranda, proposed findings of fact, and conclusions of law;

(10) issue proposals for decision pursuant to APA §2001.062, and where authorized, final decisions;

(11) for contested cases referred by an agency other than the PUC or the TCEQ, impose appropriate sanctions against a party or its representative for:

(A) filing a motion or pleading that is groundless and brought:

(i) in bad faith;

(ii) for the purpose of harassment; or

(iii) for any other improper purpose, such as to cause unnecessary delay or needless increase in the cost of the proceeding;

(B) abuse of the discovery process in seeking, making, or resisting discovery; or

(C) failure to obey an applicable rule or an order of the judge or of the state agency on behalf of which the hearing is being conducted; and

(12) where appropriate and justified by party or representative behavior described in paragraph (11) of this subsection, and after notice and opportunity for hearing, issue an order:

(A) disallowing further discovery of any kind or of a particular kind by the offending party;

(B) charging all or any part of the expenses of discovery against the offending party or its representatives;

(C) holding that designated facts be considered admitted for purposes of the proceeding;

(D) refusing to allow the offending party to support or oppose a designated claim or defense or prohibiting the party from introducing designated matters in evidence;

(E) disallowing in whole or in part requests for relief by the offending party and excluding evidence in support of those requests; and

(F) striking pleadings or testimony, or both, in whole or in part.

§155.23. Filing Documents or Serving Documents on the Judge.

The following requirements govern the filing or service on the judge of documents in contested cases pending before SOAH unless modified by order of the judge.

(1) Place for Filing Original Materials.

(A) Contested Cases Generally. The original of all pleadings and other documents requesting action or relief in a contested case, except contested cases referred to SOAH by the PUC and the TCEQ, shall be filed with SOAH once it acquires jurisdiction under §155.7 of this title (relating to Jurisdiction). Pleadings, other documents, and service to SOAH shall be directed to: Docketing Division, State Office of Administrative Hearings, 300 West 15th Street, Room 504, P. O. Box 13025, Austin, Texas 78711-3025. The time and date of filing shall be determined by the file stamp affixed by SOAH. Unless otherwise ordered by the judge, only the original and no additional copies of any pleading or document shall be filed.

(B) Cases Referred by the PUC.

(i) Except for exhibits offered at a prehearing conference or hearing, the original of all pleadings and documents in a contested case referred to SOAH by the PUC shall be filed with the clerk at the PUC in accordance with the rules of the PUC.

(ii) The time and date of filing these materials shall be determined by the file stamp affixed by the clerk.

(iii) The party filing a document with the clerk at the PUC (except documents provided in the discovery process that are not the subject of motions filed in a discovery dispute) shall serve a copy of the document on the judge by delivery on the same day as the filing.

(iv) The court reporter shall serve the transcript and exhibits in a proceeding on the judge at the time the transcript is provided to the requesting party. SOAH shall maintain the transcript and exhibits until they are released to the PUC by the judge. If no court reporter is requested by a party, SOAH shall maintain the recording of the hearing and the exhibits until they are released to the PUC by the judge.

(C) Cases Referred by the TCEQ.

(i) Except for exhibits offered at a prehearing conference or hearing, the original of all pleadings and documents in a contested case referred to SOAH by the TCEQ shall be filed with the chief clerk at the TCEQ in accordance with the rules of the TCEQ.

(ii) The time and date of filing these materials shall be determined by the file stamp affixed by the chief clerk, or as evidenced by the file stamp affixed to the document or envelope by the TCEQ mail room, whichever is earlier.

(iii) The party filing a document with the chief clerk at the TCEQ (except documents provided in the discovery process which are not the subject of motions filed in a discovery dispute) shall serve a copy of the document on the judge by delivery on the same day as the filing.

(iv) The transcript and exhibits in a proceeding shall be served on the judge at the time the transcript is provided to the requesting party. SOAH shall maintain the transcript and exhibits until they are released to the TCEQ by the judge. If no court reporter is requested by a party, SOAH shall maintain the recording of the hearing and the exhibits until they are released to the TCEQ by the judge.

(2) Confidential Materials.

(A) Filings Generally. A party filing materials made confidential by law shall file them in an enclosed, sealed, and labeled container, accompanied by an explanatory cover letter. The cover letter shall identify the docket number and style of the case and explain the nature of the sealed materials. The container shall identify the docket number, style of the case, and name of the submitting party, and be marked "CONFIDENTIAL & UNDER SEAL" in bold print at least one inch in size. Each page of the confidential material shall be marked "confidential."

(B) Materials Submitted for In Camera Review. A party submitting materials for in camera review by the judge shall supply them to the judge in an enclosed, sealed, and labeled container, accompanied by an explanatory cover letter copied to all parties. The cover letter, addressed to the judge, shall identify the docket number, style of the case, explain the nature of the sealed materials, and specify the relief sought. The container, addressed to the judge, shall identify the docket number, style of the case, and name of the submitting party, and be marked "IN CAMERA REVIEW" in bold print at least one inch in size. Each page for which a privilege is asserted shall be marked "privileged." Said materials will not be received for filing by SOAH unless the judge so orders. Unless otherwise ordered by the judge, materials reviewed in camera will be returned to the party that submitted them.

(3) Discovery Requests and Documents Produced in Discovery.

(A) Discovery requests and deposition notices to be served on parties and responses and objections to discovery requests shall not be filed with SOAH or served on the judge, except as provided in subparagraph (C) of this paragraph.

(B) Documents produced in discovery shall be served upon the requesting parties and notice of the service shall be given to all parties, but neither the documents produced nor the notice of service shall be filed with SOAH or served on the judge, except by order of the judge. The party responsible for service of the discovery materials shall retain a true and accurate copy of the original documents and become their custodian.

(C) Motions requesting relief in a discovery dispute shall be accompanied by only those portions of discovery materials relevant to the dispute.

(D) If documents produced in discovery are to be used at hearing or are necessary to a prehearing motion that might result in a final order on any issue, only the portions to be used shall be filed with SOAH or offered into evidence.

(4) Facsimile Filings. Documents may be filed with SOAH, or in PUC or TCEQ cases served on the judge, by facsimile transmission according to the following requirements:

(A) The quality of the original hard copy shall be clear and dark enough to transmit legibly.

(B) The first sheet of the transmission shall indicate the number of pages being transmitted, and shall contain a telephone number to call if there are problems with the transmission.

(C) Neither the original nor any additional copies of facsimile filings should be filed with SOAH.

(D) The sender shall maintain the original of the document with the original signature affixed.

(E) The date imprinted by SOAH's facsimile machine on the transaction report that accompanies the document will determine the date of filing or of service on the judge. Documents received on a Saturday, Sunday or other day on which SOAH is closed shall be deemed filed the first business day thereafter.

(5) Effect of Signing Pleadings. The signatures of parties or authorized representatives constitute their certification that they have read the pleading and that, to the best of their knowledge, information, and belief formed after reasonable inquiry, the pleading is neither groundless nor brought in bad faith.

§155.43. Making a Record of Contested Case.

(a) A record of all contested case proceedings will be made. At the judge's discretion and order, the making of a record of a prehearing conference may be waived, and the actions taken at the conference may instead be reflected in a written order issued after the conference. For any proceeding in a docket set to last no longer than one day, SOAH is responsible for making a tape recording of the hearing or prehearing conference.

(1) A referring agency that prefers to arrange for a stenographic recording of all docketed proceedings on a regular basis may do so by filing a statement of intent to do so. The statement shall be filed with the SOAH docket clerk and shall remain in effect for all proceedings conducted by SOAH on behalf of the referring agency unless the statement is revoked in writing. The referring agency shall make arrangements for stenographic recording of all proceedings while the statement is effective, unless the judge waives the requirement for a prehearing conference or as provided in subsection (b) of this section.

(2) A referring agency that prefers to make arrangements to videotape all docketed proceedings on a regular basis may file a statement of intent to do so, as specified in paragraph (1) of this subsection. If a docketed proceeding is set to last longer than a day, a referring agency nevertheless is subject to subsection (b) of this section.

(b) Unless otherwise ordered by the judge, the referring agency shall provide a court reporter for any proceeding in a docket set to last longer than one day. The court reporter shall prepare a stenographic record of the proceeding but shall not prepare a transcript unless a party or the judge so requests.

(c) The tape recording made by SOAH under subsection (a) of this section, the videotape made by the referring agency under subsection (a) of this section if a statement is on file, or the stenographic recording prepared under subsection (b) of this section is the official record of the proceeding for purposes of all actions within SOAH's jurisdiction. The judge may order a different means of making a record if circumstances so require and may designate that record as the official record of the proceeding.

(d) Any party may use a means of making an unofficial record of the proceeding that is in addition to the means specified in the rules or by the judge.

(1) The party shall file and serve a notice of intent to use an additional means at least two days before the proceeding.

(2) The party shall make all arrangements associated with the additional means.

(3) The judge may order that the additional means not be used or that it cease being used if it may cause or is causing disruption to the proceeding.

(4) At the proceeding the judge may order that the additional means sought to be used shall be the method of preparing the official record of the proceeding and dispense with any other means required by this section, unless there is a timely objection at the beginning of the proceeding.

(e) On the written request to the referring agency by a party to a contested case or on request of the judge, a written transcript of all or part of the proceedings shall be prepared by a court reporter from the means used to make the official record of the proceeding. If the proceeding has been taped or video recorded, the referring agency shall inform SOAH of the need to deliver the original recording to a court reporter, selected by the referring agency, for preparation of the transcript.

(1) Costs of a transcript ordered by any party ordinarily shall be paid by that party. If permitted by the referring agency's statute, rules, or policy, the cost of the transcript may be assessed to one or more parties.

(2) When only the judge requests a transcript, the referring agency may bear that cost or assess the cost as provided for in paragraph (1) of this subsection.

(3) Paragraphs (1) and (2) of this subsection do not preclude the parties from agreeing to share the costs associated with the transcript.

(4) The original of any transcript prepared shall be filed with SOAH.

(5) Proposed written corrections of purported errors in a transcript shall be filed with SOAH and served on the parties and the court reporter within a reasonable time after discovery of the error. The judge may establish deadlines for the filing of proposed corrections and responses. The transcript will be corrected only upon order of the judge.

(6) A transcript prepared according to these procedures becomes the official record of the proceedings for purposes of all actions within SOAH's jurisdiction.

(f) The judge shall maintain any exhibits admitted during the proceeding and the official record of the proceeding, other than a stenographic record. However, the judge may allow the court reporter to retain the exhibits and the tape or video recording of the proceeding, if applicable, while a transcript is being prepared. The exhibits and transcript or recording will be sent to the referring agency after issuance of the order or proposal for decisions and consideration of any exceptions to the proposal for decision and replies. The judge may retain the exhibits and transcript or recording to prepare for presentation of the proposal for decision to the referring agency, if a presentation is requested by the referring agency, or SOAH may seek temporary return of the exhibits and transcript or recording to enable the judge to prepare for that presentation if the materials have already been sent to the referring agency.

(g) When an interpreter will be needed for all or part of a proceeding, a party shall file a written request at least seven days before the setting. SOAH shall provide and pay for:

(1) an interpreter for deaf or hearing impaired parties and subpoenaed witnesses in accordance with §2001.055 of the APA;

(2) reader services or other communication services for blind and sight impaired parties and witnesses; and

(3) a certified language interpreter for parties and witnesses who need that service.

(h) If existing technology allows, and upon consent of the parties, a judge may permit broadcasting or televising of proceedings, provided the judge determines that doing so: serves the public interest in accessibility to the proceedings; will not unduly interfere with the efficiency of the proceedings; will not distract, intimidate, or otherwise adversely affect the participants; and will not impair the dignity of the proceedings.

§155.45. Participation by Telephone or Videoconferencing.

(a) A party may request to appear by telephone or to present the testimony of a witness by telephone, upon timely motion stating the reason(s) for the request, containing the pertinent telephone number(s), and affirmatively stating that the proposed witness will be the same person who appears telephonically at the hearing. A timely motion for telephone appearance that is unopposed will be deemed granted without the necessity of an order, unless denied by order of the judge.

(b) A party may request to appear by videoconferencing or to present the testimony of a witness by videoconferencing, upon timely motion stating the reason(s) for the request and the city of residence of the party or witness. In deciding whether or not to grant the request, the judge shall consider all relevant matters, including the availability of videoconferencing facilities at the time of the hearing.

(c) The judge may conduct a prehearing conference by telephone or videoconferencing upon adequate notice to the parties, even in the absence of a party motion.

(d) All substantive and procedural rights apply to telephone and videoconferencing prehearings and hearings, subject only to the limitations of the physical arrangement.

(e) Documentary evidence to be offered at a telephone or videoconferencing prehearing conference or hearing shall be served on all parties and filed with SOAH at least three days before the prehearing or hearing unless the judge, by written order, amends the filing deadline.

(f) For a telephone or videoconferencing hearing or prehearing conference, the following may be considered a failure to appear and grounds for default if the conditions exist for more than ten minutes after the scheduled time for hearing or prehearing conference:

(1) failure to answer the telephone or videoconference line;

(2) failure to free the line for the proceeding; or

(3) failure to be ready to proceed with the hearing or prehearing conference as scheduled.

§155.59. Proposal for Decision.

(a) For contested cases in which the judge does not have authority to issue a final order, the judge shall prepare a proposal for decision.

(b) The judge shall submit the proposal for decision to the final decision maker and furnish a copy to each party.

(c) The parties may submit to SOAH and the referring agency exceptions to the proposal for decision, and replies to exceptions to the proposal for decision.

(1) Exceptions shall be filed within 15 days after the date of service of the proposal for decision. A reply to the exceptions shall be filed within 15 days of the filing of the exceptions.

(2) The judge may, on the judge's own motion and for good cause, extend or shorten the time in which to file exceptions or replies.

(3) The parties shall direct any motions for extension of time in which to file exceptions or replies to the judge. Parties' motions for extensions of time shall be filed no later than five days before the applicable deadline for submission of exceptions or replies and shall demonstrate either:

(A) good cause for the requested extension; or

(B) agreement of all other parties to the extension.

(4) The judge shall review all exceptions and replies and notify the referring agency within 15 days of the deadline for filing a reply to the exceptions whether the judge recommends any changes to the proposal for decision.

(d) The judge may amend the proposal for decision in response to exceptions and replies to exceptions, and may also correct any clerical errors in the proposal for decision, without the proposal for decision again being served on the parties.

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 February 12, 2004.

TRD-200400968
Cathleen Parsley
General Counsel
State Office of Administrative Hearings
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Proposal publication date: October 17, 2003
For further information, please call: (512) 475-4931

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 80. MANUFACTURED HOUSING

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (Department) adopts without changes §§80.203 and 80.206. The text to the adopted rules without changes will not be republished. The following new rules are adopted with changes and will be republished: New §§80.181- 80.183, 80.200, 80.201, 80.204, 80.205 and 80.209. The following amended rules are adopted with changes and will be republished: §§80.127 and 80.207. The proposed rules were published in the September 19, 2003 issue of the *Texas Register* (28 TexReg 8076).

The effective date of the rules is thirty (30) days following the date of publication with the *Texas Register* of notice that the rule has been adopted.

A public hearing was held on October 28, 2003. The following interested groups or associations presented comments either at the hearing or in writing: Texas Manufactured Housing Association ("TMHA").

Set forth below are comments from TMHA and other parties suggesting revisions to specific subsections and the analysis and recommendations of staff.

Section 80.127(d) - In the past, a failure to perform warranty work was not, in and of itself, a violation. There had to be an order and a violation of the order, too. This changes it so that if a licensee does not perform required warranty work within the required period, that would be a violation. A number of commenters argued that this proposed language put licensees at a severe disadvantage in warranty disputes. A commenter stated that §80.127(d) and §80.132(1)(A) were in conflict. The commenter went on to indicate that under §80.132(1)(A) the consumer was insured to notify the retailer or manufacturer, providing an opportunity for voluntary compliance. It indicated that the 40 day period was arbitrary and might be too long or too short under given facts and circumstances. It was argued that the Department ought to encourage voluntary resolution. Although the Department believes the proposed rule allows for an extension to be approved by the Department for good cause, the Department added language to §80.127(d)(3) to clarify that reasonable time will be given. The Board discussed this matter at length and heard additional testimony at its February 6, 2004, meeting. It was decided to add clarifying language that when a warranty assignment is reviewed by the Department and the review is finalized, the licensee will be given an appropriate and reasonable period of time to comply, not just whatever happens to remain of the original forty day period.

New §80.181- A commenter suggested alternate language, "Before accepting a completed credit application from a consumer, a retailer…" The Department has revised the language.

Section 80.181(1)- A commenter stated there is no statutory provision for the instructions at the end of the disclosure form that states the retailer must maintain the signed acknowledgement for at least 25 months. Since this is a disclosure that must be given to every applicant whether they ultimately purchase a home or not, this could lead to a record-keeping nightmare. The commenter suggested that the 25 month time frame be applied only to those acknowledgments / applications that result in sold homes. The Department has deleted the instructions since §80.121(b) requires all verifications and copies of notices required by our rules to be maintained in the retailer's sales file for a minimum of 6 years.

Section 80.182- A commenter stated that this section needs to be re-titled or broken into parts or both because it contains the disclosure required by Section 163 and the right of rescission. This has been done.

New §80.182- A commenter stated that the 1201.163 Disclosure created by SB 521 was intended to narrow the focus of the consumer to more of the details of home ownership and to ensure that possible finance options are presented. There is no need to present this form until the prospective homeowner has completed the initial credit application step and has been conditionally approved by a lender. However, the statute does provide that the 163 Disclosure be given at least 24-hours prior to closing so (a) should probably start with "At least 24-hours prior…" Please review the attached suggested form revisions. The Department agrees with the "At least 24 hours" recommendation. The form is treated separately in the following paragraph, after all discussion of rule text.

Section 80.182(a)(2)- Comments were received objecting to having made the form bilingual and that there is no provision in SB 521 to provide the 1201.163 Disclosure in Spanish. Commenters stated the Department's rule will put an unnecessary burden on licensees and goes well beyond what is required by Texas Law and that the proposed section should be omitted. The Department's intent is to assist Spanish-speaking consumers by making disclosures available in Spanish. The Department will not require the retailer to provide the disclosure in Spanish; however, the consumer may request a copy in Spanish from the retailer or from the Department. A legend in Spanish has been added at the top of the English version (Figure: 10 TAC §80.181(a)(1)) informing consumers that a Spanish version is available upon request.

Section 80.182(b)- A commenter stated that in SB 521, the 3-day right of rescission was created as a stand-alone section and it seems that Department rules should take the same approach and create a new section. The commenter states SB 521 is very clear on this issue and the Department is over stepping its authority and nowhere in 1201.1521 does it say or imply that this provision does not apply to real property (new or used). The commenter stated that adopting this rule will deny consumers protections clearly granted to them by the Legislature in this section of the law and this rule should not be adopted. The Department has move the right of rescission rule to §80.183 and rewritten the rule for clarification. After an extended discussion at the February 6, 2004, board meeting, it was decided that the right of rescission is three calendar days, not three business days.

Section 80.182(c)(2)- A commenter stated there should be some responsibility placed on the consumer that wants to rescind their contract. There is no reason to create confusion and unnecessary delays and expense to be incurred by consumers and licensees by creating the possibility of confusion on wrong addresses and missed courier deadlines. If the customer can show up in person to sign the contract to buy a home they should be able to show up in person or get to a fax machine within the 3-day time period to rescind the contract. The Department deleted the proposed form.

Section 80.182(c)(4)- A commenter stated the Department is overstepping its authority. Nowhere in SB 521 does the statute even imply a 7-day time period. The statute is clear. If the right of rescission is not exercised by midnight of the 3rd day the opportunity to do so has passed. This section is a good example of why this important option for the consumer should come with the equally important obligation to adhere to its time limits. The Department withdraws this proposed section. However, the Department does not believe it exceeded its authority. It simply created a presumption that a posted notice of rescission, if not received within a week, was presumed not given. With this section deleted a properly posted notice of rescission could be effective even if received much later.

Section 80.182(c)(4)- Another commenter asked that it be stated that the presumption created was not rebuttable, noting that it would provide a protection. It was the Department's intent that it not be rebuttable. This is not an issue since the Department has deleted this section.

Section 80.182 - There were general comments on the right of rescission as it related to special order homes. It was indicated

that a retailer would not special order a home without a non-refundable deposit. The Department does not see any way around the fact of the right of rescission and does not have authority to clarify the interrelationship of the deposit on a special order home with the right of rescission. There does not appear, however, to be any statutory exception for deposits. The best way to handle this is to wait until the three day period has elapsed before submitting the order.

Section 80.182- A commenter suggested that the consumer sign a form acknowledging receipt of the right of rescission. The Department believes that notice of the right is provided in the Section 162 disclosure.

Section 80.182- A commenter stated that it was clearly contemplated that the right of rescission be based on calendar days, not business days. The Department has clarified this in the rule, as adopted.

Section 80.182(d)- A commenter stated the rule should be adopted as an addition to §80.124 so that all rules concerning deposits are listed together. And in §80.124, there are already rules for deposits and down payments on specially ordered homes. However, it should be noted that there is a difference between an "Earnest Money" situation and a "binding contractual agreement" mentioned in §80.182(d)(1). 1201.1505 specifically calls for an earnest money contract and makes it clear that among its provisions there should be the 3-day right rescission before the order is placed. In addition, 1201.1505 provides for there to be a binding loan commitment a lender if applicable. The commenter stated the section is unnecessary since the statute is clear on this issue, but if there has to be a rule the Department should use the language provided by the Legislature. The Department agrees with moving this subsection to §80.124 but is not acting on §80.124 at this time.

Section 80.182(e)- A commenter asked which disclosure this subsection was referring to since the section deals with more than one disclosure. The Department moved this subsection to §80.182(b) that refers to the 163 Disclosure.

Section 80.182 - A commenter asked for clarification as to which forms needed to be in 12 point type. The Department has determined that the Section 162 and Section 163 disclosures must both be in at least twelve point type.

New §80.183- A commenter stated 1201.163 clearly states that this disclosure is to provide the consumer with "estimates" as they continue to gather more information about buying a home. There is nothing in the statute that even implies that the 163 Disclosure has anything to do with "a binding agreement" or "constitutes a firm offer by the retailer" to provide or do anything. At the time this disclosure is given the consumer may still be considering several different options and among those options is what kind of loan to use. How can a form that presents things to consumers in general terms be considered a "firm offer"? As long as §80.182 clearly states the use and timing of the 163 Disclosure this whole section is not needed and should be deleted. A commenter indicated that an attempt had been made to merge two concepts: Provide the Sec. 163 notice 24 hours before the contract is entirely executed and provide a copy of the proposed contract 24 hours before it is to be executed. The Department deleted the original language relating to 24 hour advance copy of certain documents and replaced it with the rewritten three day right of rescission rule that was previously proposed in §80.182. The provision regarding what constitutes a "firm offer has been deleted from the final rule as it is addressed in the statute

New §80.200(a)(1)- A commenter stated the same terms should be used throughout the rule to avoid confusion. If the Department wants to use "seller / transferor", then "consumer" should probably be changed to buyer / transferee. The Department will keep the term consumer, defined in the Act but using it in conjunction with transferee, since transferee encompasses not only buyers but other acquirers, such as heirs and devisees.

New §80.201 - After an extended discussion, including public commentary at the February 6, 2004, Board meeting, it was decided that the Department ought to require proof of no tax liens whenever an initial or revised Statement of Ownership and Location is issued. This was based in large part on consideration of the effect of HB 468 (77th Legislature) on the creation of tax liens for tax years prior to 2001.

New §80.201(a)(2)(D)- A commenter stated this section makes reference to a home that is relocated. What will be required for a new SOL when the home is not relocated? The Department believes that this presents a policy issue. The law does not appear to require verification of paid property taxes if the home is not moved. Obviously, if there are tax liens recorded with the department against the home, they would have to be discharged or consent would be required. A home may be sold "in place" if the sale is either lawful or exempt and no proof of a lawful move would be required. The Department revised the section for clarification.

New §80.204(c)(1)- A commenter stated that the 1201.163 disclosure is for consumer information purposes only and has nothing what so ever to do with installations. This subsection should be deleted, but if it is allowed to stay, 1201.163 is required specifically for "chattel" sales of manufactured homes. Not land and home sales or not cash sales. How will the 163 Disclosure be produced when a consumer-to-consumer sale takes place? The Department deleted the subsection.

New §80.204(c)(2)- A commenter stated that the 1201.163 has nothing to do with installations, but if allowed to stay, the last sentence could be read to conflict with §80.182(e) which states that signed acknowledgments must be kept of file for 25 months. The Department deleted the subsection.

Section 80.205(a)(4) -- A Commenter thought it was burdensome to require separate filings for each location. It was indicated that this could cause logistical problems for limit-site dealers moving inventory from location to location. The Department recommended this because of the unique licensing structure under the Act, requiring each sales site to be separately licensed and bonded. The Department determined that the proposed language will remain unchanged.

New §80.205(c)(1)(D)- A commenter asked why the Department needs a certification that a repossessed or foreclosed home will not be located on the same property as the previous owner. The commenter said these homes are resold in place all the time. The Department revised the language to clarify that it is possible for a home to be sold in place if the site of sale is lawful (i.e., a licensed retail site or an exempt transaction).

New §80.205(c)(2)- A commenter stated that the taxes should already be paid if the home was moved legally, but should the Department also make reference to proof of paid taxes along with the release of lien information on repossesses and foreclosed homes? The Department believes this is a policy issue on requiring proof of paid taxes on a home that is sold in place and on which no tax lien has been recorded. Of course if such a home is re-sold, it must be sold in either a properly licensed transaction

or an exempt transaction; and if the sale is by a licensee, a warranty of good and marketable title is required. The Department determined that the proposed language will remain unchanged.

Section 80.207(a)(2)- A commenter stated that since the Department produces forms called affidavits, it should be made clear whether the affidavit referred to in this subsection is a Department form or a typed and notarized statement produced by the owner. The Departments position is that the language does not specify that the affidavit is a department form, it can be assumed that the affidavit is not required to be made on a department form. No change in the language is needed.

Section 80.207(b)- A commenter suggested alternate sentence structure: A manufactured home that has been designated for "business use only" may be…." Also this subsection seems to imply that once the Department inspects the home, the owner may only elect to treat the home as personal property. If that is not the case please consider rewording this subsection so that all options are made clear. The Department agrees and revised the text to clarify that the owner may elect to treat the home as either personal property or real property.

New §80.209(a)- A commenter stated that the new SOL form should have a space for the Date of Manufacturer to be listed if the date is known. The information on size should be specific as to floor size or size including the hitch. Under the Transferee information the form asks for "county where home is installed." At the time of sale the home is usually not yet installed so consider using "county where home will be installed". The department might consider making this form into a legal sized document to allow improved spacing of the information making the form more user friendly. Another commenter asked that the date of manufacture not be added since it is not specified on a site built home and the industry is attempting to treat manufactured homes similarly to site built homes wherever possible. The Department added date of manufacture. It is often requested from insurers, and including it on the SOL will help reduce call-ins. The Department prefers letter size forms because of the requirements for document microfilming. The Department agrees to include statutory language to specify how the size should be reported on the application. Under the Transferee information, the Department revised the "County Where Home Is Installed" language to "County Where Home Is or Will Be Installed."

Except as noted below, the rules as proposed on September 19, 2003 are adopted as final rules with the following non-substantive changes.

The text in §80.127(d) is rewritten for clarification.

New §80.181 is reworded for clarification.

Figure: 10 TAC §80.181(1)- Consumer Disclosure Statement (English version) is revised to include a legend at the top of page that explains a Spanish version is available on request and the last paragraph on the form was revised taking out the requirement that the retailer maintain the acknowledgement for at least 25 months.

Figure: 10 TAC §80.181(2)- Consumer Disclosure Statement (Spanish version) is a new form that is the same text as the English version.

New §80.182(a) is revised for clarification and additional text is added in paragraph (a)(2) to explain that retailers are not required to provide the form in Spanish; however, the consumer can request a copy from the retailer or Department.

Figure: 10 TAC §80.182(a)(1)- Choosing a Loan to Buy a Manufactured Home (English version) is revised to include a legend at the top of page that explains a Spanish version is available on request and the first and second paragraphs were revised for clarification.

Figure: 10 TAC §80.182(a)(2)- Choosing a Loan to Buy a Manufactured Home (Spanish version) is revised by rewording the first two paragraphs.

New §80.182(b) and (c) are changed to further explain the disclosure requirements. The three day right of rescission information is rewritten and moved to §80.183.

Figure: 10 TAC §80.182(c)(2)- Notice of Three Day Right of Rescission. The form is deleted.

New §80.182(d) is deleted.

New §80.182(e) moved to §80.182(b).

The title and text of New §80.183 changed from 24 Hour Advance Copy of Certain Documents to Three Day Right of Rescission. The three day right of rescission proposed text is rewritten for clarification. The originally proposed text relating to 24 Hour Advance Copy of Certain Documents is deleted.

New §80.200(b) is revised for clarification.

New §80.201(a)(2)(D) is revised for clarification.

New §80.204(c) is deleted.

New §80.205(c)(1)(D) is rewritten for clarification.

Section 80.207(b) is revised for clarification.

New §80.209 forms are revised for clarification..

Figure: 10 TAC §80.209(a)- Application for Statement of Ownership and Location is revised for clarification purposes.

Figure: 10 TAC §80.209(b)- Release of Lien, Foreclosure of Lien or Lien Assignments (Form B) is revised for clarification purposes.

The following is a restatement of the rules' factual basis:

Section 80.127 is adopted (with changes) to clarify that a failure to provide required warranty work on a timely basis is a violation of the Act.

New §80.181 is adopted (with changes) that implement new consumer protection provisions adopted in SB 521 and requires a notice be given prior to the taking of any credit application. This notice informs potential acquirers of manufactured homes that home ownership involves other costs and responsibilities besides making payments on any loan or other financing to buy the home. A consumer's failure to address such matters may result in their being unable to enjoy all of the benefits of their home and may even subject them to losing their home. Therefore, they should consider how they will address all applicable requirements, not simply qualifying for purchase financing.

Figure: 10 TAC §80.181(1)- Consumer Disclosure Statement (English version) is adopted (with changes).

Figure: 10 TAC §80.181(2)- Consumer Disclosure Statement (Spanish version) is adopted (with changes).

New §80.182 is adopted (with changes) that implements the requirement for an additional disclosure, prior to the execution of an agreement to purchase a home. The decision to purchase and the decision how to finance the purchase are often made

together. This disclosure will provide consumers with important information to consider in making a decision as to how to finance their purchase. It will enable them to consider additional costs that may be involved in their loan and additional detail about the likely costs of taxes, insurance, and other necessary payments. The required disclosure is proposed as a bilingual form.

Figure: 10 TAC §80.182(a)(1)- Choosing a Loan to Buy a Manufactured Home (English version) is adopted (with changes).

Figure: 10 TAC §80.182(a)(2)- Choosing a Loan to Buy a Manufactured Home (Spanish version) is adopted (with changes).

New §80.182(b) and (c) moves to §80.183 (relating to Three Day Right of Rescission) which replaces the previously proposed new §80.183 that related to 24 Hour Advance Copy of Certain Documents. The three day right of rescission is created by SB 521 and is adopted (with changes). The proposed Right of Rescission form is deleted.

Figure: 10 TAC §80.182(c)(2)- Notice of Three Day Right of Rescission. The form is not adopted.

New §80.183 relating to 24 Hour Advance Copy of Certain Documents is replaced with Three Day Right of Rescission that was previously proposed as new §80.182(c). The three day right of rescission is created by SB 521 and is adopted (with changes).

Renaming Subchapter G to Statements of Ownership and Location to comply with changes made by SB 521 is adopted (without changes).

New §§80.200, 80.201, 80.204, 80.205 as well as conforming changes to other portions of Subchapter G, are adopted (with changes) to implement the change from issuance of title documents to the issuance of Statements of Ownership and Location. The Statement of Ownership and Location will be a statement by the Division of its records regarding the ownership, location, recordation of certain liens, and election (by the owner) to treat the home as real property or personal property. This will be a controlling and presumptive record and may not be altered without evidence that liens have been discharged or that lienholders have given consent. There is also a requirement that a revision to the statement of location requires evidence of payment of property taxes. The Division is especially interested in comments as to the practical issues involved in implementing these requirements, including the ability of lenders to protect their positions and the ability of consumers to be provided promptly with evidence of ownership and other matters of record.

Section 80.203 is adopted (without changes) for the purpose of clarification.

Section 80.206 is adopted (without changes) to comply with changes made by SB 521.

Section 80.207 is adopted (with changes) to comply with changes made by SB 521.

New §80.209 is adopted (with changes) to implement the change from issuance of title documents to the issuance of Statements of Ownership and Location. The Statement of Ownership and Location will be a statement by the Division of its records regarding the ownership, location, recordation of certain liens, and election (by the owner) to treat the home as real property or personal property. This will be a controlling and presumptive record and may not be altered without evidence that liens have been discharged or that lienholders have given consent.

Figure: 10 TAC §80.209(a)- Application for Statement of Ownership and Location is adopted (with changes).

Figure: 10 TAC §80.209(b) - Release of Lien, Foreclosure of Lien or Lien Assignments (Form B) is adopted (with changes).

SUBCHAPTER E. GENERAL REQUIREMENTS

10 TAC §80.127

The amended rule is adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Subtitle C, Chapter 1201, §1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.603, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division.

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

No other statute, code, or article is affected by the amended rule.

§80.127. Sanctions and Penalties.

(a) In accordance with the provisions of Government Code, Chapter 2306, §2306.604, the director may assess and enforce penalties and sanctions against a person who violates any applicable law, rule, regulation, or administrative order of the department. The director may:

(1) issue to the person a written reprimand that specifies the violation;

(2) revoke or suspend the persons license;

(3) place on probation a person whose license is suspended; or

(4) assess an administrative penalty in an amount not to exceed $1,000 for each violation in lieu of, or in addition to, any other sanction or penalty.

(b) In determining the amount of a sanction or penalty, the board and the director shall consider:

(1) the kind or type of violation and the seriousness of the violation;

(2) the history of previous violations; the kind or type of previous violations, and the length of time between violations;

(3) the amount necessary to deter future violations;

(4) the efforts made to correct the violation or previous violations; and

(5) any other matters that justice may require.

(c) Violations will be subject to sanctions and penalties as set forth in Government Code, Chapter 2306.604. Revocation or suspension of a license may be assessed only for multiple, consistent, and/or repeated violations. For first-time violations of a department rule which does not relate to the construction or installation of the home, a voluntary letter of compliance will be issued in lieu of other sanctions.

(d) When a licensee first receives notification of a claim for warranty service, the licensee must respond timely to the request. A failure to do so shall constitute a violation of these rules.

(1) It is presumed that a response was timely if the required warranty service is provided within forty (40) calendar days from the date of the request; provided, however, that if the matter involves an imminent safety hazard, it must be addressed as quickly as is reasonably possible.

(2) The time to respond to a request for warranty service may be extended by the Director in response to a request setting forth good cause for the extension. Any such request must be made to the Director prior to the expiration of the allotted time for response. Requests may be made by U.S. First Class mail, by FAX, or by e-mail, or, if followed with written confirmation sent U.S. First Class mail, by telephone.

(3) If, after reasonable investigation, the licensee disputes whether warranty service is required and the licensee is unable to resolve the matter by agreement with the consumer, the licensee may request that the Department perform an inspection of the home. The running of the time to respond to the request for warranty service will be suspended from the time the request for inspection is received until the Department performs the inspection and issues its findings. When the Department concludes its review it will work with the affected licensee(s) and consumer(s) to agree upon a reasonable time to address its findings. In the event the parties cannot agree on a reasonable time, the Director shall issue a revised order assigning a time for compliance. Any such order shall be subject to appeal and a hearing. Any such hearing shall be a contested case under Tex.Gov.Code, Chapter 2001.

(e) All written notices and preliminary reports of violations shall specify in detail the particular law, rule, regulation, or administrative order alleged to have been violated along with a detailed statement of the facts on which the allegation is based.

(f) The respondent in an administrative hearing shall be entitled to due process and a hearing under the provisions of Government Code, Chapter 2001 and Chapter 2306. The respondent and the director may enter into a compromise settlement agreement in any contested matter prior to signing of the final order.

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 February 13, 2004.

TRD-200401049
Timothy K. Irvine
Executive Director, Manufactured Housing Division of TDHCA
Texas Department of Housing and Community Affairs
Effective date: March 28, 2004
Proposal publication date: September 19, 2003
For further information, please call: (512) 475-2206

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SUBCHAPTER F. CONSUMER NOTICE REQUIREMENTS

10 TAC §§80.181 - 80.183

The new rules are adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Subtitle C, Chapter 1201, §1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.603, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division.

The agency hereby certifies that the new rules have been reviewed by legal counsel and found to be within the agency's authority to adopt.

No other statute, code, or article is affected by the new rules.

§80.181. Section 162 Notice.
Before accepting a completed credit application from a consumer, a retailer (or any salesperson or other agent acting on behalf of a retailer) shall provide the following disclosure.

(1) English version of Section 162 Notice:
Figure: 10 TAC §80.181(1)

(2) Spanish version of Section 162 Notice (the retailer is not required to provide the form in Spanish; however, the consumer may request a copy in Spanish from the retailer or from the Department):
Figure: 10 TAC §80.181(2)

§80.182. 163 Disclosure.
(a) In a chattel mortgage or consumer loan transaction, the retailer shall deliver to the consumer, at least 24 hours before the execution of the contract, the disclosure set forth in paragraph (1) of this subsection and a copy of the contract to be executed with all information included, signed by the retailer.

(1) English version of disclosure:
Figure: 10 TAC §80.182(a)(1)

(2) Spanish version of disclosure (the retailer is not required to provide the form in Spanish; however, the consumer may request a copy in Spanish from the retailer or from the Department):
Figure: 10 TAC §80.182(a)(2)

(b) The disclosure must be given in writing in at least 12 point type. It may not be attached to any other disclosure or document. The consumer must sign and date a copy of the disclosure to acknowledge that it was provided.

§80.183. Three Day Right of Rescission.
(a) The first calendar day after the day on which the applicable contract is executed is the first day, and the three day right of rescission expires unless notice has been given prior to midnight on the third calendar day following the date of execution of the applicable contract.

(b) The three day right of rescission may not be waived.

(c) A licensee may rely on a signed acknowledgement from a consumer, executed after the right of rescission has expired, confirming that the right expired without being exercised.

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 February 13, 2004.

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Executive Director, Manufactured Housing Division of TDHCA
Texas Department of Housing and Community Affairs
Effective date: March 28, 2004
Proposal publication date: September 19, 2003
For further information, please call: (512) 475-2206

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SUBCHAPTER G. STATEMENTS OF OWNERSHIP AND LOCATION

10 TAC §§80.200, 80.201, 80.203 - 80.207, 80.209

The new and amended rules are adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Subtitle C, Chapter 1201, §1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.603, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division.

The agency hereby certifies that the new and amended rules have been reviewed by legal counsel and found to be within the agency's authority to adopt.

No other statute, code, or article is affected by the new and amended rules.

§80.200. Responsibility for Completion and Filing of an Application for a Statement of Ownership and Location.

(a) When a person required to be licensed under the Standards Act is involved in the sale or transfer of ownership of a manufactured home, they must, no later than thirty (30) calendar days after the date of the closing of the sales or transfer transaction, either:

(1) Provide the transferee with an Application for Statement of Ownership and Location completed as to all parts that the seller transferor should be able to complete, including execution and the attachment of all necessary supporting documentation, and deliver it to the consumer for completion and filing; or

(2) Obtain the transferee's notarized signature on a fully completed application for Statement of Ownership and Location and file the completed application, together with the required fee and all necessary supporting documentation, with the Department.

(b) The transferor must retain copies of the completed application and all supporting documentation as evidence that it conveyed good and marketable title to the manufactured home to the transferee. A contract to convey title after completion of an extended payout, as opposed to a financed extended payout secured by a lien on the manufactured home, does not constitute a conveyance of good and marketable title. An extended payout is any repayment involving more than one installment or any finance charge.

§80.201. Issuance of Statements of Ownership and Location.

(a) Initial Statements.

(1) The Department will issue an initial Statement of Ownership and Location within ten (10) working days after receipt of a complete application, accompanied by all documentation necessary to support the application.

(2) In order to be deemed complete, an application for a Statement of Ownership and Location must include, as applicable:

(A) A completed and fully executed Application for Statement of Ownership and Location on the Department's prescribed form;

(B) The required fee;

(C) If one or more liens are to be reflected on the Statement of Ownership and Location, copies of documentation establishing the creation, existence, and priority of each such lien;

(D) If a manufactured home is relocated, satisfactory evidence that there are no property tax liens on the home or that provision has been made for them. Satisfactory evidence would include, but would not be limited to, evidence that the relocation was effected with a TxDoT approved move or a statement from a title company, lender, or escrow agent, executed by a person purporting to be its duly authorized officer or representative, that money sufficient to pay the taxes was being held by them and would be applied to the payment of those taxes.

(b) Revised Statements.

(1) The Department will issue a revised Statement of Ownership and Location within ten (10) working days after receipt of a complete application, accompanied by all documentation necessary to support the application.

(2) In order to be deemed complete, an application for a revised Statement of Ownership and Location must include, as applicable:

(A) A completed and fully executed Application for Statement of Ownership and Location on the Department's prescribed form;

(B) The required fee;

(C) If one or more liens are to be reflect on the Statement of Ownership and Location, copies of documentation establishing the creation, existence, and priority of each such lien;

(D) If one or more existing liens are to be released or transferred, appropriate supporting documentation, including a properly executed and completed release of lien form;

(E) If a manufactured home is to be designated for use as a dwelling after the home has been designated for business use only or salvage, evidence of a satisfactory habitability inspection by the Department, accompanied by the required fee;

(F) If a manufactured home is relocated, satisfactory evidence that there are no property tax liens on the home or that provision has been made for them. Satisfactory evidence would include but would not be limited to, evidence that the relocation was effected with a TxDoT approved move, a paid taxes certificate from the county tax assessor for the county where the home was located prior to the move, or an original, signed statement from a title company, lender, or escrow agent, executed by a person purporting to be its duly authorized officer or representative, that money sufficient to pay the taxes was being held by them and would be applied to the payment of those taxes;

(G) In instances where title to a manufactured home is conveyed in a transaction other than a transaction requiring a license under the Standards Act, such as testamentary and non-testamentary transfers, private sales not requiring a license, voluntary or court-ordered partitions, etc, originals or certified copies of appropriate documentation to support any such transfer, as required by the Department; and

(3) Any change in a Statement of Ownership and Location shall result in a new Statement of Ownership and Location being issued, and the new Statement of Ownership and Location shall specify the effective date which shall be either the date of the submission of the completed application or such other date as the Director may determine is appropriately supported by the information provided.

(c) Replacing a Document of Title.

(1) Upon receipt of a written request, applicable fee(s), and any necessary additional information, including a notarized statement

of election of real or personal property status, the Department will replace a document of title with a Statement of Ownership and Location.

(2) If a manufactured home title showed that it was personal property, that will be presumed to be its status until and unless a revised Statement of Ownership and Location is applied for and issued. Likewise, if a manufactured home has had a certificate of attachment issued and had title cancelled to real property, that shall be presumed to be its status until and unless a revised Statement of Ownership and Location is applied for and issued.

§80.204. Installation Information.

(a) The installation information, on forms approved by the department, must accompany each application for a Statement of Ownership and Location and shall contain the following information:

(1) description of the home, including:

(A) serial number;

(B) HUD label number or Texas seal number;

(C) size of home;

(D) name of manufacturer;

(E) Wind Zone, if available; and

(F) map of the location of the home.

(2) whether or not the home was, or will be, moved as a result of the sale or transfer;

(3) whether or not the home was, or will be, installed at a new location as a result of the sale or transfer;

(4) the location of the home immediately prior to the sale or transfer;

(5) if moved, or to be moved, the location of the home after the move and the name and address of the person or company that moved, or will move, the home; and

(6) if installed, or to be installed, the location of the home after installation; and the name and address of the person or company that installed, or will install, the home.

(b) If the home was installed as a result of the sale or transfer, the installation fee required under §80.20(b) of this title (relating to Fees) must be submitted along with the installation information (Notice of Installation). The installation fee may be combined with the titling fee for each home.

§80.205. Lien Information.

(a) Inventory Financing Liens.

(1) A lien and security interest on manufactured homes in the inventory of a retailer, as well as to any proceeds of the sale of those homes, is perfected by filing an inventory finance security form approved by the department and in compliance with these sections.

(2) The creditor-lender financing the inventory and the retailer must execute a security agreement which expressly sets forth the rights and obligations of the two parties in the inventory finance arrangement.

(3) The inventory finance security form shall contain the following:

(A) signatures of both the retailer and the creditor-lender;

(B) the name, sales location, address, and license number of the retailer; and

(C) the name and address of the creditor-lender.

(4) A separate form must be filed for each licensed sales location.

(5) For manufactured homes for which no Statement of Ownership and Location or Document of Title has been issued, the filing of the inventory-finance security form perfects a security interest in all manufactured homes, whether then owned or thereafter acquired, as well as to any proceeds of the sale of those homes, provided that:

(A) the home is financed by the creditor-lender;

(B) the creditor-lender has advanced any funds for the home; or

(C) the creditor-lender has incurred any obligation for the home.

(6) This security interest attaches to a particular manufactured home only when the act described in either paragraph (5)(A), (B), or (C) of this subsection would either:

(A) enable the retailer to acquire the manufactured home;

(B) pay the existing balance of a creditor-lender for funds secured by a security interest in the manufactured home;

(C) in the event that the retailer and manufacturer are the same entity, pay funds to the manufacturer-retailer after completion of the manufacture of the manufactured home; or

(D) in the event that the retailer has no debt owed against the inventory, enable the retailer to use the manufactured home as security for a new debt.

(7) No provision in the security agreement between the parties to an inventory financing arrangement shall in any way modify, change, or supersede the requirements of this section for the perfection of security interests in manufactured homes in the inventory of a retailer.

(b) Release of Liens.

(1) The lienholder of a lien recorded on a Statement of Ownership and Location shall deliver a properly executed release of lien form prescribed by the department to the owner of record within thirty (30) calendar days of the satisfaction of the debt or obligation secured by the lien.

(2) The lien recorded on a Statement of Ownership and Location shall be released by the department upon receipt of a release of lien form properly executed by the lienholder of record, and a new Statement of Ownership and Location shall be issued.

(c) Foreclosure or Repossession.

(1) In the event of sale after either foreclosure or repossession of a manufactured home that is not real property, the department shall issue a new Statement of Ownership and Location upon receipt of a properly executed application containing the following information:

(A) The description of the home along with an indication of whether the home is a foreclosure or repossession;

(B) The name and address of the lienholder and name of the person authorized to sign for the lienholder;

(C) An indication of whether the home was repossessed by judicial order or sequestration. A true copy of the order or bill of sale shall be attached; and

(D) A certification that:

(i) the home will be sold from a licensed retailer's location; or

(ii) the seller is not required to be licensed under Subchapter C of the Standards Act.

(2) In the event of foreclosure or repossession of a manufactured home that is not real property, the department will not issue a new Statement of Ownership and Location until receipt of release of lien.

(d) Right of Survivorship: If two or more eligible persons are shown as purchasers or transferees, they may execute the right of survivorship election on an application for a Statement of Ownership and Location. Such election constitutes an agreement for the right of survivorship. If the survivorship election is taken, then the department will issue a new Statement of Ownership and Location to the surviving person(s) upon receipt of a copy of the death certificate of the deceased person(s), and a properly executed application for Statement of Ownership and Location, and the applicable fee.

§80.207. Reinstatement of Canceled Documents of Title.

(a) A manufactured home which has been declared real estate, may be converted and declared personal property upon inspection by the department for habitability and upon receipt of the following:

(1) a properly executed release of lien releasing any lien resulting from a security interest in the home from the lender;

(2) if no lien or security interest exists, an affidavit from the owner of record, executed before a notary public that no lien or security interest exists against the home;

(3) a properly executed application for the reissuance of a Statement of Ownership and Location and the required fee;

(4) confirmation from a title insurance company authorized to do business in Texas that no other liens exist on the manufactured home; and

(5) payment for a habitability inspection to ensure that the home is habitable and payment for the reissuance of a Statement of Ownership and Location.

(b) A manufactured home which has been designated for business use, may be used as a dwelling and elected as personal or real property upon inspection by the department for habitability and upon receipt of the following:

(1) payment for a habitability inspection; and

(2) receipt of a properly executed application for reinstatement accompanied by the proper fees.

§80.209. Statement of Ownership and Location Forms.

(a) Application for Statement of Ownership and Location:
Figure: 10 TAC §80.209(a)

(b) Form B (Release of Lien, Foreclosure of Lien or Lien Assignments):
Figure: 10 TAC §80.209(b)

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 February 13, 2004.

TRD-200401051
Timothy K. Irvine
Executive Director, Manufactured Housing Division of TDHCA
Texas Department of Housing and Community Affairs
Effective date: March 28, 2004
Proposal publication date: September 19, 2003
For further information, please call: (512) 475-2206

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SUBCHAPTER G. TITLING

10 TAC §80.204, §80.205

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (Department) adopts repeal of §80.204 and §80.205 without changes to the proposed as published in the September 19, 2003 issue of the *Texas Register* (28 TexReg 8106).

The repeal of §80.204 and §80.205 allows for adoption of new rules that will substantially update the rules to comply with the new legislation enacted by the 78th Legislative Session.

The effective date of repeal is thirty (30) days following the date of publication with the Texas Register of notice that the rule has been repealed.

No comments were received for or against the proposal to repeal.

The repeal is adopted under the Texas Manufactured Housing Standards Act, Occupations Code, Subtitle C, Chapter 1201.052, which provides the Department with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and under Texas Government Code, Chapter 2306, §2306.603, which authorizes the director to adopt rules as necessary to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statute, code, or article is affected by the repeal.

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 February 13, 2004.

TRD-200401052
Timothy K. Irvine
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: March 28, 2004
Proposal publication date: September 19, 2003
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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 21. INTERCONNECTION AGREEMENTS FOR TELECOMMUNICATIONS SERVICE PROVIDERS

The Public Utility Commission of Texas (commission) adopts new Chapter 21, Interconnection Agreements for Telecommunications Service Providers. The proposed new rules were published in the October 10, 2003 issue of the *Texas Register* (28 TexReg 8739). Project Number 25599 is assigned to this proceeding.

The following sections are adopted with changes to the text as proposed:

Subchapter A, General Provisions and Definitions--§§21.3, Definitions; 21.5, Representative Appearances; 21.7, Standards of Conduct; 21.9, Computation of Time; Subchapter B, Pleadings, Documents, and Other Materials--§§21.31, Filing of Pleadings, Documents and Other Materials; 21.33, Formal Requisites of Pleadings and Documents to be Filed with the Commission; 21.35, Service of Pleadings and Documents; 21.41, Motions; Subchapter C, Preliminary Issues, Orders, and Proceedings--§§21.61, Threshold Issues and Certification of Issues to the Commission; 21.67, Dismissal of a Proceeding; 21.73, Consolidation of Dockets, Consolidation of Issues, and Joint Filings; 21.75, Motions for Clarification and Motions for Reconsideration; 21.77, Confidential Material; Subchapter D, Dispute Resolution--§§21.91, Mediation; 21.95, Compulsory Arbitration; 21.97, Approval of Negotiated Agreements; 21.99, Approval of Arbitrated Agreements; 21.101, Approval of Amendments to Existing Interconnection Agreements; 21.103, Approval of Agreements Adopting Terms and Conditions Pursuant to Federal Telecommunications Act of 1996 (FTA) §252(i); Subchapter E, Post-Interconnection Agreement Dispute Resolution--§§21.123, Informal Settlement Conference; 21.125, Formal Dispute Resolution Proceeding; and 21.127, Request for Expedited Ruling; and 21.129, Request for Interim Ruling Pending Dispute Resolution.

The following sections are adopted with no changes to the text as proposed:

Subchapter A, General Provisions and Definitions--§§21.1, Purpose and Scope; 21.11, Suspension of Rules and Good Cause Exceptions; Subchapter B, Pleadings, Documents, and Other Materials --§21.37, Examination and Correction of Pleadings and Documents; §21.39, Amended Pleadings; Subchapter C, Preliminary Issues, Orders, and Proceedings--§§21.63, Interim Issues and Orders; 21.65, Interlocutory Appeals; 21.69, Summary Decisions; 21.71, Sanctions; Subchapter D, Dispute Resolution--§§21.93, Voluntary Alternative Dispute Resolution; and Subchapter E, Post-Interconnection Agreement Dispute Resolution--§21.121, Purpose.

The commission withdraws the following sections: §21.10, Waivers; and §21.105, Approval of Agreements Adopting Terms and Conditions of the T2A.

The new rules in Chapter 21 are necessary to establish procedures for the implementation of the Federal Telecommunications Act of 1996 (FTA) as it relates to interconnection agreements and amendments to interconnection agreements, and formal and informal dispute resolution, mediation, and arbitration of interconnection agreements. Chapter 21 replaces the rules currently existing in Chapter 22, subchapters P, Q, and R. In addition, the commission is simultaneously adopting under separate publication in this issue of the *Texas Register*, the repeal of Chapter 22, Subchapters P, Q, and R.

The new sections clarify existing procedures and are more administratively efficient for both the commission and parties. The new sections reduce the number of copies required and allow for the dissemination of information by electronic mail and website to reduce costs; modify timelines for greater efficiency; modify the confidential information requirements to be consistent with the commission's procedural rule §22.71 of this title, relating to Filing of Pleadings, Documents and Other Materials; establish procedures for motions for reconsideration; delete existing requirements no longer necessary due to uncontested cases being processed administratively; and other non-substantive changes to better reflect commission practice.

The commission received written comments on the proposed new chapter from AT&T Communications of Texas, LP (AT&T); Covad Communications Company (Covad); Southwestern Bell Telephone, LP, doing business as SBC Texas (SBCT); and the State of Texas, by and through the Office of the Attorney General (OAG). Reply comments were received from AT&T, SBCT, OAG, and Verizon Southwest (Verizon).

A public hearing was held at commission offices on Monday, December 8, 2003. Representatives from AT&T, SBCT, and OAG attended the hearing and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

Preamble question

The commission requested comments on the following issues: (1) Proposed new §21.10 allows the commission to find that parties have waived applicable deadlines by implication under certain circumstances; and (2) proposed §21.99(b) and §21.101(h) allow the commission to remand an agreement to the presiding officer for further proceedings. What effects does the proposed language for §§21.10, 21.99(b) and 21.101(h) have on the FTA's nine-month deadline for compulsory arbitrations?

Comments

AT&T opposed the adoption of proposed §21.10, as discussed in more detail below, noting that nothing in the FTA suggests that an implied waiver is permitted or appropriate. AT&T asserted that an implied waiver would allow a back-door exit from the statutory nine-month deadline and that failure to approve a final arbitration award within nine months based on the finding of an implied waiver would contravene federal law. With regard to proposed §21.99(b), AT&T stated that FTA does not allow for an exception to the nine-month deadline in order to remand a proceeding, or a portion thereof, to the presiding officer. AT&T advised that unless the remanded proceedings were concluded and an amended final award issued before the 270th day, the failure to issue an award in a timely manner would be contrary to federal law. AT&T commented that §21.101(h) applies to approval of amendments to existing interconnection agreements and is not subject to the same timeframes as compulsory arbitrations. Therefore, a remand under §21.101(h) would not implicate the FTA's nine-month deadline.

Commission response

The commission addresses these comments under the discussions on §§21.10, 21.99, and 21.101.

General Comments

OAG suggested that the procedures for conduct of arbitrations and post-interconnection agreement dispute resolution hearings be modified to recognize an official "interested party" status in order to more adequately protect the interests of state agency customers and consumers in general. OAG asserted that to allow

minimal comments to be filed solely at the discretion of the presiding officer could result in denial of its or any other consumer representative's opportunity to affect decisions on threshold issues concerning public policy. OAG proposed that "interested party" status be limited to formally contested proceedings under proposed §21.95 and §21.125. OAG advised that this limited level of participation would not interfere in the contractual rights of parties or otherwise burden the proceeding with additional discovery, testimony, or other evidentiary issues and would avoid any conflict with the FTA §252.

SBCT opposed the comments submitted by the OAG to expand FTA proceedings to allow participation by non-parties to the interconnection agreement. SBCT asserted that such participation conflicts with the FTA requirement that only issues negotiated by the parties may be subject to an FTA arbitration. SBCT opposed allowing non-parties to submit issues.

Verizon opposed the creation of an "interested party" status as suggested by OAG. Verizon stated that arbitration/dispute resolution proceedings are disputes between two parties and that to the extent these proceedings have public interest ramifications, the arbitrator and commission provide sufficient protection. Verizon commented that including multiple participants may raise issues that are not even in dispute between the two parties that are privy to the dispute and may make it even more difficult for the commission to meet the FTA deadlines for completing an arbitration proceeding.

SBCT suggested that the commission's Chapter 21 rules include a specific rule similar to §22.145, relating to Subpoenas.

Commission response

The commission declines to modify the procedures for the conduct of arbitrations (§21.95) and post-interconnection agreement dispute resolution (§21.125) hearings as suggested by OAG. Subsection (d) of §21.95, relating to Compulsory Arbitration, does allow interested parties to file a statement of position, recognizing that certain threshold issues may arise in new arbitrations that raise public policy concerns. However, FTA §252(b)(4) limits the state commission's consideration of arbitration petitions and any response(s) thereto to the issues set forth in the petition and response. Moreover, FTA §252(b)(1) limits arbitration to the negotiating parties. As the OAG is not a party to the negotiation regarding interconnection, it cannot, under the FTA, seek arbitration. Further, because the commission cannot consider issues which were not raised in the petition or response, the commission cannot, under the FTA, consider any issues not raised by the negotiating parties. Accordingly, as it is inappropriate for the commission to address a non-negotiating interested party's issues in an FTA proceeding unless such issues are already raised by a negotiating party, §21.95(d) limits the participation of an interested party to the filing of a statement of position.

Subsection (f) of §21.125, relating to Formal Dispute Resolution Proceeding, does not allow for an interested party to file a statement of position on the grounds that a post-interconnection dispute is a unique disagreement between parties to a contract, and does not generally involve the threshold issues considered in arbitrations creating a new interconnection agreement. Typically, post-interconnection disputes involve fact-specific, business-to-business situations. In the interest of resolving such ongoing business issues as expeditiously as possible, the commission finds it reasonable to place limits upon the participation of non-parties to the contract.

As to SBCT's suggestion that Chapter 21 include a rule similar to §22.145, Subpoenas, under proposed §21.95(j) and §21.125(h), arbitrators have the powers of presiding officers, including the power to issue subpoenas, as cross-referenced to §22.202. Accordingly, rather than relying upon cross-references to another section outside this chapter, the commission clarifies arbitrators' powers to issue subpoenas under proposed §21.95(j) and §21.125(h).

Comments on Subchapter A, General Provisions and Definitions

§21.3, Definitions

Instead of incorporating definitions wholesale from existing Chapter 22, §22.2, SBCT suggested that the definitions actually used in Chapter 21 be incorporated into proposed §21.3 to avoid potential ambiguity in the interpretation of the new Chapter 21 Rules. For example, regarding the definition of "party," SBCT cited that it is unclear whether the commission intended to incorporate Chapter 22, Subchapter F, regarding classification and alignment of parties as well as intervention, into Chapter 21. SBCT commented that there appears to be a conflict between the intervention rules in Chapter 22 (§22.103 and §22.104) and proposed new §21.95(d). SBCT also noted that the reference to the definition of "docket," in §22.2(19) states, "a proceeding handled as a contested case under APA." However, the term "docket" in Chapter 21 primarily describes a docket number and does not mean a contested case under APA.

Commission response

The commission agrees and clarifies the definitions, as identified by the commenter.

§21.5, Representative Appearances

SBCT suggested that authorized representatives should be limited to a party's: (1) employee, (2) attorney licensed in Texas, or (3) a non-Texas licensed attorney if a Texas-licensed co-counsel also represents the party. FTA proceedings require legal interpretation and different rules of conduct apply to attorneys and non-attorney representatives.

Commission response

The commission declines to adopt SBCT's proposal, finding it unnecessarily restrictive. The standards set forth in §21.5 are consistent with existing commission procedures and practices. The commission is not aware of any difficulties that parties have encountered in particular cases that could be solved by SBCT's proposal. Moreover, should SBCT encounter specific problems on a going-forward basis, the commission believes the presiding officer's authority is sufficient to allow such matters to be addressed on a case-by-case basis as circumstances warrant.

§21.7, Standards of Conduct

AT&T urged that the commission clarify whether the *ex parte* communications rule prohibits communication with commission personnel regarding an issue that will likely be the subject of a subsequent proceeding. AT&T supports an *ex parte* requirement that would prohibit communications during the time period immediately prior to the filing of a dispute resolution proceeding.

SBCT suggested adding a subpart to proposed §21.7(b), specifying the permissible communications with commission personnel, i.e., whether communication is permitted with commission personnel regarding an issue that will likely be the subject of

a subsequent proceeding. SBCT claimed that without clarifying the proposed rule, the Texas Disciplinary Rules of Professional Conduct may prohibit certain attorney communications that the commission's rules do not limit for non-attorney representatives. SBCT added that the commission's standards of conduct should include certain standards imposed upon attorneys under the Texas Disciplinary Rules of Professional Conduct, specifically §§3.01, 3.02, 3.03 and 3.04, to ensure that consistent standards apply to all representatives appearing before the commission.

Commission response

Section 21.7 contains standards of conduct "for parties," which suggests that a particular matter is pending. Section 21.7(a)(1) specifies that "professional representatives shall observe and practice the standard of ethical and professional conduct prescribed for their professions." The commission finds that the rule, as currently written, already bars inappropriate *ex parte* communications including any communications that violate professional ethics rules, such as those applying to attorneys. Moreover, because certain communications regarding matters that may come before the commission may be helpful to commission staff, as well as to the potential parties, the commission finds that a blanket prohibition, as suggested by AT&T, would disallow even discussions which enable commission staff to efficiently organize workload, streamline issues, and allocate limited resources. Accordingly, the commission makes no changes based on these comments.

Regarding SBCT's comments that the rules include certain standards of conduct imposed on attorneys, the commission includes a reminder to lawyers of their responsibilities under the Texas Disciplinary Rules of Professional Conduct, including the sections identified by SBCT.

§21.9, Computation of Time

AT&T urged that §21.9(b)(2), regarding extensions of time for decisions by a presiding officer or the commission, be amended to specify an explicit time frame unless parties agree to a longer extension. AT&T suggested a period not to exceed 30 business days as a reasonable limitation that will provide some predictability to the parties.

Commission response

The commission agrees with the suggestion made by AT&T and amends the rule to incorporate the suggested change.

§21.10, Waiver

AT&T indicated strong opposition to proposed §21.10 and its belief that the rule as written is not in the public interest. AT&T asserted that the proposed rule is dangerously vague as to the grounds that might support an implied waiver. AT&T also argued that the rule suggests an ability to completely ignore statutory and regulatory deadlines and established procedural schedules based upon "extremely arbitrary grounds." AT&T argued that this proposed rule fails to provide for more efficient, more expedient resolution of disputes and only suggests the possibility of unjustified delays in commission rulings.

SBCT agreed with AT&T that the rule is vague regarding the grounds for implied waiver. SBCT suggested clarifying the rule to define when a presiding officer of the commission can conclude an implied waiver occurred. At the prehearing conference SBCT stated that the rule should contain an objective standard which would define when the presiding officer could conclude that a standard had been met that justified an implied waiver.

Verizon agreed with AT&T's recommendation to delete §21.10. Verizon asserted that the section is vague about the standard that would be used by the presiding officer to imply the waiver and invites arbitrary and inconsistent treatment. Verizon stated that the commission's intent with the proposed section appears to be concern over meeting the FTA's nine-month deadline in compulsory arbitrations. Verizon commented that a more effective means of ensuring that a compulsory arbitration is completed within the deadline is to require the party requesting arbitration to file its direct testimony at the time the petition is filed.

Commission response

The commission has considered commenters' stated concerns and withdraws §21.10. However, the withdrawal of this proposed section does not preclude a finding that a party's conduct has caused delay and affected procedural deadlines. The presiding officer has the discretion and authority to appropriately revise, extend, or restart a procedural schedule if a party's actions are found to require such a revision or extension in order to avoid prejudice to the other parties to the proceeding, or to avoid placing an unreasonable burden upon the commission.

§21.11, Suspension of Rules and Good Cause Exceptions

AT&T urged the commission to specifically recognize in the proposed rule that rules cannot be suspended if to do so would be contrary to statutory requirements.

Commission response

The commission declines to amend the proposed rule and believes that AT&T's suggested change would not add anything of substance to the rule. The commission does not have the authority to change statutory requirements and need not so note in its rules.

Comments on Subchapter B, Pleadings, Documents, and Other Materials

§21.31, Filing of Pleadings, Documents, and Other Materials

SBCT proposed that the commission's rules contain an option for parties to file only a complete original, electronic copy of pleadings. SBCT noted that filing and serving a single copy in an electronic format would further ensure consistency between the copy filed with the commission and the copy served on parties.

SBCT further suggested that there is no need to file copies of discovery requested and responses. Submitting such request impose an administrative burden on the party as well as the commission. In addition, discovery responses tend to contain confidential information requiring confidential treatment that further increases administrative burdens. Furthermore, responses may contain irrelevant and inadmissible information.

Verizon supported the comments of SBCT to allow parties to make electronic filings without the need to file paper copies. Verizon commented that this would ease the burden on parties and on the commission's filing and record retention system. Verizon stated that if a single paper copy is needed for the commission's document retention system, this is still preferable to the current requirements.

Commission response

The commission finds that filing only an electronic copy of pleadings and documents in proceedings under this chapter is impracticable for commission purposes of administrative efficiency and record retention requirements. However, the commission amends §21.31 to reduce the number of copies required for applications for interconnection agreements filed under §21.97 relating to Approval of Negotiated Agreements, §21.101 relating to Approval of Amendments to Existing Interconnection Agreements, and §21.103 relating to Approval of Agreements Adopting Terms and Conditions Pursuant to Federal Telecommunications Act of 1996 (FTA) §252(i), from ten to three. The commission also eliminates the need for parties to file discovery responses with the commission; however, the commission still requires that discovery requests be filed with the commission in order to monitor the proceedings and for administrative efficiency in case objections to the discovery requests are filed.

§21.33, Formal Requisites of Pleadings and Documents to be Filed with the Commission

AT&T noted that reference in §21.33(a) is made to "pleadings as defined in Section 22.2 of this title" when, in fact, the definition section is contained at proposed §21.3 and does not define the term "pleadings." AT&T also argued that use of the term "pleading" in the proposed rule is overbroad and the rule should, instead, read "a response to a motion, if made, shall be filed . . . ."

AT&T pointed out a typo in §21.33(b) in that "shall" appears before and after the colon. AT&T urged that the requirement that DPLs be signed be deleted from the rule, given that it is not customary for DPLs to be signed and they are almost always attached to a pleading, motion or other signed document.

AT&T asserted that, under proposed §21.33(d) as stated, a party's failure to comply with the specified citation guides would be grounds for rejection of that filing. AT&T urged that this section be amended to read that filings should "endeavor to" comply with well-known rules of citation. AT&T also urged that the requirement that parties provide copies of any cited authority be further narrowed. AT&T asserted that the rule should except all other legal authority cited in filings to which commission staff and party representatives presumably have easy access including reported federal court decisions, Texas state statutes (other than PURA), the United States Code (especially the 1996 Federal Telecommunications Act), the Texas Administrative Code, the Code of Federal Regulations and state and federal rules of civil procedure.

Verizon stated that AT&T's proposal to further narrow the requirement to attach copies of cited authorities to briefs should be adopted. Verizon commented that federal court cases, state and federal statutes and rules, and Texas and federal rules of procedure are all readily available by Internet and that it unnecessarily burdens both the filing party and the commission's filing and document retention system by requiring documents to be longer than necessary.

SBCT commented that it is unclear what reports, "pursuant to PURA" would need to be filed in an FTA proceeding as stated in proposed Rule §21.33(a)(2). SBCT proposed a limit to such reports to those filed pursuant to commission rules or the commission's request.

Commission response

On adoption, the definitions incorporated by reference in the proposed rule have been added to §21.3; therefore, the commission removes all references to §22.2 throughout Chapter 21. The typographical errors in §21.33(b) are corrected. The rule now specifies that parties should "endeavor to" comply with the rules of citation.

In response to comments of AT&T and Verizon, the rule now specifies additional cited authorities that parties need not provide. Regarding signatures on DPLs, if the DPL is an attachment to a pleading, motion, or other signed document, the DPL need not be separately signed. However, if the DPL is filed as a stand-alone document a signature is required. No change to the rule is necessary regarding this comment by AT&T

In response to SBCT's comment, the commission deletes the reference to PURA in §21.33(a)(2).

§21.35, Service of Pleadings and Documents

SBCT commented that proposed §21.35 should contain all requirements applicable to service on other parties without cross-referencing Chapter 22, §22.74. SBCT further suggested moving proposed §21.41(c), dealing with service, to proposed §21.35 so that all rules dealing with service appear in one rule. SBCT suggested clarifying the incorporated Chapter 22, §22.74, to specify that parties are required to serve all parties of record by 3:00 p.m., consistent with proposed §21.30(h). SBCT further proposed to clarify when service is effective for calculating response deadlines, and provide additional time to respond to pleadings served after 3:00 p.m. or otherwise not received according to the service requirements.

AT&T replied to a proposal by SBCT that the rules specifically provide that pleadings and other documents be served by 3:00 p.m. and that the rules be clarified for response deadlines when documents are served after 3:00 p.m. AT&T suggested that, if the commission intends to specifically address service time, the rules should instead allow for service of pleadings and other documents by 5:00 p.m., rather than 3:00 p.m., and that the rules should specifically permit compliance with the deadline via service by electronic means.

Commission response

The commission agrees to move the requirements of §21.41(c), dealing with service, to proposed §21.35 so that all rules dealing with service appear in one rule. The commission adds the language from §22.74 that was incorporated by reference to §21.35. In addition, the commission adds language that service after 5:00 p.m. local time of the recipient shall be deemed service on the following day.

§21.39, Amended Pleadings

SBCT suggested clarifying proposed §21.39 to ensure parties to an FTA Compulsory Arbitration proceeding present all disputed issues with the petition or response as required by the FTA.

In reply comments, AT&T stated it does not object to SBCT's proposed language in principal as long as the proposed limitation is not used as a "gotcha" device to keep an issue from being raised that was actually negotiated (e.g., where an issue may not be phrased in the right way or may be subsumed in a larger issue).

Commission response

The commission finds some merit in the comments of both SBCT and AT&T As to SBCT's concerns, the commission agrees that

FTA §252(b)(2) requires the petitioner to provide the state commission with all relevant documentation concerning the unresolved issues, and notes that FTA §252(b)(4)(A) limits the consideration of the state commission to the issues set forth in the petition and response. On the other hand, as AT&T observes, in large and lengthy negotiations it can be difficult to track each item that was actually negotiated, particularly as to identifying specific wording of individual sub-issues. The commission observes that the rule language, as proposed, requires a showing of good cause for any amendment outside the ten-day window. Thus, the commission believes that SBCT's concerns are already addressed and finds adding SBCT's proposed wording unnecessary and redundant.

§21.41, Motions

AT&T urged that language be included in this section to require the presiding officer to rule on all motions within a reasonable time. According to AT&T, such a requirement will help ensure that the case proceeds in a timely and efficient manner and within the applicable timeframes.

In regard to §21.41(f), AT&T stated its belief that parties should be given some discretion amongst themselves to agree upon certain extensions without the need for commission intervention. Extensions eligible for such agreement would include filing deadlines that do not ordinarily require action by the presiding officer (e.g. responses to discovery requests, extensions to the discovery deadline, extensions to the filing of testimony), so long as the agreed extension does not affect any other deadline. In such a case, AT&T argued, citing Texas Revised Civil Procedure 11, parties should be able to memorialize their agreement in writing and file it with the commission.

SBCT supported AT&T's comment that parties should be able to agree to extend certain deadlines as long as this does not affect other deadlines.

Commission response

AT&T suggested a reasonableness requirement be added for the presiding officer to act. However, the commission observes that such a requirement is implicit. With respect to the suggestion that parties should be able to agree to extend certain deadlines without approval of the arbitrators, the commission notes that, because the presiding officer(s) also must rely on established procedural schedules for their own preparation for the proceeding, parties must continue to request extensions for particular filings from the presiding officer(s). Parties agreeing among themselves, for example, to move the date for filing rebuttal testimony closer to the hearing date might not afford the presiding officer sufficient time to fully review the testimony prior to the hearing. Further, parties' extensions to discovery deadlines may modify the dates for filing motions to compel, which are ruled upon by the presiding officer. Moreover, as experienced in a recent commission arbitration, complications can arise where parties' agreements to extend are not entirely clear between the parties and have never been provided to the commission. However, in an effort to provide some flexibility to the parties, the commission has amended this section to allow for agreed modifications to certain discovery deadlines to be filed with the commission, rather than requested in a motion. The commission also modifies §21.41 to move subsection (c) to §21.35, as discussed under comments on §21.35.

Comments on Subchapter C, Preliminary Issues, Orders, and Proceedings

§21.61, Threshold Issues and Certification of Issues to the Commission

AT&T urged the adoption of a deadline for parties to identify any threshold or certified issues. AT&T noted that the current rule for compulsory arbitrations, §22.305(f) (and its proposed corollary §21.95(e)) requires challenges to the "arbitrability" of any issue at the first prehearing conference. AT&T asserted that this would be an appropriate presumptive deadline for parties to raise any threshold or certified issues.

SBCT proposed allowing motions for reconsideration of rulings on threshold issues. An issue that meets the standard for consideration as a threshold issue should be significant enough to merit commission consideration in a motion for reconsideration. SBCT added that briefs should be permitted on the certified issue, consistent with the Chapter 22 rule.

In reply comments, SBCT supported AT&T's proposal that §21.61 contain a deadline for parties to identify threshold or certified issues.

Commission response

The commission agrees with AT&T that parties should raise threshold issues, as well as challenges to the arbitrability of any issues, no later than the first prehearing conference and amends the rule accordingly. The commission elects not to incorporate SBCT's suggested change regarding motions for reconsideration on threshold issues. Allowing motions for reconsideration on threshold issues is both impractical and unnecessary. The compressed timeframes required by statute make interlocutory appeals highly impractical. Furthermore, the parties still have an opportunity to raise their concerns in a motion for reconsideration of the arbitration award. With respect to filing briefs on certified issues, the commission finds that such briefs may be useful. Accordingly, the proposed rule is modified to allow the filing of briefs within five working days of the certified issue's submission.

§21.63, Interim Issues and Orders

AT&T urged that the rule be amended to specify that the presiding officer should issue interim orders within a reasonable time so as not to delay the orderly procession of the case.

Commission response

The commission makes no change on the basis of AT&T's comments. Timely issuance of interim orders is presumed and implied in the current rule.

§21.65, Interlocutory Appeals

AT&T urged a change in this section to reflect the exclusion to the interlocutory appeal rule contained in proposed §21.7(a)(2): "A decision by a presiding officer to exclude a party, witness, attorney, or other representative shall be subject to immediate appeal to the commission."

Commission response

The commission makes no change on the basis of AT&T's comments. The current rule, as written, allows a party to appeal an interim order when "immediate and irreparable injury, loss, or damage will result from enforcement of the order" which addresses AT&T's expressed concern.

§21.67, Dismissal of a Proceeding

AT&T noted that the proposed rule permits dismissal only of a petitioner's entire claim. AT&T urged that the rule should instead

permit dismissal of one or more of petitioner's claims instead of requiring dismissal of all claims. AT&T also urged that dismissal of counterclaims may also be appropriate and suggested that the rule be revised to allow for dismissal of a proceeding or for "dismissal of any claim within a proceeding."

SBCT supported AT&T's comments that would allow a presiding officer to dismiss any proceeding or any claim within a proceeding. SBCT stated that this is consistent with current commission practice and allows the presiding officer the latitude to eliminate a particular claim that fits within the listed grounds for dismissal.

Commission response

The commission agrees and has modified proposed §21.67 accordingly.

§21.73, Consolidation of Dockets, Consolidation of Issues, and Joint Filings

Covad urged that this section be expanded to permit multi-party proceedings on common or generic issues as appropriate. Covad proposed language to specifically mandate that issues may only be considered generically if: (1) the issues are of generic applicability to parties in a dispute resolution or arbitration proceeding; (2) the issue(s) has industry wide applicability; (3) the joint consideration would serve the interests of efficiency and avoid unnecessary expense and duplication of resources; and (4) the generic consideration would not prejudice any party. Covad stated that generic proceedings under these circumstances would help to alleviate the strain on limited time, manpower, and financial resources of both the commission and parties and would enhance the ability to maintain consistent decisions concerning like issues.

In reply comments, OAG supported the comments of Covad, with the additional proviso that all "interested parties" as defined in OAG's initial comments be allowed to participate. OAG opined that this would allow the interested parties to have influence in matters of significant public policy affecting consumers.

Verizon opposed Covad's suggestion that multi-party proceedings on common or generic issues should be allowed. Verizon stated that expansion of arbitration proceedings into multi-party proceedings having industry-wide applicability raises notice and due process concerns. Verizon stated that this would require revision to the rules to ensure that all market participants receive notice and an opportunity to participate, would require significant commission resources, and jeopardize the commission's ability to complete the proceeding within the nine-month deadline set by FTA §252(b)(4).

SBCT asserted that consolidation of issues and dockets should be consistent with the FTA and non-parties should not participate unless they meet the conditions for consolidation in proposed §21.73. SBCT stated that Covad's proposal to consider common issues in a generic proceeding failed to explain how such a proceeding would comply with FTA requirements. SBCT claimed that a generic proceeding would allow carriers to avoid negotiation and seek commission adjudication of issues contrary to the FTA.

Commission response

The commission finds that the FTA does not expressly provide for or prohibit multi-party or generic proceedings, but does expressly allow for consolidation of state proceedings under FTA §252(g). Parties are not precluded from agreeing to hold "generic" proceedings on issues of industry concern. Section 21.73 addresses the issues of consolidation of dockets or issues and joint filings and states that the commission or presiding officer shall consider: (1) the administrative burden on parties and the commission; (2) whether there are issues of fact or law common to the proceedings; (3) whether separate proceedings would create a risk of inconsistent resolutions; and (4) whether allowing joinder or consolidation would result in undue delay to the proceeding. The commission will strongly consider options to reduce administrative burdens on the parties and commission staff. The commission finds that the rule as proposed is consistent with FTA §252(g) and addresses the concerns of parties; however, for clarity the commission adds the language "or prejudice any party" to §21.73(c)(3)(D).

§21.75, Motions for Clarification and Motions for Reconsideration

SBCT suggested that motions for clarification should be available for all orders, except the Proposal for Award issued in a Compulsory Arbitration proceeding pursuant to proposed §21.95(t).

Commission response

The commission clarifies §21.75(a) to indicate that this subsection applies only to arbitration awards. Accordingly, motions for clarification of orders would still be available under §21.41.

§21.77, Confidential Material

AT&T requested that subsection (b) be amended to provide that a party asserting that material is exempt from disclosure have five rather than three business days to respond to a challenge to confidentiality designations. AT&T further requested that subsection (b)(1) be amended to reflect that the standards to be applied are those enacted by the legislature and those contained in the "TPIA itself" (Texas Public Information Act).

In regards to §21.77(f), Acknowledgement, AT&T urged that a notarized statement should not be required. AT&T argued that it is inappropriate and unnecessary to require attorneys of record for a party to execute a notarized statement attesting that they agree to be bound by the protective order. AT&T requested that the commission eliminate the notarization requirement especially with respect to counsel of record.

SBCT requested a time limit on when a party may file a motion to declassify material designated as confidential. SBCT further suggested that a party should have at least five business days to respond to such a motion. Parties receiving information designated as confidential in response to a discovery request should file any motion to declassify within a reasonable time after receiving discovery responses or within 30 days of receiving information designated as confidential. A party should not be allowed to file a motion to declassify on the day before a hearing. SBCT advocated requiring filing of notices of the presiding officer's belief that material is not confidential, or of a motion to declassify, within 30 days after receipt of information designated as confidential or not less than 15 business days before a scheduled hearing on the merits.

Verizon supported the comments of both AT&T and SBCT that a party should have five business days to respond to a challenge of confidentiality.

Commission response

The commission rejects AT&T and SBCT's proposal to allow five days for responding to a confidentiality challenge in §21.77(b).

The party asserting confidentiality should already know the basis for claiming confidentiality and therefore should be able to respond promptly.

The commission agrees with AT&T's request to specify that the Texas Public Information Act standards apply in determining whether material is exempt from disclosure. This modification clarifies the appropriate considerations for determining exceptions to disclosure.

The commission declines to eliminate the notarization requirement in §21.77(f) as requested by AT&T Requiring a sworn nondisclosure statement strengthens the protection of confidential information.

After considering SBCT's request for time limits on motions to declassify and the presiding officer's belief that material is not confidential, the commission adds that any motion to declassify shall be provided at least 15 working days prior to the hearing on the merits. A notice of the presiding officer's belief shall be provided at least ten working days prior to the hearing on the merits. The commission declines to impose other time limits.

Comments on Subchapter D, Dispute Resolution

§21.91, Mediation

AT&T disagreed with the principle that a party may only request mediation when the other party agrees to mediate. AT&T argued that any party should have the option of requesting that the presiding officer or the commission compel non-binding mediation. AT&T also stated that the rule should preserve the ability of the presiding officer and commission to order parties to mediate in appropriate circumstances. AT&T argued that FTA §252(a)(2) permits "any party" in a negotiation to seek mediation from a state commission, not requiring that both parties agree to mediate.

AT&T also asserted that the commission should consider incorporating into the rule confidentiality provisions similar to those contained in the Texas Civil Practice & Remedies Code. *See* Texas Civil Practice and Remedies Code §154.073.

Verizon opposed AT&T's suggestion to allow the commission to direct an unwilling party to participate in non-binding mediation. Verizon stated that it is unlikely that forcing a party into mediation would be productive and that mediation should be a voluntary process.

Commission response

The commission amends the rule to incorporate the change proposed by AT&T Although the odds of making progress by forcing a party into mediation seem rather low (and this is especially true due to tight timeframes for negotiation and arbitration), the FTA does permit any party to seek mediation and the rule is modified accordingly. If the mediation is not consensual, however, the timeframes in the FTA should not be tolled and the rule, as written, already contemplates this situation.

§21.95, Compulsory Arbitration

§21.95(a), Request for arbitration

AT&T proposed that the requirement set forth in §21.95(a)(5)(E) to submit a list of resolved issues as part of the petition be deleted. AT&T argued that it is not possible for parties to provide a list of every resolved issue. According to AT&T, having all issues that were discussed and resolved reflected in the agreed contract language should satisfy the requirements of the FTA.

Commission response

The commission agrees with AT&T's observation that it may not be possible for parties to provide a list of every resolved issue. Further, because the agreed contract language provided by the parties should satisfy the requirements of FTA §252(b)(2)(A)(iii), the commission amends the rule to delete the requirement that a list of resolved issues be provided.

§21.95(d), Participation

AT&T urged that this section be amended to allow for the establishment of industry-wide proceedings. SBCT opposed AT&T's suggestion that this section be modified to allow for the establishment of industry wide proceedings.

SBCT proposed eliminating position statements and lists of issues by "interested persons" because the commission's proposed rules allow consolidation of issues and dockets. SBCT asserted allowing a non-party "interested person" to add issues conflicts with FTA and with the commission's proposed rules requiring specification of all issues in the petition or response. Verizon agreed with SBCT that subsection (d) should be revised to eliminate the provision that allows interested parties to file statements of position or list of issues.

In reply comments, OAG opposed SBCT's comments on subsection (d) suggesting that the commission eliminate the ability of "interested persons" to file a statement of position and/or a list of issues for consideration in the proceeding. OAG commented that prohibiting even this limited form of participation is inconsistent with the commission's reasonable goals of efficiency and avoiding duplicative proceedings, as well as obtaining the widest possible level of participation to avoid having to revisit these kinds of issues on a piecemeal basis. In addition, OAG asserted that SBCT failed to cite a single instance where this provision, which currently exist in §22.305(e) of this title, has burdened any party.

Commission response

The commission declines to adopt AT&T's proposal for industry-wide proceedings. The commission finds that the FTA does not expressly provide for, nor expressly prohibit multi-party or generic proceedings. Parties are not precluded from agreeing to hold "generic" proceedings on issues of industry concern. As noted above, the commission will strongly consider options to reduce administrative burdens on the parties and commission staff and increase the efficiency of these proceedings.

The commission concurs with SBCT that §21.95(d) should not include lists of issues by interested persons. FTA §252(b)(4)(A) limits the commission's consideration of issues to those presented in the parties' petitions and responses. However, the commission disagrees with SBCT regarding position statements by interested parties, since the conflict with the FTA and the proposed rules pertain to identifying issues for consideration as opposed to position statements. Accordingly, the commission deletes the reference to interested persons' list of issues, but retains the language allowing interested persons to file position statements.

§21.95(f), Notice

AT&T urged that the proposed rule be changed to provide that the hearing may not be scheduled earlier than 50 days after the request for arbitration. AT&T noted that 50 days are allowed between the filing of a petition and a hearing in a post-interconnection dispute resolution proceeding and argued that a shorter time should not be allowed in a more comprehensive arbitration.

Commission response

The commission elects not to make the suggested change. The rule, as written, permits broader scheduling options than the change suggested by AT&T would allow. There may be instances in which parties and the commission would like to commence the hearing sooner than 50 days after receipt of a complete request for arbitration. While in most cases arbitrations, particularly comprehensive ones, will not have hearings set that quickly, the rule need not preclude the shorter timeline.

§21.95(k), Discovery

AT&T argued that §21.95(k)(1) overly restricts the scope of discovery and is inconsistent with Texas law and the Texas Rules of Civil Procedure. AT&T asserted that the scope of discovery should be limited only to information that is relevant or reasonably calculated to lead to the discovery of relevant evidence.

Commission response

The commission elects not to amend the rule to address AT&T's concern. Given that the deadlines for arbitration are extremely tight under the FTA, discovery of anything but essential information would not be productive and would harm many parties' ability to properly prepare for the proceeding itself.

However, because commenters have raised issues regarding the scope of discovery and the extension of discovery deadlines, the commission modifies subsection (k) to clarify that the presiding officer has broad discretion regarding discovery and that Chapter 22, Subchapter H, Discovery Procedures, which provides cross-references to the Texas Rules of Civil Procedure, shall serve as guidance for discovery conducted under Chapter 21.

§21.95(k)(2), Limits

AT&T argued that a presumptive limit of 25 RFIs would inevitably hinder a party's ability to prepare its case and provide the commission with the best record upon which to base its final decision.

SBCT requested clarification of proposed §21.95(k)(2) that the discovery limits apply to the aggregate total of requests for information (RFIs), requests for inspection and production of documents (RFPs), and requests for admissions (RFAs).

Commission response

The commission amends the rule as requested by AT&T to reflect a presumptive maximum number of 40 requests, rather than 25. The commission does not believe that a modification to the rule is necessary to address the comments of SBCT in that the discovery limits, as amended, clearly apply to "40 requests" which contemplates an aggregate total of all of RFIs, RFPs, and RFAs.

§21.95(k)(3), Timing

SBCT requested clarification to proposed §21.95(k)(3) to prevent unreasonably shortened discovery response deadlines.

AT&T noted that SBCT suggested, in its comments, that this subsection provide that the discovery response period cannot be less than 20 days, absent agreement of the parties. In its reply comments, AT&T noted support for the current rule which maintains the arbitrator's discretion to determine whether a shorter discovery response deadline is appropriate under the circumstances of the case.

Commission response

The commission declines to modify subsection (k)(3). The presiding officer should have the flexibility to tailor the time periods as the situation warrants.

§21.95(m)(2), Conformity of rules

SBCT advocated that proposed §21.95(m)(2) require notice to the parties regarding a determination on the application of evidentiary rules (or other rules) before filing direct testimony. Otherwise, parties could submit testimony inconsistent with the presiding officer's determination.

Commission response

The commission disagrees with SBCT's suggestion. The rule currently allows the presiding officer to decide whether or not to apply the *strict* rules of evidence or other rules. Unless and until a presiding officer views the materials tendered by a party and considers objections thereto, the presiding officer cannot determine whether the circumstances warrant strict application or not. The presiding officer must consider the need for a full and complete record for the commission, but must also weigh those interests against an objecting party's concerns. This evaluation cannot occur until a party files evidence and an opposing party has an opportunity to file objections. This approach is consistent with commission historic practice and has not, to the commission's knowledge, resulted in the filing of inconsistent testimony. Therefore, the commission declines to adopt SBCT's proposal.

§21.95(o)(2), Decision point list and witness list

SBCT suggested revisions to proposed §21.95(o)(2) to prevent parties from copying a witness' entire testimony, instead of a summary, into the DPL.

Commission response

Proposed subsection (o)(2) already requires "a short synopsis of each witness's position." Accordingly, SBCT's proposed modification is unnecessary.

§21.95(r), Brief

SBCT commented that proposed §21.95(r) should permit reply briefs since they have become standard practice in FTA proceedings and allow parties to correct misstatements in opposing parties' initial briefs.

In its reply comments, AT&T indicated its support for giving the arbitrator discretion to determine whether the parties should submit reply briefs.

Commission response

The commission declines to adopt SBCT's suggestion. Given the compressed timeframes provided by statute, reply briefs should not be allowed as a matter of course. Rather, the presiding officer should have the discretion to allow reply briefs.

§21.95(s), Time for decision

AT&T urged that the rules be clarified to state exactly what must be completed by the nine-month deadline. AT&T believes completion of the process must be issuance of a final arbitration award by the presiding officer. AT&T suggested removing the final sentence in this subsection and moving it to subsection (t)(3) and making it state specifically that the arbitration team shall complete the arbitration process by issuing the arbitration award no later than nine months after the date on which a party receives a request for negotiation (unless the deadline is waived). Additionally, AT&T argued that all involved, including parties and the commission itself, must comply with the timeframes established

in the rules to meet the timelines set forth in the FTA. AT&T therefore urged that the rule should contain a mandatory requirement that the decision be issued within 30 days of the filing of briefs, if any. If no briefs are filed, AT&T urged that the rule should require issuance of the final order within 30 days of the hearing.

Commission response

The commission agrees with AT&T's suggestion to specify that the arbitration award must be issued within the nine-month timeframe. This would clarify what must be complete within the nine-month period.

§21.95(t), Decision

AT&T argued that this rule should specifically state that the award must be issued, absent waiver or agreement, within the nine-month timeframe. AT&T also requested that the rule provide that the presiding officer issue the arbitration award within a date certain of receipt of any exceptions, perhaps within ten business days.

Commission response

The commission rejects AT&T's suggestion. AT&T's proposed changes are unnecessary and redundant, particularly in light of subsection (s), which specifies the timeframes for decisions.

§21.97, Approval of Negotiated Agreements

AT&T urged that the rule be clarified to state that the incumbent local exchange company (ILEC) is the party required to file the verified statement. As written, AT&T asserted, it is not clear whether only the ILEC is required to file the verified statement.

SBCT advocated deleting proposed §21.97(b) because proposed §21.97(g) already requires SBCT to post notice of approved interconnection agreements. If the commission imposes separate posting requirements, SBCT requested clarification that notice may be provided by direct notice, web posting, or electronic mail.

Commission response

The commission declines to delete §21.97(b), as proposed by SBCT. SBCT's suggested changes would unnecessarily restrict the presiding officer's ability to require notice as circumstances may warrant. Because the commission is retaining separate posting requirements, the commission has made the clarifications suggested by SBCT in its alternative proposal. The commission notes that FTA §252(i) imposes the duty to make available any interconnection, service, or network element provided under an approved agreement to which it is a party upon a local exchange carrier, not just the incumbent local exchange carrier. Arguably, either or both parties to the negotiated agreement may be required to provide notice, since both are local exchange carriers. Thus, the commission determines that the presiding officer should be afforded flexibility in reaching decisions regarding notice and declines to make AT&T's proposed change to this section or the other notice sections identified in AT&T's comments.

§21.99, Approval of Arbitrated Agreements

AT&T noted "significant concerns" with the process for approval of arbitrated agreements and the lack of opportunity to submit comments to the Commissioners during that phase. AT&T argued that the FTA gives the commission the authority to review, modify, or reject terms contained in interconnection agreements and the inability of parties to provide comments during commission review of agreements is contrary to procedural due process.

SBCT did not oppose AT&T's proposed comment process but questioned what SBCT considered AT&T's "inconsistent demands" regarding compliance with FTA statutory timeframes while including full-blown discovery. Nonetheless, SBCT did not oppose allowing parties' comments during commission review of interconnection agreements if they can be accomplished within the available timeframe.

AT&T was also concerned that the remand procedure in the rule has the potential to create significant delays in the goal of getting a single conforming agreement. AT&T argued that the commission should reject or modify interconnection terms only on the basis of the existing record and on comments from the parties and interested persons. AT&T urged deletion of the remand procedure, particularly if no standards or deadlines are established to govern such remands.

SBCT agreed with AT&T that allowing the commission to remand proceedings to the presiding officer would push a final decision past the statutory deadline. SBCT did not oppose a remand conducted within the statutory deadline or pursuant to the parties' waiver of such deadline. SBCT noted that an interconnection agreement may provide for the parties to negotiate new terms if the commission rejects a part of the agreement, in which case the remainder of the agreement can be approved.

Commission response

In order to afford the parties full opportunity for due process, the commission has added language to allow for the filing of comments within the statutory 30-day commission approval deadline. Given the parties' concern regarding remand and the limited 30-day timeframe, the commission has modified that language in this section to disallow a remand. However, the commission also notes that inclusion of a comment cycle necessitates requiring parties to file their comments as early as possible. Therefore, parties are required to file any comments on the language ordered within five calendar days of the filing of the agreement adopted by arbitration. Replies to any filed comments shall be made within three calendar days of the filing of the comments.

§21.101, Approval of Amendments to Existing Interconnection Agreements

AT&T indicated its support for §21.101(c).

§21.103, Approval of Agreements Adopting Terms and Conditions Pursuant to Federal Telecommunications Act of 1996 (FTA) §252(i)

SBCT noted that the FTA and 47 C.F.R. §51.809 do not require a carrier make available individual interconnection, service, or network element arrangements without incorporating the arrangement into an interconnection agreement or amendment to an interconnection agreement. SBCT proposed requiring ILECs to provide the interconnection agreement or amendment containing the requested arrangement(s) within 15 business days of the request. SBCT asserted that the 15 business day interval is reasonable in light of the volume and size of contracts. At the prehearing conference, SBCT added that 47 C.F.R. §51.809 specifies that the ILEC will make available the individual interconnection service for network element arrangements at the same rates, terms, and conditions as those provided in the agreement. Therefore, SBCT took the position that there would need to be an agreement containing those terms for them to be provided under the same terms and conditions and that 15 business days

would provide both negotiators and contract administrators sufficient time to put the agreement together and work out any disputes on how those sectional MFNs should apply to an existing interconnection agreement.

Commission response

The commission agrees with SBCT that additional time may be necessary to incorporate terms into an agreement. Accordingly, §21.103 is modified to require ILECs to make any interconnection, service, or network element available within 15 working days of request.

§21.105, Approval of Agreements Adopting Terms and Conditions of the T2A

SBCT asserted that this proposed rule is unnecessary because the commission already has proposed rules applicable to the approval of agreements under FTA. With respect to the T2A, the commission previously issued Order No. 55. Moreover, the T2A expired on October 13, 2003, but continues in effect until replaced by a successor agreement as specified in Docket Number 27470.

Commission response

The commission accepts SBCT's proposal to withdraw §21.105, given that the T2A will no longer be available and the proposed rules already address the adoption of agreements.

Comments on Subchapter E, Post-Interconnection Agreement Dispute Resolution

§21.121, Purpose

AT&T recommended that the commission explicitly state that it has authority not only under federal law but under state law as well, given that the commission has made this finding in the past.

SBCT opposed AT&T's comments suggesting that the rule specify that the commission has authority under state law to resolve arbitrations and disputes brought under the FTA. SBCT asserted that blending an FTA proceeding with a state law contested case proceeding would violate due process because the rules would not be clear.

Commission response

The commission elects to make no amendment to the rule on the basis of these comments. Contrary to AT&T's assertion, the rule as written does not purport to describe the authority under which the commission conducts post-interconnection agreement dispute resolution. The reference to the FTA describes the authority under which the commission approves interconnection agreements only. It is undisputed that the commission has the authority to resolve post-interconnection disputes. The commission will resolve such disputes under any and all authority it has and the rule need not reflect all such authority.

§21.123, Informal Settlement Conference

AT&T objected to the tolling provision in this section arguing that it would allow a party to delay the formal dispute resolution process by requesting an informal settlement conference simply to delay matters. AT&T argued that keeping the formal dispute resolution schedule in place provides an incentive that makes the informal settlement conference a more meaningful exercise.

Commission response

The commission amends the rule to address the concern raised by AT&T It would indeed be inappropriate to permit one party to toll the resolution of a dispute merely by requesting an informal settlement conference. Under the revised rule, unless agreed by both parties, such tolling will not take place.

§21.125, Formal Dispute Resolution Proceeding

§21.125(a), Initiation of formal proceeding

SBCT advocated the deletion of proposed §21.125(a)(1)(F). SBCT asserted that the formal dispute resolution proceeding may not serve as a means for renegotiating or re-writing binding interconnection agreements. SBCT stated that allowing parties to submit proposed modified contract language encourages the parties to exceed the commission's authority in interpreting an interconnection agreement.

AT&T noted that SBCT requested the elimination of the requirement that a petition initiating a post-interconnection agreement dispute proceeding include proposed modified contract language. AT&T opposed SBCT's proposal that the requirement be eliminated. AT&T argued that proposing modified language may be appropriate to clarify the interconnection agreement, noting that competitive local exchange companies (CLECs) periodically need to bring disputes under the interconnection agreement where there are gaps in language that could not have been foreseen.

Commission response

The commission disagrees with SBCT's proposal to delete §21.125(a)(1)(F). Agreements may require modification to clarify its meaning or fill gaps in the terms.

§21.125(k), Arbitration award

AT&T urged that the rule be modified to provide a mandatory requirement that the decision be issued within 15 days of the filing of briefs, if any, and, if not, within 15 days of the hearing.

Commission response

The commission rejects AT&T's suggestion to limit the time within which to issue a decision. Such time limits are not required by statute and the commission declines to unnecessarily restrict the presiding officer's discretion.

§21.129, Request for Interim Ruling Pending Dispute Resolution

§21.129(a), Purpose

SBCT requested clarification because two clauses in subsection (a) appear inconsistent. At the public hearing, SBCT stated that the clarification is needed regarding the language in the parenthetical in paragraph (2), "(including issues of pricing and/or payment for any service functionality, or network element when such pricing and/or payment issues affect provisioning)" which appears to be somewhat inconsistent with paragraph (3).

Verizon agreed with SBCT that §21.129(a) is inconsistent and in need of clarification. Verizon stated that since subsection (g) requires the presiding officer to find good cause to grant interim relief, it would appear that the intent of subsection (a)(3) may have been to require payment of undisputed amounts as an essential prerequisite to a finding of good cause. If so, Verizon averred that the sentence should be revised to read, "However, in no event shall the presiding officer find good cause for interim relief if undisputed amounts have not been paid." Even with such a revision, Verizon opposed any proposal in subsection (a)(2) that would allow a petitioner to challenge pricing terms that have been previously agreed to and approved and would allow a petitioner to proceed with a request for interim relief on pricing terms

by paying only the amount that the petitioner believes is reasonable. Verizon asserted the following arguments: (1) to the extent interim relief permits a party to change a price in an existing agreement approved under FTA §252, absent a full and complete review of the evidence, it is unlawful and contradicts the plain language of FTA; (2) even if lawful, the interim rule presents a host of other issues, i.e., must the ILEC charge all CLECs the same interim rate to avoid a claim of discrimination, or must CLECs first show that their ability to provide service is "compromised," whatever that means?; and (3) the rule further compresses the time within which the commission must resolve open issues under FTA by creating a separate "mini-case" within an existing arbitration.

Commission response

The commission agrees that subsection (a) is unclear as proposed. Accordingly, the commission clarifies subsection (a)(3) to state that a party may not obtain interim relief to avoid payment of undisputed charges.

The commission disagrees with Verizon's position that interim relief setting a rate is inappropriate. The rate may be in dispute because of ambiguity in the agreement. The case may be that there is no clear basis for either party to assert a particular rate. The commission also finds that the interim rate would not pose the complications suggested by Verizon. The interim rate, given its temporary nature, would not be available to other parties, unless incorporated into the agreement as result of an award. Furthermore, the issues in an interim relief hearing would need to be addressed anyway as part of the larger dispute, so the "mini-case" does not unjustifiably compress time.

§21.129(f), Evidence

SBCT opposed §21.129(f) that allows a request for interim ruling supported only by affidavit. SBCT stated that a responding party should have the opportunity to cross-examine the witness submitting the affidavit. Also, the responding party should have an opportunity to request some type of security when a party seeks an interim ruling.

In reply comments, AT&T disagreed with SBCT's position on §21.129(f). AT&T opposed the "rigid requirement" that any witness testifying in support of a request for relief must be available. AT&T also opposed SBCT's proposal to allow a party responding to a request for interim ruling the opportunity to seek some type of security. AT&T noted that virtually all requests for interim rulings are made by CLECs and argued that the history of interconnection disputes at the commission does not support the need for CLECs to post a bond or other type of security. AT&T also argued that it would be difficult in most cases to quantify the security.

Commission response

The commission elects not to require witnesses to testify in person given the expedited nature of an interim relief hearing. As a practical matter, the movant would want a live witness available to answer the presiding officers' questions, given that §21.129(g) requires the presiding officer to consider whether the movant has a substantial likelihood of success on the merits and whether there is a substantial threat of irreparable injury. Under §21.129(f), the presiding officer must issue a ruling based on the evidence at the interim relief hearing. Consequently, the movant has an incentive to provide a witness at the hearing.

With respect to the SBCT's proposal for security, the commission finds that security is not necessary since §21.129(g)(3) requires consideration of harm to other parties. Furthermore, under §21.129(g)(5), the presiding officer has discretion to consider the existence of security in the decision to grant or deny interim relief.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this chapter, the commission makes other minor modifications for consistency and the purpose of clarifying its intent.

SUBCHAPTER A. GENERAL PROVISIONS AND DEFINITIONS

16 TAC §§21.1, 21.3, 21.5, 21.7, 21.9, 21.11

These new sections are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998, Supplement 2004) (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, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act: §14.002, §14.052 and the Federal Telecommunications Act of 1996, 47 U.S.C. §151, *et. seq.*

§21.3. Definitions.

The following terms, when used in this chapter, shall have the following meanings, unless the context or specific language of a section clearly indicates otherwise:

(1) Administrative review--Process under which an application may be approved without a formal hearing.

(2) Affected person--The definition of affected person is that definition given in the Public Utility Regulatory Act, §11.003(1).

(3) Application--A written application, petition, complaint, notice of intent, appeal, or other pleading that initiates a proceeding.

(4) Arbitration--A form of dispute resolution in which each party presents its position on any unresolved issues to an impartial third person(s) who renders a decision on the basis of the information and arguments submitted.

(5) Arbitration hearing--The hearing conducted by an arbitrator to resolve any issue submitted to the arbitrator. An arbitration hearing is not a contested case under the Administrative Procedure Act, Texas Government Code §§2001.001, et. seq.

(6) Arbitration team--Employees of the commission assigned to serve as arbitrators in a dispute resolution proceeding. One or more members of the arbitration team may serve as the presiding officer(s) of a dispute resolution proceeding. The Arbitration team does not include commission employees specifically assigned to advise commissioners.

(7) Arbitrator--The commission, any commissioner, or any commission employee selected to serve as the presiding officer in a compulsory arbitration hearing.

(8) Authorized representative--A person who enters an appearance on behalf of a party, or on behalf of a person seeking to be a party or otherwise to participate, in a proceeding. The appearance may be entered in person or by subscribing the representative's name upon any pleading filed on behalf of the party or person seeking to be a party

or otherwise to participate in the proceeding. The authorized representative shall be considered to remain a representative of record unless a statement or pleading to the contrary is filed or stated in the record.

(9) Commission--The Public Utility Commission of Texas.

(10) Commissioner--One of the members of the Public Utility Commission of Texas.

(11) Complainant--A person who files a complaint intended to initiate a dispute resolution proceeding.

(12) Compulsory arbitration--The arbitration proceeding conducted by the commission or its designated arbitrator pursuant to the commission's authority under FTA §252.

(13) Contested case--A proceeding, including a ratemaking or licensing 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.

(14) Control number--Number assigned by the commission's Central Records to a docket, project, or tariff.

(15) Days--Calendar days, not working days, unless otherwise specified by this chapter or the commission's substantive rules.

(16) Decision Point List (DPL)--A matrix established before the submittal of testimony that includes the specific issues to be decided in a dispute resolution proceeding.

(17) Dispute resolution proceeding--A proceeding conducted by a presiding officer or commission employee in accordance with this chapter. A dispute resolution proceeding is not a contested case subject to the Administrative Procedure Act, Texas Government Code §§2001.001, et. seq. A dispute resolution proceeding may include formal or informal proceedings.

(18) Docket--A proceeding under this chapter.

(19) FTA--The federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Stat. 56 (1996), (codified at 47 U.S.C. §§151 et seq.).

(20) Hearing--Any proceeding at which evidence is taken on the merits of the matters at issue, not including prehearing conferences.

(21) Informal settlement conference--One or more optional, informal meetings between parties to an interconnection agreement and commission staff in which commission staff assist the parties to reach settlement as to all or some of the disputed issues.

(22) Mediation--A voluntary dispute resolution process in which a neutral third party, including, but not limited to, a member of the commission staff, assists the parties in reaching agreement. The mediator does not have the authority to impose a resolution.

(23) Party--A party to negotiations under Subchapter D Dispute Resolution or a party to an agreement under Subchapter E Post-Interconnection Dispute Resolution.

(24) Person--An individual, partnership, corporation, association, governmental subdivision, entity, or public or private organization.

(25) Petition--A written document complying with §21.33 of this title (relating to Formal Requisites of Pleadings and Documents to be Filed with the Commission) intended to initiate a dispute resolution proceeding with the commission.

(26) Petitioner--A person who files a petition intended to initiate a dispute resolution proceeding with the commission.

(27) Pleading--A written document submitted by a party, or a person seeking to participate in a proceeding, setting forth allegations of fact, claims, requests for relief, legal argument, and/or other matters relating to a proceeding.

(28) Prehearing conference--Any conference or meeting of the parties, prior to the hearing on the merits, on the record and presided over by the presiding officer.

(29) Presiding officer--The commission, any commissioner, any hearings examiner or administrative law judge, or arbitrator presiding over a proceeding or any portion thereof.

(30) Proceeding--Any hearing, investigation, inquiry or other fact-finding or decision-making procedure, including the denial of relief or the dismissal of a complaint, conducted by the commission.

(31) Project--A rulemaking or other proceeding that is not a docket or a tariff.

(32) PURA--The Public Utility Regulatory Act, Texas Utilities Code, Title 2, as it may be amended from time to time.

(33) Respondent--A person against whom a petition has been filed.

(34) Working day--A day on which the commission is open for the conduct of business.

§21.5. Representative Appearances.

(a) Generally. Any person may appear before the commission or in a hearing in person or by authorized representative. The presiding officer may require a representative to submit proof of authority to appear on behalf of another person. The authorized representative of a party shall specify the particular persons or classes of persons the representative is representing in the proceeding.

(b) Change in authorized representative. Any person appearing through an authorized representative shall provide written notification to the commission and all parties to the proceeding of any change in that person's authorized representative. The required number of copies of the notification shall be filed in Central Records under the control number(s) for each affected proceeding and shall include the authorized representative's name, address, telephone number, email address, and facsimile number.

(c) Lead counsel. A party represented by more than one attorney or authorized representative in a matter before the commission may be required to designate a lead counsel who is authorized to act on behalf of all of the party's representatives, but all other attorneys or authorized representatives for the party may take part in the proceeding in an orderly manner, as ordered by the presiding officer.

(d) Change in information required for notification or service. Any person or authorized representative appearing before the commission in any proceeding shall provide written notification to the commission and all parties to the proceeding of any change in their address, telephone number, facsimile number, or email address. The required number of copies of the notification shall be filed in Central Records under the control number(s) for each affected proceeding.

§21.7. Standards of Conduct.

(a) Standards of conduct for parties.

(1) Every person appearing in any proceeding shall comport himself or herself with dignity, courtesy, and respect for the commission, presiding officer, and all other persons participating in the proceeding. Professional representatives shall observe and practice the standard of ethical and professional conduct prescribed for their professions. In particular, lawyers are reminded of their responsibilities

under the Texas Disciplinary Rules of Professional Conduct, §§3.01, 3.02, 3.03 and 3.04.

(2) Upon a finding of a violation of paragraph (1) of this subsection, any party, witness, attorney, or other representative may be excluded by the presiding officer from the proceeding in which the violation transpired for such period and upon such conditions as are just, or may be subject to sanctions in accordance with §21.71 of this title (relating to Sanctions). A decision by a presiding officer to exclude a party, witness, attorney, or other representative shall be subject to immediate appeal to the commission.

(b) Communications.

(1) Ex parte communications. Unless required for the disposition of ex parte matters authorized by law, a presiding officer assigned to render a decision may not communicate, directly or indirectly, in connection with any substantive issues currently the subject of a dispute resolution proceeding before that presiding officer with any person, party, or their representatives, except on notice and opportunity for all parties to participate. Members of the commission or a presiding officer assigned to render a decision may communicate ex parte with employees of the commission who have not participated in any hearing in the case for the purpose of utilizing the special skills or knowledge of the commission and its staff in evaluating the evidence.

(2) Communications between presiding officers and Commissioners and employees of the commission acting as advisors to Commissioners. Unless required for the disposition of ex parte matters authorized by law, a presiding officer assigned to render a decision may not communicate, directly or indirectly, in connection with any substantive issues currently the subject of a dispute resolution proceeding before that presiding officer with any commissioner, or with an employee of the commission acting as an advisor to the commission, except on notice and opportunity for all parties to participate.

(3) Application to arbitration team. As used in this section, the term "presiding officer" includes all members of the arbitration team.

(c) Standards for recusal of presiding officers. Presiding officers shall disqualify themselves or shall recuse themselves on the same grounds and under the same circumstances as specified in the Texas Rules of Civil Procedure, Rule 18b.

(d) Motions for disqualification or recusal of a presiding officer.

(1) Any party may move for disqualification or recusal of a presiding officer stating with particularity the grounds why the presiding officer should not preside. The grounds may include any disability or matter, not limited to those set forth in subsection (c) of this section. The motion shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall be verified by affidavit.

(2) The motion shall be filed within five working days after the facts that are the basis of the motion become known to the party. The motion shall be served on all parties by hand delivery, facsimile transmittal, or overnight courier delivery.

(3) Written responses to motions for disqualification or recusal shall be filed within three working days after the receipt of the motion. The presiding officer may require that responses be made orally at a prehearing conference or hearing.

(4) The presiding officer shall not rule on any issues that are the subject of a pending motion for recusal or disqualification. The commission shall appoint another presiding officer to preside on all matters that are the subject of the motion for recusal until the issue of disqualification is resolved.

(5) The parties to a proceeding may waive any ground for recusal or disqualification after it is fully disclosed on the record, either expressly or by their failure to take action on a timely basis.

(6) If the presiding officer determines that a motion for disqualification or recusal was frivolous or capricious, or filed for purposes of delaying the proceeding, sanctions may be imposed in accordance with §21.71 of this title.

(7) Disqualification or recusal of a presiding officer, in and of itself, has no effect upon the validity of rulings made or orders issued prior to the time the motion for recusal was filed.

(e) Subsequent proceedings. A commission employee who has participated as a mediator under §21.91 of this title (relating to Mediation), a presiding officer under §21.95 of this title (relating to Compulsory Arbitration), or a staff member designated as an advisor to the presiding officer under §21.95 of this title may not participate as an advisor to Commissioners in any subsequent commission proceedings concerning the review and approval of the resulting agreement pursuant to the Federal Telecommunications Act of 1996 (FTA) §252(e), except in cases where two or more of the Commissioners act as the presiding officer. In a proceeding to approve an arbitrated agreement pursuant to §21.99 of this title (relating to Approval of Arbitrated Agreements), the commission or the presiding officer may call upon an employee who has participated on the arbitration team under this chapter to the extent necessary to explain the arbitration team's final decision.

§21.9. Computation of Time.

(a) Counting days.

(1) Except for computation of the arbitration window under Federal Telecommunications Act of 1996 (FTA), in computing any period of time prescribed or allowed by this chapter, by order of the commission or any presiding officer, or by any applicable statute, the period shall begin on the day after the act, event, or default in question. The period shall conclude on the last day of the designated period unless that day is a day the commission is not open for business, in which event the designated period runs until the end of the next day on which the commission is open for business. The commission shall not be considered to be open for business on state holidays on which only a skeleton crew is required.

(2) In computing the window for arbitration under FTA, the arbitration window shall be computed inclusive of the 135th and 160th day of the party's receipt of a request for negotiation under FTA §252.

(b) Extensions.

(1) Documents or pleadings. Unless otherwise provided by statute, the time for filing any documents or pleadings may be extended by the presiding officer, upon a written filing or an oral request on the record made prior to the expiration of the applicable period of time, showing that there is good cause for such extension of time and that the need for the extension is not caused by the neglect, indifference, or lack of diligence of the party making the motion.

(2) Decisions. The time for issuing any decision by a presiding officer or the commission may be extended by the presiding officer in a written order for good cause unless the decision deadline is prescribed by FTA. The time for issuing a decision may not be extended by more than 30 working days unless agreed by the parties. Decision deadlines pursuant to FTA may be waived or extended by parties' written agreement or oral agreement on the record.

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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Rules Coordinator
Public Utility Commission of Texas
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SUBCHAPTER B. PLEADINGS, DOCUMENTS, AND OTHER MATERIALS

16 TAC §§21.31, 21.33, 21.35, 21.37, 21.39, 21.41

These new sections are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998, Supplement 2004) (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, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act: §14.002, §14.052 and the Federal Telecommunications Act of 1996, 47 U.S.C. §151, *et. seq*.

§21.31. Filing of Pleadings, Documents, and Other Materials.

(a) Applicability. This section applies to all pleadings as defined in §21.3 of this title (relating to Definitions) and the following documents:

(1) letters or memoranda relating to any item with a control number;

(2) discovery requests and responses; and

(3) Decision Point List (DPL) filings.

(b) File with the commission filing clerk. All pleadings and documents required to be filed with the commission shall be filed with the commission filing clerk and shall state the control number in the heading, if known.

(c) Number of items to be filed. Unless otherwise provided by this chapter or ordered by the presiding officer, the number of copies to be filed, including the original, is as follows:

(1) for applications filed pursuant to §21.97 of this title (relating to Approval of Negotiated Agreements, §21.101 of this title (relating to Approval of Amendments to Existing Interconnection Agreements, and §21.103 of this title (relating to Approval of Agreements Adopting Terms and Conditions Pursuant to Federal Telecommunications Act of 1996 (FTA) §252(i)): three copies;

(2) for all other petitions and responses: ten copies;

(3) for discovery requests: ten copies;

(4) for testimony and briefs: ten copies, except when it is known that two or more of the Commissioners will serve as the presiding officer;

(5) for testimony and briefs when two or more of the Commissioners will serve as the presiding officer: 19 copies;

(6) for the final approved interconnection agreement: two copies; and

(7) for other pleadings and documents: ten copies.

(d) Receipt by the commission. Pleadings and any other documents shall be deemed filed when the required number of copies and the electronic copy, if required, in conformance with §21.33 of this title (relating to Formal Requisites of Pleadings and Documents to be Filed with the Commission), are presented to the commission filing clerk for filing. The commission filing clerk shall accept pleadings and documents if the person seeking to make the filing is in line by the time the pleading or document is required to be filed.

(e) No filing fee. No filing fee is required to file any pleading or document with the commission.

(f) Office hours of the commission filing clerk. With the exception of open meeting days, for the purpose of filing documents, the office hours of the commission filing clerk are from 9:00 a.m. to 5:00 p.m., Monday through Friday, on working days.

(1) Central Records will open at 8:00 a.m. on open meeting days. With the exception of paragraph (2) of this subsection, no filings will be accepted between the hours of 8:00 a.m. and 9:00 a.m.

(2) On open meeting days, between the hours of 8:00 a.m. and 9:00 a.m., the Commissioners and the Policy Development Division may file items related to the open meeting on behalf of the Commissioners.

(A) The Commissioners and the Policy Development Division shall provide the filing clerk with an extra copy of all documents filed pursuant to this paragraph for public access.

(B) The Policy Development Division shall provide the parties of record copies of documents filed under this paragraph as soon as possible after filing. To the extent practicable, the existence of documents filed under this paragraph shall be announced prior to the discussion on the noticed item at the open meeting. In addition to providing copies via mail or facsimile, staff may transmit the documents to the parties of record by electronic transmission or via hand-delivery at the open meeting.

(g) Filing a copy or facsimile copy in lieu of an original. Subject to the requirements of subsection (c) of this section and §21.33 of this title, a copy of an original document or pleading, including a copy that has been transmitted through a facsimile machine, may be filed, so long as the party or the attorney filing such copy maintains the original for inspection by the commission or any party to the proceeding.

(h) Filing deadline. All documents shall be filed by 3:00 p.m. on the date due, unless otherwise ordered by the presiding officer.

§21.33. Formal Requisites of Pleadings and Documents to be Filed with the Commission.

(a) Applicability. This section applies to all pleadings as defined in §21.3 of this title (relating to Definitions) and the following documents:

(1) Letters or memoranda relating to any item with a control number;

(2) Reports pursuant to commission rules or request of the commission;

(3) Discovery requests; and

(4) Decision Point List (DPL) filings.

(b) Requirements of form.

(1) Style.

(A) All requests for dispute resolution or arbitration shall be styled as follows: Petition of {Party} for {Compulsory Arbitration or Post-Interconnection Dispute Resolution} with {Party} under FTA relating to {concise description of major issue}. All responses to requests for dispute resolution or arbitration shall be styled as follows: Response of {Party} to Petition of {Party} for {Compulsory Arbitration or Post-Interconnection Dispute Resolution} under FTA relating to {concise description of major issues}.

(B) Requests for dispute resolution pursuant to §21.131 of this title (relating to Request for Expedited Ruling) and §21.133 of this title (relating to Request for Interim Ruling Pending Dispute Resolution) shall also include such specific requests, as appropriate, in the pleading style, as follows: Petition of {Party} for {Compulsory Arbitration or Post-Interconnection Dispute Resolution} and Request for {Expedited Ruling and/or Request for Interim Ruling} with {Party} under FTA relating to {concise description of major issues}.

(2) Unless otherwise authorized or required by the presiding officer or this chapter, documents shall:

(A) include the style and number of the docket or project in which they are submitted, if available;

(B) identify by heading the nature of the document submitted and the name of the party submitting the same; and

(C) be signed by the party or the party's representative.

(3) Whenever possible, all documents should be provided on 8.5 by 11 inch paper. However, any log, graph, map, drawing, or chart submitted as part of a filing will be accepted on paper larger than provided in subsection (g) of this section, if it cannot be provided legibly on letter-size paper. The document must be able to be folded to a size no larger than 8.5 by 11 inches. Documents that cannot be folded may not be accepted.

(c) Format. Any filing with the commission, other than the DPL, must:

(1) have double-spaced or one and one-half times spaced print with left margins not less than one inch wide, except that any letter may be single-spaced;

(2) indent and single-space any quotation of 50 words or more in block quote format; and

(3) be printed or formatted in not less than 12-point type for text and 10-point type for footnotes.

(d) Citation.

(1) Form. Any party filing with the commission should endeavor to comply with the rules of citation set forth, in the following order of preference, by: the commission's "Citation Guide;" the most current edition of the "Texas Rules of Form," published by the University of Texas Law Review Association (for Texas authorities); and the most current edition of "A Uniform System of Citation," published by The Harvard Law Review Association (for all other authorities). Neither Rule 1.1 of the Uniform System nor the comparable portion of the "Texas Rules of Form" shall be applicable in proceedings.

(2) Copies. When a party cites to authority other than PURA and other Texas state statutes, commission rules, reported Texas cases, an FCC decision, the United States Code, the Texas Administrative Code, the Code of Federal Regulations, or a document on file with the commission, such party shall provide a copy of the cited authority to the presiding officer and all parties of record. Copies of authority may be provided to the presiding officer and all parties of record electronically.

(e) Signature. Every pleading and document shall be signed by the party or the party's authorized representative, and shall include the party's address, telephone number, facsimile number, and email address. If the person signing the pleading or document is an attorney licensed in Texas, the attorney's State bar number shall be provided.

(f) Page limits. Unless otherwise authorized by the presiding officer, page limits shall be as follows:

(1) With the exception of DPLs and discovery responses, no pleading or brief relating to interconnection agreements shall exceed 50 pages, excluding exhibits.

(2) Prefiled direct testimony shall not exceed 75 pages in length per witness, excluding exhibits and/or attachments. A party requesting the presiding officer to establish a larger page limit shall so move, and shall provide support on relevant factors pursuant to paragraph (4) of this subsection.

(3) The page limitation shall not apply to copies of legal authorities provided pursuant to subsection (d)(2) of this section.

(4) A presiding officer may establish a larger or smaller page limit. In establishing parties' page limits, the presiding officer shall consider such factors as which party has the burden of proof, the number of parties opposing a party's position, alignment of parties, the number and complexity of issues, the number of witnesses per party, and demonstrated need.

(g) Hard copy filing standards. Hard copies of each document shall be filed with the commission in accordance with the requirements set forth in paragraphs (1)-(4) of this subsection.

(1) Each document shall be typed or printed on paper measuring 8.5 by 11 inches. Oversized documents being filed on larger paper pursuant to subsection (b)(3) of this section shall be filed as separate referenced attachments. Except for responses to discovery, no single document shall consist of more than one paper size.

(2) One copy of each document, that is not the original file copy, shall be filed without bindings, staples, tabs, or separators.

(A) This copy shall be printed on both sides of the paper or, if it cannot be printed on both sides of the paper, every page of the copy shall be single sided.

(B) All pages of the copy filed pursuant to this paragraph, starting with the first page of the table of contents, shall be consecutively numbered through the last page of the document, including attachments, if any.

(3) For documents for which an electronic filing is required, all non-native figures, illustrations, or objects shall be filed as referenced attachments. No non-native figures, illustrations, or objects shall be embedded in the text of the document. "Non-native figures" means tables, graphs, charts, spreadsheets, illustrations, drawings and other objects which are not electronically integrated into the text portions of a document.

(4) Whenever possible, all documents and copies shall be printed on both sides of the paper.

(h) Electronic filing standards. Any document may be filed, and all documents containing more than ten pages shall be filed, electronically in accordance with the requirements of paragraphs (1)-(7) of this subsection. Electronic filings are registered by submission of the relevant electronic documents via diskette or the internet, in accordance with transfer standards available in the commission's central records office or on the commission's World Wide Website, and the submission of the required number of paper copies to the filing clerk

under the provisions of this section and §21.31 of this title (relating to Filing of Pleadings, Documents and Other Materials).

(1) All non-native figures, illustrations, or objects must be filed as referenced attachments. No non-native figures, illustrations, or objects shall be imbedded in the text of the document. "Non-native figures" means tables, graphs, charts, spreadsheets, illustrations, drawings and other objects which are not electronically integrated into the text portions of a document.

(2) Oversized documents shall not be filed in electronic media, but shall be filed as referenced attachments.

(3) Each document that has five or more headings and/or subheadings shall have a table of contents that lists the major sections of the document, the page numbers for each major section and the name of the electronic file that contains each major section of the document. Discovery responses are exempt from this paragraph.

(4) Each document shall have a list of file names that are included in the filing and shall be referenced in an ASCII text file.

(5) The table of contents and list of file names shall be placed at the beginning of the document.

(6) Each diskette shall be labeled with the control number, if known, and the name of the person submitting the document.

(7) Any information submitted under claim of confidentiality should not be submitted in electronic format.

(i) Disk format standards. Each document that is submitted to the filing clerk on diskette shall be submitted as set forth in paragraphs (1)-(3) of this subsection.

(1) 3.5 inch diskette;

(2) 1.44 M double sided, high density storage capacity; and

(3) IBM format.

(j) File format standards.

(1) Electronic filings shall be made in accordance with the current list of preferred file formats available in the commission's central records office and on the commission's World Wide Website.

(2) Electronic filings that are submitted in a format other than that required by paragraph (1) of this subsection will not be accepted until after successful conversion of the file to a commission standard.

§21.35. Service of Pleadings and Documents.

(a) Pleadings and Documents submitted to a presiding officer. At or before the time any document or pleading regarding a proceeding is submitted by a party to a presiding officer, a copy of such document or pleading shall be filed with the commission filing clerk and served on all parties. These requirements do not apply to documents which are offered into evidence during a hearing or which are submitted to a presiding officer for in camera inspection; provided, however, that the party submitting documents for in camera inspection shall file and serve notice of the submission upon the other parties to the proceeding. Pleadings and documents submitted to a presiding officer during a hearing, prehearing conference, or open meeting shall be filed with the commission filing clerk as soon as is practicable.

(b) Methods of service. Except as otherwise expressly provided by order, rule, or other applicable law, service on a party may be made by delivery of a copy of the pleading or document to the party's authorized representative or attorney of record either in person; by agent; by courier receipted delivery; by first class mail; by certified mail, return receipt requested; or by registered mail to such party's address of record, or by facsimile transmission to the recipient's current facsimile machine.

(1) Service by mail shall be complete upon deposit of the document, enclosed in a wrapper properly addressed, stamped and sealed, in a post office or official depository of the United States Postal Service, except for state agencies. For state agencies, mailing shall be complete upon deposit of the document with the General Services Commission.

(2) Service by agent or by courier receipted delivery shall be complete upon delivery to the agent or courier.

(3) Service by facsimile transmission shall be complete upon actual receipt by the recipient's facsimile machine.

(4) Unless otherwise established by the receiving party, if service is made by hand delivery, facsimile transmission, or electronic mail, it shall be presumed that all pleadings are received on the day filed. If service is made by overnight delivery, it shall be presumed that pleadings are received on the day after filing. If service is made by regular mail, it shall be presumed that pleadings are received on the third day after filing. Service after 5:00 p.m. local time of the recipient shall be deemed served on the following day.

(c) Evidence of service. A return receipt or affidavit of any person having personal knowledge of the facts shall be prima facie evidence of the facts shown thereon relating to service. A party may present other evidence to demonstrate facts relating to service.

(d) Certificate of service. Every document required to be served on all parties pursuant to subsection (a) of this section shall contain the following or similar certificate of service: "I, (name) (title) certify that a copy of this document was served on all parties of record in this proceeding on (date) in the following manner: (specify method). Signed, (signature)." The list of the names and addresses of the parties on whom the document was served, should not be appended to the document.

§21.41. Motions.

(a) General requirements. A motion shall be in writing, unless the motion is made on the record at a prehearing conference or hearing. It shall state the relief sought and the specific grounds supporting a grant of relief. If the motion is based upon alleged facts that are not a matter of record, the motion shall be supported by an affidavit. Written motions shall be served on all parties in accordance with §21.35 of this title (relating to Service of Pleadings and Documents).

(b) Time for response. Unless otherwise provided by the presiding officer, commission rule, or statute, a responsive pleading, if made, shall be filed by a party within five working days after receipt of the pleading to which the response is made.

(c) Rulings on motions. The presiding officer shall serve orders ruling on motions upon all parties, unless the ruling is made on the record in a hearing or prehearing conference open to the public.

(d) Motions for continuances.

(1) Motions for continuance and for extension of a deadline shall set forth the specific grounds for which the moving party seeks continuance and/or extension and shall reference all other motions for continuance and/or extension filed by the moving party in the proceeding. The moving party shall attempt to contact all other parties and shall state in the motion each party that was contacted and whether that party objects to the relief requested. The moving party shall have the burden of proof with respect to the need for the continuance and/or extension.

(2) Continuances will not be granted based on the need for discovery if the party seeking the continuance previously had the opportunity to obtain and/or compel discovery from the person from whom discovery is sought, except when necessary due to discovery abuses, surprise or discovery of facts or evidence which could not have been discovered previously through reasonably diligent effort by the moving party.

(3) The presiding officer may grant timely filed motions for continuance and/or extension of deadline continuances agreed to by all parties provided that any applicable statutory deadlines are extended as necessary.

(e) Deadlines for motions for continuance and extension of filing deadline.

(1) Unless otherwise ordered by the presiding officer, motions for continuance of a prehearing conference, informal settlement conference, or discovery conference shall be in writing and shall be filed no less than two working days prior to the conference or hearing.

(2) Unless otherwise ordered by the presiding officer, motions for continuance of the hearing on the merits shall be in writing and shall be filed not less than three working days prior to the hearing. In addition to the requirements in subsection (e)(1) of this section, motions for continuance shall state proposed dates for a rescheduled hearing.

(3) Unless otherwise ordered by the presiding officer, motions for extension of a filing deadline shall be in writing and shall be filed not less than one working day prior to the filing deadline.

(4) Untimely motions for continuance and/or extension of a deadline shall be presumed denied. The moving party has the burden to show good cause for untimely filing.

(f) Modification of discovery deadlines.

(1) Notwithstanding the foregoing, the deadlines for responses, objections and motions to compel may be modified by agreement of the affected parties, by filing a letter or other document evidencing the agreement no later than the date the responses, objections or motions to compel are due.

(2) In the event parties' agreed modification of a discovery deadline affects a scheduled discovery conference, parties must also comply with subsection (e) of this section.

(3) Unless the parties show good cause for untimely filing, the presiding officer may impose the original deadlines for subsequent filings.

(4) In no event shall the modification of discovery deadlines by agreement be allowed if such modification would affect a statutory deadline, unless parties' agreed modification is accompanied by a written waiver.

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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SUBCHAPTER C. PRELIMINARY ISSUES, ORDERS, AND PROCEEDINGS

16 TAC §§21.61, 21.63, 21.65, 21.67, 21.69, 21.71, 21.73, 21.75, 21.77

These new sections are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998, Supplement 2004) (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, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act: §14.002, §14.052 and the Federal Telecommunications Act of 1996, 47 U.S.C. §151, *et. seq*.

§21.61. Threshold Issues and Certification of Issues to the Commission.

(a) Threshold issues. Threshold issues are legal or policy issues that a presiding officer determines to be of such significance to the proceeding that these issues should be addressed prior to the other issues in the proceeding. Threshold issues include, but are not limited to, issues to be certified to the commission.

(1) Threshold issues may be identified by the presiding officer or by motion of a party to the proceeding. Parties shall raise any threshold issues as well as challenges to the arbitrability of any issue at the first prehearing conference. If such challenges are not raised at the first prehearing conference, they shall be deemed waived by the parties. Parties shall be given an opportunity to brief the question of threshold issues. At the discretion of the presiding officer, reply briefs may be permitted. Any determination on threshold issues shall be made in a written order.

(2) Once a presiding officer has determined that there is a threshold issue(s) in a proceeding, the presiding officer shall take up the threshold issue(s) prior to proceeding with the other issues or certify the issue(s) to the commission pursuant to subsection (b) of this section. A decision on a threshold issue is not subject to motion for reconsideration.

(b) Certification. Certified issues shall be addressed prior to proceeding with the other issues in the proceeding.

(1) Issues for certification. The presiding officer may certify to the commission a significant issue that involves an ultimate finding in the proceeding. Issues appropriate for certification are:

(A) the commission's interpretation of its rules and applicable statutes;

(B) which rules or statutes are applicable to a proceeding; or

(C) whether commission policy should be established or clarified as to a substantive or procedural issue of significance to the proceeding.

(2) Procedure for certification. The presiding officer shall submit the certified issue to the Policy Development Division, with notice to the parties when the issue is so submitted. The Policy Development Division shall place the certified issue on the commission's agenda to be considered at the earliest time practicable. Parties may file briefs on the certified issue within five working days of its submission.

(3) Abatement.

(A) In a compulsory arbitration, the presiding officer may abate all or a part of the proceeding while a certified issue is pending only if agreed to by the parties.

(B) In a post-interconnection dispute proceeding, the presiding officer may abate all or a part of the proceeding while a certified issue is pending at the presiding officer's discretion.

(4) Commission action. The commission shall issue a written decision on the certified issue no later than six working days after the open meeting at which the issue is decided by the commission, unless extended for good cause. A commission decision on a certified issue is not subject to motion for reconsideration.

§21.67. Dismissal of a Proceeding.

(a) Motions for dismissal.

(1) Upon the motion of the presiding officer or the motion of any party, the presiding officer may dismiss, with or without prejudice, any proceeding, or claim within a proceeding, without an evidentiary hearing, for any of the following reasons:

(A) lack of jurisdiction;

(B) moot questions or obsolete petitions;

(C) res judicata;

(D) collateral estoppel;

(E) unnecessary duplication of proceedings;

(F) failure to prosecute;

(G) failure to state a claim for which relief can be granted; or

(H) other good cause shown.

(2) The party that initiated the proceeding shall have five working days from the date of receipt to respond to a motion to dismiss. If a hearing on the motion to dismiss is held, that hearing shall be confined to the issues raised by the motion to dismiss.

(3) If the presiding officer determines that the proceeding, or any claim within the proceeding, should be dismissed, the presiding officer shall issue an order dismissing the proceeding or claim within the proceeding.

(4) An order dismissing a proceeding, or claim within a proceeding, under paragraph (3) of this subsection may be appealed pursuant to §21.75 of this title (relating to Motions for Clarification and Motions for Reconsideration).

(b) Withdrawal of application.

(1) A party that initiated a proceeding may withdraw its application, petition, or complaint, without prejudice to refiling of same, at any time before that party has filed its direct testimony.

(2) After the filing of its direct testimony, a party may withdraw its application, petition, or complaint, without prejudice to refiling of same, only upon a finding of good cause by the presiding officer.

(3) In the absence of a finding of good cause, a party, after the filing of its direct testimony, may withdraw its application, petition, or complaint, with prejudice to refiling of same.

(4) Alternatively, in the absence of a finding of good cause, a party, after the filing of its direct testimony, may withdraw its application, petition, or complaint without prejudice if all parties agree. If parties do not agree, the withdrawing party may be allowed to withdraw without prejudice only upon the payment of the other parties' reasonable attorneys' fees and costs.

(5) If withdrawal of an application is approved, the presiding officer shall issue an order of dismissal with or without prejudice, as appropriate.

§21.73. Consolidation of Dockets, Consolidation of Issues, and Joint Filings.

(a) Consolidation of dockets. The commission or presiding officer may on its own motion or upon a motion from a party, to the extent practical, consolidate separate dispute resolution proceedings and the approval proceedings pursuant to this chapter.

(b) Consolidation of issues. The commission or presiding officer may on its own motion or upon the motion of a party, to the extent practical, consolidate similar issues from separate dispute resolution and approval proceedings pursuant to this chapter.

(c) Joint filings or joinder.

(1) Joint filings. Parties may jointly file dispute resolution and approval proceedings when there are common issues of law or fact.

(2) Joinder. A person may request joinder when there are common issues of law or fact and shall agree to be bound by any judgment rendered as to the common issues.

(3) Factors to be considered. The commission or presiding officer shall determine whether the proceedings should be maintained as a joint proceeding or be severed or should be consolidated in whole or in part. In making this determination the commission or presiding officer shall consider:

(A) administrative burden on the parties and the commission;

(B) whether there are issues of fact or law common to the proceedings;

(C) whether separate proceedings would create a risk of inconsistent resolutions; and

(D) whether allowing joinder or consolidation would result in undue delay of the proceedings or prejudice any party.

§21.75. Motions for Clarification and Motions for Reconsideration.

(a) Motions for clarification. This subsection only applies to motions for clarification of Arbitration Awards. Motions for clarification of an Arbitration Award may be made to the presiding officer requesting that an ambiguity be clarified or an error, other than an error of law, be corrected.

(1) Procedure. A motion for clarification shall be filed within ten working days of the issuance of the presiding officer's decision or order. The motion for clarification shall be served on all parties by hand delivery, facsimile transmission, or by overnight courier delivery. Responses to a motion for clarification shall be filed within five working days of the filing of the motion.

(2) Content. A motion for clarification shall specify the alleged ambiguity or error and, as appropriate, include proposed contract language that corrects the alleged ambiguity or error.

(3) Denial or granting of motion. The presiding officer shall grant or deny the motion within ten working days of the filing of the motion. If the motion is granted, the presiding officer shall issue a decision within 15 working days of the filing of the motion.

(b) Motions for reconsideration. Motions for rehearing, appeals, or motions for reconsideration shall be styled "Motion for Reconsideration" and shall be made directly to the commission. For purposes of dispute resolution and approval proceedings the terms "appeal," "motion for rehearing," and "motion for reconsideration" are interchangeable.

(1) Limitations.

(A) Only parties to the negotiation in a compulsory arbitration pursuant to §21.95 of this title (relating to Compulsory Arbitration) may file motions for reconsideration.

(B) In a proceeding pursuant to §21.97 of this title (relating to Approval of Negotiated Agreements), only parties to the negotiated agreement may file motions for reconsideration. Issues subject to motions for reconsideration are limited to modifications made to the agreement.

(C) In a proceeding pursuant to §21.99 of this title (relating to Approval of Arbitrated Agreements), only parties to the arbitrated agreement may file motions for reconsideration.

(D) In a proceeding pursuant to §21.125 of this title (relating to Formal Dispute Resolution Proceeding), only parties to the agreement may file motions for reconsideration. Issues subject to motions for reconsideration are limited to interpretations of and modifications made to the negotiated agreement.

(E) In a proceeding pursuant to §21.101 of this title (relating to Approval of Amendments to Existing Interconnection Agreements), only parties to the amended agreement may file motions for reconsideration. Issues subject to motions for reconsideration are limited to amendments or modifications made to the agreement.

(F) In a proceeding pursuant to §21.105 of this title (relating to Approval of Agreements Adopting Terms and Conditions of T2A), only parties to the agreement may file motions for reconsideration. Issues subject to motions for reconsideration are limited to non-T2A portions of the agreement.

(G) Any motions for reconsideration not filed by parties will be considered as comment filed by an interested party.

(2) Procedure. A motion for reconsideration shall be filed within 20 days of the issuance of the order under consideration. The motion for reconsideration shall be served on all parties by hand delivery, facsimile transmission, or by overnight courier delivery. Responses to a motion for reconsideration shall be filed within ten days of the filing of the motion.

(3) Content. A motion for reconsideration shall specify the reasons why the order is unjustified or improper. If the moving party objects to contract language recommended by the presiding officer, then the motion shall contain alternative contract language along with an explanation of why the alternative language is appropriate.

(4) Agenda ballot. Upon filing a motion for reconsideration, the Policy Development Division shall send separate ballots to each Commissioner to determine whether the motion will be considered at an open meeting. The Policy Development Division shall notify the parties by facsimile and electronic mail whether any Commissioner by individual ballot has added the motion to an open meeting agenda, but will not identify the requesting Commissioner(s).

(5) Denial or granting of motion.

(A) The motion is deemed denied if, after five working days of the filing of a motion, no Commissioner by separate agenda ballot has placed the motion on the agenda for an open meeting. In such event, the Policy Development Division shall so notify the parties by facsimile and electronic mail.

(B) If a Commissioner does ballot in favor of considering the motion, it shall be placed on the agenda for the next regularly scheduled open meeting or such other meeting as the Commissioner may direct by the agenda ballot. In the event two or more Commissioners vote to consider the motion, but differ as to the date the motion shall be heard, the motion shall be placed on the latest of the dates specified by the ballots.

§21.77. Confidential Material.

(a) General. If any party believes that any material it files with the commission or provides to the presiding officer during any proceeding under this chapter should be exempt from disclosure under the Texas Public Information Act (TPIA), it may designate such material as confidential information and submit the information under seal, pursuant to the requirements of §22.71(d) of this title (relating to Filing of Pleadings, Documents and Other Materials). Material is presumed to be subject to disclosure under the TPIA unless designated as confidential.

(b) Disputes. In the event that a presiding officer believes that the material is not confidential, the presiding officer shall, unless waived by the party challenging the declassification, hold a hearing regarding declassification of the material. In the event a party disputes another party's designation of material as confidential, such party shall file a motion challenging the designation at least 15 working days before the hearing on the merits. The challenge shall include a statement as to why the material should not be held to be confidential under current legal standards, or that the party asserting confidentiality did not allow counsel to review such materials. The presiding officer shall notify the party of his belief that the material is not confidential at least ten days before the hearing on the merits. The party asserting confidentiality has three working days after the presiding officer notifies the party of his belief that the material is not confidential, or after another party's challenge is filed, to respond and bears the burden of proof on confidentiality. In determining whether material is exempt from disclosure, the presiding officer shall consider whether the material is considered to be confidential under the TPIA. Any presiding officer's decision relating to whether or not material is confidential is subject to motion for reconsideration to the commission. A party shall have three working days from the date of the presiding officer's decision to file a motion for reconsideration. The commission's decision shall be deemed a final administrative decision.

(c) Exemption from disclosure. Material received by the commission or by a presiding officer in accordance with this procedure shall be treated as exempt from public disclosure until and unless such confidential information is determined to be public information pursuant to a specific provision in the TPIA, an Open Records Decision by the Attorney General, an order of the presiding officer entered after notice to the parties and hearing, or an order of a court having jurisdiction.

(d) Material provided to parties. Material claimed to be confidential information must be provided to the other parties to the arbitration hearing provided they agree in writing to treat the material as confidential information. One copy of the material shall be provided to each party. The receiving party shall keep the confidential information properly secured during all times when the documents are not being reviewed by a person authorized to do so. The receiving party shall only make copies of the confidential information as permitted by the protective order in place in the proceeding.

(e) Review by parties. Unless otherwise agreed to by the parties or ordered by the presiding officer, each receiving party may designate no more than eight individuals associated with the party who will be allowed access to the confidential information. The individuals who may have access to the confidential information shall be limited to the receiving party's counsel of record, regulatory personnel acting at the direction of counsel, and subject matter experts and outside consultants employed by the receiving party. These individuals may use the confidential information only for the purpose of presenting or responding to matters raised in the arbitration hearing during the course of that proceeding. These individuals shall not disclose the confidential information to any person who is not authorized under this section, or the protective order in effect for that proceeding, to view this information.

(f) Acknowledgment. Each individual who is provided access to the confidential information shall sign a notarized statement affirmatively stating that the individual has personally reviewed this section and the protective order in the proceeding and understands and will observe the limitations upon the use and disclosure of confidential information. By signing such statements a party may not be deemed to have acquiesced in the designation of the material as confidential information or to have waived any rights to contest such designation or to seek further disclosure of the confidential information.

(g) Disposition of confidential information. Upon the completion of commission proceedings to review the arbitration agreement pursuant to FTA §252 and any appeals thereof, confidential information received by the parties shall be returned to the producing party. Any notes or work product prepared by the receiving party which were derived in whole or in part from the confidential information shall be destroyed at that time. Material filed with the commission will remain under seal at the commission and will continue to be treated as confidential information under this chapter. The commission may destroy confidential information in accordance with its records retention schedule.

(h) Use in other proceedings. Any confidential information produced pursuant to this section may not be used in any other proceedings before the commission. However, this section does not prevent the discovery or admissibility of any material otherwise discoverable, merely because the material was presented in the course of an arbitration hearing under 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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SUBCHAPTER D. DISPUTE RESOLUTION

16 TAC §§21.91, 21.93, 21.95, 21.97, 21.99, 21.101, 21.103

These new sections are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998, Supplement 2004) (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, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act: §14.002, §14.052 and the Federal Telecommunications Act of 1996, 47 U.S.C. §151, *et. seq*.

§21.91. Mediation.

(a) Request for mediation. Any party negotiating a request for interconnection, services, or network elements under the Federal Telecommunications Act of 1996 (FTA) §251 may request, in writing, at any time, that the commission assist the parties by mediating any differences that have arisen in the negotiations. The request shall identify the parties involved in the negotiations, the potential issues for which mediation may be needed and, if possible, an estimate of the time period during which mediation will be pursued.

(b) Mediator. Upon receipt of a request for mediation, the commission shall notify the parties of the commission employee who is assigned to serve as a mediator. The commission employee assigned to serve as a mediator may not participate in arbitration or review and approval proceedings initiated under this chapter. The mediator will work with the parties to establish an appropriate schedule and procedure for mediating any disputes. The mediator's role is limited to assisting the parties in attempting to reach an agreed resolution of the issues.

(c) Procedure. Mediation proceedings shall not be transcribed and only parties to the negotiation may participate in the mediation proceeding.

(d) Mediation and formal dispute resolution. In the event a party negotiating a request for interconnection, services, or network elements under FTA has requested both formal dispute resolution and mediation, and the responding party has agreed to mediation, the mediation will precede formal dispute resolution and any procedural deadlines applicable to formal dispute resolution are tolled for the duration of the mediation proceedings, including time needed for commission approval of a mediated agreement. To the extent parties do not successfully mediate all matters at issue, the formal dispute resolution proceeding shall not be reinitiated until the parties jointly file an update of unresolved issues and a revised procedural schedule.

§21.95. Compulsory Arbitration.

(a) Request for arbitration.

(1) Any party to negotiations concerning a request for interconnection, services or network elements pursuant to the Federal Telecommunications Act of 1996 (FTA) §251 may request arbitration by the commission by filing with the commission's filing clerk a petition for arbitration. The petitioner shall send a copy of the petition and any documentation to the negotiating party with whom agreement cannot be reached not later than the day on which the commission receives the petition.

(2) The petition must be received by the commission during the period from the 135th to the 160th day (inclusive) after the date the negotiating party received the request for negotiation. The commission shall perform a sufficiency review of the petition. To the extent that a petition is determined to be insufficient, the commission shall file a notice of insufficiency within five working days of receipt of the petition. In the absence of a notice of insufficiency, the petition shall be presumed sufficient.

(3) Where a petition for arbitration is found insufficient, the presiding officer may consider dismissal without prejudice pursuant to §21.67 of this title (relating to Dismissal of a Proceeding) and order the petitioner to refile.

(4) A petition that is procedurally sufficient must be on file with the commission by the 160th day after the date on which petitioner requested negotiation.

(5) In addition to the requirements of form specified in §21.33 of this title (relating to Formal Requisites of Pleadings and Documents to be Filed with the Commission) the petition for arbitration shall include:

(A) the name, address, telephone number, facsimile number, and email address of each party to the negotiations and the party's designated representative;

(B) a description of the parties' efforts to resolve their differences by negotiation, including but not limited to the dates of the request for negotiation and the projected timeline for compliance under FTA deadlines;

(C) a Decision Point List (DPL) that includes a list of any unresolved issues and the position of each of the parties on each of those issues;

(D) proposed contract language for each unresolved issue;

(E) all agreed contract language;

(F) if the request concerns a request for interconnection under §26.272 of this title (relating to Interconnection), the material required by §26.272(g) of this title;

(G) the most current version of the interconnection agreement being negotiated by the parties, if any, containing both the agreed language and the disputed language of both parties; and

(H) a certificate of service.

(b) Response. Any non-petitioning party to the negotiation shall respond to the request for arbitration by filing the response with the commission's filing clerk and serving a copy on each party to the negotiation. Pursuant to FTA §252(b)(3) the response must be filed within 25 days after the commission received the request for arbitration. The response shall indicate any disagreement with the matters contained in the petition for arbitration, including a detailed response to the DPL and alternative proposed contract language, and may provide such additional information as the party wishes to present.

(c) Selection and replacement of presiding officer.

(1) Upon receipt of a complete petition for arbitration, a presiding officer shall be selected to act for the commission, unless two or more of the Commissioners choose to hear the arbitration en banc. The parties shall be notified of the commission-designated presiding officer, or of the Commissioners' decision to act as presiding officer themselves. The presiding officer along with designated commission staff will act as an arbitration team. The presiding officer may be advised on legal and technical issues by members of the arbitration team. The commission staff members selected to be part of the team shall be identified to the parties.

(2) If at any time a presiding officer is unable to continue presiding over a case, a substitute presiding officer shall be appointed who shall perform any remaining functions without the necessity of repeating any previous proceedings. The substitute presiding officer shall read the record of the proceedings that occurred prior to their appointment before issuing an arbitration award or other decision.

(d) Participation. Only parties to the negotiation may participate as parties in the arbitration hearing. The presiding officer may allow interested persons to file a statement of position to be considered in the proceeding.

(e) Prehearing conference; challenges. As soon as practical after selection, the presiding officer shall schedule a prehearing conference with the parties to the arbitration. At the prehearing conference, parties should be prepared to raise any challenges to the appointment of the presiding officer or to the inclusion of any issue identified for arbitration in the petition and responses. If such challenges are not raised at the first prehearing conference, they shall be deemed waived by the parties. The presiding officer shall serve parties with the orders ruling on challenges within ten working days of the first prehearing conference. The presiding officer has the authority to schedule additional prehearing conferences to consider discovery, procedural schedules, clarification of issues, amending pleadings, stipulations, evidentiary matters, requests for interim relief, and any other matters as may assist the disposition of the proceedings in a fair and efficient manner.

(f) Notice. The presiding officer shall make arrangements for the arbitration hearing, which may not be scheduled earlier than 35 days after the commission receives a complete request for arbitration. The presiding officer shall notify the parties, not less than ten days before the hearing, of the date, time, and location of the hearing.

(g) Record of hearing. The arbitration hearing shall be open to the public. If any party requests it, a stenographic record shall be made of the hearing by an official court reporter appointed by the commission. It is the responsibility of the party ordering the stenographic record to request that the commission have an official reporter present. A party may purchase a copy of the transcript from the official reporter at rates set by the commission. The court reporter shall provide the transcript and exhibits in a hearing to the presiding officer at the time the transcript is provided to the requesting party. If no court reporter is requested by a party, the presiding officer shall record the proceedings and maintain the official record and exhibits. Each party to the arbitration hearing shall be responsible for its own costs of participation in the arbitration process.

(h) Hearing procedures.

(1) The parties to the arbitration are entitled to be heard, to present evidence, and to cross-examine witnesses appearing at the hearing.

(2) Redirect may be allowed at the discretion of the presiding officer, provided that parties have reserved time for redirect.

(3) The presiding officer may temporarily close the arbitration hearing to the public to hear evidence containing information filed as confidential under §21.77 of this title (relating to Confidential Material). The presiding officer shall close the hearing only if there is no other practical means of protecting the confidentiality of the information.

(4) In addition to providing sufficient copies for all parties, the presiding officer, and, if appropriate, the court reporter, parties shall provide three copies of all exhibits for purposes of appeal at the hearing.

(i) Applicable rules. The rules of privilege and exemption recognized by Texas law shall apply to arbitration proceedings under this subchapter. The Texas Rules of Civil Procedure, Texas Rules of Civil Evidence, Texas Administrative Procedure Act §2001.081, and Chapter 22 of this title (relating to Practice and Procedure) may be used as guidance in proceedings under this chapter.

(j) Authority of presiding officer.

(1) Generally. The presiding officer has broad discretion in conducting the arbitration hearing, including the authority given to a presiding officer pursuant to §22.202 of this title (relating to Presiding Officer). In addition, the presiding officer has broad discretion to ask

clarifying questions and to direct a party or a witness to provide information, at any time during the proceeding, as set out in subsection (q) of this section.

(2) Subpoenas.

(A) Issuance of Subpoenas. Pursuant to APA, §2001.089, the presiding officer may issue a subpoena for the attendance of a witness or for the production of books, records, papers, or other objects. Motions for subpoenas to compel the production of books, records, papers, or other objects shall describe with reasonable particularity the objects desired and the material and relevant facts sought to be proved by them.

(B) Service and return. A subpoena may be addressed to the sheriff or any constable, who may serve the subpoena in any manner authorized by the Texas Rules of Civil Procedure; and service thereof may be accepted by any witness by a written memorandum, signed by such witness, attached to the subpoena, or by any other method authorized by the Texas Rules of Civil Procedure.

(C) Fees. Subpoenas shall be issued by the presiding officer only after sums have been deposited to ensure payment of expense fees incident to the subpoenas. Payment of any such fees or expenses shall be made in the manner prescribed in APA, §2001.089 and §2001.103.

(D) Motions to quash. Motions to quash subpoenas shall be filed within five working days after the issuance of the subpoena, unless the party ordered to respond to the subpoena shows that it was justifiably unable to file objections at that time.

(k) Discovery. Pursuant to subsection (j) of this section, the presiding officer has broad discretion regarding discovery. Except as modified in paragraphs (1) - (3) of this subsection, Chapter 22, Subchapter H of this title (relating to Discovery Procedures) shall serve as guidance for all discovery conducted under this chapter.

(1) Scope. The presiding officer shall permit only such discovery as the presiding officer determines is essential, considering public policy, the needs of the parties and the commission, the commission's deadlines under FTA §252(b)(4)(c), and considering the desirability of making discovery effective, expeditious and cost effective. The presiding officer shall be the judge of the relevance and materiality of the discovery sought.

(2) Limits. Parties may obtain discovery relevant to the arbitration by submitting requests for information (RFIs), requests for inspection and production of documents (RFPs), requests for admissions (RFAs), and depositions by oral or written examination. RFIs, RFPs and RFAs shall contain no more than 40 requests (subparts are counted as separate requests). The presiding officer, upon a motion filed by a party, may permit a party to propound more than 40 requests provided that the moving party has made a clear demonstration of the relevance of and the need for the additional requests. Factors to be considered by the presiding officer in determining whether to allow additional requests shall include, but are not limited to: the number of unresolved issues, the complexity of the unresolved issues, and whether the proceeding addresses costs and/or cost studies.

(3) Timing. Discovery may commence upon the filing of the petition for arbitration. Parties shall file a proposed discovery schedule that accommodates the commission's deadlines under FTA §252(b)(4)(c), taking into consideration relevant commission regulatory timeframes. The presiding officer may impose a discovery schedule that accommodates the commission's deadlines under FTA §252(b)(4)(c). If any party requests an extension that will affect the ability to complete the proceeding within the commission's deadlines under FTA §252(b)(4)(c), all parties must agree to the extension and file a joint waiver to extend such deadlines.

(l) Time for hearing. The arbitration hearing shall be conducted expeditiously and in an informal manner. The presiding officer is empowered to impose reasonable time limits. The presiding officer may continue a hearing from time to time and place to place. Unless additional time is allowed by the commission or additional information is requested by the presiding officer, the hearing may not exceed five working days.

(m) Evidence.

(1) Relevance. The parties may only offer such evidence as is relevant and material to a proceeding and shall provide such evidence as the presiding officer may deem necessary to determination of the proceeding. The presiding officer shall be the judge of the relevance and materiality of the evidence offered.

(2) Conformity to rules. The presiding officer shall have the authority to decide whether or not to apply strict rules of evidence (or any other rules) as to the admissibility, relevance, or weight of any material tendered by a party on any matter of fact or expert opinion. The presiding officer shall provide notice of this decision prior to the deadline for filing direct testimony.

(3) Exhibits. The offering of exhibits shall be governed by §22.226 of this title (relating to Exhibits).

(4) Offers of proof. Offers of proof shall be governed by §22.227 of this title (relating to Offers of Proof).

(5) Stipulation of facts. Stipulation of facts shall be governed by §22.228 of this title (relating to Stipulation of Facts).

(6) Prefiled evidence.

(A) Parties to the hearing shall provide their direct cases to the presiding officer at least 15 working days prior to the hearing unless the presiding officer establishes a different deadline. Ten copies of the direct case shall be filed with the commission filing clerk and a copy shall be provided to each of the other parties to the hearing at the same time it is provided to the presiding officer.

(B) The prepared direct case shall include all of the party's direct evidence on all DPL issues in the proceeding, including written direct testimony of all of its witnesses and all exhibits that the party intends to offer as part of its direct case. The prepared case shall present the entirety of the party's direct evidence on each of the issues in controversy and shall serve as the party's complete direct case.

(C) Prefiled evidence shall include, to the extent allowed or requested by the presiding officer, prefiled rebuttal testimony and exhibits and shall be filed not less than eight working days prior to the hearing unless the presiding officer establishes a different deadline.

(7) Public Information. Except as provided in §21.77 of this title (relating to Confidential Information), all materials filed with the commission or provided to the presiding officer shall be considered public information under the Texas Public Information Act (TPIA), Texas Government Code, §552.001, *et. seq*.

(n) Sanctions. Whenever a party fails to comply with a presiding officer's order or commission rules in a manner deemed material by the presiding officer, the presiding officer shall fix a reasonable period of time for compliance. If the party does not comply within that time period, then after notice and opportunity for a hearing, the presiding officer may impose a remedy as set forth in §21.71 of this title (relating to Sanctions).

(o) Decision Point List (DPL) and witness list.

(1) Ten days after the filing of the response to the petition, the parties shall file a revised DPL that is jointly populated to the extent practicable, taking into consideration the status of discovery.

(2) Parties shall file a jointly populated DPL in a format approved by the presiding officer, no later than five working days before the commencement of the hearing. An electronic copy of the DPL shall also be provided. The DPL shall identify all issues to be addressed, the witnesses who will address each issue, and a short synopsis of each witness's position on each issue, with specific citation to the parties' testimony relevant to that issue. The DPL shall also provide the parties' competing contract language. Except as provided in §21.77 of this title (relating to Confidential Material), all materials filed with the commission or provided to the presiding officer shall be considered public information under the TPIA, Texas Government Code, §552.001, *et. seq*.

(p) Cross-examination. Each witness presenting written prefiled testimony shall be available for cross-examination by the other parties to the arbitration. The presiding officer shall judge the credibility of each witness and the weight to be given their testimony based upon their response to cross-examination. If the presiding officer determines that the witness's responses are evasive or non-responsive to the questions asked, the presiding officer may disregard the witness's testimony on the basis of a lack of credibility.

(q) Clarifying questions. The presiding officer or an arbitration team member, at any point during the proceeding, may ask clarifying questions and may direct a party or a witness to provide additional information as needed to fully develop the record of the proceeding. This has no effect on a party's responsibility to meet its burden of proof. If a party fails to present information requested by the presiding officer, the presiding officer shall render a decision on the basis of the best information available from whatever source derived. Moreover, failure to provide requested information may subject a party to sanctions, as set forth in §21.71 of this title.

(r) Briefs. The presiding officer may require the parties to submit post-hearing briefs or written summaries of their positions. The presiding officer shall determine the filing deadline and any limitations on the length of such submissions. Reply briefs shall not be permitted unless the presiding officer determines that they would aid in the resolution of the proceeding, after consideration of applicable deadlines.

(s) Time for decision. The presiding officer shall endeavor to issue a Proposal for Award on the arbitration within 30 days after the filing of any post-hearing briefs. If post-hearing briefs are not filed, the presiding officer shall endeavor to issue the Proposal for Award within 30 days after the conclusion of the hearing. The arbitration team shall issue an arbitration award not later than nine months after the date on which a party receives a request for negotiation under FTA, unless the parties have waived the nine-month deadline in writing or orally on the record.

(t) Decision.

(1) Proposal for Award. The Proposal for Award shall be based upon the record of the arbitration hearing. The presiding officer may agree with the positions of one or more of the parties on any or all issues or may offer an independent resolution of the issues. The presiding officer is the judge of whether a party has met its burden of proof. The Proposal for Award shall include:

(A) a ruling on each of the issues presented for arbitration by the parties, including specific contract language;

(B) a statement of any conditions imposed on the parties to the agreement in order to comply with the provisions of FTA §252(c);

(C) a statement of how the final decision meets the requirements of FTA §251, including any regulations adopted by the Federal Communications Commission (FCC) pursuant to FTA §251;

(D) the rates for interconnection, services, and/or network elements established according to FTA §252(d);

(E) a schedule for implementation of the terms and conditions by the parties to the agreement;

(F) a narrative report explaining the rulings included in the Proposal for Award, unless the arbitration is conducted by two or more of the commissioners acting as the presiding officers; and

(G) to the extent that a ruling establishes a new or different price for an unbundled network element, combination of unbundled network elements, or resold service, a statement requiring that all certificated carriers be notified of such price either through web posting, mass mailing, or electronic mail within ten days of the date the ruling becomes final.

(2) Exceptions to the Proposal for Award. Within ten working days of the issuance of the Proposal for Award the parties shall file any Exceptions to the Proposal for Award specifying any alleged ambiguities or errors. To the extent that a party objects to contract language within the Proposal for Award, the party's Exceptions to the Proposal for Award must include alternative contract language along with an explanation of why the alternative language is appropriate, with citation to the record.

(3) Arbitration Award. The Arbitration Award shall be based upon the record of the arbitration hearing. The presiding officer shall endeavor to issue the Arbitration Award within ten working days of the receipt of parties' Exceptions to the Proposal for Award. The presiding officer may agree with the positions of one or more of the parties on any or all issues or may offer an independent resolution of the issues. The presiding officer is the judge of whether a party has met its burden of proof. The Arbitration Award shall include:

(A) a ruling on each of the issues presented for arbitration by the parties, including specific contract language;

(B) a statement of any conditions imposed on the parties to the agreement in order to comply with the provisions of FTA §252(c), if any;

(C) a statement of how the final decision meets the requirements of FTA §251, including any regulations adopted by the FCC pursuant to §251;

(D) the rates for interconnection, services, and/or network elements established according to FTA §252(d), as appropriate;

(E) a schedule for implementation of the terms and conditions by the parties to the agreement;

(F) a narrative report explaining the presiding officer's rationale for each of the rulings included in the final decision, unless the arbitration is conducted by two or more of the commissioners acting as the presiding officers; and

(G) to the extent that a ruling establishes a new or different price for an unbundled network element, combination of unbundled network elements, or resold service, a statement requiring that all certificated carriers be notified of such price either through web posting, mass mailing, or electronic mail within ten days of the date the ruling becomes final.

(u) Distribution. The Proposal for Award and Arbitration Award shall be filed with the commission as a public record and shall be mailed by first class mail, or transmitted via facsimile to all parties

of record in the arbitration. On the same day that a decision is issued, the presiding officer shall notify the parties by facsimile or electronic mail that a decision has been issued. If a decision involves 9-1-1 issues, the presiding officer shall also notify the Commission on State Emergency Communications (CSEC) by facsimile or electronic mail on the same day.

(v) Implementation. Unless modified, implementation of the terms and conditions of the Arbitration Award shall comply with §21.99 of this title (relating to Approval of Arbitrated Agreements).

(w) Motions for reconsideration. No motions for reconsideration of the Proposal for Award are permitted. Motions for reconsideration of the Arbitration Award shall be filed pursuant to §21.75 of this title (relating to Motions for Clarification and Motions for Reconsideration).

§21.97. Approval of Negotiated Agreements.

(a) Application. Any agreement adopted by negotiation shall be submitted to the commission for review and approval and may be submitted by any one of the parties to the agreement, provided that all parties to the agreement seek approval. The parties requesting approval shall submit an application for approval of the agreement with the commission's filing clerk and must serve a copy on each of the parties to the agreement. Any agreement submitted to the commission for approval is a public record and no portion of the agreement may be treated as confidential information under §21.77 of this title (relating to Confidential Material). An application for approval of a negotiated agreement shall include:

(1) a complete and unredacted copy of the negotiated agreement;

(2) the name, address, and telephone number of each of the parties to the agreement;

(3) an affidavit by each of the signatory parties explaining how the agreement is consistent with the public interest, convenience, and necessity, including all relevant requirements of state law; and

(4) to the extent that an agreement adopted by negotiation establishes a new or different price for an unbundled network element, combination of unbundled network elements, or resold service, a verified statement that all certificated carriers will be notified of such price either through web posting, mass mailing or electronic mail within ten days of the date the ruling becomes final.

(b) Notice. The presiding officer may require the parties to the agreement to provide reasonable notice of the filing of the agreement. The presiding officer may require publication of the notice in addition to direct notice to affected persons. At the presiding officer's discretion, notice may be provided by direct notice, electronic mail or a web posting, provided all affected persons are made aware of the website. The presiding officer shall determine the appropriate scope and wording of the notice to be provided.

(c) Proceedings.

(1) Administrative review. The commission delegates its authority to the presiding officer to administratively approve or deny any negotiated interconnection agreements. Notice of approval or denial shall be issued within 15 days of the filing of the application. If a notice of denial is filed, the notice of denial without prejudice shall include written findings indicating any deficiencies in the agreement. An application considered under this section shall be administratively reviewed by the presiding officer unless the presiding officer determines that a formal review of the application is appropriate pursuant to paragraph (2) of this subsection. Additionally, at the presiding officer's discretion, approval can be referred directly to the commission should the presiding officer determine that there is an issue(s) more appropriately decided by the commission that does not necessarily require formal resolution.

(2) Formal resolution. If the presiding officer determines that an application for approval of a negotiated agreement should not be approved administratively, a formal review may be conducted and may require formal resolution under §21.95 of this title (relating to Compulsory Arbitration) or §21.125 of this title (relating to Formal Dispute Resolution Proceeding), as appropriate.

(d) Comments. An interested person may file comments on the negotiated agreement by filing the comments with the commission's filing clerk and serving a copy of the comments on each party to the agreement within five days of filing of the application. The comments shall include the following information:

(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.

(e) Issues. In any proceeding conducted by the commission pursuant to subsection (c)(2) of this section, the commission will consider only evidence and argument concerning whether the agreement, or some portion thereof:

(1) discriminates against a telecommunications carrier that is not a party to the agreement; or

(2) is not consistent with the public interest, convenience, and necessity; or

(3) is not consistent with other requirements of state or federal law.

(f) Authority of presiding officer. The presiding officer has broad discretion in conducting the formal resolution, including the authority given to a presiding officer pursuant to §22.202 of this title (relating to Presiding Officer) and pursuant to §21.95 of this title (relating to Compulsory Arbitration). Discovery shall be governed by §21.95(k) of this title. In addition, in a formal resolution proceeding, the presiding officer has broad discretion to ask clarifying questions and to direct a party or a witness to provide information, at any time during the proceeding, as set out in §21.95(q) of this title.

(g) Filing of agreement. Once the presiding officer approves the agreement, then the parties to the agreement shall file two copies, one unbound, of the complete agreement with the filing clerk within 15 working days of the presiding officer's decision. The copies shall be clearly marked with the control number assigned to the proceeding and the language "Complete interconnection agreement as approved (or modified and approved) on (insert date)." Also within 15 working days of the approval of the agreement, the incumbent local exchange company (ILEC) shall post notice of the approved interconnection agreement on its website in a separate, easily identifiable area of the website. The ILEC website shall provide a complete list of approved interconnection agreements, listed alphabetically by carrier, including docket

numbers and effective dates. In addition, the ILEC website shall provide a direct link to the commission's website.

§21.99. Approval of Arbitrated Agreements.

(a) Application. Any interconnection agreement resulting from arbitration shall be submitted to the commission for approval and filed in the same proceeding within 30 days of the date of the presiding officer's Arbitration Award, unless otherwise provided. Following the issuance of the presiding officer's Arbitration Award under §21.95 of this title (relating to Compulsory Arbitration), the parties shall jointly file ten copies of the final interconnection agreement, with the commission's filing clerk, incorporating all contract language ordered by the presiding officer. Any interconnection agreement submitted to the commission for approval is a public record and no portion of the interconnection agreement may be treated as confidential information under §21.77 of this title (relating to Confidential Material). The application for approval of an arbitrated agreement shall be accompanied by:

(1) a complete and unredacted copy of the arbitrated interconnection agreement including any portions of the agreement that were not the subject of arbitration;

(2) the name, address, telephone number, facsimile number, and email address of each of the parties to the agreement; and

(3) to the extent that an agreement adopted by arbitration establishes a new or different price for an unbundled network element, combination of unbundled network elements, or resold service, a verified statement that all certificated carriers will be notified of such price either through web posting, mass mailing or electronic mail within ten days of the date the ruling becomes final.

(b) Parties' comments. Any party wishing to file comments on the interconnection agreement incorporating the contract language ordered by the presiding officer as required in subsection (a) of this section, shall do so within five calendar days following the filing of the application under subsection (a) of this section. Any reply comments shall be filed within three calendar days of any initial comments.

(c) Commission approval. The commission will issue its final decision on an agreement adopted by arbitration within 30 days following the filing of the application under subsection (a) of this section. The commission's final decision may reject, approve, or modify the agreement, with written findings as to any deficiencies. If the commission does not act to approve or reject the agreement adopted by arbitration within 30 days after submission by the parties under subsection (a) of this section, the agreement shall be deemed approved.

(d) Effective date. An interconnection agreement approved by arbitration becomes effective within ten days after the date that the commission's order approving the interconnection agreement is signed by all Commissioners unless otherwise specified in the order approving the agreement.

(e) Filing of agreement. Following the commission's approval of the agreement, the parties to the interconnection agreement shall file two copies, one unbound, of the complete agreement, consistent with the commission's direction, with the commission's filing clerk within ten working days of the commission's decision. The copies shall be clearly marked with the control number for the proceeding and the language "Complete interconnection agreement (as modified) and approved on (insert date)." Also within 15 working days of the approval of the agreement, the incumbent local exchange company (ILEC) shall post notice of the approved interconnection agreement on its website in a separate, easily identifiable area of the website. The ILEC website shall provide a complete list of approved interconnection agreements, listed alphabetically by carrier, including docket numbers and effective dates. In addition, the ILEC website shall provide a direct link to the commission's website.

§21.101. Approval of Amendments to Existing Interconnection Agreements.

(a) Application. Any amendments, including modifications, to a previously approved interconnection agreement shall be submitted to the commission for review and approval. Any one party to the agreement may file the application for approval of the amendments, provided that all parties to the agreement seek approval. The parties requesting approval shall file three copies of the application with the commission's filing clerk and, when applicable, serve a copy on each of the other parties to the agreement. An application for approval of an amended agreement shall include:

(1) a complete and unredacted copy of the amended portions of the interconnection agreement, along with any other relevant portions to place the amendments in context;

(2) the name, address, telephone number, facsimile number, and email address of each of the parties to the agreement;

(3) an affidavit by each of the signatory parties explaining how the agreement is consistent with the public interest, convenience, and necessity, including all relevant requirements of state law; and

(4) to the extent that an amendment to previously approved interconnection agreement establishes a new or different price for an unbundled network element, combination of unbundled network elements, or resold service, a verified statement that all certificated carriers will be notified of such price either through web posting, mass mailing or electronic mail within ten days of the date the ruling becomes final.

(b) Notice. The commission may require the parties to the agreement to provide reasonable notice of the filing of the agreement. The commission may require publication of the notice in addition to direct notice to affected persons. At the commission's discretion, direct notice may be provided by electronic mail or a website, provided all affected persons are made aware of the website. The commission shall determine the appropriate scope and wording of the notice to be provided.

(c) Proceeding.

(1) Administrative review. The commission delegates its authority to the presiding officer to administratively approve or deny any interconnection agreement amendments. Notice of approval or denial shall be issued within 15 days of the filing of the application. If a notice of denial is filed, the notice of denial without prejudice shall include written findings indicating any deficiencies in the agreement. Amendments to interconnection agreements shall be administratively reviewed by the presiding officer unless the presiding officer determines that a formal review of the amendments is appropriate pursuant to paragraph (2) of this subsection. At the presiding officer's discretion, approval can be referred directly to the commission should the presiding officer determine that there is an issue(s) more appropriately decided by the commission that does not necessarily require formal resolution.

(2) Formal resolution. If the presiding officer determines that an application for approval of an amendment to an interconnection agreement cannot be administratively approved, a formal review may be conducted and may require formal resolution under §21.95 of this title (relating to Compulsory Arbitration) or §21.125 of this title (relating to Formal Dispute Resolution Proceeding), as appropriate.

(d) Comments. An interested person may file comments on the amended agreement by filing the comments with the commission's

filing clerk and serving a copy of the comments on each party to the agreement within five days of the filing of the application. The comments shall include the following information:

(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.

(e) Issues. In any proceeding conducted by the commission pursuant to subsection (c)(2) of this section, the commission will consider only evidence and argument concerning whether the agreement, or some portion thereof:

(1) discriminates against a telecommunications carrier that is not a party to the agreement; or

(2) is not consistent with the public interest, convenience, and necessity; or

(3) is not consistent with other requirements of state law.

(f) Authority of presiding officer. The presiding officer has broad discretion in conducting the proceeding, including the authority given to a presiding officer pursuant to §22.202 of this title (relating to Presiding Officer) and pursuant to §21.95 of this title. Discovery shall be governed by §21.95(k) of this title. In addition, the presiding officer has broad discretion to ask clarifying questions and to direct a party or a witness to provide information, at any time during the proceeding, as set out in §21.95(q) of this title.

(g) Effective date. Any amendment to an existing interconnection agreement shall become effective upon issuance by the commission of a notice of approval.

(h) Formal approval. When an amendment to an existing interconnection agreement is subject to the formal review process as proposed in subsection (c) of this section, the commission will issue its final decision on the amendment within 90 days following the filing of the application. The commission may reject, approve, or modify the amendment, or the commission may remand the agreement to the presiding officer for further proceedings. If the commission rejects the amendment, the final decision shall include written findings indicating any deficiencies in the amendment.

(i) Filing of agreement. If the presiding officer approves the amendments to the agreement, the parties to the agreement shall file two copies, one unbound, of the complete amended interconnection agreement with the commission's filing clerk within ten working days of the presiding officer's decision. The copies shall be clearly marked with the control number assigned to the proceeding and the language "Amended interconnection agreement as approved (or modified and approved) on (insert date)." Also within 15 working days of the approval of the agreement, the incumbent local exchange company (ILEC) shall post notice of the approved interconnection agreement on its website in a separate, easily identifiable area of the website. The ILEC website shall provide a complete list of approved interconnection agreements, listed alphabetically by carrier, including docket numbers and effective dates. In addition, the ILEC website shall provide a direct link to the commission's website.

§21.103. Approval of Agreements Adopting Terms and Conditions Pursuant to Federal Telecommunications Act of 1996 (FTA) §252(i).

(a) Application. Under the Federal Telecommunications Act of 1996 (FTA) §252(i), a local exchange carrier shall make available within 15 working days of receipt of request, any interconnection, service, or network element provided under a previously approved interconnection agreement to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement. Any agreement adopting terms and conditions of a previously approved interconnection agreement pursuant to FTA §252(i) shall be submitted to the commission for review and approval. Any or all of the parties to the agreement may file the application for approval. The parties requesting approval shall file three copies of the application with the commission's filing clerk and, when applicable, serve a copy on each of the other parties to the agreement. An application for approval of an agreement adopting terms and conditions pursuant to FTA §252(i) shall include:

(1) a complete and unredacted copy of the agreement;

(2) the name, address, telephone number, facsimile number, and email address of each of the parties to the agreement;

(3) the identity of the previously approved interconnection agreement from which the agreement is taken, including specific docket number and contract effective date and term; and

(4) an affidavit from the requesting telecommunications carrier explaining how the agreement is consistent with the public interest, convenience, and necessity, including all relevant requirements of state law.

(b) Provisions incorporated from §21.101 of this title (relating to the Approval of Amendments to Existing Interconnection Agreements). Applications for approval filed under this section shall be processed according to the following provisions of §21.101 of this title, which are incorporated by reference into this section: §21.101(b), (c), (d), (e), (f), and (g).

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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Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7223

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SUBCHAPTER E. POST-INTERCONNECTION AGREEMENT DISPUTE RESOLUTION

16 TAC §§21.121, 21.123, 21.125, 21.127, 21.129

These new sections are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998, Supplement 2004) (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, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act: §14.002, §14.052 and the Federal Telecommunications Act of 1996, 47 U.S.C. §151, *et. seq*.

§21.123. Informal Settlement Conference.

(a) Filing a request. Either party to an interconnection agreement may request an informal settlement conference by filing ten copies of a written request with the commission and, on the same day, delivering a copy of the request either by hand delivery or by facsimile to the other party (respondent) to the interconnection agreement from which the dispute arises. The written request should include:

(1) The name, address, telephone number, facsimile number, and email address of each party to the interconnection agreement and the requesting party's designated representative;

(2) A description of the parties' efforts to resolve their differences by negotiation;

(3) A list of the discrete issues in dispute, with a cross-reference to the area or areas of the agreement applicable or pertaining to the issues in dispute; and

(4) The requesting party's proposed solution to the dispute.

(b) The settlement conference. The commission staff conducting the informal settlement conference shall notify the parties of the time, date, and location of the settlement conference, which, if held, shall be held no later than ten working days from the date the request was filed. The commission staff may require the respondent to file a response to the request. The parties should provide the appropriate personnel with authority to discuss and to resolve the disputes at the settlement conference. If the parties are in disagreement as to the need for a settlement conference, the presiding officer may deny the request for good cause.

(c) Conduct. The settlement conference shall be conducted as informal meetings and will not be transcribed. Only parties to the interconnection agreement may participate as parties to the settlement conference.

(d) Results of settlement conference. The settlement conference may result in an agreement on the resolution of the dispute described in the request. If an agreement is reached, the agreement will be binding on the parties. In the event that the parties do not reach an agreement as a result of the settlement conference, either party may utilize other procedures for dispute resolution provided in this subchapter. The commission staff conducting the informal settlement conference may participate in a subsequent dispute resolution proceeding involving the parties to the informal settlement conference.

(e) Both formal dispute resolution and informal settlement request. In the event a party negotiating a request for interconnection, services, or network elements under the Federal Telecommunications Act of 1996 (FTA) has requested both formal dispute resolution and an informal settlement conference, the informal settlement conference will precede formal dispute resolution. If agreed to by both parties, any procedural deadlines applicable to formal dispute resolution will be tolled for the duration of the informal settlement proceedings, including time needed for commission approval of an informal settlement agreement. To the extent parties do not settle all matters at issue in the informal settlement conference, the formal dispute resolution proceeding shall not be initiated until the parties jointly file an update of unresolved issues and a revised procedural schedule.

§21.125. Formal Dispute Resolution Proceeding.

(a) Initiation of formal proceeding. A formal proceeding for dispute resolution under this subchapter will commence when a party files a petition with the commission and, on the same day, delivers a copy of the petition either by hand delivery or by facsimile to the other party (respondent) to the interconnection agreement from which the dispute arises.

(1) The petition shall comply with §21.33 of this title (relating to Formal Requisites of Pleadings and Documents to be Filed with the Commission). The petition shall include:

(A) the name, address, telephone number, facsimile number, and email address of each party to the interconnection agreement and the petitioner's designated representative;

(B) a description of the parties' efforts to resolve their differences by negotiation;

(C) a detailed list of the discrete issues in dispute, with a cross-reference to the area or areas of the parties' most current interconnection agreement, identified by docket number, applicable or pertaining to the issues in dispute;

(D) an identification of pertinent background facts and relevant law or rules applicable to each disputed issue;

(E) the petitioner's proposed solution to the dispute;

(F) proposed modified contract language, if any; and

(G) a certificate of service.

(2) To the extent applicable, the petitioner may also include in the petition a request for an expedited ruling under §21.127 of this title (relating to Request for Expedited Ruling) or an interim ruling under §21.129 of this title (relating to Request for Interim Ruling Pending Dispute Resolution).

(3) The commission shall perform a sufficiency review of a petition. To the extent that a petition is determined to be insufficient, the commission shall file a notice of insufficiency within five working days of receipt of the petition. In the absence of a notice of insufficiency, the petition shall be presumed sufficient.

(4) Where a request for formal dispute resolution found insufficient, the presiding officer may consider dismissal without prejudice pursuant to §21.67 of this title (relating to Dismissal of a Proceeding) and order the party to refile.

(b) Response to the petition. Unless §21.127 or §21.129 of this title apply, the respondent shall file a response to the petition within ten days after the filing of the petition. On the response filing date, the respondent shall serve a copy of the response on the petitioner. The response shall specifically affirm or deny each allegation in the petition. The response shall include the respondent's position on each issue in dispute, a cross-reference to the area or areas of the parties' most current interconnection agreement, identified by docket number, applicable or pertaining to the issue in dispute, and the respondent's proposed solution on each issue in dispute. In addition, the response also shall:

(1) stipulate to any undisputed facts; and

(2) identify relevant law or rules applicable to each disputed issue.

(c) Reply to response to complaint. Unless §21.127 or §21.129 of this title apply, the petitioner may file a reply within five working days after the filing of the response to the petition and serve a copy on respondent on the same day. The reply shall be limited solely to new issues raised in the response to the petition.

(d) Provisions incorporated from §21.95 of this title (relating to Compulsory Arbitration). Except as specified otherwise in this subchapter, the following provisions of §21.95 of this title are incorporated by reference into this subchapter: §21.95(c), (d), (e), (f), (g), (h), (i), (k), (l), (m), (n), (o), (p), (q), and (r), except that any discovery schedule shall take into consideration the 50-day deadline in subsection (g) of this section.

(e) Number of copies to be filed. Unless otherwise ordered by the presiding officer, parties shall file ten copies of pleadings subject to this subchapter.

(f) Participation. Only parties to the interconnection agreement may participate as parties in the dispute resolution proceeding subject to this subchapter.

(g) Notice and hearing. Unless §21.127 or §21.129 of this title apply, the presiding officer shall make arrangements for the hearing to address the petition, which shall commence no later than 50 days after filing of the complaint. If the parties' joint procedural schedule sets a hearing more than 50 days after the filing of the petition, then approval of the joint procedural schedule shall be conditioned upon the parties filing a joint waiver of the 50-day deadline. The presiding officer shall notify the parties, not less than 15 days before the hearing, of the date, time, and location of the hearing. The hearing shall be transcribed by a court reporter designated by the presiding officer.

(h) Authority of presiding officer. The presiding officer has broad discretion in conducting the dispute resolution proceeding, including the authority given to a presiding officer pursuant to §22.202 of this title (relating to Presiding Officer) and pursuant to §21.95 of this title (relating to Compulsory Arbitration). The presiding officer shall also have the authority to award remedies or relief deemed necessary by the presiding officer to resolve a dispute subject to the procedures established in this subchapter. The authority to award remedies or relief includes, but is not limited to, the award of prejudgment interest, specific performance of any obligation created in or found by the presiding officer to be intended under the interconnection agreement subject to the dispute, issuance of an injunction, or imposition of sanctions for abuse or frustration of the dispute resolution process subject to this subchapter and Subchapter D of this chapter (relating to Dispute Resolution), except that the presiding officer does not have authority to award punitive or consequential damages.

(i) Discovery. Parties may obtain discovery by submitting requests for information (RFIs), which include requests for inspection and production of documents, requests for admissions, and depositions by oral examination, as provided by §22.141(b) of this title (relating to Form and Scope of Discovery), and as allowed within the discretion of the arbitrator.

(j) Prefiled evidence/witness list. The arbitrator shall require the parties to file a direct case and a joint Decision Point List (DPL) on or before the commencement of the hearing. The arbitrator shall require the parties to file their direct cases under the same deadline. The prepared direct case shall include all of the party's direct evidence, including written direct testimony of all of its witnesses and all exhibits that the party intends to offer. The DPL shall identify all issues to be addressed, the witnesses who will be addressing each issue, and a short synopsis of each witness's position on each issue. Except as provided in §21.77 of this title (relating to Confidential Information), all materials filed with the commission or provided to the arbitrator shall be considered public information under the Texas Public Information Act (TPIA), Texas Government Code, §552.001, *et seq*.

(k) Arbitration Award.

(1) The presiding officer shall endeavor to issue a final decision on the dispute resolution within 30 days after the filing of any post-hearing briefs in the dispute resolution proceeding. If no post-hearing briefs are filed, the presiding officer shall endeavor to issue a final decision within 30 days of the close of the hearing.

(2) The Arbitration Award shall be filed with the commission as a public record and shall be mailed by first-class mail to all parties of record in the dispute resolution proceeding. On the same day that the Arbitration Award is issued, the presiding officer shall notify the parties by facsimile that it has been issued. If the decision involves 9-1-1 issues, the presiding officer shall also notify the Commission on State Emergency Communications (CSEC) by facsimile on the same day.

(3) The Arbitration Award shall be based upon the record of the dispute resolution hearing, and shall include a specific ruling on each of the disputed issues presented for resolution by the parties. The presiding officer may agree with the positions of one or more parties on any or all issues or may offer an independent resolution of the issues. The presiding officer is the judge of whether a party has met their burden of proof. The presiding officer may provide for later implementation of specific provisions as addressed in the presiding officer's decision. The decision may also contain the items addressed in §21.95(t)(1) to the extent deemed necessary by the presiding officer to explain or support the decision.

(4) Within five working days from the date the arbitrator's decision is issued, any commissioner may place the presiding officer's decision on the agenda for the next available open meeting. The decision shall be stayed until the commission affirms or modifies the decision, but such stay shall not stay any order of interim relief already in effect in the proceeding

(5) If no commissioner places the arbitrator's decision on the open meeting agenda within five working days, the arbitrator's decision is final and effective on the expiration of that fifth working day. The arbitrator shall notify the parties when the arbitrator's decision is deemed final under this paragraph.

(l) Filing of agreement. Where modifications are ordered, the parties to the interconnection agreement shall file in the same docket number, two copies, one unbound, of the complete agreement with the filing clerk within five working days of approval. The copies shall be clearly marked with the control number assigned to the proceeding and the language "Complete interconnection agreement as approved (or modified and approved) on (insert date)." Also within 15 working days of the approval of the agreement, the incumbent local exchange company (ILEC) shall post notice of the approved interconnection agreement on its website in a separate, easily identifiable area of the website. The ILEC website shall provide a complete list of approved interconnection agreements, listed alphabetically by carrier, including docket numbers and effective dates. In addition, the ILEC website shall provide a direct link to the commission's website.

(m) Motions for reconsideration. Motions for reconsideration shall be governed by §21.75 of this title (relating to Motions for Clarification and Motions for Reconsideration).

§21.127. Request for Expedited Ruling.

(a) Purpose. This section establishes procedures pursuant to which a party who files a complaint to initiate a dispute resolution under this subchapter may request an expedited ruling when the dispute directly affects the ability of a party to provide uninterrupted service to its customers or precludes the provisioning of any service, functionality, or network element. The presiding officer has the discretion to determine whether the resolution of the complaint may be expedited based on the complexity of the issues or other factors deemed relevant.

Except as specifically provided in this section, the provisions and procedures of §21.125 of this title (relating to Formal Dispute Resolution Proceeding) apply.

(b) Filing a request. Any request for expedited ruling shall be filed at the same time and in the same document as the complaint filed pursuant to §21.125 of this title. The complaint shall be entitled "Complaint and Request for Expedited Ruling." In addition to the requirements listed in §21.125(a) of this title, the complaint shall also state the specific circumstances that make the dispute eligible for an expedited ruling.

(c) Response to complaint. The respondent shall file a response to the complaint within five working days after the filing of the complaint. In addition to the requirements listed in §21.125(b) of this title, the respondent shall state its position on the request for an expedited ruling. The respondent shall serve a copy of the response on the complainant by hand-delivery or facsimile on the same day as it is filed with the commission.

(d) Hearing. After reviewing the complaint and the response, the presiding officer will determine whether the complaint warrants an expedited ruling. If so, the presiding officer shall make arrangements for the hearing, which shall, to the extent practicable, commence no later than 20 days after the filing of the complaint. The presiding officer shall notify the parties, not less than three working days before the hearing of the date, time, and location of the hearing. If the presiding officer determines that the complaint is not eligible for an expedited ruling, the presiding officer shall so notify the parties within five days of the filing of the response.

(e) Decision Point List (DPL) and witness list. Parties shall file a jointly populated DPL and witness list, in a format approved by the presiding officer, no later than five days before the commencement of the hearing. The presiding officer shall require the parties to file their DPL under the same deadline. The DPL shall identify all issues to be addressed, the witness, if any, who will be addressing each issue, and a short synopsis of each witness's position on each issue. If the schedule accommodates the filing of prefiled testimony, parties' DPL shall include specific citation to the parties' testimony relevant to that issue. Except as provided in §21.77 of this title (relating to Confidential Material), all materials filed with the commission or provided to the presiding officer shall be considered public information under the Texas Public Information Act, Texas Government Code, §552.001, *et seq*.

(f) Decision. The presiding officer shall issue a written decision on the petition within 15 days after the close of the hearing. On the day of the issuance, the presiding officer shall notify the parties by facsimile that the decision has been issued. If the decision involves 9-1-1 issues, the presiding officer shall also notify the Commission on State Emergency Communications (CSEC) by facsimile on the same day.

(g) Motions for reconsideration. Motions for reconsideration shall be governed by §21.75 of this title (relating to Motions for Clarification and Motions for Reconsideration).

§21.129. Request for Interim Ruling Pending Dispute Resolution.

(a) Purpose.

(1) This section establishes procedures pursuant to which a party who files a petition to initiate a dispute resolution under either §21.125 of this title (relating to Formal Dispute Resolution Proceeding) or §21.127 of this title (relating to Request for Expedited Ruling) may also request an interim ruling on whether the party is entitled to relief pending the resolution of the merits of the dispute.

(2) This section is intended to provide an interim remedy when the dispute compromises the ability of a party to provide uninterrupted service or precludes the provisioning of any service, functionality or network element (including issues of pricing and/or payment for any service functionality, or network element when such pricing and/or payment issues effect provisioning).

(3) However, in no event may a party obtain interim relief to avoid payment of undisputed amounts. The party seeking an interim ruling on payment issues bears the burden of proof to demonstrate what amounts are not disputed and what payments have been made pursuant to applicable contract provisions.

(b) Filing a request. Any request for an interim ruling shall be filed at the same time and in the same document as the petition filed pursuant to §21.125 or §21.127 of this title. The heading of the petition shall include the phrase "Request for Interim Ruling." The petition shall set forth the specific grounds supporting the request for interim relief pending the resolution of the dispute, as well as a statement of the potential harm that may result if interim relief is not provided. A petition that includes a request for interim ruling shall be verified by affidavit. Such petition must list the contact person, address, telephone number, facsimile number, and email address for both the petitioner and respondent.

(c) Service. The petitioner shall serve a copy of the petition and request for an interim ruling on the respondent by hand-delivery or facsimile on the same day as the pleading is filed with the commission. The petitioner shall certify on the pleading filed with the commission that service has been accomplished in compliance with this section.

(d) Response. The respondent shall file a response to the petition within three working days of the filing of the request for an interim ruling.

(e) Hearing. Within six working days of the filing of a petition and request for interim ruling, the presiding officer selected under this subchapter shall conduct a hearing to determine whether interim relief should be granted during the pendency of the dispute resolution process. The presiding officer will notify the parties of the date and time of the hearing by facsimile within three working days of the filing of a petition and request for interim ruling. The parties should be prepared to present their positions and evidence on factors including but not limited to: the type of service requested; the economic and technical feasibilities of providing that service; and the potential harm in providing the service.

(f) Evidence. The presiding officer will issue an interim ruling on the request based on the evidence provided at the hearing. Evidence to support a request for interim ruling shall be provided by affidavit or shall be verified.

(g) Consideration. The presiding officer may, after notice and opportunity for hearing, grant a request for interim relief only on a showing of good cause. In determining whether good cause exists, the presiding officer shall consider:

(1) whether there is a substantial likelihood of success on the merits of the movant's claims;

(2) whether there is a substantial threat that the movant will suffer irreparable injury if interim relief is not granted;

(3) whether the threatened injury to the movant outweighs any harm that the other party might suffer if interim relief is granted, including consideration of both parties' ability to compete;

(4) the need for relief prior to the reasonably anticipated date of a final decision in the proceeding; and

(5) any other relevant factors as determined by the presiding officer.

(h) Ruling. The presiding officer shall issue a written ruling on the request for interim relief within five working days of the close of the hearing and will notify the parties by facsimile of the ruling. If the decision involves 9-1-1 issues, the presiding officer shall also notify the Commission on State Emergency Communications (CSEC) by facsimile on the same day. The interim ruling will be effective throughout the dispute resolution proceeding until a final decision is issued pursuant to this subchapter, unless overturned by the presiding officer or otherwise determined by the commission upon appeal.

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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Adriana Gonzales
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For further information, please call: (512) 936-7223

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CHAPTER 22. PRACTICE AND PROCEDURE

The Public Utility Commission of Texas (commission) adopts the repeal of Chapter 22, Subchapter P relating to Dispute Resolution, Subchapter Q relating to Post-Interconnection Agreement Dispute Resolution, and Subchapter R relating to Approval of Amendments to Existing Interconnection Agreements and Agreements Adopting Terms and Conditions Pursuant to FTA96 §252(i) as published in the October 10, 2003 issue of the *Texas Register* (28 TexReg 8759). Chapter 21 replaces the rules that currently exist in subchapters P, Q, and R. The commission is simultaneously adopting under separate publication in this issue of the *Texas Register*, new Chapter 21, Interconnection Agreements for Telecommunications Service Providers. Project Number 25599 is assigned to these proceedings.

The following sections are repealed: In Subchapter P--§22.301, Purpose; §22.303, Mediation; §22.304, Voluntary Alternative Dispute Resolution; §22.305, Compulsory Arbitration; §22.306, Confidential Information; §22.307, Subsequent Proceedings; §22.308, Approval of Negotiated Agreements; §22.309, Approval of Arbitrated Agreements; and §22.310, Consolidation; in Subchapter Q--§22.321, Purpose; §22.322, Definitions; §22.323, Filing of Agreement; §22.324, Confidential Information; §22.325, Informal Settlement Conference; §22.326, Formal Dispute Resolution Proceeding; §22.327, Request for Expedited Ruling; and §22.328, Request for Interim Ruling Pending Dispute Resolution; in Subchapter R--§22.341, Approval of Amendments to Existing Interconnection Agreements; and §22.342, Approval of Agreements Adopting Terms and Conditions Pursuant to Federal Telecommunications Act of 1996 (FTA96) §252(i).

The commission adopts new Chapter 21 for the more efficient processing of interconnection agreement proceedings to meet the needs of parties and the commission and to codify commission practice and policy regarding interconnection agreement disputes, mediations, and arbitrations. Therefore, the rules in subchapters P, Q, and R are no longer necessary.

The commission received no comments on the proposed repeal.

SUBCHAPTER P. DISPUTE RESOLUTION

16 TAC §§22.301, 22.303 - 22.310

This repeal is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998, Supplement 2004) (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, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act: §14.002, §14.052, and the Federal Telecommunications Act of 1996, 47 U.S.C. §151, *et. seq*.

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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SUBCHAPTER Q. POST-INTERCONNECTION AGREEMENT DISPUTE RESOLUTION

16 TAC §§22.321 - 22.328

This repeal is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998, Supplement 2004) (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, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act: §14.002, §14.052, and the Federal Telecommunications Act of 1996, 47 U.S.C. §151, *et. seq*.

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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SUBCHAPTER R. APPROVAL OF AMENDMENTS TO EXISTING INTERCONNECTION AGREEMENTS AND AGREEMENTS ADOPTING TERMS AND CONDITIONS PURSUANT TO FTA96 §251(i)

16 TAC §22.341, §22.342

This repeal is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998, Supplement 2004) (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, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act: §14.002, §14.052, and the Federal Telecommunications Act of 1996, 47 U.S.C. §151, *et. seq*.

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 S. WHOLESALE MARKETS

16 TAC §25.503

The Public Utility Commission of Texas (commission) adopts new §25.503, relating to Oversight of Wholesale Market Participants with changes to the proposed text as published in the August 15, 2003 issue of the *Texas Register* (28 TexReg 6466). The proposed new rule is necessary to protect the public interest by facilitating the efficient and reliable operation of wholesale electricity markets and the reliable delivery of electricity during the transition to and the establishment of a fully competitive electric power industry in Texas. This new section is adopted under Project Number 26201.

The new rule establishes: (1) the standards that the commission will use in monitoring the activities of entities participating in the wholesale electric market in Texas and enforcing the statutory provisions, rule requirements, market Protocols, and operating guidelines applicable in that market; (2) the standards and criteria for enforcement of market Protocols and procedures adopted by the Electric Reliability Council of Texas (ERCOT); and (3) the ethical standards that apply to market participants and define the duties and prohibitions applicable to market participants. In addition, the new rule requires market entities to maintain certain records to demonstrate their compliance with the rule, creates a procedure for obtaining official interpretations and clarifications of ERCOT Protocols, identifies the role of ERCOT in enforcement actions, and describes an informal fact-finding review procedure that may be used by commission staff in reviewing compliance with the rule.

The new rule is needed to enable the commission to assure the efficient and reliable operation of electricity markets and the reliable delivery of electricity at reasonable prices during the transition to a fully competitive electric power industry in Texas. The Texas Legislature has determined that Texas should change from a system in which electric power is fully regulated by the commission to a system in which competitive forces will determine the rates, operations, and services that are available to the public. The Legislature has directed that the commission implement these changes in a manner that provides customers safe, reliable, and reasonably priced electricity. Recent experience in Texas and other states has shown that during the transition to competition, the developing wholesale and retail markets can be subject to practices by market participants that serve the private interests of the participants at the expense of the public interest. These practices have resulted in unjustified increased prices to customers and market participants, reduced reliability of the electric power grid, and ultimately threaten the implementation of a successful competitive electric market. As an example, in California, market manipulation by market participants contributed to elevated retail prices that were estimated to be $3 billion to $11 billion higher than would have occurred in a properly functioning market. These high prices also contributed to higher prices for long-term contracts for wholesale electric power. The impact on the California economy was enormous, including the bankruptcy of a major electric utility and many days of rolling blackouts that further crippled the economy and threatened the public health and safety. To protect the public interest from these possible effects, the commission finds that it is important that the obligations and restrictions applicable to market entities be specified. The new rule establishes those standards. The new rule provides many public benefits, including the protection of customers and market entities from unfair, misleading and deceptive practices; the availability of reliable transmission and ancillary services at reasonable prices to all market entities; clarification of the obligations and restrictions applicable to market entities to reduce uncertainty in the wholesale markets; clarification of the commission's procedures and standards for overseeing the activities of market entities; and the protection of the developing wholesale market from potential market power abuses. Each of these benefits is important to meeting the legislative directive to protect the public interest by facilitating the efficient and reliable operation of electricity markets and the reliable delivery of electricity at reasonable prices during the transition to a fully competitive electric power industry.

The rule was proposed as part of the commission's efforts to adopt competition rules to protect the public interest during the transition to and in the establishment of a fully competitive electric power industry under Chapter 39 of the Public Utility Regulatory Act (PURA), Texas Utility Code Annotated §§11.001-64.158 (Vernon 1998 & Supp. 2004). Chapter 39 of PURA delegated many important functions to the commission in order to "protect the public interest during the transition to and in the establishment of a fully competitive electric power industry." Among those

functions were the adoption and enforcement of rules to ensure customer protections and customer entitlements; the establishment of rules governing ERCOT and oversight of ERCOT activities; the assessment of market power; and the mitigation of market power abuses. In order to protect the public interest and to assure that prices are determined by the normal forces of competition, the commission finds that it must adopt this rule governing the enforcement of wholesale electricity markets and ERCOT administered markets. Accordingly, the commission concludes that this rule is a competition rule under PURA Chapter 39.

A public hearing on the rule was held at the commission's offices, located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, on Tuesday, October 7, 2003 at 10:00 a.m. Representatives from American Electric Power Service Company (AEP), Coral Power, L.L.C. (Coral), Reliant Resources, Inc. (Reliant), the Competitive Market Participants (CMP), TXU Energy Retail Company, LP (TXUE), Public Utilities Board of the City of Brownsville, Texas (Brownsville PUB), Brazos Electric Power Cooperative (Brazos), American National Power, Inc. (ANP), and CenterPoint Energy Houston Electric, LLC (CenterPoint) appeared at the hearing. However, none of the persons in attendance at the public hearing chose to make any comments on the proposed rule.

The commission received comments on the proposed new section from AEP, Coral, Reliant, CMP, CenterPoint, the TXU Companies (TXU), the City of Austin d/b/a Austin Energy (Austin Energy), BP Energy Company (BP), the City of San Antonio, acting by and through the City Public Service Board of Trustees (San Antonio), the Electric Reliability Council of Texas (ERCOT), the Office of Public Utility Counsel (OPUC), the Lower Colorado River Authority (LCRA), the City of Garland (Garland), Cap Rock Energy Corporation (Cap Rock), and Denton Municipal Electric (Denton). Reply comments were received from TXU, San Antonio, Coral, CMP, Reliant, AEP, OPUC, and the Independent REP Coalition (IRC).

On January 2, 2004, the commission faxed a notice to all persons who had submitted comments in this proceeding. The notice included a copy of a "redlined" version of the proposed rule showing the changes that commission staff proposed to make to the rule in its recommendation to the commission. This notice and redlined version of the proposed rule were also placed on the commission's website for review by interested persons. The notice indicated that interested persons could file comments on the redlined version within five calendar days, or by January 7, 2004. In response to that notice, additional comments were received from San Antonio, Coral, Austin Energy, TXU, CMP, CenterPoint, Reliant, AEP, OPUC, ERCOT and the Electric Power Supply Association (EPSA). A summary of the supplemental comments is included within the discussion of initial and reply comments in the following portions of this order. Similarly, the commission response also responds to the supplemental comments.

Cost benefit analysis

In its notice of proposed rule, the commission invited specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. Comments were received from CMP concerning the costs and benefits of the new rule. In various places, CMP asserted that market participants would incur additional costs in trying to comply with the rule. CMP also asserted that the commission should use a "cost-benefit analysis when choosing between a broad requirement and one narrowed to fit the problem and to allow market participants to avoid related costs and risks." CMP chided the commission for "instead addressing only the costs and benefits of having a rule versus having no rule."

Commission response

The commission disagrees with CMP's assertions that it has not properly assessed the costs and benefits of the proposed rule. Under Texas Government Code Annotated §2001.024, the notice of a proposed rule is to contain a note about public costs and benefits stating "(A) the public benefits expected as a result of adoption of the proposed rule; and (B) the probable economic cost to persons required to comply with the rule." The commission complied with these requirements in its notice published in the August 15, 2003 edition of the *Texas Register*. There is no requirement that the commission conduct a detailed cost-benefit analysis in the manner CMP proposes. Nevertheless, the commission has considered both costs imposed and the benefits derived from the proposed rule. The commission finds that the alleged costs identified by CMP and other commenters either were speculative and not adequately quantified or were based upon an exaggerated and improper interpretation of the rule requirements. The commission concludes that the public benefits outweigh the costs created by the rule and that the rule should be adopted.

FERC rules

In its notice of proposed rule, the commission referenced a June 26, 2003 Order issued by the Federal Energy Regulatory Commission (FERC) in Docket Nos. EL01-118-000 and EL01-118-001, *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, which proposed changes to the tariffs applicable to public utilities authorized to charge market-based rates. The proposed changes would have imposed provisions prohibiting a seller from engaging in anticompetitive behavior or the exercise of market power. The proposed tariff provisions identified certain transactions and practices that are prohibited and imposed reporting and record retention requirements on sellers. The order indicated that a violation of these proposed provisions would constitute a tariff violation and the seller could be subject to disgorgement of unjust profits, suspension of its market-based rate authorization, or other appropriate non-monetary penalties. Because the FERC order and proposed tariff provisions address much of the same subject matter that the commission addresses in the new section, the commission invited comments from interested persons concerning the two proposals. Specifically the commission requested that interested persons answer the following questions:

1. Compare and contrast the differences between the commission's proposed rule and each of the six market behavior rules in the proposed tariff revisions in the FERC order. What aspect of each proposal is best suited to prevent potential anti-competitive and deceptive practices by market participants in the ERCOT market, and why?

2. Should the commission attempt to harmonize the proposed new section to the FERC's proposed tariff revisions? If so, what steps can and should the commission take to that end?

Comments on Preamble Questions

The comments that were submitted in response to these questions and the commission's responses are presented below. The comments have been grouped by topic.

FERC's philosophy on market behavior rules compared to the proposed rule

AEP provided a comparison of what it perceived as two different philosophies behind the two proposed rules, in spite of the fact that both sets of rules seek to address similar problems. AEP favored FERC's stated philosophy regarding the oversight and monitoring of markets and stated that, in comparison, the commission's rule demonstrates a fundamental distrust of the market, requiring that a market participant either not engage in any activity not specifically permitted by the rules or seek approval. In contrast, AEP believed that FERC's philosophy gives a market participant more flexibility in that, "within established limits, if it is not prohibited, the behavior is permitted." AEP, Reliant, and CMP approved of FERC's three stated goals to: 1) provide effective remedies against anticompetitive behavior or market abuses; 2) provide clearly- delineated "rules of the road" without impairing the commission's ability to prevent abuses; and 3) avoid unlimited regulatory uncertainty to the detriment of participants and the market by providing reasonable bounds within which conditions on market conduct will be implemented. AEP added another FERC stated purpose for its rule, which is to foster a "stable marketplace with clearly defined rules (that) benefits both customers and market participants and creates an environment that will attract much-needed capital." However, AEP and Reliant believed that the FERC proposal fell short of those stated purposes.

Commission response

The commission disagrees with AEP that compared to the FERC's proposed rule; the commission's rule demonstrates a fundamental distrust of the market. FERC stated that its proposed market behavior rules have been informed by "what we have learned about the types of behavior that occurred in the Western markets during 2000 and 2001." Similarly, the preamble of the proposed rule invokes experience in other states, and in particular in California, where market manipulations by market participants were a major factor causing prices so high as to cause the bankruptcy of one major electric utility, rolling blackouts, a crippling of the economy, and a threat to the public health and safety. The commission believes that, to protect the public interest from these possible destructive effects, it is important to specify market participants' obligations and restrictions. Similarly, FERC's proposed rules are motivated by the need "to provide regulatory safeguards to ensure that customers are protected from potential market abuses." The commission agrees that its proposed rule is more detailed and has more specificity than the FERC rule, which the commission sees as an advantage if the goal is to provide "clearly delineated rules of the road," a goal stated by FERC. The commission however, disagrees that FERC's philosophy gives a market participant more flexibility in that, "within limits, if it is not prohibited, the behavior is permitted." Like the commission's rule, the FERC's rule attempts to complement a generic standard of behavior with "a non-exclusive list of prohibited activities that illustrates the types of activities that adversely affect competitive outcomes." FERC added: "we have also included a generic standard which will allow us to take remedial action if we discover additional activities of a seller taken in contravention of our market behavior rules affecting the justness and reasonableness of rates." The generic standard adopted by FERC in its proposed rules is a rate impact standard, a very different position from the one portrayed by AEP. Further, FERC stated that it will impose sanctions if it is demonstrated that a "transaction or behavior not expressly prohibited in our market behavior rules appears to be in violation of this rule, *i.e.*, that a given transaction or behavior is causing prices to reflect outcomes not reflective of market forces," unless the identified seller can show good cause. The commission sees one major difference in the standards included in the proposed rule compared to the FERC's proposed rules. Whereas FERC has set two main generic standards, a market power abuse standard prohibiting behavior and transactions that are anti-competitive, and a rate impact standard prohibiting behavior and transactions that cause unjust and unreasonable prices, unlike the proposed rule, it does not have a reliability standard. In the proposed rule, a market participant is prohibited from engaging in activities that are likely to adversely and materially affect the reliability of the electric system.

It would be incorrect to infer from the proposed rule that the commission has a "fundamental distrust of the market." The commission simply recognizes that market participants will engage in all the profit maximizing activities that are not expressly prohibited. When sufficient competition exists, the forces of competition set the limits that ensure that profit maximizing activities do not result in unreasonable prices, and no government intervention is needed to protect customers from price gouging. However, the commission recognizes that competition is not yet fully established in the ERCOT markets, and therefore market behavior rules are necessary to protect the public interest during the transition period. The Legislature recognized the need for protection of the public interest during this period of transition in PURA §39.001(a) when it stated: "the public interest in competitive electric markets requires that…electric services and their prices should be determined by customer choice and the normal forces of competition. As a result, this chapter is enacted *to protect the public interest during the transition to and in the establishment of a fully competitive electric power industry*." FERC was even more specific when it stated: "the potential for market abuse and the exercise of market power may exist in any region where the evolution towards a competitive market is not yet complete." (FERC Docket No. EL01-118-000, Order Seeking Comments On Proposed Revisions To Market Based Rate Tariffs And Authorization, June 26, 2003, paragraph 11.)

Like FERC, the commission recognizes that a difficult balance needs to be achieved between the need to protect the public interest with limiting rules that deter market abuses, and the risk of rules that are so restrictive as to create an unfavorable business climate and deter investments. In light of the comments received, the commission recognizes that the proposed rule can be modified to bring more balance in this respect and reduce the perception of uncertainty created by the proposed rule. However, in the area of reliability in particular, there are limits as to how much the commission can compromise and still protect the public interest. The Legislature has assigned independent organizations the function to ensure the reliability and adequacy of the regional electrical network. However, the independent organizations cannot accomplish this mandate without the cooperation of market participants. It is the commission's philosophy that market participants have certain responsibilities regarding the reliability of the electric system and cannot ignore the impact some of their profit maximizing activities may have on reliability, to the extent that this impact is predictable. Further, the Legislature has given the commission the authority to address market power in PURA §39.157. The commission cannot allow a market participant who has market power, by virtue of owning a facility essential to maintaining reliability, to exercise such market power and extract enormous profit to the detriment of the market. The commission recognizes that power plant owners should be justly compensated for helping reliability in ERCOT and has relied on the stakeholder process to develop incentive compatible market rules and Protocols that accomplish this purpose. However,

in some instances the Protocols have failed to include requirements necessary for ERCOT to adequately protect reliability. In such instances, the reliability standard contained in the proposed rule is intended to be an essential stop gap until appropriate adjustments are made in the Protocols.

Analysis of the FERC rules' content compared to the proposed rule

AEP found that the FERC's rule is unclear as to what activity is prohibited, that it lacks "intent" as an element, and that it does not recognize that "market participants can operate consistent with existing operational, environmental, and legal constraints without running afoul of the market rules." AEP supported the FERC's proposed rule only if amended as proposed by the Electric Power Supply Association (EPSA). Reliant did not embrace the FERC market behavior rules as proposed either. Reliant said that the FERC proposed market behavior rules lack clarity and the requisite standard of intent, and that they will not only prevent anti- competitive behavior and deceptive practices, but they will also prevent prudent business behaviors and activities. The commission's proposed rule, Reliant stated, suffers from the same maladies, and in addition, it incorporates detailed provisions that produce further confusion and do not really address market power abuse. According to Reliant, both the FERC proposed rules and the commission proposed rule require further review and revision, although Reliant found the FERC proposed rules less restrictive and favored the limited focus on the activities the rules are intended to govern.

AEP noted that the commission's proposed rule requires "official interpretations and clarifications regarding the Protocols" and sets out the process by which the staff would initiate informal "reviews." In contrast, the FERC proposal does not provide procedures to obtain clarifications and does not address investigations. AEP thought that these matters are addressed more generally in the FERC's practice and procedures.

Austin Energy said that the proposed FERC code is much closer to achieving the aims articulated by the commission for its rulemaking than the commission's proposal, which is unnecessarily prescriptive and leads to more confusion than clarity. Austin Energy suggested that the FERC proposal can serve as a model for the commission in revising the proposed rule, as it is "much more effective at establishing clear, enforceable standards." In addition, Austin Energy added, comments filed at FERC indicate that the FERC proposal can be improved even further.

San Antonio stated that the FERC proposal contains areas of ambiguity and non-clarity and would be improved if it incorporated the comments submitted at FERC. San Antonio declined to draw specific comparisons between the FERC proposal, given the likelihood of changes to this proposal, and the commission's proposal.

Coral declined to be specific in its comparison of the two rules, but offered some general comments. First, Coral noted that the FERC rule is grounded in its ratemaking authority, whereas the commission's rule is outside its ratemaking authority. However, Coral continued, several things are common to both proceedings: both are trying to address market behavior; they will affect the same stakeholders; they are "struggling with the balance between being overly prescriptive and being adequate to protect the public interest;" and they fail to adequately recognize the element of "intent." Coral concluded that, although the FERC proposal needs work, it avoids many of the pitfalls that flaw the commission's proposed rule, and it is closer than the commission's proposal to being clear, concise and to the point, without overreaching.

Commission response

The commission notes that many market participants who offered comments in response to the preamble questions do not think that the FERC market behavior rules offer a good model, even if they are deemed slightly less prescriptive or overreaching than the proposed rule, and notices that criticisms of the FERC rules, both in the comments received by the commission and the comments received at FERC, point to similar issues, including the lack of an intent element in both rules, vagueness, the lack of specificity and clarity, and uncertainty as to what activities are not prohibited. The commission believes that it is not appropriate to compare the proposed rule to the FERC proposed rules as "amended by EPSA" or by any other selectively picked party that submitted comments at FERC, as several market participants have attempted to do, while ignoring comments submitted by other groups such as the Electricity Consumers Resource Council (ELCON) that are supportive of the anti-manipulation provisions in the FERC rules. The commission notes that the FERC has modified its proposed rules to address some of the concerns expressed in the comments it received and has adopted a final set of market behavior rules that it considers just and reasonable. The commission has considered the modified language of the FERC rules in revising the proposed rule.

Different Grants of Authority

AEP compared the different remedies in the two proposed rules. Whereas the commission's rules include requiring corrective action, administrative penalties, criminal prosecution, revocation of licenses, or other remedies deemed appropriate, FERC's proposed penalties include the disgorgement of unjust profits, revocation of authority to sell at market-based rates, and revisions to the applicable tariff or code of conduct. Those differences stem largely from "the different grants of enforcement authority to the commission and the FERC," which, AEP stated, make it difficult to harmonize the commission's proposal with FERC's market rules. AEP and Reliant pointed out that FERC proposed its market behavior rules in the context of its market based rate authority, which contrasts with the commission's more limited authority over the wholesale market. Given this different scope of jurisdiction, AEP concluded that the manner of implementing consistent rules should be achieved through the ERCOT Protocols rather than through commission rules. Reliant, on the other hand, pointed out that the commission has the authority pursuant to PURA §39.157 to identify market power and enforce penalties against those who commit market power abuses.

Commission response

The commission agrees with AEP, Reliant and others that there are significant differences in enforcement authority between FERC and the commission that necessarily limit the extent to which the proposed rule can track the FERC market behavior rules. Although the commission agrees with Coral that there are similarities in the stated purposes of the rules, there is a major difference. FERC's market behavior rules are intended "to complement any RTO or ISO tariff conditions and market rules that may apply to sellers in these markets." (FERC Docket No. EL01-118-000, Order Seeking Comments on Proposed Revisions to Market Based Rate Tariffs and Authorization, June 26, 2003, paragraph 8.) The commission's proposed rule specifically applies to the ERCOT markets, and is therefore meant to include more specific standards in addition to generic

standards similar to those included in the FERC rules. The commission disagrees with AEP's statement that, given the different scope of jurisdiction, the manner of implementing consistent rules should be achieved through the ERCOT Protocols rather than through commission rules. PURA §39.151 requires that the Protocols be consistent with commission rules. Given the recent failure of ERCOT to adopt code of conduct rules, as discussed elsewhere in this order, the commission believes it is more appropriate to act now rather than waiting for possible future action by ERCOT, which may not occur or may prove ineffective in addressing the commission's concerns.

Need to Harmonize

In response to the preamble question on the need to harmonize the proposed rule with the proposed FERC rules, CMP answered that the commission should attempt to harmonize the proposed new section to the FERC's proposed tariff revisions, stating that "Texas behavioral requirements need to track those FERC adopts for the rest of the country." AEP added that it is desirable to have a consistent set of rules in all parts of Texas. CMP extended the need to harmonize the commission's proposed rule to not only the proposed new section of FERC's proposed tariff's revisions, but to all FERC rules for consistency, and to reduce costs and confusion. With respect to reporting requirements, CMP asserted, consistency with other FERC rules on reporting requirement will also introduce in the Texas rule more moderating language as to intent, materiality or harm, a rebuttable presumption of good faith and an exception for inadvertent error. CMP provided a list of additional benefits of mirroring the FERC's rules: the rule would be shorter, simpler, easier to understand and apply, and, because the FERC rule has a broader application, a rewrite would be less likely when the ERCOT market design changes. CMP added that FERC is knowledgeable about what behavioral requirements are needed to avoid a California type situation because it has jurisdiction over California. CMP also stated that "a rule mirroring the FERC's proposed rules would produce more competitive ERCOT markets than would the proposed rule and avoid creating additional seams between ERCOT and other markets."

Coral's response to the preamble question concerning the need to harmonize was "yes," because the objective of both commissions is essentially the same. In Coral's view, the FERC rule is further along in the development of the appropriate concepts, and the commission can benefit from FERC's analysis. In addition, Coral stated, consistency in behavioral expectations is especially important because many market participants are involved in multiple markets. Coral admitted that it has not performed an exhaustive analysis to determine the implications of harmonizing the two rules. Nevertheless, Coral opined, even if harmonizing the proposed rule with the FERC proposal (as it develops) requires substantive changes and the commission has to re-publish the rule as a result, "any delay associated with getting it right … will be small compared to the significant delays associated with the legal challenges that Coral believes will most certainly result under the current proposal."

BP agreed with the commission that it is appropriate to look at the proposed tariff revisions in the FERC order. However, BP saw a lack of clear and specific rules necessary to give market participants regulatory certainty in both proposals. BP added that the commission cannot turn to other states for best practices because other states have not developed similar market conduct rules. Neither can the commission turn to other states or to FERC for a complete and workable set of market oversight rules.

In response to the preamble question, BP believed that it is vital for the commission to harmonize its rule with FERC's, otherwise the cost to a market participant of complying with two sets of rules that may be divergent could be extremely high and result in some parties deciding not to participate in Texas markets.

In response to the preamble questions, the LCRA offered one specific comment, stating that the commission should follow FERC's lead and clarify that actions taken for a legitimate business purpose are not "Prohibited Activities" as defined in the proposed rule. LCRA was concerned that actions taken for entirely legitimate reasons and with no intent to manipulate or otherwise affect market prices may result in rule violations.

CMP, San Antonio, Coral, BP, and AEP stated that the commission should wait until FERC adopts its final rule before adopting the proposed rule. In reply comments, Reliant disagreed, stating that there are no overwhelming advantages to be gained by delaying action on the proposed rule in an effort to "harmonize" it with the FERC rule.

TXU urged the commission not to attempt to harmonize the proposed rule with the FERC's proposed tariff revisions. TXU stated that, in many areas of the proposed rule, the commission staff has incorporated the comments of market participants and provided clarity and detail to definitions and to the conduct intended to be required and/or prohibited. TXU concluded that "to now move backwards towards the more vague standard provided for in FERC's proposed tariff revisions would create great uncertainty in the ERCOT market." TXU quoted FERC's description of market manipulation as "actions or transactions without a legitimate business purpose which manipulate or attempt to manipulate market prices, market conditions or market rules for electric energy and/or electric energy products which do not reflect the legitimate forces of supply and demand…" as an example of a standard that is vague and difficult for market participants to understand and comply with. In contrast, TXU continued, the commission rule provides concrete examples of activities that are, in fact, prohibited, even though it does include catch-all prohibited activity language such as "includes, but is not limited to."

OPUC stated that the commission's proposed rules are generally more comprehensive and specific than the FERC's proposed market behavior rules, and that all types of market behaviors addressed in the FERC rules are already covered in the commission's rule. OPUC did not see any need to harmonize the commission's rule with the FERC's proposed tariff revisions because the commission's rules are more detailed and comprehensive, and they are not in any way contrary or inferior to the FERC rules. In reply comments, San Antonio disagreed and stated that comprehensiveness and specificity are not the sole criteria to be considered in determining the usefulness of FERC's efforts. According to San Antonio, the main challenge for FERC and the commission was "drafting conduct rules that strike a careful balance between the need to allow the competitive market to operate freely based on competitive principles while protecting participants and transactions from the effects of abusive practices."

In reply comments, CMP disagreed with OPUC and stated that the proposed rule is contrary to the FERC rules, including on the key question of including intent in the behavioral requirements. One example CMP offered was the FERC "legitimate business purpose" standard, which CMP deemed to be an "intent" standard.

In support of its argument for harmonization with the FERC rule, CMP provided two documents in reply comments. One was a letter from Texas Governor Rick Perry to the Southern Governors' Association addressing the sale of wholesale electricity. In his letter, Governor Perry expressed general support for FERC's efforts in the area of wholesale electricity markets and supported "standardization of market rules." The Governor listed the benefits of competition in electricity markets and stated his belief that legislative reform has led to vibrant competition in the production of electricity in Texas. The second document was a FERC order that suspended proposed Amendment No. 55, a document that sets forth nine proposed market behavior rules of the California Independent System Operator (CAISO), until February 21, 2004, pending further review and in conjunction with FERC's proceeding relating to market behavior rules. CMP quoted FERC as stating that its postponement decision "will allow these issues to be addressed in a coordinated manner." AEP made a similar argument in reply comments. In addition to advocating an intent standard consistent with the one used in the FERC proposed rule (*i.e.*, the "legitimate business purpose standard") CMP warned that if the commission and FERC adopt significantly different definitions of economic and physical withholding, there could be serious consequences in wholesale markets. In reply comments, AEP urged the commission to "wait until final FERC action, and then assess to what extent it would be desirable to harmonize the ERCOT rules with those in effect in ERCOT." (Probably meaning at FERC.)

In supplemental comments, CMP, EPSA objected that the commission's proposed rule did not mirror the language contained in the FERC's rules. They argued that the commission's proposed rule addresses similar subjects as the FERC's rules but does not use the same language and often includes additional subjects not addressed by the FERC's rules.

Commission response

The commission notes that it will not be necessary to delay adoption of its rule and wait for FERC because FERC has now finalized its market behavior rules. The commission agrees with CMP, AEP, and others that consistency with FERC's market behavior rules is desirable to avoid confusion and possibly reduce compliance costs for market participants operating in FERC regulated markets as well as in ERCOT. However, the commission does not believe that consistency means that it must adopt all FERC rules as stated by CMP, as this goes beyond the intent of the preamble questions. The commission notes that commenters do not agree on what constitutes an intent standard, or a vague standard. For example, CMP considers that the FERC's "legitimate business purpose" is a clear standard and that the intent element is inherent in the standard because, if someone acts with a legitimate business purpose, then it lacks an intention to manipulate the market or market prices. In contrast, TXU considers this same standard as an example of a standard that is vague and difficult for market participants to understand and implement. And while CMP praises FERC for having an intent standard, FERC has been assailed with commenters' criticisms for lacking such a standard. The commission also notes that, while FERC received praises for being effective at establishing clear, enforceable standards from Austin Energy, it received criticisms from TXU, who thinks the proposed rule is more specific, and from BP and others who see a lack of clear and specific rules necessary to give market participants regulatory certainty in both proposals. The commission agrees with OPUC that the proposed rule is more detailed and comprehensive than the FERC rule but also agrees with San Antonio that a major challenge lies in being able to draft rules that strike a proper balance between minimizing restrictive rules that may impede legitimate activities while protecting participants and customers from the effects of abusive practices.

The lack of consistency among the commenters in their criticisms of the behavior standards laid out in the proposed rule and the FERC rules underscores the difficulties in developing clear and enforceable market behavior rules. A common theme in the comments to both sets of rules is the need to provide more specificity as to the type of activities that are prohibited, and to reassure market participants that they will not be found guilty in hindsight based on information they could not foresee at the time of the activity. The commission agrees with AEP and Reliant that it may not be possible for the commission's rule to exactly track the FERC rules because of different areas of authority. The commission has focused on the similarities of efforts and considered the rules adopted by FERC as it assessed the concerns directed both at the FERC's rules and at the commission's proposed rule. To the extent possible, the commission has strived to avoid inconsistencies with the FERC rules. However, as the FERC stated, its rules are to complement other market rules that apply to sellers, not to replace such rules. Therefore, it would not be appropriate to mirror the FERC's rules or to adopt the same language used by FERC. Instead, the FERC's rules should be viewed as minimum requirements for market participants designed to apply on a nation-wide basis to all markets regardless of the market structure in place. In contrast, the commission's rule is designed to apply to ERCOT and contains the additional complementary requirements appropriate to the ERCOT market and market structure. The commission recognizes, however, that the two rules should be harmonized wherever possible to avoid burdening the market participants who operate outside ERCOT with having to comply with inconsistent rules at the local and federal levels, and has made changes to the rule accordingly.

General Comments on the Proposed Rule, by topic.

Rule exceeds commission's authority

Coral stated that the proposed rule exceeds the commission's authority. CMP stated that commission jurisdiction is limited to violations of ERCOT requirements and to specified steps to mitigate market power abuses found to be occurring. Reliant affirmed that, under PURA, since the commission does not have authority to regulate or approve prices, its authority is limited to penalizing market participants for abuses of market power. Reliant added that the rule violates PURA because under PURA §35.004(e), the commission is bound to accept as reasonable, prices that the ERCOT ISO pays for ancillary services on a nondiscriminatory basis, but the rule imposes a different standard in section (a)(2).

Austin Energy noted that the sanctions and penalties of Subchapter B are not applicable to municipally owned utilities and electric cooperatives, but suggested that any market participant found to be in violation of the Protocols or other market rules be required to refund inappropriately gained revenue and take remedial action. Austin Energy suggested that subsection (k) should specifically refer to the commission's authority under PURA §15.023. Austin Energy questioned whether the commission has the authority to seek "criminal prosecution under the Public Utility Regulatory Act" as stated in section (l) of the proposed rule.

Commission response

The commission disagrees with these comments and finds that it has the necessary authority to adopt the rule, as revised. This conclusion is based upon a review of PURA in its entirety. Section 14.002 of PURA grants the commission broad rule-making authority, directing the commission to "adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction." In executing its duties under PURA, the commission is guided by the language and intentions of the Legislature, as stated in various portions of PURA. The Legislature found, in §11.002(c), that changes in technology "have increased the need for minimum standards of service quality, customer service, and fair business practices to ensure high-quality service to customers and a healthy marketplace where competition is permitted by law." The Legislature has also established that the purpose of PURA is "to grant the Public Utility Commission of Texas authority to make and enforce rules necessary to protect customers of telecommunications and electric services consistent with the public interest." In PURA §39.001(a), the Legislature stated that Chapter 39 was enacted "to protect the public interest during the transition to and in the establishment of a fully competitive electric power industry." These legislative policies and directives must be considered in determining the scope of the commission's rulemaking authority under §14.002.

PURA §39.101(b)(6) states that a customer is entitled to be protected from unfair, misleading or deceptive practices. Although some portions of §39.101(b) are limited to particular providers (*e.g.*, "retail electric providers") or are limited to particular types of services (*e.g.*, "energy efficiency services"), subsection (b)(6) contains no such limitations. Section 39.101(e) expressly gives the commission authority "to adopt and enforce such rules as may be necessary to carry out" subsection (b) and provides the commission with "jurisdiction over all providers of electric service in enforcing subsections (a)-(d)." Because of the breadth of the commission's rulemaking authority and jurisdiction under subsection (e) and the lack of limitations contained in subsection (b)(6), the commission interprets §39.101 to grant it authority to protect customers against unfair, misleading or deceptive practices, regardless of whether such practices occur in the wholesale or retail markets and regardless of the type of electric service provider involved. Contrary to comments filed by some parties, the heading of Subchapter C, entitled "Retail Competition", does not limit the commission's authority under §39.101(b) to only the retail market. Section 311.024 of the Texas Government Code specifically provides that, "The heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute." Therefore the title of Subchapter C does not limit the commission's authority to adopt and enforce rules under §39.101.

PURA §39.151(d) requires the commission to oversee and review the procedures adopted by an independent organization, such as ERCOT; directs market participants to comply with such procedures; and authorizes the commission to enforce such procedures. The commission's authority under this section is not limited to taking enforcement action after ERCOT acts, as some commenters have suggested. Instead, the statute is clear that ERCOT's procedures must be "consistent with this title and the commission's rules." Thus, the commission has the authority to specify the scope and reasonableness of ERCOT's procedures through its prospective rulemaking process and not just through a post-hoc complaint process. PURA §39.151(j) requires all providers of electricity, including municipally owned utilities and electric cooperatives, to comply with the ERCOT procedures and authorizes the imposition of administrative penalties for failure to comply with those procedures. Another section, PURA §39.157, directs the commission to monitor market power associated with the generation, transmission, distribution and sale of electricity and provides enforcement power to the commission to address any market power abuses that it discovers. Section 39.157 specifies the remedies available to the commission in the event of a market power abuse, including "seeking an injunction or civil penalties as necessary to eliminate or to remedy the market power abuse or violation as authorized by Chapter 15, by imposing an administrative penalty as authorized by Chapter 15, or by suspending, revoking, or amending a certificate or registration as authorized by Section 39.356." The rule, as adopted by the commission, is consistent with this grant of authority.

The rule is also based upon and consistent with PURA §15.023, which authorizes the commission to impose an administrative penalty against a person who violates the statute or a commission rule; PURA §39.356, which allows the commission to revoke certain certifications and registrations for violation of ERCOT's procedures, statutory provisions, or the commission's rules; and PURA §39.357, which authorizes the commission to impose administrative penalties in addition to the revocation, suspension, or amendment of certificates and registrations.

The rule is intended to protect customers of electric services from market power abuses and the effects of unfair, misleading or deceptive practices in the ERCOT-administered markets and the wholesale electric markets by requiring all wholesale electric service providers to meet certain criteria and by prohibiting them from engaging in activities that threaten the reliability of the network, that force ERCOT to incur inordinately high costs in order to operate the electric network in a secure way, or that prevent the ERCOT market from functioning as a healthy competitive marketplace. Based upon the PURA sections cited above and the legislative policies and directives embodied in PURA, the commission finds that it has the necessary authority to adopt the rule as a reasonable means to protect customers during the transition to a fully competitive market.

The commission also disagrees with comments suggesting that its authority to adopt the rule is abrogated by PURA §39.001(d), which requires that the commission, and other regulatory authorities, "authorize or order competitive rather than regulatory methods to achieve the goals of this chapter to the greatest extent feasible and shall adopt rules and issue orders that are both practical and limited so as to impose the least impact on competition." Experience in both the California market and in the ERCOT market has shown that some market participants are concerned only with their own self-interest and are, at best, indifferent to the effect of their actions on customers or on competition. As discussed elsewhere in this preamble, the commission agrees that a competitive solution is preferable to a regulatory solution to govern the activities of market participants. However, for a competitive solution to be effective, a structurally competitive market must exist. Unfortunately, at this stage of its development, the wholesale electric market in Texas is not structurally competitive and competition cannot be relied upon to effectively govern the activities of market participants. This rule is especially necessary for assuring the protection of customers in the absence of a structurally competitive market in Texas and during the transition to competition. The ERCOT Protocols, adopted by the ERCOT Board after considerable input from stakeholders, contain many instances in which the duties and obligations of market participants are not clearly stated. The Protocols do not always contain the proper incentives to motivate market participants to act in a

way that benefits them as well as the market as a whole. In some instances, the Protocols contain provisions that make it possible for market participants to take actions that benefit them but harm the efficient and reliable operation of the electric network while still claiming that they are not in violation of the Protocols. Ambiguities and provisions that are not incentive-compatible prevent the Protocols from adequately protecting the interests of the public from the self-interest of individual market participants. During the time that the commission was developing this new rule, the commission invited ERCOT stakeholders to develop, through the stakeholder process, protocol revisions that would add a code of conduct to the Protocols and specify market participants' prohibited activities in the Protocols. However, the code of conduct and the list of prohibited activities developed by the stakeholders were not approved by the ERCOT Board. In particular, the Board opined that a closed list of prohibited activities was inadequate because it inferred that any activity not expressly mentioned was therefore permissible. The commission views these factors as demonstrating that, at least at this stage in the development of competitive electric markets in Texas, reliance on stakeholder-developed market rules is not adequate to the task of achieving the goals established by the Legislature in PURA relating to customer protection and the establishment and protection of a fully competitive electric power industry. Because the stakeholder process has failed in the task, and in the absence of a structurally competitive market, the commission must act to ensure that legislative goals are achieved.

As required by PURA §39.001(d), the new rule is both practical and limited so as to impose the least impact on competition. The commission is not implementing traditional regulatory tools, such as mandatory tariffed offerings, but instead has established standards to protect customers; ensure the reliability of the electric network at a reasonable cost, and ensure proper accounting for the production and delivery of electricity within the ERCOT market. The commission notes that gaming and market power abuse also have a negative impact on competition. The regulatory burden of behavioral standards must therefore be weighed against the anticompetitive behaviors that such standards are designed to deter. This rule will have a net effect of improving competition, which is the Legislature's explicit intent. As long as a market participant complies with these minimum levels of regulation, it remains free to develop its own unique service offerings and compete for business in ERCOT. Accordingly, the commission concludes that the new rule is consistent with the requirements of PURA §39.001(d).

Open-ended list of Prohibited Activities creates uncertainty

To achieve the goal of discouraging only unwanted actions, AEP asserted, the rule should clearly define the behavior that is prohibited, and the list of prohibited activities should not be open-ended. AEP noted that in a memorandum to the commission, the staff noted that the commissioners requested that the rule include a list "of prohibited activities that are specific and well defined." AEP further stated that, as a consequence of the uncertainty created by an open- ended list, market participants may curb or reduce their activity to avoid the risk of violation, but that even by curbing their activities, they cannot ensure that their actions will not be later determined to be a violation because of unforeseen consequences of their actions. CMP differed. Consistent with the proposed rule and with FERC's proposed behavior rules, CMP agreed that the list of prohibited activities should be open ended, but stated that the rule is one-sided in that it uses open-ended lists when the list could be used to prosecute a market participant, but includes closed lists when the list could be used to defend a market participant. CMP proposed to use open-ended lists where the proposed rule allows for exclusions from obligations or prohibited activities.

Commission response

The commission agrees with AEP that the goal of this rulemaking should be to discourage detrimental behavior without also discouraging behavior that is beneficial. The commission notes, however, that this standard is hard to achieve in this type of rulemaking without reducing somewhat the flexibility afforded market participants.

The commission believes that a balance can be achieved between the need to discourage market abuses that can distort pricing and impede the development of a competitive market, and the risk of being so restrictive as to discourage participation in the ERCOT market. To achieve this balance, the commission believes that the rule should include a list of prohibited activities that are specific and well defined, but not exhaustive. A closed list would imply that the activities not listed are therefore tolerated. The commission has complemented the list of prohibited activities with a set of guiding principles for acceptable and unacceptable market behavior. Like FERC in its proposed rules, the commission believes that market behavior rules should discourage not only a closed list of specific activities, but also a range of similar activities that, even if not specifically listed, have the potential to result in prices not reflective of competitive market forces. The commission believes that no list can include all the activities that can harm competition, and that it could not adequately protect customers from high prices such as those experienced during the California crisis in 2000 and 2001 if it limited prohibited activities to a closed list. The commission notes that the ERCOT stakeholders developed a closed list of prohibited activities that they submitted to the ERCOT Board for inclusion in the Protocols. Subsequently, at its June 18, 2003 meeting, the Board voted to reject the stakeholders list of prohibited activities, on the grounds that such exclusive list implied that activities not included therein were therefore permitted.

The commission disagrees with AEP that market participants should fear sanctions as a result of unforeseen consequences of their actions. Subsection (k) of the proposed rule provides that the commission staff will initiate informal fact-finding reviews as a first step prior to any formal investigation "to obtain information regarding facts, conditions, practices, or matters that it may find necessary or proper to ascertain in order to evaluate whether any market participant has violated any provision of this section." Subsection (k)(1) states that the purpose of such fact- finding reviews is to afford the market participant an opportunity to explain its activities. The commission agrees that it should further clarify that market participants will not be sanctioned if it is found that a problem is due to unforeseen and unforeseeable consequences of their action. To this end, the commission is modifying the rule to add a new subsection on affirmative defenses that specifies the opportunity a market participant has to show that its actions should not be subject to sanction by the commission.

Intent/hindsight analysis

According to AEP, the proposed rule holds market participants to standards that are unachievable because it measures compliance by the consequences of an action without regard to the merit of the participant's intentions, whether the participant could foresee the consequences, or whether the participant was aware of alternatives to its action. AEP added that, toward the end

of discouraging only inappropriate activity, the element of intent should be added to the description of prohibited activities. CenterPoint concurred, adding that without the intent element, it is conceivable that market participants will be increasingly engaged in dispute resolution to resolve allegations, adding to the cost of participating in the ERCOT market.

AEP believed that the staff has overestimated the burden of establishing intent. AEP added that, as the Enron case demonstrates, there are often memoranda, e-mails, honorable people, and watchful competitors that will reveal ill intent on the part of a market participant. Further, AEP stated that the record keeping requirements in the proposed rule will be essential in assisting staff's determination of a participant's ill intent.

Austin Energy made a similar argument, adding that evidence of prior written warning, the frequency of the conduct, the duration of the conduct, a pattern of action, history of prior violations, or the circumstances surrounding the prohibited activity can support a finding of intent. In addition, Austin Energy noted that the commission's rule recognizes that "intent" can be considered in determining whether to initiate enforcement actions or determining penalty, and reasoned that standards for finding that a violation occurred should similarly include consideration of "intent" or gross negligence. Austin Energy added that if the commission clearly specifies required or proscribed behaviors, it will be easier to prove "intent." BP made a similar argument.

CMP concurred, stating that intentional misconduct is the problem to be addressed, and that there should be an intent standard in the proposed rule. CMP affirmed that under the proposed rule, a violation could be based on matters beyond a market participant's control or caused by a third party; or a violation could be determined only using hindsight based on information not known to the market participant at the time of the conduct. Reliant concurred. LCRA presented a similar argument. Reliant and CMP gave the example of the Commodities Exchange Act, which requires that, in order to establish manipulation, "it must be proven that the defendant intended to improperly manipulate price, and that: 1) the defendant had the ability to influence price; 2) an artificial price existed; and 3) the defendant caused the artificial price." Reliant urged the commission to adopt these accepted elements as an overarching principle in the proposed rule, apply it to each definition and prohibition, and include it in a "Purpose or Policy" provision in the rule. In reply comments, AEP added its support for the Commodity Exchange Act's four part test for determining whether there was market manipulation. Coral also referred to the securities and commodity trading industries, and stated that federal statutes, regulation and applicable case law have included intent as an element to be addressed or proven when addressing behavioral issues. Coral stated that consideration of the design, resolve, or determination with which a market participant acts is critical in identifying unacceptable conduct. Coral, based on a definition of intent from Section 8A in the Restatement (Second) of Torts, stated that the rule needs "to determine whether from any acts or facts proven that the market participant desired to cause the consequences of his or her act or that he or she believed that the consequences were substantially certain to result from it." Coral added that, under PURA §15.030, an "offense is committed if a person 'willfully and knowingly' violates the statute."

Building on the concept of intent in relation to market manipulations, TXU referred to the Commodity and Futures Trading Commission (CFTC) and in particular Section 4c of the Commodity Exchange Act (CEA), which makes it unlawful for any person to participate in wash trades. TXU stated that "decisions at the CFTC and in the courts have defined such terms as 'wash trade' and 'accommodation trade' to inherently include an intent requirement." TXU quoted the Ninth Circuit Court's position in *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 284 (9th Cir. 1979), as stating that "One cannot have an 'accommodation' sale or a 'fictitious' transaction if one in fact believes he is bargaining faithfully and intends to effect a bona fide trade. Nor can one enter a transaction to cause the reporting of a false price without an intent to do so." TXU concluded that the courts and the CFTC have recognized that "rules that prohibit 'manipulation' of a market necessarily include an intent element."

TXU stated that a similar finding applies to the "market manipulation" rule of the Securities and Exchange Commission (SEC). TXU advised that "the commission should obviate the need for a Texas court to imply an element of 'intent' in this rule and should specifically include such an element in the rule along with a delineated means of proving intent as discussed below." TXU went on to say that intent can be proven by a number of means, including the establishment of a pattern of action, severity of action, or overt manifestations of intent. TXU gave definitions from the Texas Deceptive Trade Practices Act for the words "knowingly" and "intentionally". For example, "Knowingly means actual awareness at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim or, in an action brought under Subdivision (2) of Subsection (a) of Section 17.50, actual awareness of the act, practice, condition, defect, or failure constituting the breach of warranty, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness." TXU concluded that the commission can establish in the confines of the rule a reasonable means of proving "intent."

In reply comments, Coral stated that the fundamental challenge involves distinguishing between behavior driven by a legitimate business purpose and anti-competitive behavior, and provided a short review of antitrust law that addresses this challenge. Coral described a conceptual framework developed by the courts known as the "rule of reason." According to Coral, in applying the rule of reason, a court balances the perceived anticompetitive effects of the challenged conduct against the pro-competitive benefits it may have, and behavior that is not illegal per se is judged by two criteria: the intent that accompanies it, and its probable effect on competition. Regarding the intent criterion, Coral stated that the courts have distinguished between two kinds of intent: objective intent, which is inferred from a party's observable conduct; and subjective intent, which involves the actor's state of mind. Coral stated that, in "rule of reason" antitrust cases, the courts have used a standard of objective intent whereby, if a defendant can show a "legitimate business purpose with competitive benefits" that offset the perceived harm to competition, there is not only a justifiable inference that the party intended to achieve a legitimate goal, but also that the merits of the conduct outweigh the harm to competition. In this way, according to Coral, the courts have avoided the difficulties associated with the subjective intent standard, and Coral advised that the commission borrow the standard of objective intent used in

antitrust cases to distinguish anticompetitive from legitimate conduct: "the proposed rule should expressly allow market participants to explain how their conduct, if it is challenged, is justified by legitimate business purposes."

Reliant also saw an example of hindsight analysis in the list of prohibited activities in subsection (g) of the proposed rule. For example, Reliant stated that under the subsection, a violation would occur whenever a market participant's decision adversely affects the reliability of the regional network. Reliant claimed that a market participant would have to know the condition of the entire network, or it could not possibly know whether its individual decision will "adversely" affect the network. Reliant criticized subsection (g)(9), which states that a market participant is prohibited from engaging in a bidding strategy that increases market prices above competitive levels during certain emergency conditions when the ERCOT ISO must procure all bids. Reliant criticized the standard for being vague: a market participant does not know how the "competitive level" is determined, and therefore does not have enough guidance to know what he can and cannot do. In addition, Reliant objected to the standard as being based on hindsight, since a market participant will not know at the time of his action that the ERCOT ISO will have to procure the entire bids offered into the market.

In reply comments, Reliant stated that, in addition to the commission's statutory guidelines, there are precedent setting guidelines available now that should be followed to develop acceptable rules. Among the precedent setting guidelines, Reliant listed the comments of the Electric Power Supply Association (EPSA) and of the Federal Trade Commission (FTC) to the FERC proposed rules.

LCRA proposed as a solution that the commission, following FERC's lead, clarify that actions taken for a legitimate business purpose are not "Prohibited Activities."

In their supplemental comments, most of the commenters again raised the issue of adding an intent element to the commission's rule. TXU, CMP, EPSA, Coral, AEP, Reliant and CenterPoint stated that the rules adopted by FERC include an intent element and urged the commission to mirror the FERC's action by including intent in the proposed rule.

Commission response

The commission disagrees with comments suggesting it should add intent as a necessary element of a finding of a violation of the rule. The statutory scheme contained within PURA provides a range of enforcement actions available to the commission to address violations of the statute and commission rules or orders and specifies varying elements of proof applicable to each. PURA §15.030 provides for the imposition of criminal charges against any person who "willfully and knowingly violates this title." Thus, in order to obtain criminal penalties against a person, an intent to violate PURA must be demonstrated. In order to obtain civil penalties of up to $5,000 per day under PURA §15.028, the commission or the attorney general must demonstrate that one of the indicated service providers "knowingly violates this title." In contrast to these provisions, PURA §15.023 allows the commission to impose an administrative penalty against "a person regulated under this title who violates this title or a rule or order adopted under this title." Section 15.023 imposes no requirement that the violation must be done "knowingly", as in the case of civil penalties, and no requirement that the violation must be done "willfully and knowingly", as is required for criminal prosecution. Similarly, PURA §39.356, which allows the commission to revoke certificates and registrations, does not include an intent requirement but allows the commission to act in response to "significant violations" or even the failure to maintain required financial and technical qualifications. Based upon a review of the express language of PURA, the commission concludes that the Legislature did not intend to limit the commission's administrative enforcement actions to those instances in which a person acts "knowingly" or "willfully" or with any other specific improper intent. Because the Legislature did not require a finding of intent for administrative enforcement actions, the commission lacks the authority to amend PURA by adding such a requirement to the statutory language. *Harrington v. State*, 385 S.W.2d. 411 (Tex. Civ. App. -- Austin, 1964, overruled on other grounds, 407 S.W.2d. 467).

The commission's conclusion on this issue is supported by the decision in *Fay-Ray v. Texas Alcoholic Beverage Commission*, 959 S.W.2d 362 (Tex. App. -- Austin, 1998, no writ). In that case, which involved an appeal of an administrative enforcement action that resulted in revocation of a mixed beverage permit, the court rejected a contention that a specific intent to violate the statute was required before a permit could be revoked. The court stated, at page 366, that the section of the statute "does not contain any language which would indicate that a specific intent to violate that statute is required." The court also considered and rejected an argument that because intent is required in some criminal sanctions under the statute, a similar intent standard must be imposed in regard to civil sanctions. The court stated that,

"the fact that there must be specific intent to find a permittee or licensee criminally negligent for selling beer to a minor and to cancel a permit for this violation does not require us to 'harmonize' the Code by imposing a requirement of specific intent before a permit may be revoked for the negligence addressed by the Dram Shop Act in another section of the Code or under section 11.67." (*Id.*, at p. 366).

Like the situation in *Fay-Ray*, there is nothing in PURA §15.023 which requires a specific intent before administrative penalties may be assessed and there is no need to "harmonize" the criminal provisions of PURA with the administrative enforcement provisions of PURA by imposing an intent requirement that is not found in the statute.

The lack of an intent requirement in PURA §15.023 is also evidenced by the language contained in PURA §15.024(c), which prevents the commission from imposing an administrative penalty if the violation is remedied with 31 days after the person receives a notice from the commission and the person satisfies the "burden of proving to the commission that the alleged violation was remedied and *was accidental or inadvertent*." (Emphasis added.) There would be no need for this provision, and it would be rendered ineffective, if the commission had the burden of proving "intent" in order to establish a violation under §15.023. In interpreting the statute, the commission must seek to give meaning to all parts of the statute and must avoid an interpretation that renders the statute meaningless. *Southwestern Bell v. Public Utility Commission*, 79 S.W.3d 226, 229 (Tex. App. -- Austin 2002, no writ). Applying this concept, the commission concludes that intent is not an element that it must prove in order to establish a violation of the statute in administrative enforcement actions. Lack of intent, *i.e.*, the fact that an action was accidental or inadvertent, is an affirmative defense that may be raised by the person alleged to have committed a violation. In order to reflect this, the commission

has included language in the rule recognizing this affirmative defense.

Some of the parties submitting comments argued that an intent element must be implied in PURA, citing various federal cases in which intent was implied concerning violations of federal trade statutes. The commission finds that these cited cases do not establish that the commission has the need or the ability to imply an intent element when the Legislature has not included one in PURA. In *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), the United States Supreme Court ruled that proof of scienter (intent) is a necessary element in a private damage action under §10(b) of the Securities Exchange Act of 1934. The Court's decision was based upon three factors: (1) the language of the section in question; (2) the legislative history of the Act; and (3) the relationship of the section to other remedies available under the Act and the effect of the requirement on the overall statutory scheme. This analysis has been followed in subsequent cases involving the interpretation of federal regulatory statutes.

Applying the factors enunciated in *Hochfelder* the commission concludes that it would not be proper to infer an intent element as a requirement for administrative enforcement of its rules. The decision in *Hochfelder* was based upon federal law that prohibited the use of "any manipulative or deceptive device or contrivance" in the purchase or sale of securities. Based upon the use of the term "manipulative or deceptive device or contrivance", the court concluded that the law was intended to proscribe knowing or intentional misconduct. Similarly, other federal cases have relied upon the use of terms such as "fraud", "accommodation trade", "fictitious trade", or "for the purpose of" to indicate the need to imply an intent element. Unlike the federal law, the language of PURA §15.023 does not contain these provisions or similar provisions that imply the need for an intent element. All that is required under §15.023 is a determination that a person has "violate(d) this title or a rule or order adopted under this title." Therefore, the first factor from *Hochfelder*, the language of the section in question, does not indicate the need to imply an intent element. The legislative history of PURA, and the public policies expressed in PURA, also do not support the need for the creation of an intent element. The Legislature has directed that the commission has authority to "make and enforce rules necessary to protect customers of telecommunications and electric services consistent with the public interest" and that it must "protect the public interest during the transition to and the establishment of a fully competitive electric power industry." There is nothing in these policies that states or implies that customers are only to be protected from "knowing and willful" violations of the commission's rules. Finally, the third factor, the relationship of the section to other remedies available under the Act and the effect of the requirement on the overall statutory scheme, also argues against creation of an intent element. As noted previously, PURA authorizes the commission to take various enforcement actions and specifies varying levels of proof to support those actions. Requiring all of those enforcement actions to be subject to the same proof requirement (a "knowing and willful" violation) would effectively amend PURA and upset the carefully structured regulatory scheme that it creates.

The commission also notes that federal courts have primarily focused upon the statutory language in determining whether scienter was a required element of proof and have not required the same scienter requirement to apply to all parts of a statute. In *Aaron v. Securities and Exchange Commission*, 100 S. Ct. 1945 (1980), the U.S. Supreme Court held that, although one subparagraph of Section 17 the Securities Exchange Act of 1934 should be implied to include a scienter requirement, the remaining subparagraphs concerning enforcement actions do not include such a requirement. The court ruled that subparagraph 17(a)(1) contained a scienter requirement because it used the term "defraud", as well as the terms "device", "scheme", and "artifice", which had been relied upon in *Hochfelder* as embracing a scienter requirement. The court found no scienter requirement under subparagraph 17(a)(2), which prohibits obtaining money "by means of an untrue statement of a material fact, or any omission to state a material fact." The court stated that such language was "devoid of any suggestion whatsoever of a scienter requirement." The court also found no scienter requirement under subparagraph 17(a)(3), which prohibits a transaction that "operates or would operate" as a fraud. Even though subparagraph 17(a)(3) contained the word "fraud", the court declined to require scienter, stating that the language "quite plainly focuses upon the *effect* of particular conduct on members of the public, rather than upon the culpability of the person responsible." (Emphasis in the original, at page 1956.) Thus, although one portion of the statute required a finding of scienter, the Court did not extend that requirement to other portions of the statute in the absence of explicit statutory language.

The commission finds that the new rule is similar to activities prohibited by the Deceptive Trade Practices and Civil Remedies Act (DTPA), Texas Business & Commerce Code Annotated §17.41, et seq. (Vernons 2003). In *Smith v. Baldwin*, 611 S.W.2d 611, the court rejected an argument that proof of intent was required to recover under §17.46(b)(7) of the DTPA. The court noted that certain subdivisions of §17.46(b) contained language requiring proof of intent, but subdivision (7) did not. The court reasoned that the Legislature could easily have included similar language in subdivision (7), but it did not do so. The court ruled that, "When the Legislature has carefully employed a term in one section of a statute, and has excluded it in another, it should not be implied where excluded." Because the Legislature has included an intent element in both PURA §§15.028 and 15.030, but has excluded it from §15.023, it should not be implied in PURA §15.023 as some commenters have suggested.

Like the DTPA, subsection (g) of the new rule contains both a general prohibition against any act "that adversely affects the reliability of the regional electric network or the proper accounting for the production and delivery of electricity" as well as a list of specific "prohibited activities." The need for such a structure was recognized in *Pennington v. Singleton*, 606 S.W.2d 682 (Tex. 1980), an early DTPA case, in which the Court stated, at page 688:

A broad interpretation is warranted, however, due to human inventiveness in engaging in deceptive or misleading conduct. The Legislature did not intend its express purpose of protecting customers from false trade practices to be circumvented by those who seek out loopholes in the Act's provisions. For this reason, the Legislature initially provided consumers with an action under the "catch-all" provisions of §17.46(a), as well as for the violations listed in §17.46(b).

The commission finds that the same analysis should apply to this rule. The Legislature intended to authorize the commission to protect customers from unfair, misleading and deceptive practices during the transition to competition. In order to provide such protection while also recognizing the "human inventiveness" in seeking loopholes in a regulatory provision, the commission finds that it is appropriate that the rule contains both

a "catch-all" provision as well as a list of specific prohibited activities.

The commission has considered the FERC's action but does not believe that it is appropriate or consistent with the commission's authority under PURA. As discussed previously, the express statutory language of PURA does not include an intent element and the commission may not add it to the statutory criteria. The remedies proposed by FERC, disgorgement of profits and the revocation of market based rate authority, are more punitive than those available to the commission and that factor may justify the FERC's decision to include an intent element. The commission also notes that the FERC rule is stated in the alternative, *i.e.*, actions "that are intended to or foreseeably could" manipulate market prices or market rules are prohibited. Thus, if it is foreseeable that an action would result in a violation of market rules, FERC does not need to inquire into or prove the intent behind the market participant's actions.

In conclusion, the commission declines to impose an intent element in the list of prohibited activities because such an element is neither required nor implied by the statutory language of PURA.

FTC's quote regarding need for structurally competitive markets

AEP, Reliant, Coral, and CMP quoted from the comments submitted by the FTC to the FERC regarding the FERC's proposed market behavior rules. In its comments, the FTC stated that the goal is to develop structurally competitive markets, and that antitrust experience has shown that competitive markets with ease of entry are more likely than behavioral rules to protect consumers, and warned that rules and policies that create barriers to entry will undermine the development of a "structurally competitive market."

AEP and Coral added that the FTC warned FERC against detailed rules that conflict with established norms for competitive behavior as defined by antitrust laws.

AEP also added that the FTC's advice to the FERC is consistent with the Legislature's directive to the commission to "authorize or order competitive rather than regulatory methods to achieve the goal of this chapter." Reliant concurred, saying that PURA §39.001(d) does not authorize the commission to impose stringent regulatory methods instead of competitive methods that impose the least impact on competition.

Commission response

The commission agrees with the FTC that, generally speaking, structurally competitive markets that exhibit ease of entry are more likely than behavioral rules imposed on market participants to protect consumers and result in efficient pricing, output and investment. However, the commission recognizes that the wholesale electricity market in Texas was not structurally competitive at the outset of market open, and is not structurally competitive today. The Legislature acknowledged that a fully competitive electric power industry is not yet established in Texas, and stated so in PURA §39.001(a). Until sufficient competition develops in the wholesale electricity markets in ERCOT and in Texas, the commission believes that there will continue to be a need for market rules to protect the public interest. Therefore, the commission believes that there needs to be a proper balance between allowing competition to govern market participants' activities and enacting limited regulations to provide consumer protection rules, and will strive to reach this difficult balance.

The commission believes that, with time, a more structurally competitive wholesale market will develop as power companies affiliated with incumbent utilities lose generation share, and less behavioral regulation will be needed. However, the commission believes that one must be careful not to rely on broad statements applicable to competitive markets in general while ignoring the specific characteristics of electricity markets that may render these statements insufficient to address local market power, or market power that results from emergency conditions. For example, the commission is aware that local market power may continue to exist for a long time in load pockets due to transmission constraints that cannot be easily resolved and where new generation investments are not economically attractive.

The commission has always supported and will continue to support the development of market rules that provide proper incentives for efficient generation location and for competitive pricing of electric services as the best way to help a more structurally competitive market develop. However, the commission sees the development of such rules as a work in progress that needs to be complemented with market behavior rules as a practical matter. The commission believes that in several instances, such rules can do no harm to competition in that they simply will not be activated in a competitive environment. For example, a restrictive rule that is triggered when a pivotal bidder is able to set the market price will never be triggered in a competitive market, which is defined by the absence of pivotal bidders. Nevertheless, the commission is sensitive to comments that have pointed to specific instances where restrictive regulation may impede competition and the normal conduct of legitimate business activities and has taken these statements into account. Following the FTC suggestion, the commission adds the concept of materiality to the rule so as not to chill pro-competitive behavior while maintaining proper safeguards against activities that are clearly not legitimate.

Reliant stated that the proposed rule provides what the FTC has characterized as less efficient "indirect approaches" to achieving a structurally competitive market and that the proposed rule would undermine the development of such a market in ERCOT. CMP affirmed that the proposed rule could discourage entry into the ERCOT market because requirements are so absolute that compliance is unachievable or too costly.

Commission response

The commission believes that the FTC comments regarding the inefficiency of "indirect approaches" must be analyzed in context. In its comments to FERC, the FTC states that "the benefits of competition are most likely to accrue to consumers when markets operate unburdened by substantial and durable market power." In the presence of market power, the FTC advocates "policies that reduce concentration, ease of entry impediments, and facilitate price-responsive programs." However, the FTC recognizes that such direct approaches may be too costly, slow, or otherwise unavailable. When such is the case, the FTC accepts that less direct means, such as bid caps and must run obligations, may warrant consideration on an interim basis as a means to curtail market power. Thus, although the FTC encourages "FERC and the states to emphasize direct approaches to achieving structurally competitive electricity markets," as a more efficient approach, it also recognizes that "indirect approaches," although less efficient, may be necessary to prevent anticompetitive behavior and achieve consumer protection goals.

Austin Energy quoted the FTC as stating that if a seller's market power can be assessed *ex ante*, FERC can negate awarding or renewing the seller's market-based rate authority, which would

diminish the need for the application of behavioral rules after the fact.

Commission response

The commission notes that this FTC recommendation to FERC is not applicable to ERCOT. The commission does not have rate making authority over market participants in ERCOT and therefore does not have the option to negate market-rate authority as a way to address market power ex-ante. The commission notes that the FTC favors price responsive demand as an ex- ante measure that keeps prices at competitive levels, and praises the New York Independent System Operator's (NYISO's) Emergency Demand Response Program that allows customers to bid in the capacity reserves market. The commission fully agrees and has placed a high priority on addressing barriers to demand participation in the ERCOT markets. The commission points out that ERCOT has achieved exemplary demand participation in the Responsive Reserve market and that other forms of demand response through voluntary curtailment have begun to take place. Efforts continue, with the commission's support, to reduce barriers for demand participation in all ERCOT markets. The success of such efforts will be achieved when demand curtailments measurably bring prices down one or two intervals after prices start to spike, or when demand offers compete with and displace supply offers. Such results cannot be assumed at this stage other than in the Responsive Reserve market where demand participation has been effective in reducing market concentration.

FTC's position on a market impact standard v. an intent standard

In reply comments, TXU quoted the FTC's advice that FERC not condemn all actions or transactions that manipulate prices, but instead focus only on conduct that leads to unjust and unreasonable rates.

CMP stated that the FTC urges a cost-benefit analysis when choosing between a broad requirement and one that has been narrowed to fit a particular problem, and criticized the preamble to the proposed rule for addressing only the cost and benefits of having a rule versus having no rule. CMP quoted the FTC as saying that "if the conduct is not likely to result in anti- competitive *effects*, prohibition of the conduct may lead to less efficient market operations." Elsewhere, CMP criticized the proposed rule for violating PURA; excluding intent and other crucial considerations, and imposing standards of perfection and strict liability; and violating several constitutional protections. CMP added that adding intent to the standards would ameliorate most of these concerns to a significant degree.

With regards to the proposed prohibition concerning collusion, CMP and Coral quoted FTC as warning that some agreements among competitors may create efficiencies as well as carry the potential for competitive harm, and therefore care should be exercised when assessing the competitive implications of particular agreements.

With regards to antitrust law, CMP agreed when the FTC criticized FERC's use of antitrust- type terms that may conflict with how those terms are employed in antitrust enforcement, and approved of the approach taken in the proposed rule subsection (g)(5) stating that the subsection has to be interpreted in accordance with federal and state antitrust and judicially-developed standards under such statutes regarding collusion.

Commission response

The commission notes that the FTC, in its comments to FERC, recommends focusing on the impact of market participants' activities rather than on the intentions of the market participants when they engaged in the activity. This focus on market impact rather than on market participant intent is in contrast to the concern expressed by many market participants that the proposed rule lacks an "intent" element. The commission cannot reconcile the fact that CMP, who claims that the proposed rule is unconstitutional because it excludes intent, and TXU, who strongly supports an intent standard, would also support the FTC's market impact standard, since the FTC recommended approach is to ignore intent, and focus on impact. The FTC also suggests a materiality standard that would result in tolerance for activities FERC may otherwise consider illegal, as long as the activities do not result in a significant market impact, or in a material anti- competitive effect. Thus, as TXU stated, FTC advocates tolerance for a certain amount of price manipulation, and recommends FERC action only if there is a significant price impact; it states that it is not unlawful under the antitrust laws for a seller with market power to charge a profit maximizing price; and it asserts that agreements among competitors may create efficiencies as well as carry the potential for competitive harm. What matters, according to the FTC, is the price impact of certain behavior, and the competitive implications of particular agreements. The FTC refers to FERC's example of prohibited activity under its Behavior Rule #2: "collusion with another party for the purpose of creating market prices at levels differing from those set by market forces." The FTC disagrees with the apparent intent requirement of the example and states that "the modern antitrust view is that antitrust enforcement against anticompetitive agreements among competitors does not require proof of intent."

The FTC also disagrees with FERC when it states, "another instance in which FERC's Market Behavior #2 may conflict with antitrust principles is in the use of the term "without a legitimate business purpose." Antitrust laws usually apply the standard to exclusionary conduct. In some instances, the FTC continues, "antitrust has asked whether an agreement had a 'legitimate business purpose' as a way of inquiring into whether the agreement had a pro- competitive justification, as by creating efficiencies sufficient to make the market more, rather than less, competitive."

The FTC concludes: prohibition of conduct not likely to result in anticompetitive effects may lead to less efficient market operation; and by analogy, prohibition of conduct that does not lead to unjust and unreasonable rates may lead to less efficient market operation.

To avoid confusion and the potential conflicts identified above when different agencies are involved in policing anticompetitive behavior, the FTC advises FERC to reaffirm in its general rule that sellers with market-based rate authority are prohibited from engaging in conduct that would violate the antitrust laws. Further, the FTC observes that conduct that is likely to violate the Federal Powers Act's (FPA's) "just and reasonable" standard may not violate the antitrust laws. Therefore, the FTC advises, FERC should also prohibit conduct that leads to "unjust and unreasonable rates."

The commission believes that the FTC's recommendations are also applicable to the Texas situation. As discussed above, the commission believes that it has the authority to prohibit wholesale market participants' activities that may result in unreasonably priced electricity for retail customers. The commission will take into account materiality so that only activities that result in

significant anticompetitive effects, or in unjustifiably high retail prices with no competitive benefits for retail customers will be penalized.

Purpose of market monitoring standards

CMP described four objectives of creating market monitoring standards that it believes are consistent with PURA: to provide the means to monitor the ERCOT administered market; to ensure the reporting of information on market structure and operations; to propose appropriate action relating to efficiency opportunities, market design flaws, market rule violations, and market power; and to ensure a market monitoring program that is fair and independent and minimizes interference with open and competitive markets. CMP compared these objectives to, and finds consistency with, the three policy goals stated by FERC in developing market behavior rules. CMP described these as: to provide for effective remedies when market abuses occur; to provide clear market rules regarding violations known today, while allowing for remedies for market abuses that may occur in a form not envisioned today; and to provide reasonable bounds on regulation to avoid regulatory uncertainty for market participants. Further, CMP stated that FERC considers the two objectives of providing certainty to the market and protecting customers against market abuses to be equally important. CMP added that FERC acknowledges that there must be a balance between affording a complaining party the right to obtain financial compensation, and providing finality to the sellers who are the subjects of the complaint. CMP quoted FERC as saying that anticompetitive activities and abuses of market power are prohibited and must be made subject to remedial action, but that transactions consistent with the operations of supply and demand and that constitute legitimate business activities should not be discouraged or impeded.

TXU suggested that the rule should be consistent with the following principles: the proposed rule must not inhibit the effectiveness of competitive market forces in encouraging pro- competitive behavior and punishing anticompetitive behavior; it should not have the unintended effect of returning to cost of service regulation; it must protect competition, not competitors; it must be sufficiently clear as to the conduct that is being prohibited; it should include a finding of intent as a prerequisite to establishing a violation; affirmative defenses should be available where there is sufficient justification for engaging in the alleged anticompetitive actions; and it should ensure consistency with the Protocols and the market structure.

Commission response

The commission generally agrees with the four objectives of market monitoring quoted by CMP, but would modify the third and fourth objectives. While the commission has enforcement authority over operating standards within ERCOT, it also has oversight authority over procedures developed by ERCOT relating to the reliability of the regional electrical network. One of the objectives of market monitoring not mentioned by CMP is to ensure that ERCOT has sufficient tools to maintain the reliability of the electric network. The commission would modify CMP's third objective to include reliability and gaming of market rules as two additional areas where the market monitor could recommend that the commission take appropriate action. Regarding the fourth objective, the commission believes that there should be a balance between enforcement of proper market behavior to ensure that customers are protected from potential market abuses, and minimizing interference with the development and normal operations of a competitive market. The commission would modify the fourth objective to read: "to ensure a market monitoring program that is fair and independent and minimizes interference with open and competitive markets while ensuring proper action to deter and if necessary penalize activities that cause unreasonable prices, do not serve a legitimate business purpose, or that have significant anticompetitive effects." The commission believes that these objectives, as modified, are consistent with PURA.

The commission agrees with the three goals stated by FERC in developing market behavior rules, as reported by CMP. The commission agrees that it has a mandate to provide for effective remedies on behalf of customers in the event anticompetitive behavior or other market abuses occur. The commission also agrees that it is necessary to provide clear market rules regarding violations known today, while allowing for remedies for market abuses that may occur in a form not envisioned today. For this reason, the commission believes it is appropriate to include in the rule generic standards to provide the necessary guidance as to the types of activities that the commission considers to be anti-competitive or in other ways unduly harmful to customers or to the developing market, along with a list of prohibited activities that serve as examples of the kind of activities market participants should not engage in. And lastly, the commission agrees that it needs to provide reasonable bounds on regulation to limit regulatory uncertainty for market participants and revises the proposed rule to better reflect this goal.

The commission does not fully agree with CMP's rendering of the FERC statement that transactions that are consistent with the operations of supply and demand and that constitute legitimate business activities should not be discouraged or impeded. FERC states: "transactions and practices which are consistent with the normal operation of supply, demand, and true scarcity, or which otherwise have a legitimate business purpose, should neither be discouraged nor impeded." It is important to specify "transactions consistent with the *normal* operation of supply and demand *and true scarcity*" because there can be emergency situations during which conditions do not exist for a *normal* operation of supply and demand. There can also be situations where market manipulations can create *artificial scarcity*. These important qualifiers were lost in CMP's remarks. Secondly, FERC does not refer to legitimate business activities, but to activities with a legitimate business purpose. The difference is important, because although profit maximizing is a legitimate business goal, not all profit maximizing activities have a legitimate business purpose in the view of the commission. The FTC points out in its comments to the FERC that, in antitrust law, the term "legitimate business purpose" applies to activities that have "a pro-competitive justification, as by creating efficiencies sufficient to make the market more, rather than less, competitive." The commission agrees with the FTC definition and in particular, agrees that an activity that has anti-competitive effects cannot be considered to serve a legitimate business purpose. In addition, the commission does not consider activities that can foreseeably endanger the reliability of the electric network or force ERCOT to take otherwise unnecessary costly actions to protect the reliability of the electric network to have a legitimate business purpose.

The commission agrees with TXU that the rule should not inhibit the effectiveness of competitive market forces. To the extent that competitive market forces are at work, the role of the commission in guiding market behavior should be greatly reduced. As is indicated above, however, the commission does not believe that the market is structurally competitive at this time. Therefore,

some regulation of market behavior is necessary. The commission agrees with FERC's statement that: "this potential for market manipulation was not limited to the California market. In fact, the potential for market abuse and the exercise of market power may exist in any region where the evolution towards a competitive market is not yet complete; or where the design structure of the market is otherwise ill-equipped to promote competition." (Order seeking Comments, June 26, 2003, paragraph 11). Therefore, the commission agrees that, when competitive market forces are in effect, very little market interference from regulators should be necessary, whereas in situations where anticompetitive activities and market power abuses are observed, the commission has a duty to be vigilant and to take action to protect consumers. The commission agrees that the rule should protect competition, not competitors, but points out that protecting competition includes protecting competitors from unfair practices that aim at restricting their access to the market. The commission agrees that it must be sufficiently clear as to the conduct that is being prohibited and revises the proposed rule to improve clarity in this respect. The commission does not agree with TXU that a finding of intent is necessary to establish a violation. This issue is discussed in more depth in other parts of this order. The commission agrees that affirmative defenses should be available so that market participants have the opportunity to provide a justification for their activities and revises the proposed rule to include such. In addition, the commission notes that under subsection (k), redesignated as (l), relating to investigations, a market participant will have an opportunity to explain its activities during an informal fact-finding review. Finally, the commission believes that there should be consistency between the final rule and the Protocols, but that should an inconsistency exist, it will be appropriate to change the Protocols to conform to the commission rules. As to the need for consistency with the market structure, the commission points out that the market structure is currently undergoing fundamental changes, and that the rule may have to be re-evaluated and modified for consistency when the new market structure is in place.

Rule too broad and vague

CMP and Coral stated that the proposed rule is far broader than needed to address the potential problem. CMP's view was that potential problems in ERCOT could not be similar in magnitude to those experienced in California because of adequate supply and better market design. In support of this assertion, CMP quoted statements made by the commission in various reports to the Legislature to the effect that Enron trading strategies for the most part could not be used in ERCOT because they were specific to California's market rules and the configuration of its electric grid. CMP also referred to the commission's Market Oversight Division 2002 annual report stating that staff's review of 175 responses from market participants did not reveal widespread gaming of the ERCOT market. Coral stated that although the Preamble to the rule mentions the California market gaming problems, more specific Texas-related concerns need to be articulated. Coral added that the scope should be reduced to cover specific types of potential manipulation or abuse that have or could reasonably be expected to happen in the ERCOT market, absent a prohibition.

Commission response

The commission disagrees with CMP and Coral that the proposed rule is far broader than needed to address the potential problem. The commission believes that it is only prudent to provide clear and complete "rules of the road" to market participants and revises the rule to further improve its clarity as the best way to avoid the California experience. CMP's arguments are unconvincing: the commission does not believe that adequate supply in ERCOT will last forever, and points out that ERCOT is in the process of redesigning its market to address design flaws that have been identified since the market opened and that ERCOT has not been able to resolve. CMP's mention of reports to the Legislature regarding the potential for gaming activities in ERCOT is incomplete. It misses the most important piece, which is the presentation entitled "Mitigation Measures for Gaming Opportunities in the ERCOT Wholesale Electricity Market" that was presented to the Electric Utility Restructuring Legislative Oversight Committee on June 18, 2002. This presentation identifies 13 gaming opportunities in the ERCOT market, and although for each gaming opportunity identified, steps are described by which the commission intends to address the problem, many of those steps have not yet been taken or been finalized. The commission strongly disagrees with Coral that the rule should address more specific Texas- related concerns because the 13 potential gaming activities identified in the above named presentation served as the background for the development of the proposed rule. It would be imprudent to assume that only the California market could be gamed, and that only Enron could manipulate the market. FERC testifies to the need for market behavior rules when it states: "the commission has been informed … by what we have learned about the types of behavior that occurred in the Western markets during 2000 and 2001. We also have gained additional experience in other competitive markets, particularly those with organized spot markets in the East." (Docket Number EL01-118-000, Order, June 26, 2003, par. 4) FERC adds: "we also noted that this potential for market manipulation was not limited to the California market. In fact, the potential for market abuse and the exercise of market power may exist in any region where the evolution towards a competitive market is not yet complete; or where the design structure of the market is otherwise ill-equipped to promote competition." (Id., par. 11) The commission believes that experience in California and other markets, as discussed by FERC, and the commission's own experience with the ERCOT market, as discussed above, demonstrate the need for the rule. Therefore the commission declines to reduce the scope of the proposed rule.

According to AEP, the rule contains a number of provisions that are overly broad or are subject to a wide range of interpretations. BP stated that numerous provisions in the rule are too vague to be enforceable, and added that the commission should precisely specify the particular types of conduct it wishes to preclude. As example, BP referred to market power abuses defined as practices "that are *unreasonably* discriminatory or *tend to unreasonably* restrict, impair, or reduce the level of competition," and stated that the terms "unreasonably" and "tend to" are too vague to provide meaningful guidance. BP advised that the commission should limit the definition of market power abuses to instances where a market participant with market power *intentionally* discriminates or *intentionally* reduces the level of competition. Finally BP believed that the commission should specify what types of conduct wholesale market participants are allowed to engage in under the proposed rule. While recognizing that it is difficult to specify all modes of permissible conduct precisely, BP is looking for guidance as to specific actions that are acceptable and those that are not acceptable under conditions of market scarcity.

Commission response

The commission agrees that some areas of the proposed rule are subject to interpretation and revises these areas to provide more clarity. The commission is conscious, however, that the rule is facing an ambiguity-specificity paradox that is characteristic of all attempts to guide behavior. If a rule is too broad, it is subject to self-serving interpretation and creates uncertainty as to what is prohibited. If a rule is too specific, actors will tend to focus on the principle itself rather than on the objective behind the principle, causing a neglect of everything that has not been specified. The proposed rule has attempted to not only describe the standards, but also the objectives behind the standards. The broad provisions of the proposed rule are intended to describe the general objectives of the standards. However, the proposed rule also includes lists of specific obligations, and of prohibitions that are intended to serve as examples of activities the commission considers to be market abuses. The commission will revise the generic standards to bring more clarity to the general objectives that are intended. However, BP's suggestion that the commission should precisely specify the particular types of conduct it wishes to preclude and that it should specify exactly what types of conduct are allowed is unrealistic and would be mired by the problems associated with too much specificity. It would be unrealistic because a specific list of prohibited activities or of tolerated activities would have to be modified every time a new type of market abuse or manipulation is discovered and every time someone thinks of an activity that should be tolerated. Strict specificity of prohibited activities would send the message that an illicit activity that was omitted is allowed. Strict specificity of allowed activities would kill creativity. Instead, the commission believes that the rule can give better guidance as to what constitutes acceptable practices even if they are not strictly specified, drawing on the concepts of materiality and impact recommended by the FTC so as not to impede pro-competitive activities, and on the standard of predictability adopted by FERC in its final market behavior rules so as to eliminate uncertainty caused by hindsight regulation. Thus, referring to BP's definition of market power abuse example, a practice can be considered "unreasonably discriminatory" if the conduct can lead to anticompetitive effects, or cause prices that would not prevail in a competitive environment, provided the anti-competitive effect or the price impact are material. The commission disagrees with BP that an intent standard is needed in the market power abuse definition, and notes that PURA definition of market power abuse does not include an intent standard. The intent standard is discussed in other parts of the order.

Coral stated that "a rule is fatally vague if it exposes potential actors to some risk or detriment without giving fair warning of the nature of the proscribed conduct." Coral added: the standard for vagueness is whether "persons of common intelligence must guess at what is required." Further, Coral stated that a rule adopted under a statute that imposes a penalty for violation is subject to the same tests as a penal statute and must define with reasonable certainty what conduct will invoke the penalty.

Reliant criticized the proposed rule for being premised on hindsight analyses and vague standards that are inconsistent with prudence review standards acceptable under PURA, and also inconsistent with general fairness standards. Reliant stated that a properly constructed rule should provide the market participant with concise and certain descriptions of what is and what is not acceptable behavior in the market. Reliant added that the analyses should be based on the information and alternatives available to the decision maker at the time the decision was made, and not on the impact of an activity.

Commission response

As previously stated, the commission agrees with and will adopt FERC's "foreseeable" standard so that a market participant will only be responsible for the negative impact of its activities if such negative impact was foreseeable, in other words, if the market participant knew or should have known that such impact would result from its activities, based on the technical knowledge one would expect of a market participant operating in ERCOT's wholesale electricity markets. The commission disagrees with Reliant that the analysis should not be based on the impact of an activity if the impact was foreseeable and material.

TXU stated that it recognizes and supports commission staff's concern that if the commission rules are too narrowly tailored, the rules will not effectively deter all anticompetitive behavior. However, TXU stated, if in the end a broader rule is more detrimental than helpful, the overriding purpose--protecting competition--is not served. TXU expressed its concern that vague requirements in the proposed rule do not provide fair notice to market participants and invite arbitrary enforcement by the commission. TXU gave several examples. First, TXU stated that the proposed rule allows the commission to punish behavior that is "not expressly addressed" in the Protocols, but is in violation of the "purpose and intent" of the Protocols. TXU asked: how can a market participant ensure that its interpretation of the intent of the Protocols is the same as the commission's interpretation, if the intent of the Protocols is not expressly addressed in the Protocols? In another example, TXU referred to subsection (g), which it said allows the commission to punish any behavior that adversely affects the reliability of the regional electric network, and asked: how can a market participant ensure that its conduct will not affect the reliability of the regional electric network when it does not have real time transmission system information regarding the activities of other market participants? In addition, TXU included in the list of vague requirements a reference to an evaluation of whether a market participant's activities unfairly impacted other market participants, and reference to a requirement that market participants seek clarification of Protocols that are unclear. TXU also stated that if benign conduct can result in a violation under the proposed rule, this will deter market entry and pro- competitive behavior.

Austin Energy advised the commission, when developing its rules for market oversight, to ask the question: "is the action taken sufficient to remedy the harm and sufficiently circumspect to impose the minimum possible restraint and/or transactions costs on the market?" In the case of the proposed rule, Austin Energy asserted that the answer is no: the proposal fails to achieve proper balance by "establishing unachievable standards"; "establishing standards that are not clear"; "imposing price regulation;" and "being overly broad." Austin Energy predicted that these failures will potentially stifle activity and investment in the wholesale market, and increase transaction costs.

Commission response

The commission agrees with TXU that rules that are too broad will not deter anticompetitive behavior because they are open to self-serving interpretations. The ambiguity-specificity paradox in rules that attempt to guide behavior has been discussed above. There is no easy way of resolving the paradox. However, both the proposed rule and the FERC Market Behavior Rules have adopted the approach recommended in the literature: they provide generic standards that are broad and give a description of the objectives behind the standards, and they add

a non-exclusive list of specific examples of the kind of behavior that is prohibited for illustrative purposes. Subsection (a) describes the objectives of the rule and of the commission. The purpose of subsection (d) is to inform market participants of the criteria that will be used by the commission when reviewing the activities of a market participant. The commission modifies the language in subsection (d) to introduce an additional standard it will use in its review of market participants' activities, the standard of materiality recommended by the FTC in its comments to the FERC. The foreseeable standard adopted by the FERC in its final market behavior rules is included in new subsection (h), Defenses, as an affirmative defense. The commission believes that the addition of these two standards addresses the concern expressed by TXU and other parties that vague requirements do not provide fair notice to market participants and invite arbitrary enforcement by the commission. The foreseeable standard also addresses TXU's and other parties' concern that a market participant may not know in advance how its actions will impact the reliability of the electric network, or the efficient operation of the market; and it addresses the concern expressed by TXU and Reliant about hindsight regulation. The materiality standard addresses the concern expressed by TXU and several other parties that a market participant may be found in violation of the rule even though its actions had little or no effect on reliability, or on the competitiveness or efficient operation of the market.

The commission disagrees with TXU that the requirement that market participants seek clarification of Protocols is unclear. No other party has indicated that this requirement is unclear.

In response to comments, the commission has clarified or deleted some provisions to address concerns about vagueness, particularly in subsections (d) and (e) of the proposed rule. Some commenters argued that the rule is unconstitutionally vague because it allegedly forbids or requires an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Others argued that the rule does not provide the kind of notice that will enable ordinary people to understand what is prohibited or required and that it authorizes or encourages arbitrary and discriminatory enforcement. These comments have confused the standard that applies to penal statutes with the lesser standard that applies to economic regulations. As applied to economic regulations, such as this rule, a rule is vague only if it commands compliance in terms so vague and indefinite as really to be no standard at all or if it is substantially incomprehensible. *Ford Motor Co. v. Texas Dep't of Transportation*, 264 F.3d 493, 507 (5th Cir. 2003). Other cases have held that rules do not need to achieve "meticulous specificity" and may instead employ "flexibility and reasonable breadth." *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L.Ed. 2d 222 (1972). Rules satisfy due process if a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, has fair warning of what is required. *Freeman United Coal Mining Co. v. Federal Mine Safety & Health Review Comm'n*, 108 F.3d 358, 362 (D.C. Cir. 1997). In *Ford*, the court upheld the statute in question despite contentions that it did not provide "fair notice", stating at page 509:

In drafting §5.02C(c), the Legislature probably intended, permissibly so, to capture whatever creative conduct could be imagined by manufacturers to circumvent the statute's intended prohibition. A statute is not unconstitutionally vague merely because a company or an individual can raise uncertainty about its application to the facts of their case.

The commission finds that the same analysis applies to the rule. The commission has established both an overall prohibition on conduct that affects the reliability of the network or the proper accounting for the production and delivery of electricity as well as a specific list of prohibited activities in order to protect customers during the transition to a competitive electric market in Texas. These prohibitions provide fair notice to persons subject to the rule. A reasonably prudent market participant, familiar with the conditions the rule was meant to address and the objectives of the rule, has fair warning of what is required. The fact that some commenters can envision scenarios in which uncertainty may arise, regarding the application of the rule in specific circumstances, does not serve to make the rule unconstitutionally vague.

Some commenters suggest that the more prescriptive constitutional standard applicable to penal statutes should also apply to the rule, claiming that the rule is "quasi-criminal". The commission disagrees with this contention. In the *Ford* case, cited previously, the court refused to apply the standard for penal statutes to an administrative enforcement action. The court noted, at page 508, that "while the potential fines are substantial, no prohibitory effect or quasi-criminal penalties are associated with a violation of the Code." Although stated as "civil penalties" in the *Ford* case, the proposed penalty of $1.8 million is analogous to the administrative penalties imposed by the commission under PURA §15.023. Thus, the fact that administrative penalties are involved does not serve to designate the rules as "quasi-criminal".

Even if the rules are labeled as "quasi-criminal," the commission finds that the rules meet the more stringent vagueness requirement. The rules are not like those involved in *Women's Medical Center of Northwest Houston v. Bell*, 248 F.3d 411 (5th Cir. 2001). In that case the court upheld a preliminary injunction against enforcement of rules adopted by the Texas Commissioner of Health. The court found each of the rules unconstitutionally vague because, as stated at page 422:

… it impermissibly subjects physicians to sanctions based not on their own objective behavior, but on the subjective viewpoints of others. Each of these three provisions measures compliance by the subjective expectations or requirements of an individual patient as to the enhancement of her dignity or self-esteem. Even a state's witness who had helped draft the provisions conceded that there are no objective criteria for assessing compliance with the "enhancement" provisions, undermining the efficacy of the administrative process from which licensee may seek clarification. These provisions fail to "afford fair warning of what is proscribed. (Citation omitted.)

The commission's new rule is not based upon the subjective viewpoints of others, but upon the act or failure to act of a market participant. As in other cases, the fact that the rule includes broad standards or language that could be interpreted in different ways does not serve to render it vague.

As noted previously, the rule is structured similar to the DTPA. Many of the actionable claims under the DTPA are broadly stated in terms such as "causing confusion or misunderstanding", "using deceptive representations" and "making false or misleading statements" and most do not include an intent element. The DTPA was attacked as being unconstitutionally vague due to the terms used and the lack of an intent element. The Texas Supreme Court rejected those arguments in *Pennington v. Singleton*, cited previously. The court ruled, at 606 S.W.2d 690, that the "terms used are not so vague or indefinite as to violate

due process, and we will not read into them an intent requirement merely to restrict the scope of their coverage." The court explained, at page 689, that "The boundaries of illegality under the DTPA must remain flexible because it is impossible to list all methods by which a consumer may be mislead or deceived." The same rationale applies to the broad terms used by the commission in this rule. The commission finds that the terms used in the rule are not unconstitutionally vague or indefinite and that there is no need to include an intent requirement merely to restrict their scope.

Marginal cost pricing and concern about return to cost of service regulation

Austin Energy asserted that the proposed rule imposes restrictions on bidding in the ERCOT energy and capacity markets that are tantamount to price regulation. TXU made a similar argument. Austin Energy referred to subsections (g)(8) and (g)(9) of the proposed rule that prohibit behavior that may lead to prices "above competitive levels." Under subsection (g)(8), economic withholding occurs if: 1) a market participant's offer into the market is sufficiently large that the market cannot clear without the offer; 2) part or all of the offer is priced above competitive market levels; and 3) the offer results in a price that is not reflective of a competitive market. Austin Energy believed that the practical effect will be imposing marginal cost bidding on all market participants, which Austin Energy equated to imposing price regulation, or more correctly, offer regulation, and which Austin Energy believed is in contradiction of PURA §39.001. PURA, Austin Energy said, requires that prices be set in markets, not through price regulation. Austin Energy explained that, in a market, it is the interplay of buyers and sellers that disciplines bidding behavior. If a supplier chooses to bid above its costs, a lower bid will win the award, and the supplier will have to change its bidding behavior or will be driven out of business. Austin Energy concluded: "the commission staff has yet to demonstrate--outside of a few instance of poor market design--the breakdown of the market's natural discipline over bidding behavior. Short of making that finding, the commission is not justified in reintroducing price regulation."

Austin Energy recognized that "economic withholding is a serious matter that if allowed to fester could wreck havoc on the ERCOT market--even a cursory look at the California debacle shows the potential for damages." But, Austin Energy advised, rather than regulating bidding behavior, "the commission should focus on establishing a fair and level competitive market and rooting out true instances of market power abuse."

Commission response

The commission emphasizes that its attention to marginal cost is part and parcel of its concern about market power. The commission agrees with Austin Energy that the interplay of buyers and sellers should discipline bidding behavior. The ability of the market to provide such discipline, however, depends on robust competition. Pricing in excess of marginal cost by a seller who is immune from the chastening hand of competition is an abuse of market power.

Marginal cost pricing conceptually includes a normal profit, which is defined as the average profit expected in the industry when conditions of competition prevail. Under the theory of marginal cost pricing, a seller makes an offer at its marginal cost and, if selected, receives the market clearing price. A seller with an efficient unit offered at marginal cost is almost assured to be selected and paid more than its marginal cost. The only seller who does not receive more than its marginal cost is the one with the least-efficient unit among those selected. This unit's marginal cost is equal to the market clearing price.

If a seller decides to submit an offer above its marginal cost, or if it chooses to inflate its expectation of a normal profit, it should run the risk of being replaced in the market by another seller. As long as competition can impose this risk on the seller, pricing above marginal cost does not present a regulatory concern. In the absence of a fully competitive market, the commission has an obligation to ensure that the seller does not impose on buyers a price substantially higher than would prevail under competitive conditions. PURA §39.001(a) entitles the public to electricity prices that are determined by the *normal* forces of competition. Prices that are substantially above the marginal cost of the marginally efficient unit when not tempered by competition are, therefore, injurious to the public interest. The commission has a duty to protect the public from such prices.

In electricity markets, it is difficult to find markets that continuously operate under a competitive environment, and it is not unusual to find local market power in geographical pockets, even when the generation share of each resource owner is low, because transmission constraints or other reliability constraints often give some resource owners temporary or localized market power. Market power is a dynamic phenomenon in electricity markets, and the commission must have the ability to address abuses that occur during the times when the market is not competitive, even as those times become less frequent. The commission is therefore particularly concerned with sellers' offer prices in load pockets where competition is absent.

In the real world, a unit that is always marginal will submit offers higher than its marginal cost because its marginal cost alone would not allow it to recover its short run fixed costs. This unit may be selected only a few times a year and will bid at a level that allows it to continue to run a few times a year and cover its maintenance cost. In a competitive market, this unit will be selected if capacity reserves are short, setting the market price at a high level for all energy sold. If the unit is selected with high frequency, it will send a signal that will attract investments in new generation. Thus, market prices above the marginal costs of the least efficient unit in this instance is a reflection of scarce supply and high demand and is not a regulatory concern. However, in a market where one or more market participant can exercise market power, offering the most inefficient unit to the market or bidding above marginal costs may not be a reflection of scarce supply, but instead a market manipulation to push prices high above the marginal cost of the least efficient unit needed to meet the demand. For example, a market participant who has market power may withhold production from more efficient units and offer its least efficient unit at that unit's marginal costs or higher, with confidence that the unit will be selected and set the price for all energy sold. Such withholding of production may bring in enormous profit to the market participant. Another example of market manipulation occurs when a market participant bids all or a large part of its production at a very high price, regardless of marginal costs. Here again, the market participant who has market power is confident that it will be rewarded often enough to bring in large gains that more than compensate for the times when its bid is not selected. Thus, artificial scarcity can be created through either physical withholding of production, or in the second example, economic withholding of production. Both of these practices, when used by suppliers insulated from competition, are abuses of market power and constitute violations of this section and of PURA §39.157(a). The commission eliminates

proposed subsection (g)(8) to address Austin Energy, TXU, BP, and other commenters' concerns about establishing a marginal cost bidding requirement, and replaces it with new subsection (g)(8) to clarify that physical and economic withholding of production are considered market power abuses that violate this section.

Reliant objected that the rule would not allow increasing prices in reaction to a "short term" market condition to send appropriate price signals necessary for continued investments.

In support of its opposition to subsection (g)(8) and (g)(9) relating to marginal cost bidding, Austin Energy gave the example of a bidder who would offer in every interval the same quantity of power at the same price, but above its marginal cost. According to Austin Energy, the "consistent bidder" would be guilty of economic withholding if for some intervals other bidders left the market and it became pivotal as a result, even though this was not the bidder's intent.

Commission response

Under the rule, if a "consistent bidder" were to become a pivotal bidder, as described by Austin Energy, and set the market price above competitive levels, and if it were established through the informal or formal investigative processes that the market participant had market power and that the bidding behavior served no legitimate business purpose, the bidder would be in violation of the rule. It would still be a violation if there was a foreseeable possibility that the supplier would have market power at some point (even momentarily) and the efficacy of the strategy inherently relied on market power. The practice of a hockey stick bidder who routinely bids a few megawatts (MWs) at the highest possible price in the hope of setting the market price when an emergency occurs that creates temporary scarcity of supply does not serve a legitimate business purpose. The use of such practices by a market participant with market power, which ensure price gouging and hold customers hostage in times of emergency, is a reflection of the exercise or abuse of market power even if temporary. Contrary to Reliant's assertion, such abuses of market power should not be tolerated regardless of whether they may send price signals that attract investments. The commission believes that customers must be protected from such practices.

Austin Energy opined that the commission has already decided that hockey-stick bidders do not exercise market power abuses in relation to the Modified Competitive Solution Method (MCSM) in that it allows the hockey-stick bidder to be paid as bid. Surely, Austin Energy contended, the commission would not have approved pay-as-bid for the hockey-stick bidder if it were exercising market power abuse.

Commission response

Contrary to Austin Energy's assertion, the commission has not determined that hockey-stick bidders do not exercise market power abuses. Regarding the MCSM, by deciding to allow the hockey-stick bidder to be paid as bid, the commission chose to implement a less intrusive form of regulation aimed at establishing incentives compatible with desired behavior rather than imposing pure command and control measures. Under the commission's ruling, a bidder will no longer benefit from a hockey-stick bid because the bid, if struck, will no longer set the market price for all previous quantities bid and the bidder will only receive the price it bid for the insignificant one or two MWs that are typical of hockey-stick bids. By adopting this pricing method, the commission did not rule or imply that use of a hockey-stick bid is not a form of market power abuse. Austin Energy's interpretation of the commission's action in this regard is misguided.

According to Austin Energy, in order to establish that a hockey-stick bidder has market power the commission would have to establish that the bidder had prior knowledge that its bid was essential to clearing the market for a number of intervals and that it had intent to commit price gouging.

Commission response

In response to Austin Energy's and other parties' argument that a supplier cannot predict when conditions will exist that would render the supplier pivotal, the commission suggests that it is not necessary for a pivotal supplier to know exactly when such conditions exist to exercise market power. If a market participant is frequently able to set the market clearing price, it can consistently submit high bids with the assurance that it will be selected frequently enough and that the return will be high enough to outweigh its loss when it is not selected. The commission believes that it is appropriate to evaluate a pivotal supplier's offers on a case by case basis when the offers result in consistently high market clearing prices, to determine whether the supplier has market power and is exercising its market power. If the market participant did not know and could not reasonable anticipate that its bid would adversely affect the market, and if the activity served a legitimate business purpose, the market participant has an opportunity to establish those facts as an affirmative defense under new subsection (h) of the rule.

Coral said that the provision on economic withholding implies that a generating facility that is unavailable for any reason other than unscheduled maintenance is potentially guilty of "economic withholding," which Coral equated to outlawing scheduled maintenance. In addition, Coral opined that under PURA, there is no obligation to serve associated with the wholesale market. In supplemental comments, several market participants also indicated that the definition of artificial shortage in subsection (c)(2) amounts to a "must-offer" requirement.

Commission response

The commission is unable to see how a prohibition against economic withholding could possibly be equated to outlawing scheduled maintenance, as economic withholding is the result of a pricing strategy. However, a market participant who falsely declares that a unit is unavailable for maintenance reasons may be found in violation of the section for physically withholding the unit and making false representations to ERCOT regarding its capability.

Regarding Coral's assertion that under PURA, there is no obligation to serve associated with the wholesale market, the commission agrees that ERCOT currently does not have a universal "must-offer" requirement. However, the commission points out that, under PURA §39.157(a), if a market participant has market power, withholding of production is an example of an abuse of market power. Therefore, PURA §39.157(a) indirectly establishes a "must-offer" obligation for a market participant who has market power. The commission also points out, however, that the affirmative defenses described in subsection (h) would still apply. A supplier with market power must offer all its available capability, but if taking a unit off-line served a legitimate business purpose (as in the case of equipment failure or manufacturer-specified maintenance, for example,) it would not be in violation of this rule.

The commission agrees with commenters who stated in supplemental comments that the proposed definition of artificial shortage may be interpreted as establishing a universal "must- offer" requirement and eliminates this definition. A more detailed discussion of this item is included under the discussion of subsection (c)(2) below.

Standard Needed for Finding Market Power Abuse

Austin Energy quoted PURA's definition of market power abuses as "practices by persons possessing market power that are unreasonably discriminatory or tend to unreasonably restrict, impair, or reduce the level of competition." Austin Energy insisted that the commission's authority to address market power abuses must be linked to a finding that the market participant possesses market power. Therefore, Austin Energy continued, it is crucial that the commission define market power to provide market participants proper guidance and clarity about inappropriate behavior, and that it address the questions: what does it mean to possess market power; and, how is market power identified and measured?

Austin Energy added that there should be a debate as to the proper definition of market power, and a ruling by the commission as to what constitutes market power and market power abuse in order to achieve needed regulatory balance. In addition, Austin Energy advised, the commission should identify and prohibit anti-competitive behavior and behavior that constitutes abuse of market power, while at the same time neither discouraging nor impeding legitimate business.

Commission response

The commission agrees that a person can only be found to have committed market power abuses if it has market power, as stated in PURA. In order to avoid any potential conflict between the rule and PURA, the commission deletes this definition from the rule and will rely on the statutory definition of "market power abuses" in implementing the rule.

The commission agrees with Austin Energy and others that it needs to define market power and will do so in a separate project, Project Number 29042, *Rulemaking on Definition of Market Power*. The commission will invite further debate regarding the definition of market power in its newly initiated rulemaking.

Role of ERCOT in Enforcing Operating Standards

Subsection (i) of the proposed rule requires ERCOT to develop and submit for commission approval an internal process to monitor occurrences of non-compliance with the Protocols that have the potential to impede ERCOT operations, or represent a risk to system security. ERCOT stated that such an internal process already exists and that therefore, it is unnecessary to include this requirement in the rule. Further, ERCOT argued, the Protocols are "somewhat self- enforcing" because they are designed to provide incentives for market participants to behave properly and to use specific market mitigation measures to address situations where incentives will not work. Thus, ERCOT noted, the Protocols require all Qualified Scheduling Entities (QSEs) to sign a Standard Agreement, and if they violate the Agreement, their ability to participate in the ERCOT market may be terminated. ERCOT also referred to the Modified Competitive Solution Method (MCSM) adopted by the commission as a market mitigation method designed to help make the Protocols self-enforcing. ERCOT also pointed to "other market mitigation measures that are under discussion as part of the Texas Nodal market rule development process" in Project Number 28500 relating to Activities Related to the Implementation of a Nodal Market in ERCOT, as further evidence that there is no need for enforcement procedures. ERCOT recognized, however, that "diligent and timely enforcement of operating requirements is necessary for ERCOT to manage the grid in a reliable and safe manner." ERCOT also recognized that failure to perform under every provision of the Protocols may not always have a financial penalty.

Commission response

The commission agrees with ERCOT that, where proper incentives exist in the Protocols, there is no need to add authoritative command-and-control measures. The commission does not believe, and ERCOT has not demonstrated, that the incentives for proper behavior and mitigation measures contained in the Protocols are sufficient to address all opportunities for activities that can be harmful to the market, or threaten reliability. It would not be prudent or responsible for the commission or for ERCOT to rely solely on the Protocols as a set of self-enforcing market rules that can ensure an efficient and reliable functioning of the market, as the ERCOT market is immature, and the market rules contained in the Protocols are still in the developmental stage, as evidenced by the 400 Protocol Revision Requests that have been submitted in the two years since the market opened. As ERCOT itself points out, market mitigation measures are under discussion as part of the new market redesign process, a discussion that has only recently begun. Such measures are being discussed because the market cannot be expected to discipline itself, and because it is unlikely that the new market design and resulting Protocols will be self enforcing. Further, the commission fails to see how the current discussion of market mitigation measures could be a justification for relaxing or eliminating ERCOT's enforcement of its operating procedures. The commission believes that an ERCOT procedure for enforcing operating requirements is necessary to protect customers and ensure that safe and reliable electricity service will be available to them. In determining that proposed subsection (i) relating to ERCOT procedures for enforcing operating standards is necessary, the commission seeks to make clear that ERCOT has a duty to monitor compliance with the ERCOT Protocols and Operating Standards and to report non-compliance to the commission's Market Oversight Division when such non-compliance has the potential to impede the efficient and reliable operation of the market by ERCOT. The need for ERCOT to perform monitoring and enforcement activities was clearly foreseen by the Legislature in PURA §39.151(i). Further, PURA §39.151(d) requires the commission to oversee and review the procedures adopted by an independent organization, such as ERCOT, and authorizes the commission to enforce such procedures.

Garland supported the provisions of subsection (g) of the proposed rule relating to prohibited activities as necessary to assist with the improvement of reliability. Garland believed that the section clearly outlines workable and equitable definitions of "prohibited activities" and "economic withholding." Garland added that such clear definitions are necessary to avoid a situation in which "the competition to provide energy and services often takes second place to a competition to discover loopholes and create opportunities in which some market participants can reap substantial benefits that would not be available in a truly equitable and competitive markets."

Commission response

The commission agrees with Garland. The commission removes subsections (g)(8) and (g)(9) for reasons explained in the discussion of marginal cost pricing above. However, the commission adds new subsection (g)(8) to clarify that a market participant who has market power and engages in withholding of production, whether economic or physical withholding, is in violation of this rule for abusing its market power.

Garland added that, to further support an equitable and competitive market, the rule should add language to subsection (d) stating that the Protocols are intended to support the efficient operation of the market "while ensuring that users of services provide fair compensation to providers of services, and that providers of services deliver what they are compensated for providing."

Commission response

The commission agrees with the concept of fair compensation for services provided and recognizes that the Protocols do not always provide for such fair compensation to the providers of reliability services to ERCOT. The commission is also aware that attempts are being made through the ERCOT protocol revision process to remedy this problem and actively supports these efforts. The commission also agrees with the second part of Garland's statement and believes that it relates to gaming activities. The commission believes that the second part of the statement is addressed by subsections (g)(4) and (6).

Cap Rock supported the goal of the proposed rule and urged the commission to take into account the new market design adopted by the commission in Docket Number 26376 and to make sure that the rule will be applicable to the new market rules currently being designed.

Commission response

The commission is aware of the need to ensure consistency of the rule with the new market design and will assess the need to make changes to the rule once the new market design is known and adopted.

The Independent REP Coalition believed that the proposed rule is an important measure for the stability of the market that will provide some assurances to outside entities looking to invest in deregulated energy activities.

Commission response

The commission agrees with the Independent REP Coalition that the rule is essential to the stability of electricity markets in Texas.

Comments on specific subsections

§25.503(a)

TXU recommended adding a new subsection (a)(10) to explicitly identify that one purpose of the rule is to "be practical and limited so as to impose the least impact on competition."

CMP proposed revisions to clarify that the rule applies to REP activities in the wholesale market only, and not in the retail market. In addition, CMP would add a new subsection (a)(10) similar to the one proposed by TXU; and a new subsection (a)(11), to specify that one purpose is to provide fair procedures that meet due process requirements.

AEP would strike (a)(1) and (a)(3), stating that phrases taken from the retail customer protection sections of PURA Chapter 39 are inapplicable to wholesale markets.

Reliant would strike the phrase "including practices in the ERCOT administered market" in subsection (a)(1), explaining that the phrase is unnecessary because it is clear from the general purpose statement that the rule applies to the ERCOT region. Reliant would delete (a)(2), claiming that, based on Reliant's reading of PURA §35.004, the standard of reasonable prices for ancillary services is met upon the introduction of customer choice and upon acquisition by the ERCOT ISO of ancillary services on behalf of market participants.

BP took exception to the proposed rule's goal of prescribing "ERCOT's role in enforcing operating standards with the ERCOT regional network," saying that as a private entity comprised of market participants, ERCOT should not be engaged in the enforcement of the operating standards, but that enforcement should remain with the commission. BP added that ERCOT's role should be limited to ensuring compliance with the Protocols.

Commission response

The commission disagrees with TXU and CMP that a new subsection (a)(10) is appropriate to explicitly identify that one purpose of the rule is to "be practical and limited so as to impose the least impact on competition." The quoted language applies generally to rules and orders issued by the commission governing the establishment of a competitive wholesale electricity market. While the commission has complied with this requirement in adopting this rule, the language does not accurately identify the purpose or the reason for the rule. Accordingly, the commission declines to list it as a specific purpose of this rule.

The commission disagrees with CMP that a new subsection (a)(11) is needed to specify that one purpose of the rule is to provide fair procedures that meet due process requirements. The commission provides fair procedures that meet due process requirements in all of its rules. As in the previous discussion, the commission declines to list this general requirement as a specific purpose of this rule.

The commission disagrees with AEP that subsections (a)(1) and (a)(3) should be eliminated because they are taken from the retail customer protection sections of PURA Chapter 39 and are inapplicable to wholesale markets. As explained elsewhere in this order, the commission believes that PURA expressly gives the commission jurisdiction and authority to enforce rules as may be necessary to protect customers against unfair, misleading or deceptive practices, regardless of whether such practices occur in the retail or wholesale market.

The commission modifies (a)(1) to indicate: "practices that may occur in wholesale electricity markets, including ERCOT administered markets," so as to eliminate any ambiguity about which markets are affected by the rule. The commission believes that this change addresses CMP's concern as it clarifies that the rule applies only to the wholesale market and not to retail prices and services. The commission similarly clarifies in different parts of subsection (a) that the subsection refers to the wholesale market.

The commission disagrees with Reliant's interpretation of the commission's authority over ancillary services pricing. ERCOT's acquisition of ancillary services is governed by the procedures contained within the ERCOT Protocols and other operating procedures. Pursuant to PURA §39.151(d), those procedures must comply with the requirements of the commission's rules and the commission retains oversight authority to review and revise those procedures as necessary to ensure compliance with the statute and commission rules. PURA §35.004 should

not be read in isolation, as Reliant does, to negate this explicit grant of authority to the commission.

The commission disagrees with BP that ERCOT should not be engaged in the enforcement of its operating standards. PURA §39.151 (d) states: "An independent organization certified by the commission for a power region shall establish and enforce procedures … relating to the reliability of the regional electrical network and accounting for the production and delivery of electricity among generators and all other market participants. The procedures shall be subject to commission oversight and review." In addition, §39.151(i) states: "The commission may delegate authority to the existing independent system operator in ERCOT to enforce operating standards within the ERCOT regional electrical network and to establish and oversee transaction settlement procedures. The commission may establish the terms and conditions for the ERCOT independent system operator's authority to oversee utility dispatch functions after the introduction of customer choice." The commission adds language in subsection (a)(9) to clarify the purpose of the rule in this respect.

§25.503(b)

ERCOT suggested changing "market participants" to "market entities", as ERCOT is not a market participant.

Commission response

The commission agrees with ERCOT and changes the rule accordingly.

§25.503(c)

The commission received comments concerning the following definitions, which are included in subsection (c).

Artificial congestion

Reliant argued that the definition of artificial congestion is faulty because it assumes that a market participant has an expectation that congestion will occur the next day at the time he submits a schedule to ERCOT, which may not be the case. Coral objected to the definition on similar grounds, adding that any single generator does not cause congestion, rather it is caused by a combination of factors, most of which are beyond the control of any single party.

Austin Energy, AEP, BP and TXU said this term should include the element of intent. Austin Energy said that the definition should track the one used by FERC, which specifies that a market participant "first creates congestion, and then relieves it for the purpose of receiving payment." TXU recommended a similar change, adding that the commission could consider information available at the time.

Reliant said a market participant could submit a day-ahead schedule to ERCOT expecting no congestion the following day, but could still be penalized if that expectation turned out to be wrong because of factors beyond its control. Reliant and TXU also commented that under the proposed definition of artificial congestion, a market participant could be found in violation any time the commission could in hindsight identify some economically feasible redispatch that would have avoided or mitigated congestion. Coral, CPS, Reliant and TXU pointed out that market participants do not have timely access to aggregated information regarding the state of the transmission system or activities of other market participants, which makes their compliance dependent on factors beyond their control. Coral commented further that congestion is not caused by any single generator.

CMP said the definition should be deleted from the rule altogether because the standard is not in PURA and would probably conflict with antitrust law. AEP also said this definition should be deleted from the rule and should instead be defined in the ERCOT Protocols. If kept in the rule, AEP added, the definition should specify that the MP's purpose was to create congestion, and should be limited to entities with market power.

In supplemental comments, San Antonio, Austin Energy, TXU, CMP, CenterPoint, Reliant, and AEP called attention to how staff's redline differed from FERC's definition of artificial congestion on two points. These parties stated that staff's redline failed to take into account whether the scheduled power flows were uneconomic, and if so, whether the market participant purported to relieve the congestion it had created. TXU, CMP, and AEP said further that staff's redline amounted to a hindsight evaluation because it was implicitly based on information that the market participant would not have at the time the schedule was submitted.

Commission response

The commission agrees that the definition should be amended and revises it by clarifying two conditions. First, the definition specifies that a market participant has a number of options for scheduling, dispatching or operating a resource. Second, from among those options, the market participant chooses one that is more likely to create or exacerbate congestion instead of an option that does not have that result.

The commission agrees with commenters that artificial congestion should be understood in the context of information available at the time, and of choices and circumstances within a market participant's control. However, the commission declines to add the intent language recommended by Austin Energy and others. For reasons elaborated elsewhere in this order, intent is not a necessary element of a finding of violation under this rule. The commission agrees with the parties providing supplemental comments, and modifies the wording to bring it closer to FERC's definition. The commission specifies that the multiple options for scheduling must be knowable, that the selected option must one that foreseeably causes congestion, that the market participant is paid to relieve the congestion it created, and that the action would be economically inferior without the congestion payments. This definition should be interpreted to include rent payments that the market participant receives from congestion revenue rights.

The commission disagrees with AEP and CMP that this definition should be omitted from the rule. Many commenters in this rulemaking have called for greater clarity with respect to activities that could be subject to enforcement action, and defining terms such as "artificial congestion" is necessary to provide clarity. Furthermore, because artificial congestion could be the subject of an enforcement action, it would be inappropriate for the commission to cede the task of defining this term to stakeholders who themselves may eventually come under investigation.

Artificial shortage

Austin Energy, AEP, Reliant, LCRA, and CPS said the rule's definition of artificial shortage should include the intent to raise prices. For example, LCRA noted that a supplier may have a contract for standby services that commits a resource, with the result that the resource is not scheduled. LCRA said the supplier may have no intent to affect prices and may be unable to predict that such maintenance will affect prices. Similarly, TXU suggested specifying that legitimate activities that take resources out of the

market--routine maintenance, for example--would not be considered an artificial shortage. AEP further called for limiting the definition to entities with market power, or for deleting the definition altogether.

BP commented that a "safe harbor" provision could provide clarity with respect to artificial shortages. For example, a market participant who provides ERCOT with reasonable advance notice for non-emergency maintenance could be exempted from the rule's provisions related to artificial shortage. Similarly, TXU and CenterPoint sought clarification that legitimate conduct--scheduled, non-emergency maintenance, for example--would not violate the rule's artificial shortage provisions. Coral said that however the term is defined, it should take into account dual-grid plants, adding that such a resource should not be required to bid or schedule into ERCOT when its supply is directed to a non-ERCOT power area.

Reliant disagreed with the proposed rule's definition of artificial shortage, which would be created when a resource owner undertakes non-emergency maintenance and such action "affects market prices through the withholding of production." Reliant objected that a standard that does not take into account the possibly legitimate reasons for undertaking the maintenance should not be adopted. Reliant was concerned that the definition could create a liability for normal maintenance that needs to be performed pursuant to warranty requirements, and does not allow for honest mistakes that could be made in reporting plant capability.

CMP said the definition should be deleted altogether because the commission should not craft sweeping new definitions and standards that are not in PURA and are likely to conflict with antitrust law.

In supplemental comments, Austin Energy, TXU, CMP, and CenterPoint said that the staff's redlined version inappropriately created a must-offer requirement for generators because of the ending phrase "or in other ways operating and scheduling its facilities in a manner that materially affects market prices through withholding of supply." These parties claimed that, under this definition, legitimate reasons for not running or offering a unit into the market could be considered withholding of capacity.

Commission response

The commission acknowledges that the staff's redlined version may be perceived as introducing a universal "must-offer" requirement, which is not its intention in this rulemaking. The commission agrees that a "must-offer" requirement does not currently exist in the Protocols. Deleting the last two phrases of the definition in staff's redlined version eliminates this universal requirement. The commission notes that the first part of the definition addresses a generator's false representation of its operational capabilities. For example, declaring a unit available in the day-ahead resource plan and withdrawing it an hour before real-time could constitute "falsely representing the operational capabilities" of a resource if the owner profited by the resulting price increase and could not show a legitimate reason for suddenly changing the unit's status. The commission agrees, however, that truthfulness and accuracy in reporting the availability of a generating unit to ERCOT is addressed in subsection (f)(9) and does not need to be repeated. Therefore the commission concludes that this definition is not necessary and agrees to withdraw it.

Although a universal "must-offer" requirement does not currently exist in ERCOT, the commission finds that a higher standard for withholding of production exists for suppliers possessing market power. PURA §39.157(a) states that "market power abuses are practices by persons possessing market power," and that market power abuses include withholding of production. In other words, withholding of production by a person possessing market power is a violation of PURA. Thus by statute, suppliers with market power must offer all their available production and capacity into the market, and failure to do so without a legitimate business reason would constitute an abuse of market power.

The commission therefore withdraws the definition of artificial shortage in subsection (c)(2) and reference to the definition in subsection (g)(2) to remove the universal "must-offer" requirement from the rule. However, the commission also revises subsection (g)(8) to clarify that persons with market power may not withhold production unless they can demonstrate a legitimate business purpose or other affirmative defense.

The commission believes that removal of subsections (c)(2) and (g)(2) addresses the concerns expressed by all the parties who provided comments and supplemental comments regarding the definition of artificial shortages.

Economically viable resource

Many commenters recommended deleting this definition because the term is not used in the rule and therefore does not need to be defined. Coral further objected to the definition because it implies that the commission has the authority to set or determine appropriate prices, although PURA makes it clear that the commission has no such authority. Coral and Reliant also said the definition fails to provide for long-term costs, opportunity costs or profits. Consequently, Reliant said, it exposes market participants to penalties even though they may be making reasonable business decisions based on the information available at the time. AEP said that if the definition is maintained, it should clearly be limited to short-run economic feasibility. Denton noted that "economically viable" is subjective, and even when defined, actions that are not economically viable may be necessary to ensure reliability and stability of the electrical system.

Commission response

The commission agrees that this definition is not necessary and deletes it from the rule.

Efficient operation of the market

CMP requested that the definition be struck, stating that the term is used to describe a purpose of the Protocols, about which the Protocols are silent or ambiguous; and because the definition and aspects of that definition are not in PURA. CMP added that the definition imposes a standard of perfection because it refers to the "optimal" utilization of resources, that it is contrary to PURA's regulatory scheme for that same reason, and that market participants would not know in advance whether the conduct would meet the standard. CMP stated that the term: "just compensation" is impermissibly vague, and added that the reference to resolving congestion would make no sense if congestion was not the alleged problem.

Austin Energy stated that efficiency is an improper criterion for determining market abuses because it is an ideal outcome that is unachievable. Austin Energy stated that the Legislature avoided reliance on this hypothetical notion by not imposing economic efficiency, and instead, "it imposes competitive markets," in recognition that "competitive electric markets lead to economic efficiency," a basic economic teaching according to Austin Energy.

Austin Energy would favor competitive versus anticompetitive behavior as an easier standard to evaluate when conducting market oversight. San Antonio made a similar argument. Austin Energy and San Antonio gave examples in the Protocols where economic efficiency is second to other goals such as fairness, simplicity and reliability.

Commission response

The commission finds that it is not limited to conduct described or mentioned in the Protocols when it prohibits activities that it finds contrary to the public interest. Neither is the commission limited by terms mentioned in PURA. The term does not describe a specific conduct required of a market participant, but it describes the potential impact of a market participant's conduct. As used in the rule, the definition provides guidance to market participants concerning the factors the commission will review in enforcement actions and the factors they should consider in operating ethically. The commission modifies the language so that it is clear that market participants are expected to not engage in activities that interfere with the efficient operation of the market, and to support the efficient and reliable operation of the market through their market activities in general. This change addresses CMP's concern that the definition imposes a standard of perfection.

The commission believes that Austin Energy and San Antonio incorrectly equated "the efficient operation of the market" with "economic efficiency." These two concepts do not equate and may even conflict at times. The definition of "Efficient Operation of the Market" in the proposed rule is intended to refer to the optimal utilization of resources, subject to transmission constraints, and not to the "economically efficient" utilization of resources, as Austin Energy and San Antonio incorrectly infer. The commission agrees to modify the definition to eliminate any confusion and further clarify its intention when it uses the term "Efficient Operation of the Market."

Market participant

ERCOT commented that the term "market participant" as defined in the proposed rule differed from the definition used in the ERCOT Protocols. Moreover, ERCOT is not a market participant. ERCOT therefore recommended the term "market entity" and suggested adding a list of the kinds of entities included.

TXU recommended deleting "load-serving entity" (LSEs) from the definition of market participant because, as worded in the proposed rule, it was unclear whether the term included retail electric providers (REPs). TXU requested that the rule also clarify that transactions between REPs and their end-use retail customers are not viewed as wholesale enforcement issues.

Commission response

The commission agrees to change "market participants" to "market entity" in subsection (b). However, the commission is retaining a definition of "market participant" as a market entity other than ERCOT so that the rule can clearly differentiate between provisions that apply to all market entities and those that apply to entities other than ERCOT.

The commission declines to delete the term "load-serving entity" from the definition of market participant because it is clear from subsection (a), Purpose, that the rule applies to the activities of LSEs, including retail electric providers (REPs), participating in the wholesale electricity markets and markets administered by ERCOT.

Market power abuses

Austin Energy said the proposed rule's definition of market power abuse failed to provide clarity or standards for findings of market power abuse. Austin Energy observed that if the commission were to address how market power is identified and measured, it would provide the clarity that is presumably the intent of this rulemaking. Austin Energy reiterated its recommendation that the commission adopt the common definition of market power found in the Department of Justice and Federal Trade Commission merger guidelines, specifically "the ability profitably to maintain prices above competitive levels for a significant period of time." Austin Energy added that market power must be defined in order to inform standards for market power abuse.

BP said that the terms "unreasonable" and "tends to" in the definition of market power abuse are too vague to provide market participants with meaningful guidance as to what kinds of behavior constitute a market power abuse.

AEP, BP, CMP, San Antonio, and Reliant said the proposed rule failed to track PURA's definition of market power abuse. These parties stated that the rule should recognize that the possession of market power is a necessary condition of market power abuse. TXU said the definition should also add language from PURA that specifies "the possession of a high market share in a market open to competition may not, of itself, be deemed to be an abuse of market power…." TXU also said the rule should specify that violations of §25.272 of this title will be dealt with under that rule. CenterPoint said the rule should define predatory pricing.

Commission response

The commission agrees with Austin Energy that a definition of market power is needed. Because the proposed rule attempts to define market power *abuse* and not market power, however, adding a definition of market power at this time could raise procedural issues. The commission will open a separate rulemaking project to define market power.

With respect to market power abuse, the comments by various parties support the conclusion that the term need not be defined in this rule. PURA §39.157 defines market power abuse, and that statutory definition necessarily controls the provisions of this rule. The commission therefore deletes the definition of market power abuses contained in the proposed rule.

Official interpretation of the Protocols

The definition is eliminated as subsection (h) sufficiently describes the process intended under this term. Comments regarding this item and commission response are to be found under the discussion of subsection (h) (redesignated subsection (i).)

Protocols

ERCOT noted that the definition of "Protocols" contained in the proposed rule is different from how ERCOT defines the Protocols. In addition, TXU noted that ERCOT's Protocols control when they conflict with ERCOT's Operating Guides, even though the definition in the proposed rule equates the two. Reliant said further that while the Protocols are approved by the commission, the Operating Guides are not. ERCOT said that the term "ERCOT procedures" may be more appropriate to the rule. Austin Energy suggested language clarifying that the version of the Protocols in effect at the time of alleged misconduct would govern with respect to the action being investigated by the commission.

In supplemental comments, parties requested that the ERCOT procedures referred to in this section be limited to procedures

that are public and exclude administrative procedures internal to ERCOT. Parties also requested adding language to specify that, when there are inconsistencies between the Protocols and the Operating Guides or other ERCOT procedures, the Protocols govern.

Commission response

The commission agrees with ERCOT and adopts the term "ERCOT procedures." The interpretation of this term comprises not only the content of the Protocols and the Operating Guides, but the procedures governing how the two relate to one another and are amended. On the other hand, the commission declines to specify in the definition that the version of the Protocols in effect at the time of the alleged misconduct is what governs. The commission may be called upon to interpret the Protocols and, as part of that process, may need to consider other matters, including, but not limited to, the meaning of technical terms, the application of electric industry standards and practices, the object sought to be obtained by the provision, the consequences of a particular interpretation, and previous or pending Protocol revisions. Consistent with this change in definition, the commission has revised references to "Protocols" in other portions of the rule to now refer to "ERCOT procedures", where appropriate, in order to conform to the new defined term.

The commission agrees to add language to indicate that the reference to ERCOT procedures in this section is limited to procedures that are public and excludes administrative procedures internal to ERCOT. The commission also clarifies that the Protocols generally govern whenever there are inconsistencies between the Protocols and the Operating Guides, except when ERCOT staff determines that a provision contained in the Operating Guides or other ERCOT procedures is technically superior for the efficient and reliable operation of the network.

§25.503(d)

Austin Energy objected that subsection (d) was based upon a concept of economic efficiency and that economic efficiency is an unachievable standard for evaluating market performance. Austin Energy also questioned whether the commission would ever be able to determine whether any conduct undermined the efficient operation of the market. San Antonio also objected to the rule provision declaring that one of the purposes of the Protocols is "the efficient operation of the market." San Antonio argued that this standard is vague and that in many cases the "efficient operation of the market" is not achieved in the Protocols. San Antonio also objected to the list in subsection (d)(2) of the considerations the commission will use in reviewing a market participant's activities. San Antonio argued that any such list should consist solely of (1) the provisions of applicable statutes; (2) the provisions of applicable commission rules; and (3) the provisions of applicable ERCOT Protocols.

BP stated that the standards contained in subsection (d) are too vague to provide any meaningful guidance to market participants. BP noted that ERCOT has routinely considered and rejected attempts to include Protocol provisions stating the purpose and intent of the Protocols. BP asserted that ERCOT has decided that the Protocols should only be interpreted based upon their express language and BP encouraged the commission to take the same approach. BP suggested that references to "unfair, misleading or deceptive" practices should be replaced by references to "fraudulent or deceptive trade practices." BP asserted that by referring to this "existing legal standard" the market participants would clearly understand what practices the commission deems unacceptable. BP also objected to language referring to an activity that "reduced the competitiveness of the market." BP asserted that the phrase was too broad and vague and could potentially include activities that served a legitimate business purpose.

CMP argues that application of the rule would violate constitutional provisions concerning vagueness, retroactivity and ex post facto laws. CMP argued that market participants are only required to comply with the Protocols as written and that the rule should be revised to simply refer to PURA's purposes, if a description of purposes is retained. Similarly, CMP suggested that the list of considerations should be revised to list the factors contained in PURA §15.023. CMP also suggested that the language be clarified to indicate it only applied to the activities of market participants in the ERCOT administered wholesale market. CMP requested the addition of new language stating that certain acts or omissions are not considered a violation of the rule, including acts that were beyond the participant's control, acts that are consistent with supply and demand or have a legitimate business purpose, and acts that are not intentional.

TXU and AEP suggested that the reference to "unfair, misleading, or deceptive practices affecting customers" be deleted because it is based upon a PURA provision that deals with retail service while the rule concerns the wholesale market. TXU also requested the deletion of language concerning the commission's ability to address conduct not "expressly addressed" in the Protocols. TXU asserted that such provision does not give market participants fair notice of required behavior. At most, the commission's reliance upon the purpose and intent of the Protocols should be limited to the interpretation of ambiguous Protocol language. TXU argued that the factors listed in subsection (d)(2) included only factors that would count against the market participant and did not include any factors that would tend to indicate that a market participant had not engaged in improper conduct. To remedy this, TXU suggested the addition of such factors, including the market participant's history of compliance and any efforts to correct errors. TXU also objected that the list of factors failed to include a consideration of the market participant's intent and that the factors tended to protect individual competitors rather than protecting competition.

Reliant suggested that subsection (d) should be expanded to also monitor the activities of the ERCOT ISO as well. Rather than relying on the purpose and intent of the Protocols, Reliant stated that the Protocols revision process, contained in Section 21 of the Protocols, should be used to clarify any ambiguities. Reliant also noted that the list of purposes did not include the accounting function described in PURA §39.151(a) and requested that it be added. Reliant argued that portions of the list of considerations in subsection (d)(2) were vague and requested that they be revised and an intent element be added.

Austin Energy requested deletion of language indicating that the commission would be guided by the intent and purpose of the Protocols, asserting that market participants should not be held to any standards unless they have been warned by individual notice that their activity is prohibited by the Protocols. Austin Energy argued that the intent and purpose of the Protocols was established by ERCOT in Section 1.2 of the Protocols, which is to carry out the Legislature's charge for an Independent Organization under PURA.

AEP argued that the rule creates uncertainty, and explained that the Protocols either address a subject or they do not. A market participant should be able to rely upon the express language of

the Protocols and not subject to second guessing as to whether an action is consistent with the purpose and intent of the Protocols. AEP also requested that an intent element be added to this subsection.

Garland requested that subsection (d)(1)(B) be revised to indicate that users of services are required to pay fair compensation for the services they receive and that providers of services are compensated for the services they provide. Garland argued that many of the problems in ERCOT involve attempts by some market participants to shift the burden of their operating decisions to other participants, efforts by market participants to obtain compensation for costs incurred in following ERCOT instructions and claims for payment by some market participants for services they did not provide. Garland asserted that the rule should contain a clear articulation of this concept in order to create an environment in which participants compete to provide services instead of competing to implement inequitable market structures. In reply comments, CMP asserted that the Protocols do not serve the purpose Garland identified and that the commission lacks the jurisdiction to impose such a requirement.

Commission response

For reasons discussed elsewhere in this order, the commission disagrees with the suggestion to add an intent element to this rule and disagrees with comments suggesting that references to "unfair, misleading or deceptive" practices should be deleted. The commission reiterates that its authority to protect customers is not limited to practices in the retail market but extends to unfair, misleading or deceptive practices in the wholesale market as well. The commission agrees with comments suggesting that the provision requiring market entities to comply with the purpose and intent of the Protocols introduces uncertainty concerning the scope of the rule. In order to remove such uncertainty, the commission is deleting the list of the purposes and intent of the Protocols. Deletion of the language also addresses concerns about vagueness, retroactivity and *ex post facto* laws and a possible conflict with Protocols language that were raised by some commenters, and comments suggesting additions or revisions to the list of purposes. However, deletion of the language should not be interpreted as an agreement that market participants are only required to comply with the Protocols as written, as CMP stated, or that the commission does not have the ability to address conduct not "expressly stated" in the Protocols. The commission has the authority to address unfair, misleading or deceptive practices and market abuses that affect the reliability of the electric network, the efficient functioning of the market, or the competitiveness of the market, such as any activity that unduly restrains trade or unreasonably excludes firms from the market or significantly impairs their ability to compete, regardless of whether these activities are expressly addressed in the Protocols.

Concerning the list of factors considered by the commission when reviewing the activities of market participants, the commission declines to limit the list to a mere repetition of PURA §15.023 as suggested by Austin Energy, or to add factors listed under this section of PURA as suggested by TXU. This provision is intended to provide some guidance to market participants of the types of market impacts that adversely affect the competitive market. By providing a list of adverse market impacts the commission will monitor, the commission places market participants on notice of the results that they should strive to avoid if they want to avoid an administrative enforcement action, to the extent that such results are foreseeable. This notice function is different than, and does not replace, the factors that the commission will consider under PURA §15.023 in determining the amount of an administrative penalty in the event the rule is violated. In response to a comment from Reliant, the commission is revising this list to include a reference to the accounting function that is provided by ERCOT. For reasons discussed elsewhere in this order, the commission disagrees with the comments of Austin Energy and San Antonio that mistakenly allege that the rule incorporates an unachievable standard of economic efficiency.

The commission disagrees with BP's assertion that language referring to an activity that "reduced the competitiveness of the market" is too broad and vague, and that an activity that reduces the competitiveness of the market can have a legitimate business purpose. As stated by the FTC in its comment to the FERC, "in some instances, antitrust has asked whether an agreement had a "legitimate business purpose" as a way of inquiring whether the agreement has a procompetitive justification, as by creating efficiencies sufficient to make the market more, rather than less, competitive." (FERC Docket Number EL01-118-000, Comment of the Federal Trade Commission, p. 13, August 28, 2003.) The commission agrees with the FTC that an activity that reduces the competitiveness of the market cannot have a legitimate business purpose. However, the commission is adding a new subsection (h), Defenses, which will allow market participants to invoke the legitimate business purpose standard when appropriate as an affirmative defense. The new subsection also addresses CMP's request for language that indicates that acts beyond the control of the market participant are not considered a violation of the rule, provided that all elements of the affirmative defense are proven.

In addition, to add clarity to the rule and reduce uncertainty, the commission adds a materiality standard, as suggested by the FTC in its comments to the FERC, so that actions having a benign impact, or no adverse impact, on market competitiveness, or the efficient and reliable operation of the market, will not be considered in violation of the rule. However, the commission may request that a market participant discontinue a practice that has the potential to harm the reliability of the electric network, or the efficient operation or competitiveness of the market, even if the practice does not always produce an undesirable outcome.

Garland's comments regarding the need for fair compensation for reliability services provided to ERCOT are addressed elsewhere in this order. The commission believes that Garland's concerns about market abuses, such as a market participant getting paid for a service not provided and other such gaming activities, are addressed by subsections (f) and (g).

The commission agrees with TXU that the purpose is to protect competition and not individual competitors and modifies subsection (d)(2)(B), redesignated as subsection (d)(2), to specify that the commission will consider activities that materially reduce the competitiveness of the market, including activities that unfairly impacted other market participants in a way that restricts competition. Additionally, the commission is eliminating proposed subsection (d)(2)(E) as it is duplicative of proposed subsection (d)(2)(B), redesignated as subsection (d)(2).

§25.503(e)

AEP asserted that the requirement to "ensure the efficient and reliable operation of the ERCOT electric system" was an unachievable standard and created economic uncertainty. AEP requested that it be revised to state that a market participant should not knowingly interfere with the operation of ERCOT. AEP also

objected to subsection (e)(4) as a matter that is more properly addressed in the ERCOT Protocols.

Austin Energy objected to requiring market participants to comply with the "purpose and intent" of the Protocols. As in their comments to subsection (d), Austin Energy asserted that the standard is too vague.

Reliant, Austin Energy, and TXU all made similar comments, asserting that the language of this subsection is too vague and recommended removing the requirement to comply with the "purpose and intent" of the Protocols. Reliant also recommended that an intent element be included in the ethical standards, otherwise market participants could be subject to penalties for virtually any action they took. Reliant stated that subsection (e)(3) was included within the requirements of subsection (e)(1) and was therefore repetitive and should be deleted.

TXU suggested deleting this subsection because it is redundant of other requirements. Alternatively, if the subsection is only a list of expectations, TXU suggested the deletion of subsection (g)(10), so that violation of subsection (e) would not be a prohibited activity subject to penalties. TXU also argued that the rule is too broad and suggested that it be revised by limiting the requirement to comply with laws and regulations to only those laws and regulations within the jurisdiction of the commission; eliminating a redundant requirement to schedule, bid and operate their resources consistent with the efficient and reliable operation of the market; and deleting a redundant requirement to not engage in activities that create artificial congestion or artificial shortages.

Commission response

The commission agrees with AEP that requiring market participants to "ensure" the efficient and reliable operation of the market may be an unachievable standard and modifies the language to indicate that the commission expects market participants to "support" the efficient and reliable operation of the market. The commission believes that this expectation is fully consistent with the legislative goal of developing a competitive electricity market, protecting customers from unfair, misleading, or deceptive practices, and ensuring that customers have access to safe, reliable, and reasonably priced electricity. The commission believes that there are often situations in which it is quite possible for a market participant to anticipate that a seemingly profit maximizing activity could jeopardize the efficient operation of the electric network by ERCOT and result in high costs to the market. An example taken from factual observation is a market participant who would schedule a planned outage for the month of January, then decide a few days before the outage start date to postpone the plant's scheduled maintenance to March because market prices appear to be on an upward trend as January gets closer. The result would be that ERCOT would first direct transmission companies to plan for scheduling maintenance transmission outages for lines affected by the plant outage in January, and then would have to order these transmission outages to be re-scheduled to another month, March for example. This rescheduling could potentially create very high cost to the market, and add the additional risk that rescheduling the transmission outages for March may not be possible or may conflict with other outages previously scheduled for March. The market participant's decision in this example undermines the efficient and reliable operation of the electric network, even though it is not an express violation of the Protocols. It may force ERCOT to operate the electric system in an unsafe state, or to take actions resulting in inordinately high costs in order to maintain reliability, and may have a substantial impact on prices ultimately paid by customers. A reasonable alternative to the market participant's action in this example would be for the market participant to inform ERCOT of its desire to reschedule the outage and only go ahead with the rescheduling if ERCOT can accommodate it without substantial reliability issues that are inordinately costly to resolve. Another alternative would be the direct assignment to the market participant of the costs incurred by its last minute decision to deviate from the outage plan it previously submitted to ERCOT, providing a work-around exists that will enable ERCOT to maintain a safe operation of the network. These alternatives, which are not addressed in the Protocols, serve to illustrate the need for this section given that the Protocols fail to sufficiently protect the market and reliability.

Although the commission greatly favors incentive compatible market rules over behavioral standards to ensure the efficient and reliable operation of the market, experience has shown that it takes time to identify flaws in the market rules, and even more time to implement a remedy through the stakeholder process. The commission believes that, when evaluating a market participant's activity, it should ask: should the market participant have known that its action would interfere with the reliable or efficient operation of the market by ERCOT? In the above example, there should not be any confusion or uncertainty to the market participant about the impact of its action, because ERCOT has effectively provided numerical evidence as to the cost of such action to the market. In other instances when the market impact is not foreseeable, the market participant will have the opportunity to demonstrate during an informal review process under subsection (k), Investigations, that it could not have anticipated the impact of its action on the reliable and efficient operation of the market. In addition, the commission adds a foreseeable standard in new subsection (h), Defenses, that will ensure that the action will not be subject to penalty. The commission therefore believes that the standard is fair, that it is consistent with legislative goals, and that it should be retained.

For reasons discussed elsewhere in this order, the commission disagrees with the suggestion to add an intent element to this rule. However, the commission agrees with comments suggesting that this subsection on ethical standards should be seen as aspirational in character. The commission is revising the rule to clarify that point by deleting subsection (g) (10) that makes a violation of the guiding ethical standards a prohibited activity subject to penalties. The commission also agrees to remove the requirement to comply with the "purpose and intent" of the Protocols. The commission believes that these changes sufficiently address the comments concerning the alleged uncertainty created by subsection (e), Guiding ethical standards, and eliminates concerns about potential vagueness. The commission stresses that the proper functioning of a competitive electricity market depends upon customer confidence that market participants are acting in accordance with effective ethical standards. In order to provide assurances of ethical conduct to the public, the commission recommends that each market participant adopt ethical standards consistent with this subsection.

§25.503(f)

CMP proposed to eliminate subsection (e) and add two new subsections to (f) corresponding to (e)(2) and (e)(3).

Commission response

In light of the changes made to subsection (e), the commission believes that the concerns expressed by CMP have been addressed. Subsection (e) contains guiding ethical principles that

do not subject market participants to penalties, whereas subsection (f) lists market participants' obligations. Each of the subsections serves a purpose and the commission declines to eliminate subsection (e) and transfer part of it to subsection (f), as suggested by CMP.

TXU commented that a number of the affirmative duties in this subsection are more appropriately addressed as prohibited activities and should be moved to subsection (g), Prohibited Activities. TXU added that the commission should add an intent element to the list of prohibited activities.

BP commented that this subsection is well structured, sets forth specific, affirmative activities that market participants must follow in order to comply with the rule, and that market participants will know exactly what action they need to take to ensure they do not violate the rule. BP stated that this type of regulatory clarity is vital to a healthy wholesale electricity market.

Commission response

The commission disagrees with TXU that it should add an intent element to the list of prohibited activities for reasons discussed elsewhere in this order. The commission does not believe that the duties listed in subsection (f) would be more appropriately placed in the "prohibited activities" section, as suggested by TXU, and agrees with BP that this subsection is well structured and clearly specifies activities market participant should engage in to comply with the rule. The commission declines to make the change suggested by TXU.

Subsection (f)(1)

Reliant suggested eliminating this subsection stating that "knowledgeable" is not clearly defined and is redundant of subsection (e)(1) in which the market participant is expected to conduct business activities in accordance with the Protocols. AEP also suggested deleting this subsection stating that it puts the commission in the business of regulating the affairs of unregulated entities.

Commission response

The commission disagrees with Reliant that "knowledgeable" is not clearly defined and believes that this provision is necessary to clarify that a market participant cannot plead ignorance of the Protocols as a defense. The commission disagrees with AEP and believes that it has the authority to require that market participants know and observe the market rules. PURA §39.151(j) requires that all market participants must "observe all scheduling, operating, planning, reliability, and settlement policies, rules, guidelines, and procedures established" by ERCOT. As part of their technical qualifications for obtaining certification, retail electric providers (REPs) must demonstrate their ability to comply with the ERCOT procedures under §25.107 of this title (relating to Certification of Retail Electric Providers). The commission's form for REP certification also requires that the REP submit an affidavit in which the REP swears that it will comply with "all system rules and standards" established by ERCOT. Both REPs and power generation companies (PGCs) can have their certifications revoked for failure to maintain their qualifications, including the failure to comply with procedures adopted by ERCOT. (See, §25.107(j)(9) and §25.109(i)(1) & (2), relating to Registration of Power Generation Companies and Self-Generators.) The commission fails to see how market participants can comply with this requirement without taking steps to assure that their employees are knowledgeable of the contents of the ERCOT procedures that they have sworn to follow.

Subsection (f)(2)

TXU suggested that (f)(2) should be added to (g) and should be a prohibition against intentionally violating the Protocols. In addition, TXU suggested modifying (f)(2)(C) to identify circumstances where violation of an ERCOT instruction, Protocol requirement, or written commitment is justified. CMP and Reliant proposed removing references to "official interpretations of the Protocols issued by ERCOT." CMP also proposed adding to the list of exclusions: "when required by applicable law; or for other good cause." AEP suggested deleting this entire section stating that the items are more appropriately addressed in the ERCOT Protocols, but if this provision is retained, AEP requested that language be added to allow a market participant to be excused from compliance for good cause.

Commission response

The commission declines to move any of the duties described in this subsection to the subsection on prohibited activities, as suggested by TXU. The commission agrees to add a generic safe harbor provision to (f)(2)(C) to catch any possible circumstances that could excuse non-compliance with an ERCOT instruction, Protocol requirement, or written commitment, as suggested by CMP, AEP and Reliant. The commission disagrees with AEP that the items in this subsection are more appropriately addressed in the ERCOT Protocols and declines to eliminate the subsection.

The commission declines to eliminate references to official interpretations of the Protocols by ERCOT for reasons explained later in the discussion of proposed subsection (h) (redesignated subsection (i).)

Subsection (f)(3)

TXU, CMP, and Reliant proposed eliminating the "good faith effort" language from (f)(3) stating that the definition of "good faith effort" is widely understood, does not need definition and should not be a requirement of strict adherence. AEP suggested deleting (f)(3) as it believes this is more appropriately addressed in the Protocols. TXU indicated that currently ERCOT Protocol §6.8.3.1(5) provides that market participants shall provide good faith estimated details identifying eligible expenses for reliability must run monthly costs for initial settlements. TXU expressed concern that although these are intended to be estimated details related to costs, (f)(3) as written would require in reality actual RMR costs be provided.

CMP proposed adding in a "good cause" exemption for not meeting the requirements of this subsection. Reliant added that there should be an allowance for honest mistakes. CenterPoint requested that a provision be added to allow the market participant to consider possible financial implications when exercising a best effort or good faith effort in meeting a requirement.

Commission response

The commission disagrees that this subsection should be eliminated as suggested by CMP, Reliant and AEP, noting that the subsection is needed for added clarity because the term "good faith effort" is used several times in the Protocols but lacks definition. The commission considers that the example provided by TXU is not applicable, as a "good faith estimate" is still an estimate, which is a well understood term. Good faith estimates are the results of conscious efforts to provide estimates that are based on well supported data, and the requirement for good faith estimates cannot be interpreted as a requirement for actual data.

The commission agrees to add an exemption for good cause as suggested by CMP. The commission believes that Reliant's concern regarding "honest mistakes" is addressed by the addition of a subsection on affirmative defense to this rule.

The commission disagrees with CenterPoint that a negative financial impact is sufficient reason for a market participant to not follow the Protocols. There are costs and risks associated with participating in the wholesale electricity market or any market. A market participant can decide not to participate in a market if it does not like the market rules, but cannot decide which rules it will follow once it has entered the market.

Subsection (f)(4)

CMP stated that in the event that ERCOT sends out instructions that cannot be complied with, a market participant must have flexibility to inform ERCOT through a single notification of compliance difficulty, and not have to repeat that notification every interval.

CMP stated that "immediately" should not be construed to prevent a market participant from addressing safety issues first. Reliant made a similar argument and requested that "as soon as practical" be used to replace "immediately."

AEP proposed to delete the first sentence stating that it concerns the ERCOT process and is a subject matter more properly addressed in an ERCOT Protocol. AEP suggested adding that a market participant has the burden to demonstrate "in any commission proceeding in which the failure to comply is raised," why it cannot comply, to clarify that the market participant is not obligated to initiate a proceeding to seek a declaration that its non-compliance is excusable.

Commission response

The commission agrees with CMP regarding a single notification to ERCOT of inability to comply and changes the rule accordingly. However, as a result of this change, the commission notes that each market participant must be made responsible for notifying ERCOT when the problem ceases and adds this requirement to the rule as well.

The commission declines to change "immediately" to "as soon as practical" as requested by CMP and Reliant. When an event occurs at a facility that also has the potential to affect the reliability of the network, the operator of a market participant has an obligation to tend to both the safety of the facility involved and the safety of the network by notifying ERCOT. Additionally, this provision provides a safe harbor in cases when circumstances are such that the operator is unable to inform ERCOT immediately. The commission clarifies the rule by adding the language suggested by AEP that a market participant who does not comply with a Protocol requirement has the burden to demonstrate "in any commission proceeding in which the failure to comply is raised," why it cannot comply.

Subsection (f)(5)

CMP proposed to add a requirement that information requests from commission staff must be in writing and subject to limitations on discovery applicable in contested cases. CMP also proposed to further define a "complete" response demonstrating the claimed inability to comply, as a response explaining the circumstances surrounding the alleged failure and providing documents and other materials relating to such alleged failure. CMP further requested a change from seven days to five business days to account for holidays. CMP, Reliant and TXU requested more flexibility in the requirement for a market participant response deadline of seven days. In supplemental comments, CenterPoint requested that it be allowed 20 days to respond, as allowed under commission rules for responding to requests for information in a contested case.

CenterPoint commented that the commission staff should be required to respond within 30 days or other reasonable time limit of a market participant's notification of non-compliance. If the commission staff fails to meet this deadline, the market participant's failure to comply would be deemed justified and not in violation of this rule. In reply comments AEP agreed, arguing that such time limit will allow timely closure of the matter.

Commission response

The commission notes that formal investigations are already governed by the rules of contested cases, and declines to adopt CMP's proposal to subject commission staff requests for information to limitations on discovery applicable in contested cases. The commission agrees that commission staff requests for information will be in writing.

The commission agrees to add further clarification as to the expected market participant response, as suggested by CMP, and specifies that a market participant is expected to provide a "detailed and reasonably complete response." The commission emphasizes that a market participant is expected to provide as complete a response as it possibly can if it is to cooperate fully with the commission staff's review. The commission agrees to change the response time from seven days to five business days as suggested by CMP, and to amend the rule to give commission staff the ability to extend the deadline if necessary. These changes should address the need for more flexibility expressed by CMP, TXU and Reliant. The commission disagrees with CenterPoint's request to extend the time limit for responses to 20 days. The information concerning a notification of failure to comply with the Protocols should not be voluminous and should not take significant time to assemble and deliver. If there is need for additional time in a particular situation, the market participant can seek an extension under the rule. However, this exceptional circumstance should not be used to set the time limit for all circumstances involving a failure to comply.

The commission disagrees with CenterPoint and AEP's proposal for a time limit for commission staff response as it believes that the time required for investigating a violation of the rule depends on the circumstances of the event and may exceed 30 days or other time limit, and that such time limit could interfere with the commission's ability to protect the public interest against inappropriate activities in the wholesale market.

Subsection (f)(6)

CMP stated that the proposed rule imposes an unreasonably strict liability standard whereby a market participant commits a violation if its bid resource is unavailable due to a *force majeur* event and in addition the rule makes no allowance for inadvertent error. CMP proposed a remedy by adding a requirement that such actions must be knowingly performed by the market participant. Reliant expressed similar concerns and requested deleting the requirement and stating that the bids must be consistent with the Protocols. AEP also proposed to delete this section, stating that this provision concerns the operation of the market and ERCOT's functions and is more properly addressed in an ERCOT Protocol.

Coral commented that since the purpose of this rulemaking is to position the commission to address intentional market manipulation in a manner that causes harm to others, the words, "willfully and knowingly" should be added to this section.

San Antonio suggested that a requirement that energy bids be consistent with the portfolio ramp rate specified in the bid be deleted because it is unclear how a bid could be inconsistent with the applicable ramp rate. CenterPoint suggested that "portfolio" ramp rates should be changed to "applicable" ramp rates to make this rule applicable to all resources.

Commission response

The commission believes that the addition of an affirmative defense section to the rule addresses the concerns expressed by CMP regarding cases of *force majeur* and inadvertent error. The commission does not add "willfully and knowingly" or other intent element for reasons discussed elsewhere in this order.

The commission declines to delete this subsection, as suggested by Reliant, AEP, and San Antonio. Changes in scheduled energy, and bids of ancillary services, in excess of the physical capability of a portfolio to timely ramp its generation, have been observed to affect the frequency of the interconnection. The deployment of ancillary services to compensate for such ramp rate failures leaves fewer resources available to ensure the safe and reliable operation of the grid. A ramp rate violation occurs when a QSE schedules an increase or decrease in generation of a magnitude in excess of the observed physical capability of its portfolio to implement during the ten minute window across schedule intervals. A ramp rate violation also occurs when a QSE bids quantities of ancillary service capabilities in excess of the observed physical ability of its portfolio to implement when deployed by ERCOT. The commission revises the rule to refer to "applicable" ramp rates as suggested by CenterPoint.

Subsection (f)(7)

TXU and Austin Energy suggested that (f)(7) be modified to address reporting to publishers of indices only and that a new subsection (f)(8) be added to address statements by market participants to ERCOT and the commission.

CMP suggested adding an intent standard by referring to market participants "knowingly" submitting false information, and a materiality standard by referring to omission of "material" information. AEP, Coral and TXU would also add an intent standard. CMP stated that the word "complete" is unduly subjective and imposes a standard of perfection. CMP's proposed revision would require that market participants not submit incomplete, inaccurate or misleading information subject to adequate standards of confidentiality and in accordance with industry standards.

Reliant asserted that PURA does not give the commission the authority to govern the content of messages that are part of a company's free speech, and concluded that the reference to the media should be deleted. AEP made a similar argument. Reliant added that a market participant should not be held accountable for any information that it does not have access to at the time the report is required. Reliant would add language to require that "authorized" personnel submit all information. TXU proposed to limit the requirement to information reported to publishers of electricity and natural gas price indices.

CenterPoint requested that the rule be modified such that it assigns responsibility for information as it pertains to the market participant's own assets only. CenterPoint suggested that this is particularly applicable as it pertains to a QSE because while a QSE may be an aggregator of information from other market participants such as PGC's and power marketers it is not in a position to ensure the accuracy of all information that may be required from such entities.

Austin Energy, recognizing the abuses that have recently been revealed regarding the reporting of false prices to manipulate market indices, agreed that companies should be prohibited from manipulating markets by falsely reporting prices to index services, but considers it unnecessary to require that market participants be responsible for the accuracy of statements, data and information other than transaction prices to reporters or publishers of market indices. Austin Energy agreed that the rule should be modified to make the market participant responsible for the veracity of information submitted to the commission and ERCOT.

TXU commented that consistent with the "safe harbor" provided in the FERC's Policy Statement on Natural Gas and Electric Price Indices, the commission should "not seek to prosecute and/or penalize parties for inadvertent errors in reporting."

In supplemental comments, CMP stated that subsections (f)(7)-(8) are inconsistent with the FERC rules and they imposed a separate duty of due diligence instead of limiting the scope of the provisions.

Commission response

The commission agrees to address statements made to ERCOT and the commission separately from information reported to publishers of indices as suggested by TXU and Austin Energy. In order to accomplish this, the commission divides the broad requirements of proposed subsection (f)(7) into two separate subsections. Information provided to publishers of market indices is covered by the revised subsection (f)(7), while the provision of information to ERCOT and the commission is addressed in new subsection (f)(8). The commission adds a materiality standard in new subsection (f)(8) to address the materiality concern expressed by CMP.

The commission declines to add an intent standard as suggested by CMP, TXU, AEP and Coral for reasons discussed elsewhere in this order. The commission changes the rule to specify that information provided by market participants to market publications and publishers of surveys and market indices for the computation of an industry price index shall be true, accurate, reasonably complete and shall be consistent with the market participant's activities, subject to generally accepted standards of confidentiality and industry standards. The commission believes that this change, which focuses on false reporting to price index services, removes the "perfection" standard, allows for confidentiality considerations, and allows market participants to follow industry standards in choosing what information they will disclose. The commission finds that this action addresses the concerns expressed by CMP, TXU, Austin Energy, and Reliant. By taking this action, the commission should not be viewed as agreeing with Reliant's and AEP's assertions that the rule, as proposed, violated constitutional fee speech protections. The commission disagrees with Reliant and AEP. The courts have held that commercial fee speech, like that addressed in the rule, is not subject to the same constitutional protections as other forms of fee speech. In *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed.2d 341 (1980), the U. S. Supreme Court held that "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public of lawful activity." (447 U.S. at 563). Because the rule requires the submission of

true and accurate information and only prohibits the submission of false and misleading information, it comes within the bounds of acceptable regulation of commercial speech. Reliant's and AEP's arguments on this point are rejected, and the revisions to the rule make them moot.

The commission declines to require that authorized personnel only be able to submit information as suggested by Reliant and instead adds language in subsection (f)(7) and new subsection (f)(8) to require that each company exercise due diligence to avoid the reporting of false information. As a part of that due diligence, market participants may choose to limit how, and by whom, information is provided to market publications and publishers of market indices. The commission does not believe that it is necessary to specify that QSEs are not responsible for the accuracy of information that pertains to the owner of an asset they represent, since the QSE can always establish that the information came from the asset owner, and all market participants are required to maintain their own records of information under subsection (j). The commission believes that the new subsection on affirmative defense sufficiently addresses the concern expressed by TXU regarding inadvertent errors in reporting. The commission disagrees with CMP's assertion that the due diligence language is not consistent with the FERC's rules. The FERC rule clearly establishes due diligence as an affirmative defense that can be relied upon by a market participant. The due diligence language of subsections (f)(7)-(8), read in conjunction with the new affirmative defense language in subsection (h), also establishes due diligence as a defense.

Subsection (f)(8), redesignated as (f)(9)

Reliant and San Antonio commented that notification "immediately" was not always possible and suggested replacing "immediately" with "as soon as practical". AEP proposed to eliminate the second sentence stating that reporting to ERCOT about operational changes is more appropriately addressed by an ERCOT Protocol. AEP requested a clarifying change to specify that market participants should comply with all "applicable" reporting requirements. TXU suggested a modification to require market participants to notify ERCOT "immediately after the market participant is aware of the event, and only if the event materially affects the operation of resources."

ERCOT filed supplemental comments suggesting that the reporting requirement of subsection (f)(8) should only apply to market participants and should not apply to ERCOT. ERCOT argued that it is already required to respond to information requests pursuant to §25.362 of this title, relating to Electric Reliability Council of Texas (ERCOT) Governance, so there was no need to include the reporting requirement in this rule. ERCOT also argued that it already provides a wide variety of information to the commission pursuant to the Protocols. ERCOT was concerned that much of the data it provides to the commission is not complete and must be adjusted later and that such filing could be considered a violation of this subsection.

Commission response

The commission determines that timely reporting of the availability and maintenance of a generating unit or transmission facility is of crucial importance and necessary to allow ERCOT to operate the electric grid in a safe and reliable manner, and therefore declines to remove the requirement that reporting be done immediately as suggested by several commenters. The commission believes that, if circumstances are such that they do not allow immediate reporting, the new subsection on affirmative defense ensures market participants sufficient opportunity to demonstrate as much and not be penalized. The commission agrees to add a materiality standard as suggested by TXU. The commission disagrees with AEP that reporting requirements are sufficiently addressed in the Protocols and do not need to be addressed in the rule. Experience with instances in which market participants have delayed in providing essential information to ERCOT, and the effect of such delays on the market, demonstrate the need for this rule. The commission does not believe that it is necessary to specify that market participants should comply with all "applicable" reporting requirements as suggested by AEP, as all reporting requirements governing the availability and maintenance of a generating unit or transmission facility are applicable. AEP failed to give an example of a reporting requirement that would not be applicable.

The commission disagrees with ERCOT's request to exempt it from the requirements of subsection (f)(8). Although other commission rules and the Protocols may require ERCOT to provide information to the commission, subsection (f)(8) goes beyond a mere reporting requirement and requires that the information be accurate and not false and misleading. The commission believes that it is important that this requirement be imposed on both market participants and on ERCOT. If the information to be submitted is preliminary or subject to later true-up ERCOT can clearly indicate such facts in order to avoid liability for inaccuracies. Accordingly, the commission declines to adopt ERCOT's revision.

Subsection (f)(9), redesignated as (f)(10)

CMP proposed to impose limitations on discovery to requests for information from ERCOT similar to those applicable in commission contested cases. TXU proposed to delete the requirement to provide information as specified in "ERCOT instructions". TXU complained that market participants should only be required to provide information that is specified in the Protocols and pursuant to Protocol time limits.

Commission response

The commission does not believe that it is necessary or appropriate to put a limitation on information requests from ERCOT similar to limitations on discovery applicable in commission contested cases. The commission declines to delete "ERCOT instructions" from this requirement as ERCOT may on occasion need information beyond that specified in the Protocols in order to ensure the safe and reliable operation of the grid.

Subsection (f)(10), redesignated as (f)(11)

CMP proposed a clarification to specify that the proposed rule does not prohibit a market participant from seeking a Protocol revision rather than a formal Protocol interpretation. CMP also proposed a revision to clarify that informal efforts to obtain clarifications are not discouraged or prohibited as informal communications can be highly beneficial in helping market participants understand what is required or permitted and providing ERCOT early notice of market or technological developments or needs for Protocol revision. CMP also pointed out that, in an emergency requiring immediate decision or action, there might not be time to seek a formal Protocol clarification or interpretation. CMP stated that its proposed revisions preserve the commission's current ability to consider what informal efforts were appropriate and what weight to give them. Reliant proposed that

when a Protocol is unclear or a situation is not contemplated under the Protocols, the process for revision or clarification should be as is contained in the Protocols and references to subsection (h) should be deleted.

Commission response

The commission changes the rule to address the concerns expressed by CMP. The commission declines to delete subsection (h) (redesignated as subsection (i)), and references to it, as suggested by Reliant, for reasons explained later in this order in the discussion of subsection (h)(redesignated as subsection (i)).

Subsection (f)(11), redesignated as (f)(12)

Reliant stated that this subsection imposes an excessive requirement but does not clearly define what level of participation in the protocol revision process is required. Reliant suggested that the requirement should be to bring the issue to the attention of the appropriate subcommittee and/or the ERCOT staff. CMP suggested changing the proposed rule from "requiring" to "allowing" a market participant who identifies a provision or procedure that produces outcomes inconsistent with the efficient and reliable operation of the ERCOT market to call the provision to the attention of the appropriate ERCOT subcommittee, and to eliminate the requirement to work proactively to develop Protocols that are clear and consistent. CMP argues that without these changes the fiscal note would require a much larger cost estimate as it would require employees to act outside their company's core business area, and it is unclear what working proactively means.

AEP proposed to revise the obligation to report Protocol inefficiencies and to pro-actively work with ERCOT subcommittees so that it was also applicable to members of ERCOT or the commission staff.

TXU suggested clarifying that the provision referred to in this section is a Protocol provision.

Commission response

The commission does not agree with CMP that calling an inefficient provision in the Protocols to the attention of the appropriate ERCOT subcommittee would require additional personnel and legal support on the part of market participants. This is something market participants already do routinely when the inefficiency affects their business. The rule should not be interpreted to affirmatively require market participants to microscopically examine the Protocols for inefficient provisions. Instead, the rule simply adds a reporting requirement when a market participant identifies such a provision. CMP failed to show how this reporting requirement could cause a company to hire additional employees or to perform work outside its core business area. The commission therefore declines to make this requirement optional. The commission agrees to reduce the perceived burden on market participants by changing the requirement to "pro-actively work with ERCOT subcommittees" to a requirement to "cooperate with ERCOT subcommittees."

The commission believes that it is not necessary to extend the obligations of this subsection to members of ERCOT or the commission staff. The commission notes that the commission staff is not a market entity, and additionally, the commission and its staff already operate under a legislative mandate to promote the development of a competitive market. Secondly, in many instances market participants who actively participate in the development of market Protocols at ERCOT have diverse interests given their loyalty to the company that employs them, whereas this is not the case for either the ERCOT staff, who operates under a legislative mandate to independently maintain the reliability of the grid, or to the commission staff, who is under a mandate to represent and defend the public interest. Since these parties have no self interest in retaining and possibly exploiting inefficient Protocol provisions, there is no need to require them to report such inefficiencies when discovered. The commission is confident that both of these parties will continuously work to eliminate errors or inefficiencies in the Protocols.

The commission agrees with TXU and changes the rule to indicate that the term "provision" in the rule refers to a provision in the ERCOT procedures, which include the Protocols and the Operating Guides.

Subsection (f)(12), redesignated as (f)(13)

CMP suggested limiting this requirement to affected personnel while excluding administrative staff and others. AEP proposed to eliminate this section stating that it regulates the internal affairs of non-regulated entities, which is beyond the commission's and ERCOT's authority.

OPUC proposed that the internal procedures be required to be written and that they should be provided to the commission upon request, as it may be useful for the commission to review the applicable internal procedures and recommend changes to the procedures as part of a mitigation measure. In reply comments, CMP disagreed with OPUC's proposal because it contended that effective procedures to instruct personnel typically include both written and oral instruction, and stated that the second sentence is not needed because that obligation already exists.

Commission response

The commission agrees with CMP that the requirement should address affected personnel only and modifies the rule accordingly. The commission disagrees with AEP's contention that it does not have the authority to require market participants to establish internal procedures for its personnel. As discussed previously in this order, PURA and the commission's rules require that market participants must comply with the requirements of the ERCOT procedures. In order to comply with these technical requirements for continued certification and with representations made in its certification request, a market participant is required to take steps to assure that its employees are aware of the requirements applicable to the entity. The commission agrees with OPUC that the internal procedures should be documented and changes the rule to add this requirement. The commission agrees with CMP that the obligation for a market participant to provide its internal procedures to the commission upon request already exists in the rule under proposed subsection (k) (redesignated as subsection (l)), which specifies that the commission staff may require the market entity to provide information reasonably necessary for the purposes of a fact finding review or an investigation.

§25.503(g)

CMP opined that the commission has no authority to prohibit every activity that adversely affects the reliability of the electric network and proposed to eliminate the first sentence that prohibits such activities because it lacks an intent element. CMP stated that prohibited activities should exclude not only acts or practices expressly allowed by the Protocols but also those "required" by the Protocols; and acts or practices conducted in compliance with express directions from ERCOT but also those "required to be conducted." CMP suggested adding to the list of exceptions

language referring to "other legal authority" to prevent market participants from being faced with conflicting legal requirements from different sources. Reliant made a similar argument. Reliant criticized the general definition of prohibited activities in the introductory paragraph as lacking an intent element and subjecting good-faith behavior to hindsight review. CMP proposed to strike the reference to "prices that are not reflective of market forces" as being unclear. Reliant would replace it with a reference to "prices that are not reflective of competitive market forces."

TXU and Austin Energy proposed striking the first sentence describing prohibited activities and TXU wanted to introduce an intent standard stating that "it shall be a violation of this section for a market participant to knowingly engage in prohibited activities." TXU proposed that the list of prohibited activities be a closed list. TXU would remove "activities that constitute market power abuses" from the introductory paragraph and add such activities to the list of specific prohibited activities. Austin Energy proposed to indicate that the list of prohibited activities in this subsection is an example of market power abuses.

BP suggested that the commission should clarify the definition of market power abuses, stating that the definition in the proposed rule as "practices that are unreasonably discriminatory or tend to unreasonably restrict, impair, or reduce the level of competition…" is too vague to provide market participant with meaningful guidance as to what constitutes market power abuse under the rule. BP would add an intent element in the definition of "market power abuses."

AEP would define prohibited activities as "any act or practice in violation of a commission rule, ERCOT protocol, or PURA," and strike the first sentence in the introductory paragraph as being overly broad and lacking any element of intent. AEP proposed to remove the list of prohibited activities from this subsection, stating that these specific items concern the daily operation of the market and therefore should be addressed in the Protocols.

LCRA proposed to add an exclusion for acts and practices that have a "legitimate business reason" in the definition of prohibited activities.

Garland praised the provisions of subsection (g) as assisting with the improvement of reliability, and noted that this subsection clearly outlines workable and equitable definitions of "prohibited activities" and "economic withholding." Garland claimed that vagueness and varied interpretations of these concepts have been troublesome during the transition to competition.

Commission response

The commission adds a materiality element in the definition of prohibited activities, which is now defined as "any act or practice of a market participant that *materially and adversely* affects the reliability of the regional electric network," in recognition of the fact that the commission does not prohibit legitimate and routine activities that do not have a material impact on reliability or force ERCOT to take substantial and costly actions to maintain the safety of the grid. In case of an inadvertent event such as the loss of a unit or tripping of a line, a market participant has the option to demonstrate to commission staff the inadvertent nature of the event during an informal fact finding review if one is initiated. Alternatively, under new subsection (h), Defenses, a market participant will have the opportunity to show that a reliability problem was caused by an inadvertent event as a defense if necessary. The commission believes that CMP's concern about the commission's authority to prohibit every activity that adversely affects reliability is addressed by this change. The commission declines to add the words "or required" and "required to be conducted" as proposed by CMP as those words would be duplicative, since an activity that is required is a subset of all allowed activities. The commission agrees to add reference to "other legal authority" as proposed by CMP and Reliant. The commission declines to strike the reference to "prices that are not reflective of market forces" as suggested by CMP, but agrees to replace it with a reference to "prices that are not reflective of competitive market forces," as suggested by Reliant.

The commission declines to strike the first sentence defining prohibited activities, as suggested by TXU, Austin Energy, and AEP, and declines to add an intent element to the definition as suggested by TXU, AEP, and RRI, for reasons discussed elsewhere in this order. The commission also declines to make the list of prohibited activities a closed list, as suggested by TXU, for reasons discussed elsewhere in this order. The commission agrees to remove the reference to market power abuses from the introductory paragraph of this subsection and include it as an additional prohibited activity in the list that follows, as suggested by TXU. The commission declines to add or subtract from the definition of "market power abuses" as suggested by BP because the term is statutorily defined in PURA §39.157(a), and notes that PURA does not have an intent element in its definition of market power abuses. The commission declines to characterize the list of prohibited activities as example of market power abuses, as proposed by Austin Energy, as several of the activities listed can be exercised by a market participant who does not have market power.

The commission declines to remove the list of prohibited activities from this subsection as suggested by AEP. The commission notes that the Protocols do not contain a list of prohibited activities, and that the ERCOT Board rejected a proposal from market participants to include in the Protocols a closed list of prohibited activities. Thus the commission believes that the list, whose purpose is to provide examples of prohibited activities, serves an important purpose to guide market participants' behavior as they operate in the ERCOT market.

The commission declines to add an exclusion for activities that have a legitimate business purpose, as suggested by LCRA, and instead adds a new subsection (h), Defenses, that affords a market participant the opportunity to use the legitimate business purpose standard as a defense.

The commission agrees with Garland that this subsection is necessary to improve reliability by increasing market participants' awareness of their responsibility to support the reliability of the electric grid and subjecting to sanctions activities that have the potential to undermine such reliability. Accordingly, the subsection is being retained.

Subsection (g)(1)

TXU and other commenters proposed to strike the phrase "or artificially worsens existing congestion," as being redundant. CMP proposed to strike the entire paragraph and replace it with a prohibition to "engage in transactions or schedule resources with the intent of creating congestion to manipulate prices or jeopardize the security of dispatch operations."

Reliant and other commenters would also add an intent element. Reliant stated that, without knowing how other market participants are operating their units, there is no way to know if the operation of a unit will create artificial congestion as it is defined. BP made a similar argument. Reliant added the word "energy" after "schedule" for added clarity.

Commission response

The commission agrees to strike the phrase "or artificially worsens existing congestion," as being redundant. The commission adds the word "energy" after "schedule" as suggested by Reliant.

The intent element has been previously discussed and rejected. The commission partly agrees with Reliant and BP that one cannot create artificial congestion without knowing how others operate their units. However, the commission believes that a market participant can determine with some accuracy which of its units can create congestion and which can relieve it when the pattern is repeated. Based on this ability to determine which of its units could create congestion, and which units could solve congestion, Enron engaged in various gaming practices in California during the 2000-2001 period, including the so-called "Death Star," "Wheel Out," and "Load Shift" strategies. In addition, the "Dec Game" widely practiced by California market participants at the time, consisted of a market participant operating a unit on one side of a constraint with the result of creating congestion, and being paid to relieve the congestion with a unit located on the other side of the constraint. The commission agrees that the normal operation of a unit for legitimate purposes can inadvertently create congestion. The commission does not refer to this type of congestion as "artificial" congestion and has redefined "artificial congestion" in subsection (c)(1) to improve clarity and reduce uncertainty. In addition, new subsection (h), Defenses, provides an opportunity for a market participant to invoke a legitimate business purpose as a defense if it becomes necessary.

Subsection (g)(2)

CMP proposed to put a definition of artificial shortage in this subsection instead of subsection (c), Definitions. CMP's definition would require compliance with the Protocols, and makes reference to obligations market participants have under PURA §39.151(j). CMP and Reliant added an intent element. CMP stated that there is no broad regulatory obligation to provide service applicable to the wholesale market, that such an obligation applies to retail service only, and that the proposed rule goes beyond legislative intent. CMP proposed additional minor wording changes, replacing "operate their facilities" with "run their generating plants" and "schedule such facilities" with "schedule such resources or other power supplies." CMP changed "jeopardizing" to "risk jeopardizing" in (g)(2)(A), and changed "not economically viable" to "uneconomic" in (g)(2)(C). Reliant added "at the time of the decision not to operate, bid or schedule" to (g)(2)(C).

Regarding the exemption afforded by (g)(2)(C), Denton asked who would be making the determination that the given circumstances are such that it would not be economically viable to operate a facility, and stated that such determination would be very subjective. Denton stated that in some cases, it may on occasion be necessary, in order to ensure reliability and stability of the transmission system, for a market participant to operate facilities even though such operation might not be economically viable for that particular market participant. Denton therefore suggested that this provision be properly qualified to ensure the reliability of the system. Independent REP Coalition makes a similar argument.

Austin Energy proposed to add an exclusion in a new subsection (g)(2)(D) for "other reasonable public policy purposes of a municipal governing body."

Commission response

The commission eliminates subsection (g)(2) for the reasons discussed in other portions of this order (see discussion of subsection (c)(2)). This change addresses CMP's concern regarding a wholesale service obligation. The commission addresses the prohibition against withholding of production by a market participant who has market power in subsection (g)(8) below. Elimination of this subsection also addresses other concerns expressed by commenters.

The commission agrees with Denton and recognizes that (g)(2)(C) would have allowed arbitrary decisions as to whether a unit is economically viable under the circumstances. Further, the commission agrees with Denton that in some cases, it may be necessary in order to ensure the reliability and stability of the transmission system for a market participant to operate facilities even though such operation might not be economically viable for that particular market participant. However, this issue is no longer a concern here with the elimination of the subsection.

Subsection (g)(3)

CMP and Reliant, proposed adding an intent element. OPUC noted that the California Oversight Electric Board indicated in FERC Docket EL01-118-000 that the restriction of wash trades to transactions involving the same parties is potentially problematic because wash trades can be accomplished through independent or affiliated third party arrangements. OPUC proposed to amend (g)(3)(B) to include: offsetting buy and sell trades with the same counterparty "or with multi-parties." In reply comments, CMP stated that OPUC's suggestion is an example of why the commission should await federal developments before adopting a rule. CMP stated that pending national energy legislation includes language that combines OPUC's idea with the concept of intent.

In supplemental comments, AEP objected to adding a materiality standard to FERC's definition of wash trades. FERC prohibits trades that (among other elements of the definition) involve "no net change" in beneficial ownership. AEP objected to rule language that would prohibit more transactions than does the FERC definition.

Commission response

The element of intent has been previously discussed and rejected. The commission agrees with OPUC that wash trades may be accomplished through independent or affiliated party arrangements. The commission also agrees with CMP that this is a problem that is not ERCOT specific and therefore it is desirable to harmonize the rule with FERC policies. The commission adopts FERC's Behavior Rule Number 2(a) regarding wash trades and adds "or through third party arrangements" to address OPUC's concern. Although the issue raised by the California Oversight Electric Board were brought up during the comment period in FERC Docket EL01- 118-000, FERC did not explain why it did not adopt the recommendation of the California Board. FERC explained that there are two key elements in a wash trade, *i.e.*, "transactions which are (i) prearranged to cancel each other out; and (ii) involve no economic risk." However, under the FERC rule, transactions with these characteristics would not be considered violations if an independent or affiliated third party was involved, which the commission believes needs to be corrected. The commission notes that FERC declined to add an intent element to its Market Behavior Rule (2)(a), stating that

"wash trades, by their very nature, are manipulative and purposely so. By definition, parties to a wash trade intend to create prearranged off-setting trades with no economic risk." (FERC Docket No. EL01-118-000, November 17, 2003, pp. 19-20).

The commission finds that AEP's argument against including the word "material" in subsection (g)(3), pertaining to wash trades, is unpersuasive. The commission notes that FERC's definition of wash trades is new and untested, therefore it has yet to be seen whether market participants will attempt to game this definition. AEP is correct in observing that the staff redline would prohibit more transactions than would a strict reading of FERC's definition. To be more precise, the additional transactions captured by the commission's definition are wash trades with a minuscule (as opposed to zero) net change in beneficial ownership. These transactions are no less harmful or deceptive than wash trades with zero net change. By adding the materiality standard, the commission's version makes it harder to game the definition. It also implicitly introduces the expectation that the practice serve a legitimate business purpose. Finally, the commission points out that it has adopted a materiality standard throughout the rule following a recommendation from the FTC in its comment to the FERC and in response to comments from TXU and others as a way to add clarity and reduce uncertainty in the rule. The commission considers it appropriate to add this standard here as well.

Subsection (g)(4)

CMP suggested changing "reliability products" to "reliability services." CMP and Reliant would add an intent element. Reliant stated that there are circumstances in which a unit trips in real time, which may have been unforeseen at the time the unit was committed.

Commission response

The commission agrees to change "reliability products" to "reliability services" as suggested by CMP. The intent element has been previously discussed and rejected. The commission notes that in the example of an unforeseen event provided by Reliant, the market participant will be able to explain the circumstances during the informal fact-finding review, if one is initiated. Additionally, the market participant has the option to establish a lack of foreseeability as a defense under new subsection (h) if necessary.

Subsection (g)(5)

CMP proposed adding an intent standard. Reliant declared that this subsection does not have any bearing on the operations or reliability of the ERCOT region and for that reason should be deleted.

Commission response

The intent standard has been previously discussed and rejected. The commission declines to delete this subsection as suggested by Reliant because trades that are conducted with the result of misrepresenting the financial conditions of the organization adversely affect the health and competitiveness of the market, as demonstrated by the decline in the electric markets following the allegations of financial misrepresentations by market participants during and after the California crisis.

Subsection (g)(7)

CMP strongly supported the second sentence, which states that this provision should be interpreted in accordance with federal and state antitrust statutes and judicially developed standards under such statutes regarding collusion. TXU proposed to remove "regarding collusion." CMP proposed to remove the entire statement from (g) (7) and create a new subsection (l) that would include the same message more broadly applying to the entire section. In addition, CMP struck "to affect the price or supply of power" from the prohibition because this would encompass activities that are benign or beneficial.

Commission response

The commission declines to remove the second sentence and create a new subsection to indicate that the entire section and terms used in the section should be interpreted consistently with applicable federal and state antitrust law for the reasons explained elsewhere in this order. The reference to federal and state antitrust provisions is appropriate when referring to collusion and will be retained. The commission declines to broaden the application of that statement as proposed by TXU for the same reasons. The commission agrees that agreements that affect the price and supply of power in a way that is beneficial to competition should not be prohibited and modifies the rule to indicate that only agreements intended to "manipulate" the price and supply of power are prohibited.

Subsections (g)(8) and (9)

TXU requested adding that "market participants may properly bid in a manner to recover their operating costs" to (g)(8), and adding language to recognize that the competitive market levels at times of emergencies may be higher than normal in (g)(9).

CMP stated that the requirements in these two subsections raise several concerns: they lack an intent standard, a foreseeable standard, and a materiality standard. CMP added that opportunity costs and transactional commitment risk must be considered. CMP pointed out that PURA states that the possession of a high market share is not, in and of itself, an abuse of market power. CMP added that language such as "competitive market levels" and "price that is not reflective of a competitive market" is too broad, and asked for clarification as to whether those terms refer to the laws of supply and demand at that specific time and place. CMP also asked clarification as to whether scarcity pricing was acceptable.

Reliant also found the reference to "competitive market levels" problematic, and stated that this amounts to a hindsight penalty. Reliant stated that the proposed definition of economic withholding is not a workable definition that would allow a distinction between behavior intended to be economic withholding and legitimate business behavior, and it ignores the characteristics of specific units. Reliant added that taking the "competitive market level" as a price reference does not allow a distinction between a unit that runs only a few hours per year and a unit that runs continuously, and is an unknown standard. Further, Reliant contended, any bid that is below the administratively set cap of $1,000 should be exempt of any allegation of economic withholding. In addition, Reliant contended, implementation of the Modified Competitive Solution Method provides a sufficient mitigation measure to eliminate the ability to economically withhold, and therefore (g)(8) should be eliminated. Reliant requested that (g)(9) should also be eliminated, stating that market prices could increase as a result of legitimate bidding strategies.

Austin Energy stated that the provision of these subsections is too far reaching and vague, and that the practical effect is to impose marginal cost bidding on all market participants, *i.e.*, imposing price regulation in contradiction of PURA §39.001(a).

San Antonio commented that economic withholding is a practice that generally is considered a market power abuse, and therefore is only exercisable by an entity possessing market power and should be addressed in subsection (g) under the provision that "activities that constitute market power abuse are also prohibited." San Antonio also stated that a market participant could not know if its bid was essential for the market to clear, unless a market participant has a sufficiently large presence in a region or local area, such that it is quite clear over time that its bids would be required. San Antonio requested that (g)(8) and (g)(9) be deleted.

BP stated that subsection (g)(8) can be interpreted as meaning that only cost-based bidding is allowed under the rule, or alternatively, that marginal cost bidding is required. BP requested clarification as to whether the commission wishes to impose a marginal cost-based bidding regime, and whether scarcity pricing is disallowed under the rule, which BP contended could potentially discourage participation in the ERCOT market. BP made a similar argument regarding subsection (g)(9).

Denton was also concerned about the reference to "competitive level" prices in (g)(8) and (g)(9), and proposed that the commission instead adopt language broad enough to restrict bidding without a legitimate business purpose that raises market prices, or alternatively clearly set a cap on prices during emergencies.

CenterPoint proposed adding to (g)(9) language requesting that market participants not engage in bidding strategies that increase market prices above both "the market participant's marginal, variable, and short term fixed costs along with return on investment, and competitive level." CenterPoint defined "short term fixed costs" to include, but not be limited to, "labor expenses, administrative and general expenses and wear and tear costs."

Commission response

The commission agrees with TXU that "market participants may properly bid in a manner to recover their operating costs," and that "the competitive market levels at times of emergencies may be higher than normal." The commission agrees with CMP that opportunity costs and transactional commitment risk must be considered. The commission disagrees with several commenters and believes that "prices reflective of a competitive market" is a valid standard, and that such a standard can be established under different possible scenarios and for different unit characteristics. The commission also disagrees with Reliant that such a standard cannot allow a distinction between a unit that runs only a few hours a year and a unit that runs continuously. However, the commission agrees that, until such price standards are developed, the concept may create uncertainty as to what constitutes prices reflective of a competitive market. The commission disagrees with Reliant that any bid that is below the administrative cap of $1,000 should be exempt of any allegation of economic withholding, and notes that a market participant who has market power may be able to repeatedly set prices close to the $1,000 bid cap through economic withholding and cause considerable damage to the market and to competition by doing so. In addition, the commission believes that Reliant overstated the effect and purpose of the Modified Competitive Solution Method, which the commission adopted to address the limited problem of hockey stick pricing during times of no zonal congestion. This mechanism is not designed to mitigate the entire gamut of economic withholding strategies as implied by Reliant. Economic withholding can occur outside the bounds of hockey stick pricing and can occur when the transmission system is congested.

The commission agrees with San Antonio that economic withholding is a practice that generally is considered a market power abuse, and that it should be addressed under the provision that prohibits activities that constitute market power abuses. The commission agrees to eliminate subsections (g)(8) and (9), and substitute new subsection (g)(8), which lists market power abuse as a prohibited activity. With this change, the commission clarifies, as requested by BP, that marginal cost bidding is not required under the rule for market participants who do not have market power. The commission believes, however, that a market participant who has market power and prices its services substantially above its marginal cost may be found to be economically withholding and therefore may be in violation of the rule. The commission adds language to further specify that withholding of production, whether it is economic withholding or physical withholding, by a market participant who has market power, constitutes abuse of market power and is therefore a violation of this section. With this change, the commission believes that it has addressed the concerns expressed by the commenters as well as the commission's concerns about economic and physical withholding by entities possessing market power, and the commission's concern about price gouging during emergencies by entities possessing market power. The commission recognizes that market power and market power abuses will have to be further defined to add clarity and reduce uncertainty and will do so in its new rulemaking on market power in Project Number 29042.

Subsection (g)(10)

TXU, CMP, AEP, and Reliant objected to the commission giving ethical standards the same legal effect as obligations and requested that this provision be eliminated.

Commission response

The commission agrees that the ethical standards provided in subsection (e) are guiding ethical standards and should not be given the same legal standing as obligations, and therefore removes subsection (g)(10).

OPUC indicated that the March 24, 2003 strawman rule included a prohibition against risk hedging by market participants that resulted in an adverse effect on system reliability or shifted costs to other market participants. This provision was subsequently deleted. OPUC objected to the removal of this provision, noting that the Market Oversight Division has evidence of market participants engaging in improper hedging in the past. OPUC requested a new paragraph under subsection (g) stating: "a market participant shall not manage or hedge its risks at the expense of system reliability, or in a way that is inconsistent with the efficient operation of the market or unduly shifts costs onto (an)other market participant(s)."

In reply comments, Reliant and CMP disagreed, stating that the provision lacked clarity and subjected the market participant to hindsight evaluation. AEP agreed with Reliant and CMP and stated that the provision was overly broad and could encompass many otherwise innocent activities. CMP added that the language is beyond the scope of market power abuses as defined in PURA §39.157(a) and does not conform to PURA §39.001(d). TXU also objected to reinstating this provision, claiming that market participants would have great difficulty managing and hedging risks without inadvertently violating the section.

Commission response

The commission agrees with Reliant, CMP, AEP and TXU that hedging risks is generally a legitimate business activity. However, the commission agrees with OPUC that some market participants may have engaged in risk hedging activities in the past that were not for a legitimate purpose. The commission also agrees with OPUC that market participants should not engage in risk hedging activities that materially and adversely affect the reliability of the regional electric network. However, the commission believes that the concern about the effect of certain risk hedging activities on system reliability is addressed within subsection (g) in the definition of prohibited activities, and that risk hedging may not be used as a defense under new subsection (h), Defenses, if the activity does not have a legitimate business purpose and adversely affects the reliability of the regional electric network. The commission also agrees that a market participant should not engage in risk hedging activities that unduly shift costs onto other unknowing market participants, but notes that a risk hedging activity that would unduly shift costs onto other unknowing market participants would be considered anti-competitive and would therefore also be a violation of this section. Subsection (d) was modified to specify that, when reviewing the activities of a market entity, the commission will consider whether the activity was conducted in a manner that materially reduced the competitiveness of the market, including whether the activity unfairly impacted other market participants in a way that restricts competition. The commission therefore finds that hedging activities that are not for a legitimate business purpose are already prohibited in the rule and declines to re-insert the paragraph as suggested by OPUC.

OPUC indicated that the March 24, 2003 strawman rule included a provision prohibiting market participants from unnecessarily claiming that information is confidential, and objected that the provision was subsequently removed. OPUC requested that the commission include a new paragraph under subsection (g) stating that "a market participant should not claim that information provided to ERCOT is confidential unless the information is market sensitive. Entities claiming that information provided is confidential must be able to demonstrate as much."

In reply comments, TXU disagreed and stated that "this broadly-worded prohibition infringed upon a market participant's right to interpret applicable law relating to the confidentiality of trade secret and other information and to advocate its interests based upon that interpretation." CMP also disagreed stating that the ERCOT Protocols and other applicable law address confidentiality in depth and already prohibit a violation of the Protocols. CMP and AEP added that under current laws, market sensitivity is not the only basis for confidentiality. AEP added that it is unnecessary to create another process in these rules for evaluating confidentiality beyond current protective order provisions.

Commission response

The commission staff removed the provision regarding confidentiality of information provided to ERCOT from the strawman rule because it found that the Protocols sufficiently address the confidentiality of information provided by Market Participants to ERCOT in great detail. Section 1.3.1.1. of the Protocols lists items that are considered protected information; section 1.3.1.2 lists items that are not considered to be protected information; section 1.3.3 discusses the expiration of protected information status; section 1.3.8 allows the commission to reclassify protected information as non-confidential in accordance with commission rules; and section 1.3.9 describes how a market participant can petition the commission to include specific information with the definition of protected information. The commission therefore finds that there is no need for the requested language and declines to re-insert this provision in subsection (g).

§25.503(h), a new subsection

As noted previously, several commenters suggested that the commission add an intent element to the rule. Others suggested that the commission include provisions to assure that market entities would not be punished for unintended or unforeseen results of actions that were taken for a legitimate business purpose.

In supplemental comments, Austin Energy generally supported the commission's inclusion of an affirmative defense subsection and the defenses listed therein. CMP and AEP argued that the commission's new provision for affirmative defenses was not sufficient and imposed more regulatory risk and burdens on market participants. AEP, TXU, and CenterPoint objected that the affirmative defense language improperly shifted the burden of proof to the market participant. CMP also noted that the market participant should not have the burden of proof because it does not have access to the information that is most probative concerning intent and foreseeability. Coral commented that the proposed language failed to indicate that the defenses would also be applicable to allegations of violations of subsections (e) and (f), as well as subsection (g). Coral also noted that the defenses were stated in the conjunctive form so that a market participant would have to satisfy all three elements in order to claim a defense. Coral suggested that the language be changed to disjunctive by using the word "or" instead of the word "and". AEP and CenterPoint made similar comments. Reliant recommended adopting the FERC's approach to intent and eliminating subsection (h) since it would no longer be needed.

Commission response

The commission rejects the requests to limit the application of the rule to intentional or knowing and willful violations of the Protocols or the rule for reasons previously stated in this order. Although intent is not a required element of a violation of PURA or the commission's rules or orders, the commission can consider intent in determining whether to pursue an enforcement action in a particular case or in determining the level of penalty to be assessed in response to a particular violation. PURA §15.023(b) specifically directs the commission to consider certain matters in calculating the amount of an administrative penalty, including "the nature, circumstances, extent, and gravity of a prohibited act", the "history of previous violations", "efforts to correct the violation", and "any other matter that justice may require." PURA §15.024(c) prevents the commission from assessing an administrative penalty against a person if the person has remedied the violation within 30 days and if the person meets the burden of proof to demonstrate that the violation was remedied and was accidental or inadvertent. The commission interprets these statutory provisions as giving it the discretion to consider a person's intent in an administrative enforcement action. Thus, although intent is not a required element of proof for a violation in an administrative enforcement under the rule, the commission will consider a person's intent in determining whether an enforcement action is necessary and the type and extent of any remedy required.

The commission disagrees with comments that the rule requires that market participants have perfect knowledge of all of the conditions of the network and the scheduling activity of other parties. Such an exaggerated and excessive reading of the rule is unreasonable and improper. The commission does not expect

perfect knowledge of the network, but one of the goals of the rule is to encourage all market participants to consider the reliability of the network in their decision making process and recognize the potential effect that their individual actions can have on network reliability, based on the knowledge a market participant operating in the ERCOT markets is expected to have. The commission recognizes that individual market participants do not always have sufficient information available to anticipate what effects their actions may generate, however, the commission also does not want to implicitly encourage market participants to ignore network reliability as a means of avoiding potential liability for their actions. In order to address both the commission's concerns about reliability and the participants' concerns about an exaggerated application of the rule, the commission has added a new subsection concerning affirmative defenses. The new subsection allows a market participant to avoid enforcement if its actions served a legitimate business purpose and "it did not know, and could not reasonably anticipate, that its actions" would otherwise result in a violation. The defense is based both on what the market participant actually knew as well as what it should have known. The commission believes the new subsection sufficiently addresses the market participants' concerns without allowing them to be intentionally ignorant or consciously indifferent to the impact of their actions on the overall reliability of the network and the proper functioning of the market.

The commission believes that the new subsection allows market entities to protect themselves when they are truly without fault. The rule also places the burden of proof upon the market entity to prove the elements of the claimed affirmative defense. The burden of proof provision is consistent with PURA §15.024((c) and with recognized principles placing the burden of proof on the party having peculiar knowledge of the facts to be proved. *Dessommes v. Dessommes*, 505 S.W.2d 673, 679 (Tex. Civ. App. -- Dallas, 1973, writ ref'd n.r.e.). The commission disagrees with CMP's assertions that it does not have access to information needed to demonstrate its intent or knowledge of a particular situation. The facts that are necessary to prove the elements of these types of affirmative defenses (a legitimate business purpose or the steps the market participant has taken as due diligence) are peculiarly within the knowledge of the market entity claiming the defense and therefore it is appropriate to place the burden of proof on the market entity to support its claim.

The commission agrees with comments that the defenses should also be available for alleged violations of subsection (f) and revises the rule accordingly. No defenses are needed concerning subsection (e) because the ethical obligations stated in that subsection are aspirational and a "violation" of that subsection, standing alone, will not subject a person to enforcement action by the commission. The commission also agrees that the language of subsection (h) should be clarified. The due diligence defense is only intended to apply in situations in which the rule requires due diligence, and the rule is revised accordingly.

The commission disagrees that a legitimate business purpose and a lack of foreseeability should be separate affirmative defenses. Instead, to qualify for an affirmative defense, the market participant must demonstrate both that the violation served a legitimate business purpose and that it did not know and could not reasonably anticipate the adverse affect of its actions. In adopting its rules, the FERC expressly stated that "manipulative actions engaged in by sellers are not undertaken for a legitimate business purpose." The FERC went on to note that "an action or transaction which is anticompetitive (even though it may be undertaken to maximize seller's profits), could not have a legitimate business purpose under our rule." Thus, under the FERC rules, if an action is "intended to or foreseeably could manipulate market prices, market conditions, or market rules," the action cannot be said to serve a legitimate business purpose. In order to avail itself of the "legitimate business purpose" defense, a market participant must also demonstrate that there was no foreseeable anticompetitive impact or intentional manipulation. The commission agrees with the way FERC defines the applicability of the "legitimate business purpose" standard.

§25.503(h), redesignated as subsection (i)

CMP stated that ERCOT should designate more than one employee for the purpose of issuing official interpretations and clarifications regarding the Protocols, that the person should be ERCOT staff as opposed to a stakeholder serving on the ERCOT Board or on an ERCOT committee, that ERCOT should only clarify what it has the ability to clarify, and that the requestor should have the option to not take the contemplated action and not seek a protocol revision.

CMP believes that a process for interpretations and clarifications of the Protocols when made publicly available could assist with consistent interpretation of and compliance with the Protocols, and solve problems market participants have had finding appropriate ERCOT personnel to answer questions. CMP, however, stated that the proposed process is problematic because CMP interprets it as including a duty to comply with the clarification or interpretation that would be instantaneous. In addition, CMP warned against a process that would substitute ERCOT official clarifications and interpretations of the Protocols for Protocol revisions, for which there is an established process in the Protocols.

CMP objected to the provision that the ERCOT official would consult with the commission staff before issuing a clarification or interpretation of the Protocols, stating that if there is consultation of commission staff, there also needs to be public input.

In addition, CMP stated that the proposed rule is an unconstitutional delegation, specifying that a delegation occurs "when an entity is given a public duty and the discretion to set public policy, promulgate rules to achieve that policy, or ascertain conditions upon which existing laws will apply." CMP's proposed remedy is to specify that ERCOT and the commission would not be bound by an official interpretation and market participant would have no affirmative duty to comply with it.

TXU stated that, because of the potentially substantial economic and reliability impacts of many requests for Protocol interpretations and clarifications, such interpretations and clarifications must be issued promptly or the process would be useless. TXU suggested a requirement that ERCOT respond to the requestor within 10 business days of ERCOT's receipt of the request.

AEP stated that, while it supports a procedure such as that provided by subsection (h), the process by which ERCOT provides official interpretations should be left to ERCOT.

ERCOT, Reliant, and Austin Energy stated that the proposed process for Protocol clarifications and interpretations is unnecessary because a process called Protocol Revision Request already exists in the Protocols to serve the same purpose. Austin Energy stated that under that process, the Protocol Revision Subcommittee is responsible for interpreting the Protocols, subject to approval of the ERCOT board and to commission oversight. Austin Energy added that the role of the ERCOT staff is

limited to implementation of the Protocols, while the stakeholders are responsible for policy matters. San Antonio made the same argument. In reply comments, CMP and AEP supported the recommendation to delete subsection (h).

BP stated that "official interpretations" of the Protocols must come from the commission through a formal process; otherwise, the result could be unpublished rulings that escape formal review and appeal.

Commission response

The commission agrees with CMP that a process for interpretations and clarifications of the Protocols would assist with consistent interpretation of and compliance with the Protocols, and solve problems market participants have had finding appropriate ERCOT personnel to answer questions. Accordingly, the commission agrees with TXU and AEP that the process is needed. The commission believes that the current Protocol Revision Request Process is insufficient to address the need of market participants to communicate frequently with an official entity to better understand and comply with ERCOT procedures, and therefore declines to delete this subsection. The commission disagrees with AEP that the process should be left entirely to ERCOT, as the commission was given oversight and review authority over ERCOT procedures in PURA §39.151(d). The commission changes the rule to clarify that a market participant seeking an interpretation or clarification of the Protocols shall use the PRR process contained in the Protocols whenever practicable, but that if an unforeseen situation arises and it is not practicable to submit the issue to the PRR process, a market entity may seek an official interpretation or clarification from a designated ERCOT official. The commission believes that this change addresses the concerns expressed by CMP, Reliant, ERCOT, and Austin Energy.

The commission agrees with TXU that interpretations and clarifications must be issued promptly or the process would be useless, and changes the rule to specify that ERCOT shall respond to the requestor within ten business days of ERCOT's receipt of the request for interpretation or clarification. The commission changes the rule to specify that ERCOT shall respond with either an official Protocol interpretation or a recommendation that the requestor take the request through the PRR process, and makes a similar change in redesignated subsection (i)(4) to address concerns expressed by CMP that ERCOT should only clarify what it has the ability to clarify, and that the requestor should have the option to seek or not seek a protocol revision. The commission also agrees with CMP that ERCOT should be able to designate more than one ERCOT official who will be authorized to receive requests for clarification and issue official interpretations as ERCOT may need this flexibility to adequately respond to the needs of market participants. The commission changes the rule accordingly.

The commission agrees with CMP that the person authorized to issue official interpretations or clarifications of the Protocols should be ERCOT staff as opposed to a stakeholder serving on the ERCOT Board or on an ERCOT committee but believes that its intention is sufficiently clear in the rule.

The commission disagrees with CMP that the ERCOT official should not consult with the commission staff before issuing a clarification or interpretation of the Protocols, or that if there is consultation of commission staff, there also needs to be public input. The commission also disagrees with BP's proposition that "official interpretations of the Protocols must come from the commission through a formal process, otherwise the result could be unpublished rulings that escape formal review and appeal." The commission believes that ERCOT officials should consult with commission staff to ensure that the clarification or interpretation they issue is consistent with commission orders, rules and policies as well as with ERCOT procedures. If an issue is of such nature that it requires a new policy decision with public input, the requestor will be referred to the PRR process or to the commission. Thus the commission declines to make CMP's requested change.

The commission also disagrees with CMP's assertions that the rule contains an unconstitutional delegation of authority. Reviewing the factors listed in *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997), the commission finds that the delegation of authority to ERCOT is valid. PURA §39.151(d) and the rule allow for meaningful review of ERCOT's actions by the commission, the state agency charged with oversight of ERCOT. If an affected market participant disagrees with the official interpretation issued by ERCOT, it may seek an amendment of the Protocols as provided for in the Protocols, appeal the interpretation to the commission, or both. During either an appeal or a protocol amendment proceeding, persons affected by the interpretation can be heard and their views considered in deciding whether, and how, the Protocols may be revised. Pursuant to PURA §39.151, ERCOT is authorized to enforce the Protocols and, as part of that activity, it may be necessary to interpret the Protocol provisions. Such interpretations provide market clarity regarding the application of the Protocols to particular individuals. Although ERCOT may be able to identify rule or Protocol violations, it is not authorized to implement any of the enforcement actions that the Legislature has delegated to the commission. Therefore, ERCOT has no power to impose criminal sanctions against any individual. ERCOT has no pecuniary or personal interest in the authority to interpret and enforce the Protocols. PURA §39.151 requires that an "independent organization", like ERCOT, must be "sufficiently independent of any producer or seller of electricity that its decisions will not be unduly influenced by any producer or seller." The commission has previously determined that ERCOT meets this requirement, so there is no indication of a pecuniary or personal interest that would conflict with ERCOT's public function under PURA and the rule. The rule's delegation of authority to ERCOT is limited in extent and subject matter and only applies in situations where the use of the Protocols Revision Request procedure is impracticable. ERCOT has special qualifications and training concerning the creation, amendment and application of the Protocols because it is charged with implementing and enforcing them on a daily basis and thus has the qualifications to perform the task that is assigned to it. The Legislature has provided standards concerning the type of activities that ERCOT is to perform and ERCOT will be guided by those standards in exercising its tasks under PURA and the rule. Finally, the commission, through its oversight authority, can review any decisions made by ERCOT in administering its delegated authority and can assure that ERCOT complies with the statutory and rule requirements. For the above stated reasons, the commission rejects CMP's contention that the rule results in an unconstitutional delegation of authority to ERCOT.

§25.503(i), redesignated as subsection (j)

ERCOT suggested deleting subsection (i). ERCOT stated that the provisions in subsection (i) are more appropriately included as part of ERCOT's internal processes than in a commission

rule, and stated that it already had an internal process substantially in compliance with the proposed rule language. ERCOT added that such internal process includes notifying MOD of significant violations, and suggested that it can work with MOD to make sure that ERCOT internal procedures are adequate to meet MOD's needs. In Reply comments, CMP supported ERCOT's recommendation to delete subsection (i).

TXU requested clarification regarding occurrences of non-compliance with the Protocols that have the potential to "create significant burden or place significant costs on the other market participants." TXU proposed that ERCOT appoint a qualified representative that would be responsible for making a final evaluation of whether the ERCOT Protocols have been violated before issuing a notice of non-compliance. This way, ERCOT would be able to speak in a more unified voice with a more uniform interpretation of the Protocols. TXU recommended changing the rule to require that notices of non-compliance be in writing to allow ERCOT and the market participants to track ERCOT's interpretations of the Protocols and ensure consistency in interpretation. In addition, TXU suggested adding language that would require ERCOT to inform the commission staff and the market participant in writing if the issue is not resolved at ERCOT level after the system operator has informed the market participant of the problem in writing. This, TXU stated, would give the market participant one last opportunity to remedy the non-compliance prior to commission staff action and ensure that an appropriate market participant decision maker is aware of the notice of non-compliance.

CMP suggested that the prescribed procedures be limited to material occurrences. CMP added that ERCOT should not report an occurrence of non-compliance immediately to commission staff if the issue is not resolved in a single call to the market participant. CMP suggested adding a provision that ERCOT promptly provide information to and respond to questions from market participants to allow the market participant to understand and respond to an alleged material occurrence of non-compliance with the Protocols.

Reliant suggested replacing "mandatory bids" with "decremental bids," explaining that decremental bids are the only mandatory bids in the ERCOT region, and proposed inserting "shall" instead of "should" in the sentence regarding non-compliance for continuity. Reliant suggested eliminating the word "immediately" in subsection (i)(3), and allowing for the market participant to be given a "reasonable time" within which to notify the ERCOT ISO as to why an instance of non-compliance has taken place or has been repeated in the event that a non- compliance issue has not been resolved.

BP opined that ERCOT is ill-suited to enforce its operating guidelines, and that this function should be left to the commission. BP added that any actions taken by ERCOT must be bounded explicitly within the ERCOT Protocols.

Commission response

The commission believes that this subsection is necessary to add guidance to the existing ERCOT internal compliance process and formally add a provision for commission oversight and review of the referred ERCOT procedure. The commission therefore disagrees with ERCOT and with CMP that this subsection should be deleted.

In light of TXU's comment seeking clarification regarding occurrences of non-compliance with the Protocols that have the potential to "create significant burden or place significant costs on the other market participants," the commission concludes that ERCOT's role should be limited to enforcing compliance with ERCOT procedures as they relate to the reliable operation of the electrical network. The commission decides that market participant activities that have the potential to create significant burden or place significant costs on the other market participants are potential market abuses that more properly fall under the commission's Market Oversight Division authority for monitoring and enforcement purposes. The commission therefore deletes this sentence.

The commission adds language to clarify that this subsection addresses material occurrences of non-compliance with ERCOT procedures to address the materiality concern expressed by CMP. The commission also specifies that ERCOT shall inform the commission staff if the material occurrence of non-compliance is not resolved after the system operator has verbally informed the market participant operator, and subsequently notified the supervisor of the operator. The commission believes that this clarification addresses the concerns expressed by CMP that "ERCOT should not report an occurrence of non-compliance immediately to commission staff if the issue is not resolved in a single call to the market participant." The commission believes that this changes also sufficiently addresses TXU's concerns that the market participant be given one last opportunity to remedy the non-compliance prior to commission staff action and ensure that an appropriate market participant decision maker is aware of the notice of non-compliance. However, the commission does not believe that the notice should necessarily be in writing. Notification of non-compliance by ERCOT under the described procedure typically takes place to correct harmful activities in real time, when compliance is required immediately to address unsafe conditions and prevent a reliability event. If compliance is not possible, ERCOT must be informed immediately of the reason why so it can take action to maintain security. Requiring that the market participant be informed in writing before commission staff is made aware of the problem could delay compliance or remedial action and may result in ERCOT operating under unsafe conditions for prolonged periods of time. The commission therefore declines to require written notification of the operator's supervisor before ERCOT informs the commission staff of the material occurrence of non-compliance, as requested by TXU and by other commenters in supplemental comments. The purpose of making the commission staff aware of a material occurrence of non-compliance is both to put the market participant on notice that the Market Oversight Division of the commission is watching its activities, and to enable the commission staff to take expeditious action, if necessary, to protect the public interest. The commission declines to require that ERCOT appoint a qualified representative that would be responsible for making a final evaluation of whether the ERCOT Protocols have been violated before issuing a formal notice of non-compliance, as the commission believes that this level of detail should be left to ERCOT. The commission notes that ERCOT already has representatives in its Compliance Division that are qualified to make such final evaluation before written notices of non-compliance are sent to the market participant.

The commission agrees with CMP that adding a provision that ERCOT promptly provide information to and respond to questions from market participants to allow the market participant to understand and respond to an alleged material occurrence of non-compliance with the Protocols may be useful to obtain compliance from the market participant, and adds this requirement. However, this requirement should not be interpreted as allowing

the operator of the market participant to refuse to comply with the ERCOT operator's instruction because it disagrees with the ERCOT operator, or to argue with the ERCOT operator about the need for compliance.

Regarding compliance with mandatory bids, the commission agrees with Reliant that at the present time, decremental bids are the only mandatory bids, but wishes to adopt language that is flexible enough to allow for future changes in the requirement. The commission therefore decides to adopt additional language that will preserve this flexibility while addressing Reliant's concern. The commission also changes "should" to "shall" in the sentence concerning non- compliance indicators monitored by ERCOT, as suggested by Reliant. The commission declines to change the word "immediately" in subsection (i)(3) (redesignated as (j)(3)), and to allow for the market participant to be given a "reasonable time" within which to notify the ERCOT ISO as to why an instance of non-compliance has taken place, as suggested by Reliant, because of the immediacy of real time situations more fully explained above.

The commission disagrees with BP that ERCOT is ill-suited to enforce its operating guidelines. As stated elsewhere in this order, PURA gives ERCOT enforcement authority over its procedures relating to the reliability of the electrical network and the accounting for the production and delivery of electricity among market participants, subject to commission oversight.

§25.503(j), redesignated as subsection (k)

Reliant proposed to amend this section to include ERCOT as an entity that is obligated to maintain records since it too is an entity subject to oversight by the commission. Reliant also suggested clarifying that records of verbally dispatched instructions (VDIs) should also be kept by ERCOT. Reliant suggested changing the requirement to document the "legitimacy" of an outage to a requirement to document the "reasons" of an outage in proposed subsection (j)(2)(C).

Denton stated that the commission should not require market participants to maintain records relative to all planned and forced generation and transmission outages including all documentation necessary to document the legitimacy of the outage because ERCOT already has a process in place to approve or disallow planned outages for generation and transmission.

AEP and Austin Energy proposed to specify that the requirement is to maintain records of information provided to market publications and publishers of surveys and price indices concerning activities in the ERCOT wholesale market and should not include information disclosed to the general media in subsection (j)(2)(D).

TXU companies proposed to use the definition of "transaction" from §25.93 of this title (relating to Quarterly Wholesale Electricity Transaction Reports) as a means to distinguish the transaction information required by the rule from information related to ERCOT retail transactions. TXU also suggested that ERCOT is better equipped to maintain records of VDIs, and for the sake of efficiency and accuracy the commission should require ERCOT to maintain records of VDIs. TXU proposed to clarify that proposed subsection (j)(2)(D) refers to the retention of information described under this section, which includes transaction, pricing, outage, settlement information and other information that would be relevant to an investigation under the proposed rule.

TXU commented that it is unclear who the "entities involved" are under proposed (j)(2)(D) and who the "official of the market participant to whom financial information was reported" is under proposed (j)(2)(E).

Denton stated that the commission should not require market participants to maintain records of information disclosed to the media and reports of financial information under proposed (j)(2)(D) and (j)(2)(E) because these appear to be very over-broad reporting requirements for which no justification is indicated.

TXU proposed modification of proposed (j)(3) to recognize that market participants may not have maintained three years' records at this point and to make the record keeping section a prospective obligation. In reply comments, AEP agreed.

OPUC stated that the rule should be changed to reflect the responsibility of the market participant to show why information should be considered confidential. Additionally, OPUC stated that it should be provided confidential access to all information provided under proposed subsections (j)(4) and (k)(2). OPUC claimed that it is not a competitor and that no harm to the competitive market can occur if OPUC obtains this sensitive market data. In reply comments, CMP and TXU disagreed stating that OPUC lacks regulatory authority and asserting that the Legislature has determined that OPUC should not have this special treatment.

BP suggested a clarification of proposed (j)(4) to specify that market participants may provide records of information to the commission under a confidentiality agreement or protective order if the commission requests such records.

Commission response

The commission agrees with Reliant and adds ERCOT as an entity that is obligated to maintain records, including records of VDIs, and changes the requirement to document the "legitimacy" of an outage to a requirement to document the "reasons" of an outage. The commission revises the rule to refer to "transactions" as defined in §25.93(c)(3) of this title (related to Quarterly Wholesale Electricity Transaction Reports), as suggested by TXU. The commission agrees to require that ERCOT keep records of VDIs, but will revise this requirement so that it is not applicable to market participants, as suggested by TXU. The commission clarifies that proposed subsection (j)(2)(D) (redesignated as (k)(2)(D)) refers to the retention of information described under this section, which includes transaction, pricing, outage, settlement information and other information that would be relevant to an investigation under the proposed rule, as suggested by TXU, and adds language to that effect in the rule. The new language should address the concerns expressed by AEP, Austin Energy and Denton as it limits the kind of information provided to publishers for which records need to be kept.

The commission disagrees with Denton that ERCOT already has sufficient information about planned and forced generation and transmission outages including all documentation necessary to document the legitimacy of the outage that could be required for the purpose of an investigation. In addition, the commission notes that Denton is incorrect in that ERCOT does not have the authority to approve or reject generation outages under the Protocols, and therefore has even less information and documentation regarding generation outages than it does about transmission outages.

The commission agrees to clarify that the entities referred to in proposed (j)(2)(D) (redesignated as (k)(2)(D)) are the company employees involved in providing the information as well as the publishers to whom it was provided, and to clarify that the financial reports referred to in (j)(2)(E) (redesignated as (k)(2)(E)) are reports provided to external parties only, and modifies the rule accordingly. This addition should address the concern expressed by Denton that the requirement is over-broad, as it defines the financial reports to be maintained more narrowly.

The commission agrees to make record keeping a prospective obligation as requested by TXU and AEP, and indicates as much in the rule.

The commission disagrees with OPUC that it should be provided access to confidential material on the same basis and terms as the commission staff, and agrees with CMP and TXU that the Legislature did not give OPUC this special treatment. The commission agrees with AEP that OPUC may have access to the protected information if the information is provided in a proceeding, and when a protective order is issued, or when the parties have a confidentiality agreement in place.

The commission agrees to clarify that market participants may provide records of information under a confidentiality agreement or protective order "if the commission requests records retained pursuant to this section," and indicates as much in the rule.

§25.503(k), redesignated as subsection (l)

CMP generally supported the concept of informal fact-finding as proposed in this subsection. However, CMP suggested revisions to clarify that market participants may withhold information that is privileged or would otherwise not be available in discovery. CMP also requested clarifications that the commission would not direct ERCOT to terminate an agreement with a QSE without following proper procedure and requested that more time be allowed for a market participant to comply with commission requests for information.

TXU proposed deleting subsection (k)(4) because it duplicated matters that TXU proposed for inclusion in subsection (l). TXU also objected that the informal staff review proposed in subsection (k) was open-ended, allowing staff an unlimited time to review a matter before deciding whether or not to pursue formal commission action. TXU claimed that this created additional financial risk and uncertainty in the market. TXU proposed to add a procedure that would allow staff 90 days to review the matter. After that time, the market participant could petition the commission staff to close the investigation. Staff would then have fourteen (14) days within which to either institute formal enforcement action or close the investigation. In reply comments, AEP supported TXU's request for a time limit on an informal investigation.

San Antonio suggested that the commission adopt the 90-day time limit for enforcement actions contained in the FERC's rule. San Antonio asserted that the provision was needed to avoid regulatory uncertainty and avoid the prospect of an open-ended investigation. AEP and CenterPoint filed similar comments.

Reliant suggested that subsection (k)(1), which allows staff to contact a market participant to give the market participant an opportunity to explain its actions, be revised to give the market participant an opportunity to "demonstrate compliance with the Protocols." Reliant also suggested combining subsections (k)(3) and (k)(4) because they deal with a similar topic, and also requested that subsection (k)(6) be revised to allow any person to file a formal complaint or pursue other relief available under the law.

OPUC suggested that subsection (k)(2) should be revised to require market participants to show why information should be considered confidential before the commission agrees to treat it as confidential under the rule. In reply comments, TXU, Reliant, Austin Energy, San Antonio, CMP and AEP objected to OPUC's proposed treatment of allegedly confidential information, arguing that there was no need for such procedure and that OPUC's proposal was inconsistent with the law. OPUC also requested that subsection (k)(4) be amended to include "disgorgement of profits" as one of the remedies that the commission could pursue in the event of a violation of the rule or the Protocols. OPUC asserted that the market participant should be required to forego its illegal financial gains and pay a penalty over and above those amounts. OPUC argued that combining disgorgement with administrative penalties was necessary so that the sanction for a rule violation is "large enough to deter market participants from engaging in future illegal market activities." In reply comments, TXU, Reliant, CMP and AEP asserted that the commission lacks the statutory authority to order disgorgement of profits as OPUC requests.

Austin Energy recommended that subsection (k) be revised to include language stating the criteria the commission would use in determining whether to initiate a formal investigation. These criteria would include the factors considered under PURA §15.023, as well as the market participant's intent and whether ERCOT had previously issued a written warning notice to the market participant concerning the behavior involved. Austin Energy argued that these changes would address the issue of intent and provide additional means by which staff could determine intent if the market participant ignored the written warning from ERCOT. Austin Energy also requested that the list of potential remedies in subsection (k)(4) contain an express reference to PURA §15.023. In supplemental comments, OPUC requested that the commission retain the list of remedies included in subsection (k)(4) to provide notice to market participants of the remedies available to the commission.

AEP requested that subsection (k)(5) be revised to indicate that, if a market participant does not fully cooperate with staff, the staff would be able to request a formal investigation of the market participant. AEP argued that this is preferable to the current language, which could result in the market participant being subject to administrative penalties for failure to fully cooperate with the informal investigation. AEP asserted that this result would violate the constitutional protection against self-incrimination, since other portions of the rule refer to possible criminal prosecution.

CenterPoint requested certain minor clarifications and also requested that the reference to QSE in Subsection (k)(4) be changed to "such market participant." In supplemental comments, CenterPoint stated that the standard for initiation of an enforcement action should be that there is a "reasonable basis to conclude that a violation has occurred."

Commission response

For reasons discussed elsewhere in this order, the commission disagrees with the suggestion to add an intent element to this rule. The commission also disagrees with comments suggesting that a requirement for a written notice from ERCOT be included in the rule as a means of addressing the issue of intent. The rule provides sufficient notice to market participants without requiring an additional written notice from ERCOT before an

enforcement action may be initiated. The commission agrees with Austin Energy's suggestion to include language stating the criteria the commission will use in determining whether to initiate enforcement action but disagrees that such criteria should be based on PURA §15.023. PURA §15.023 only specifies the criteria that the commission must use in setting the amount of an administrative penalty, after a violation has been established and does not establish the criteria for a commission decision to initiate an enforcement action, which will determine whether a violation occurred. Accordingly, the commission adds language to subsection (k)(4), redesignated (l)(4), to require that, for alleged violations that have been reviewed in the informal procedure established in this subsection, staff make a prima facie case that includes a summary of the evidence indicating to the commission staff that the market participant has violated this section, and other findings resulting from the investigation allowed by this section. This change also addresses CenterPoint's request that there should be a "reasonable basis to conclude that a violation has occurred."

The commission disagrees with comments suggesting that a time limit should be imposed on the informal review process contained in the rule. The review process often requires review of voluminous, complex records and reports from ERCOT and the market participant(s) involved. The time spent reviewing these documents can be significant and can be extended through no fault of the staff, particularly when one or more party may have an interest in delaying or avoiding the review. Although a time limit may serve the interests of a market participant, the commission fails to see how the public interest is served by such time limit. The commission has a very limited number of staff members available to conduct such reviews who also have other responsibilities in rulemaking projects and contested case proceedings designed to protect the public interest. Imposing an arbitrary limit on the time they can spend reviewing a particular transaction may prevent a thorough review of the transaction or prevent them from performing other important functions. The commission encourages its employees to perform their jobs quickly, efficiently, and effectively, but will not include a provision that may lead to a less than thorough review or the filing of an unnecessary complaint to meet an arbitrary time limit.

Concerning the provision in subsection (k)(4), which lists the remedies available to the commission, the commission disagrees with suggestions that the list should be expanded to include "disgorgement," or that it should be limited to only the remedies specified in PURA §15.023. As in the case of subsection (l), discussed elsewhere, the recitation of remedies in subsection (k)(4) was neither intended to expand nor limit the range of remedies available to the commission, but to provide some notice of the types of remedies available. To avoid any confusion over this point, the commission is revising this language to remove language referring to any particular remedies. The commission will determine the appropriate remedy in any particular enforcement case depending upon the facts in that case and the remedies available at law.

The commission disagrees with OPUC's comments that the rule should include a process for determining whether particular documents are entitled to treatment as confidential information. The goal of the investigation is to obtain information in a timely fashion to determine whether or not more formal enforcement action is needed. Requiring a procedure for determining whether the information is properly treated as confidential would add unnecessary delay to the process. If further action is necessary, the commission could determine issues of confidentiality in the enforcement action. If no action is taken, the information remains subject to the requirements of the Texas Public Information Act and confidentiality could be determined in response to an open records request. By accepting the information under a claim of confidentiality, the commission is not agreeing with such claims and reserves the right to challenge such claims if necessary. However, the commission will treat such information as confidential until a decision is issued declaring that such treatment is not appropriate. Concerning CMP's comments about other potential bases of a claim of confidentiality, the commission is revising the rule to allow such claims, however, the commission sees no need for the broad language referring to "limitations applicable to discovery in contested cases" as proposed by CMP. The limitations applicable to discovery may vary from case to case, so adding this language would only introduce new uncertainty to the rule.

The commission agrees with some of the suggestions requesting clarifications to the language of the rule and is revising the rule to include these clarifications. The commission declines to adopt Reliant's proposal to change subsection (k)(1) to allow a market participant to "demonstrate compliance with the Protocols." This language may be too restrictive. Because the commission is adding a subsection concerning affirmative defenses, a market participant may be able to demonstrate a situation in which it was not in "compliance with the Protocols" but nevertheless should not be found to be in violation of the rule. The rule language allowing the market participant "an opportunity to explain its activities" would allow it to assert its affirmative defense while Reliant's proposed language would not. Additionally, the commission notes that "compliance with the Protocols" is not the commission's sole consideration. There may be situations in which a market participant's actions may not be expressly addressed in the Protocols, but which constitute fraud or a market abuse and materially affected the proper functioning or the reliability of the market, either through negligence or in a way that was predictable.

§25.503(l), redesignated subsection (m)

TXU proposed that subsection (l) be revised to indicate that the commission will not take an enforcement action until after notice and an opportunity for a hearing are provided to the market participant involved. TXU also argued that the language of subsection (l) implies that the commission is seeking to impose remedies that are beyond its statutory authority to impose. AEP made similar arguments and suggested that subsection (l) should be revised to state that the only remedies available to the commission are those specified in PURA §39.157. CMP also suggested that the language should be limited to the remedies available to the commission as specified in PURA. Additionally, CMP recommended that the language also reflect that the commission has the discretion to order no relief, such as in cases where no harm has resulted or the harm has already been remedied. On a related matter, CMP requested the inclusion of a new subsection, which would state that the section does not present a basis upon which a party may seek to revoke a bilateral contract; state that the new section does not provide a basis for a third- party cause of action, except for complaints to ERCOT or the commission specifically provided for in the rule; and state that the new section does not provide a basis for changing wholesale power costs under contracts based upon formulary rates, fuel adjustments, or average system costs.

Commission response

The commission disagrees with these comments and believes that the commenters have misunderstood the purpose of subsection (l). This subsection was included primarily to give notice to market participants about the range of remedies available to the commission. It was intended to neither expand nor limit the types of remedies the commission could require in the event of a violation of this, or any other, commission rule. Therefore, the commission declines the requests to include other language limiting its ability to fashion remedies to address particular violations. However, the comments have shown a need for clarification of subsection (l). The commission determines that the most appropriate change is to revise the language to remove any reference to a particular remedy and to instead indicate that the commission may seek any remedy available at law.

For similar reasons, the commission declines to adopt the additional subsection proposed by CMP, which would limit the remedies available to the commission. The commission will determine the appropriate remedy for any particular violation of this rule based upon the facts in each case and law applicable to the situation.

Other Issues

CMP filed a comment seeking to add a subsection that would indicate that the entire section "should be interpreted consistently with applicable federal and state antitrust law."

Commission response

The commission sees no need for this provision and declines to adopt it. PURA §39.158(b) states that Chapter 39 is "intended to complement other state and federal antitrust provisions." Thus the rule, which is, in part, adopted pursuant to Chapter 39, should be seen as a complement to state and federal antitrust provisions. PURA does not require that the commission's rules be "consistent with state and federal antitrust provisions" as CMP requested. Where the Legislature wants the commission's rules to be consistent with other law, it expressly states that requirement, as it did in PURA §55.308, requiring that the commission's rules on telecommunications slamming "shall be consistent with applicable federal laws and rules." The difference between rules that "complement" federal law and rules that are "consistent with" federal law is significant and is an indication that the Legislature intended that the commission's authority was not limited solely to implementing existing state and federal antitrust provisions. The rule also contains customer protection provisions that are not dependent upon antitrust law. Stating that the rule will be interpreted consistent with antitrust provisions improperly limits the scope of the rule.

In supplemental comments, San Antonio suggested that the rule should contain a provision requiring an annual evaluation of the rule, given the dynamic character of competitive markets. San Antonio noted that the FERC included a similar provision in its rules.

Commission response

The commission declines to adopt San Antonio's suggestion. Texas Government Code Annotated §2001.039 requires state agencies to review their rules every four years to determine whether such rules should be readopted. Additionally, Texas Government Code Annotated §2001.021 allows interested persons to submit a petition for rulemaking to propose the adoption of an agency rule. The commission believes that these two provisions provide ample grounds to assure that the rule will receive periodic review to remain compatible with the developing market. There is no need to adopt a provision requiring a more frequent review period, particularly in view of the staff resources that are involved in such endeavor.

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 purposes of clarifying its intent.

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2004) (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; and specifically, PURA §15.023, which authorizes the commission to impose an administrative penalty against a person who violates the statute or the commission's rules; PURA §35.004, which requires that the commission ensure that ancillary services necessary to facilitate the transmission of electric energy are available at reasonable prices with terms and conditions that are not unreasonably preferential, prejudicial, predatory, or anticompetitive; PURA §39.001, which establishes the legislative policy to protect the public interest during the transition to and in the establishment of a fully competitive electric power industry; PURA §39.101, which establishes that customers are entitled to protection from unfair, misleading, or deceptive practices and directs the commission to adopt and enforce rules to carry out this provision and to ensure that retail customer protections are established that afford customers safe, reliable, and reasonably priced electricity; PURA §39.151, which requires the commission to oversee and review the procedures established by an independent organization, directs market participants to comply with such procedures, and authorizes the commission to enforce such procedures; PURA §39.157, which directs the commission to monitor market power associated with the generation, transmission, distribution, and sale of electricity and provides enforcement power to the commission to address any market power abuses; PURA §39.356, which allows the commission to revoke certain certifications and registrations for violation of an independent organization's procedures, statutory provisions, or the commission's rules; and PURA §39.357, which authorizes the commission to impose administrative penalties in addition to revocation, suspension, or amendment of certificates and registrations.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 15.023, 35.004, 39.001, 39.101, 39.151, 39.157, 39.356, and 39.357.

§25.503. Oversight of Wholesale Market Participants.

(a) Purpose. The purpose of this section is to establish the standards that the commission will apply in monitoring the activities of entities participating in the wholesale electricity markets, including markets administered by the Electric Reliability Council of Texas (ERCOT), and enforcing the Public Utility Regulatory Act (PURA) and ERCOT procedures relating to wholesale markets. The standards contained in this rule are necessary to:

(1) protect customers from unfair, misleading, and deceptive practices in the wholesale markets, including ERCOT-administered markets;

(2) ensure that ancillary services necessary to facilitate the reliable transmission of electric energy are available at reasonable prices;

(3) afford customers safe, reliable, and reasonably priced electricity;

(4) ensure that all wholesale market participants observe all scheduling, operating, reliability, and settlement policies, rules, guidelines, and procedures established in the ERCOT procedures;

(5) clarify prohibited activities in the wholesale markets, including ERCOT-administered markets;

(6) monitor and mitigate market power as authorized by the Public Utility Regulatory Act (PURA) §39.157(a) and prevent market power abuses;

(7) clarify the standards and criteria the commission will use when reviewing wholesale market activities;

(8) clarify the remedies for non-compliance with the Protocols relating to wholesale markets; and

(9) prescribe ERCOT's role in enforcing ERCOT procedures relating to the reliability of the regional electric network and accounting for the production and delivery among generators and all other market participants, and monitoring and obtaining compliance with operating standards within the ERCOT regional network.

(b) Application. This section applies to all market entities, as defined in subsection (c) of this section.

(c) Definitions. The following words and terms when used in this section shall have the following meaning, unless the context indicates otherwise:

(1) Artificial congestion--Congestion created when multiple foreseeable options exist for scheduling, dispatching, or operating a resource, and a market participant chooses an option that is not the most economical, that foreseeably creates or exacerbates transmission congestion, and that results in the market participant being paid to relieve the congestion it caused.

(2) Efficient operation of the market--Operation of the markets administered by ERCOT, consistent with reliability standards, that is characterized by the fullest use of competitive auctions to procure ancillary services, minimal cost socialization, and the most economical utilization of resources, subject to necessary operational and other constraints.

(3) ERCOT procedures--Documents that contain the scheduling, operating, planning, reliability, and settlement procedures, standards, and criteria that are public and in effect in the ERCOT power region, including the ERCOT Protocols and ERCOT Operating Guides as amended from time to time but excluding ERCOT's internal administrative procedures. The Protocols generally govern when there are inconsistencies between the Protocols and the Operating Guides, except when ERCOT staff, consistent with subsection (i) of this section, determines that a provision contained in the Operating Guides is technically superior for the efficient and reliable operation of the electric network.

(4) Market entity--Any person or entity participating in the ERCOT-administered wholesale market, including, but not limited to, a load serving entity (including a municipally owned utility and an electric cooperative,) a power marketer, a transmission and distribution utility, a power generation company, a qualifying facility, an exempt wholesale generator, ERCOT, and any entity conducting planning, scheduling, or operating activities on behalf of, or controlling the activities of, such market entities.

(5) Market participant--A market entity other than ERCOT.

(6) Resource--Facilities capable of providing electrical energy or load capable of reducing or increasing the need for electrical energy or providing short-term reserves into the ERCOT system. This includes generation resources and loads acting as resources (LaaRs).

(d) Standards and criteria for enforcement of ERCOT procedures and PURA. The commission will monitor the activities of market entities to determine if such activities are consistent with ERCOT procedures; whether they constitute market power abuses or are unfair, misleading, or deceptive practices affecting customers; and whether they are consistent with the proper accounting for the production and delivery of electricity among generators and other market participants. When reviewing the activities of a market entity, the commission will consider whether the activity was conducted in a manner that:

(1) adversely affected customers in a material way through the use of unfair, misleading, or deceptive practices;

(2) materially reduced the competitiveness of the market, including whether the activity unfairly impacted other market participants in a way that restricts competition;

(3) disregarded its effect on the reliability of the ERCOT electric system; or

(4) interfered with the efficient operation of the market.

(e) Guiding ethical standards. Each market participant is expected to:

(1) observe all applicable laws and rules;

(2) schedule, bid, and operate its resources in a manner consistent with ERCOT procedures to support the efficient and reliable operation of the ERCOT electric system; and

(3) not engage in activities and transactions that create artificial congestion or artificial supply shortages, artificially inflate revenues or volumes, or manipulate the market or market prices in any way.

(f) Duties of market entities.

(1) Each market participant shall be knowledgeable about ERCOT procedures.

(2) A market participant shall comply with ERCOT procedures and any official interpretation of the Protocols issued by ERCOT or the commission.

(A) If a market participant disagrees with any provision of the Protocols or any official interpretation of the Protocols, it may seek an amendment of the Protocols as provided for in the Protocols, appeal an ERCOT official interpretation to the commission, or both.

(B) A market participant appealing an official interpretation of the Protocols or seeking an amendment to the Protocols shall comply with the Protocols unless and until the interpretation is officially changed or the amendment is officially adopted.

(C) A market participant may be excused from compliance with ERCOT instructions or Protocol requirements only if such non-compliance is due to communication or equipment failure beyond the reasonable control of the market participant; if compliance would jeopardize public health and safety or the reliability of the ERCOT transmission grid, or create risk of bodily harm or damage to the equipment; if compliance would be inconsistent with facility licensing, environmental, or legal requirements; if required by applicable law; or for other good cause. A market participant is excused under this subparagraph only for so long as the condition continues.

(3) Whenever the Protocols require that a market participant make its "best effort" or a "good faith effort" to meet a requirement, or similar language, the market participant shall act in accordance with the requirement unless:

(A) it is not technically possible to do so;

(B) doing so would jeopardize public health and safety or the reliability of the ERCOT transmission grid, or would create a risk of bodily harm or damage to the equipment;

(C) doing so would be inconsistent with facility licensing, environmental, or legal requirements; or

(D) other good cause exists for excusing the requirement.

(4) When a market participant is not able to comply with a Protocol requirement or official interpretation of a requirement, or honor a formal commitment to ERCOT, the market participant has an obligation to notify ERCOT immediately upon learning of such constraints and to notify ERCOT when the problem ceases. A market participant who does not comply with a Protocol requirement or official interpretation of a requirement, or honor a formal commitment to ERCOT, has the burden to demonstrate, in any commission proceeding in which the failure to comply is raised, why it cannot comply with the Protocol requirement or official interpretation of the requirement, or honor the commitment.

(5) The commission staff may request information from a market participant concerning a notification of failure to comply with a Protocol requirement or official interpretation of a requirement, or honor a formal commitment to ERCOT. The market participant shall provide a response that is detailed and reasonably complete, explaining the circumstances surrounding the alleged failure, and shall provide documents and other materials relating to such alleged failure to comply. The response shall be submitted to the commission staff within five business days of a written request for information, unless commission staff agrees to an extension.

(6) A market participant's bids of energy and ancillary services shall be from resources that are available and capable of performing, and shall be feasible within the limits of the operating characteristics indicated in the resource plan, as defined in the Protocols, and consistent with the applicable ramp rate, as specified in the Protocols.

(7) All statements, data and information provided by a market participant to market publications and publishers of surveys and market indices for the computation of an industry price index shall be true, accurate, reasonably complete, and shall be consistent with the market participant's activities, subject to generally accepted standards of confidentiality and industry standards. Market participants shall exercise due diligence to prevent the release of materially inaccurate or misleading information.

(8) A market entity has an obligation to provide accurate and factual information and shall not submit false or misleading information, or omit material information, in any communication with ERCOT or with the commission. Market entities shall exercise due diligence to ensure adherence to this provision throughout the entity.

(9) A market participant shall comply with all reporting requirements governing the availability and maintenance of a generating unit or transmission facility, including outage scheduling reporting requirements. A market participant shall immediately notify ERCOT when capacity changes or resource limitations occur that materially affect the availability of a unit or facility, the anticipated operation of its resources, or the ability to comply with ERCOT dispatch instructions.

(10) A market participant shall comply with requests for information or data by ERCOT as specified by the Protocols or ERCOT instructions within the time specified by ERCOT instructions, or such other time agreed to by ERCOT and the market participant.

(11) When a Protocol provision or its applicability is unclear, or when a situation arises that is not contemplated under the Protocols, a market entity seeking clarification of the Protocols shall use the Protocol Revision Request (PRR) process provided in the Protocols. If the PRR process is impractical or inappropriate under the circumstances, the market entity may use the process for requesting formal Protocol clarifications or interpretations described in subsection (i) of this section. This provision is not intended to discourage day to day informal communication between market participants and ERCOT staff.

(12) A market participant operating in the ERCOT markets or a member of the ERCOT staff who identifies a provision in the ERCOT procedures that produces an outcome inconsistent with the efficient and reliable operation of the ERCOT-administered markets shall call the provision to the attention of the appropriate ERCOT subcommittee. All market participants shall cooperate with the ERCOT subcommittees, ERCOT staff, and the commission staff to develop Protocols that are clear and consistent.

(13) A market participant shall establish and document internal procedures that instruct its affected personnel on how to implement ERCOT procedures according to the standards delineated in this section. Each market participant shall establish clear lines of accountability for its market practices.

(g) Prohibited activities. Any act or practice of a market participant that materially and adversely affects the reliability of the regional electric network or the proper accounting for the production and delivery of electricity among market participants is considered a "prohibited activity." The term "prohibited activity" in this subsection excludes acts or practices expressly allowed by the Protocols or by official interpretations of the Protocols and acts or practices conducted in compliance with express directions from ERCOT or commission rule or order or other legal authority. The term "prohibited activity" includes, but is not limited to, the following acts and practices that have been found to cause prices that are not reflective of competitive market forces or to adversely affect the reliability of the electric network:

(1) A market participant shall not schedule, operate, or dispatch its generating units in a way that creates artificial congestion.

(2) A market participant shall not execute pre-arranged offsetting trades of the same product among the same parties, or through third party arrangements, which involve no economic risk and no material net change in beneficial ownership.

(3) A market participant shall not offer reliability products to the market that cannot or will not be provided if selected.

(4) A market participant shall not conduct trades that result in a misrepresentation of the financial condition of the organization.

(5) A market participant shall not engage in fraudulent behavior related to its participation in the wholesale market.

(6) A market participant shall not collude with other market participants to manipulate the price or supply of power, allocate territories, customers or products, or otherwise unlawfully restrain competition. This provision should be interpreted in accordance with federal and state antitrust statutes and judicially-developed standards under such statutes regarding collusion.

(7) A market participant shall not engage in market power abuse. Withholding of production, whether economic withholding or physical withholding, by a market participant who has market power, constitutes an abuse of market power.

(h) Defenses. The term "prohibited activity" in subsection (g) of this section excludes acts or practices that would otherwise be included, if the market entity establishes that its conduct served a legitimate business purpose consistent with prices set by competitive market forces; and that it did not know, and could not reasonably anticipate, that its actions would inflate prices, adversely affect the reliability of the regional electric network, or adversely affect the proper accounting for the production and delivery of electricity; or, if applicable, that it exercised due diligence to prevent the excluded act or practice. The defenses established in this subsection may also be asserted in instances in which a market participant is alleged to have violated subsection (f) of this section. A market entity claiming an exclusion or defense under this subsection, or any other type of affirmative defense, has the burden of proof to establish all of the elements of such exclusion or defense.

(i) Official interpretations and clarifications regarding the Protocols. A market entity seeking an interpretation or clarification of the Protocols shall use the PRR process contained in the Protocols whenever possible. If an interpretation or clarification is needed to address an unforeseen situation and there is not sufficient time to submit the issue to the PRR process, a market entity may seek an official Protocol interpretation or clarification from ERCOT in accordance with this subsection.

(1) ERCOT shall develop a process for formally addressing requests for clarification of the Protocols submitted by market participants or issuing official interpretations regarding the application of Protocol provisions and requirements. ERCOT shall respond to the requestor within ten business days of ERCOT's receipt of the request for interpretation or clarification with either an official Protocol interpretation or a recommendation that the requestor take the request through the PRR process.

(2) ERCOT shall designate one or more ERCOT officials who will be authorized to receive requests for clarification from, and issue responses to market participants, and to issue official interpretations on behalf of ERCOT regarding the application of Protocol provisions and requirements.

(3) The designated ERCOT official shall provide a copy of the clarification request to commission staff upon receipt. The ERCOT official shall consult with ERCOT operational or legal staff as appropriate and with commission staff before issuing an official Protocol clarification or interpretation.

(4) The designated ERCOT official may decide, in consultation with the commission staff, that the language for which a clarification is requested is ambiguous or for other reason beyond ERCOT's ability to clarify, in which case the ERCOT official shall inform the requestor, who may take the request through the PRR process provided for in the Protocols.

(5) All official Protocol clarifications or interpretations that ERCOT issues in response to a market participant's formal request or upon ERCOT's own initiative shall be sent out in a market bulletin with the appropriate effective date specified to inform all market participants, and a copy of the clarification or interpretation shall be maintained in a manner that is accessible to market participants. Such response shall not contain information that would identify the requesting market participant.

(6) A market participant may freely communicate informally with ERCOT employees, however, the opinion of an individual ERCOT staff member not issued as an official interpretation of ERCOT pursuant to this subsection may not be relied upon as an affirmative defense by a market participant.

(j) Role of ERCOT in enforcing operating standards. ERCOT shall develop and submit for commission approval a process to monitor material occurrences of non-compliance with ERCOT procedures, which shall mean occurrences that have the potential to impede ERCOT operations, or represent a risk to system reliability. Non-compliance indicators monitored by ERCOT shall include, but shall not be limited to, material occurrences of schedule control error, failing resource plan performance measures as established by ERCOT, failure to follow dispatch instructions within the required time, failure to meet ancillary services obligations, failure to submit mandatory bids or offers that may apply, and other instances of non-compliance of a similar magnitude.

(1) ERCOT shall keep a record of all such material occurrences of non-compliance with ERCOT procedures and shall develop a system for tracking recurrence of such material occurrences of non-compliance.

(2) ERCOT shall promptly provide information to and respond to questions from market participants to allow the market participant to understand and respond to alleged material occurrences of non-compliance with ERCOT procedures. However, this requirement does not relieve the market participant's operator from responding to the ERCOT operator's instruction in a timely manner and should not be interpreted as allowing the market participant's operator to argue with the ERCOT operator as to the need for compliance.

(3) ERCOT shall keep a record of the resolution of such material occurrences of non-compliance and of remedial actions taken by the market participant in each instance.

(4) ERCOT shall inform the commission staff immediately if the material occurrence of non- compliance is not resolved after the system operator has orally informed the market participant of the problem. The occurrence is not resolved if:

(A) the same instance of non-compliance is repeated more than once in a six-month period; or

(B) the occurrence continues after ERCOT has first orally notified the operator of the market participant, and subsequently notified, orally or in writing, the supervisor of the operator of the market participant.

(k) Standards for record keeping.

(1) A market participant who schedules through a qualified scheduling entity (QSE) that submits schedules to ERCOT on behalf of more than one market participants shall maintain records to show scheduling and bidding information for all schedules and bids that its QSE has submitted to ERCOT on its behalf, by interval.

(2) All market participants and ERCOT shall maintain records relative to market participants' activities in the ERCOT-administered markets to show:

(A) information on transactions, as defined in §25.93(c)(3) of this title (relating to Quarterly Wholesale Electricity Transaction Reports), including the date, type of transaction, amount of transaction, and entities involved;

(B) information and documentation of all planned and forced generation and transmission outages including all documentation necessary to document the reason for the outage;

(C) information described under this subsection including transaction information, information on pricing, settlement information, and other information that would be relevant to an investigation under this section, and that has been disclosed to market publications

and publishers of surveys and price indices, including the date, information disclosed, and the name of the employees involved in providing the information as well as the publisher to whom it was provided; and

(D) reports of the market participant's financial information given to external parties, including the date, financial results reported, and the party to whom financial information was reported, if applicable.

(3) After the effective date of this section, all records referred to in this subsection except verbally dispatch instructions (VDIs) shall be kept for a minimum of three years from the date of the event. ERCOT shall keep VDI records for a minimum of two years. All records shall be made available to the commission for inspection upon request.

(4) A market participant shall, upon request from the commission, provide the information referred to in this subsection to the commission, and may, if applicable, provide it under a confidentiality agreement or protective order pursuant to §22.71(d) of this title (relating to Filing of Pleadings, Documents, and Other Material).

(l) Investigation. The commission staff may initiate an informal fact-finding review based on a complaint or upon its own initiative to obtain information regarding facts, conditions, practices, or matters that it may find necessary or proper to ascertain in order to evaluate whether any market entity has violated any provision of this section.

(1) The commission staff will contact the market entity whose activities are in question to provide the market entity an opportunity to explain its activities. The commission staff may require the market entity to provide information reasonably necessary for the purposes described in this subsection.

(2) If the market entity asserts that the information requested by commission staff is confidential, the information shall be provided to commission staff as confidential information related to settlement negotiations or other asserted bases for confidentiality pursuant to §22.71(d)(4) of this title.

(3) If after conducting its fact-finding review, the commission staff determines that a market entity may have violated this section, the commission staff may request that the commission initiate a formal investigation against the market entity pursuant to §22.241 of this title (relating to Investigations).

(4) If, as a result of its investigation, commission staff determines that there is evidence of a violation of this section by a market entity, the commission staff may request that the commission initiate appropriate enforcement action against the market entity. A notice of violation requesting administrative penalties shall comply with the requirements of §22.246 of this title (relating to Administrative Penalties). Additionally, for alleged violations that have been reviewed in the informal procedure established by this subsection, the commission staff shall include as part of its prima facie case:

(A) a statement either that --

(i) the commission staff has conducted the investigation allowed by this section; or

(ii) the market participant has failed to comply with the requirements of paragraph (5) of this subsection;

(B) a summary of the evidence indicating to the commission staff that the market participant has violated one of the provisions of this section;

(C) a summary of any evidence indicating to the commission staff that the market participant benefited from the alleged violation or materially harmed the market; and

(D) a statement that the staff has concluded that the market participant failed to demonstrate, in the course of the investigation, the applicability of an exclusion or affirmative defense under subsection (h) of this section.

(5) A market entity subject to an informal fact-finding review or a formal investigation by the commission has an obligation to fully cooperate with the investigation, to make its company representatives available within a reasonable period of time to discuss the subject of the investigation with the commission staff, and to respond to the commission staff's requests for information within a reasonable time frame as requested by the commission staff.

(6) The procedure for informal fact-finding review established in this subsection does not prevent any person or commission staff from filing a formal complaint with the commission pursuant to §22.242 of this title (relating to Complaints) or pursuing other relief available by law.

(m) Remedies. If the commission finds that a market entity is in violation of this section, the commission may seek or impose any legal remedy it determines appropriate for the violation involved.

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 February 9, 2004.

TRD-200400893
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
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Proposal publication date: August 15, 2003
For further information, please call: (512) 936-7223

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS STATE BOARD OF MEDICAL EXAMINERS

CHAPTER 165. MEDICAL RECORDS

22 TAC §§165.1, 165.2, 165.5

The Texas State Board of Medical Examiners adopts amendments to §165.1, §165.2 and new §165.5, concerning Medical Records. Section 165.1 is adopted without changes to the proposed text as published in the January 2, 2004, issue of the *Texas Register* (29 TexReg 37) and will not be republished. Sections 165.2 and 165.5 are adopted with changes to the proposed text as published in the January 2, 2004, issue of the *Texas Register* (29 TexReg 37). The text of the rules will be republished.

The amendments to §165.1 and §165.2 clarify the definitions for medical records and maintenance of records and add Health Insurance Portability and Accountability Act (HIPAA) requirements. New §165.5 outlines the requirements concerning transfer or disposal of medical records. The change in §165.2(l) will clarify that the more restrictive/stringent law is applicable regarding the release of patient information. Language has been added to

§165.5(a)(1)(C) that will clarify that it is the physician's responsibility to provide notice to patients regarding transfer and disposal of medical records.

The following comments were received:

Concentra, Inc. commented in support of the rules. However, they asked for clarifying changes regarding several sections that the Board agreed with and are reflected in the changes that have been adopted.

Seven other comments were received from various members of the public including physicians and attorneys who voiced objections to the fee increase for costs involved in obtaining medical records. The Board carefully reviewed these comments and determined that the costs correctly reflect a maximum amount to be charged based upon the actual costs to the physician in producing the records.

The amendments and new rule are adopted under the authority of the Occupations Code Annotated, §153.001, which provides the Texas State Board of Medical Examiners to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; and enforce this subtitle.

§165.2. Medical Record Release and Charges.

(a) Release of Records Pursuant to Written Request. As required by the Medical Practice Act, §159.006, a physician shall furnish copies of medical and/or billing records requested or a summary or narrative of the records pursuant to a written release of the information as provided by the Medical Practice Act, §159.005, except if the physician determines that access to the information would be harmful to the physical, mental, or emotional health of the patient. The physician may delete confidential information about another patient or family member of the patient who has not consented to the release. If by the nature of the physician's practice, the physician transmits health information in electronic form, the physician may be subject to the Health Insurance Portability and Accountability Act (HIPAA) 45 C.F.R. Parts 160-164. Unless otherwise provided under HIPAA, physicians subject to HIPAA must permit the patient or an authorized representative access to inspect medical and/or billing records and may not provide summaries in lieu of actual copies unless the patient authorizes the summary and related charges.

(b) Deadline for Release of Records. The requested copies of medical and/or billing records or a summary or narrative of the records shall be furnished by the physician within 15 business days after the date of receipt of the request and reasonable fees for furnishing the information.

(c) Denial of Requests for Records. If the physician denies the request for copies of medical and/or billing records or a summary or narrative of the records, either in whole or in part, the physician shall furnish the patient a written statement, signed and dated, within 15 business days of receipt of the request stating the reason for the denial and how the patient can file a compliant with the federal Department of Health and Human Services (if the physician is subject to HIPAA) and the Texas State Board of Medical Examiners. A copy of the statement denying the request shall be placed in the patient's medical and/or billing records as appropriate.

(d) Contents of Records. For purposes of this section, "medical records" shall include those records as defined in §165.1(a) of this title (relating to Medical Records) and shall include copies of medical records of other health care practitioners contained in the records of the physician to whom a request for release of records has been made.

(e) Allowable Charges.

(1) The physician responding to a request for such information shall be entitled to receive a reasonable, cost-based fee for providing the requested information. A reasonable fee shall be a charge of no more than $25 for the first twenty pages and $.50 per page for every copy thereafter. If an affidavit is requested, certifying that the information is a true and correct copy of the records, a reasonable fee of up to $15 may be charged for executing the affidavit. A physician may charge separate fees for medical and billing records requested. The fee may not include costs associated with searching for and retrieving the requested information.

(2) A reasonable fee, shall include only the cost of:

(A) copying, including the labor and cost of supplies for copying;

(B) postage, when the individual has requested the copy or summary be mailed; and

(C) preparing a summary of the records when appropriate.

(f) Emergency Requests. The physician providing copies of requested medical and/or billing records or a summary or a narrative of such records shall be entitled to payment of a reasonable fee prior to release of the information unless the information is requested by a licensed Texas health care provider or a physician licensed by any state, territory, or insular possession of the United States or any State or province of Canada if requested for purposes of emergency or acute medical care.

(g) Non-emergent Requests. In the event the physician receives a proper request for copies of medical and/or billing records or a summary or narrative of the records for purposes other than for emergency or acute medical care, the physician may retain the requested information until payment is received. If payment is not routed with such a request, within ten calendar days from receiving a request for the release of such records, the physician shall notify the requesting party in writing of the need for payment and may withhold the information until payment of a reasonable fee is received. A copy of the letter regarding the need for payment shall be made part of the patient's medical and/or billing record as appropriate.

(h) Improper Withholding for Past Due Accounts. Medical and/or billing records requested pursuant to a proper request for release may not be withheld from the patient, the patient's authorized agent, or the patient's designated recipient for such records based on a past due account for medical care or treatment previously rendered to the patient.

(i) Subpoena Not Required. A subpoena shall not be required for the release of medical and/or billing records requested pursuant to a proper release for records under this section and the Medical Practice Act, §159.006, made by a patient or by the patient's guardian or other representative duly authorized to obtain such records.

(j) Billing Record Requests. In response to a proper request for release of medical records, a physician shall not be required to provide copies of billing records pertaining to medical treatment of a patient unless specifically requested pursuant to the request for release of medical records.

(k) Prohibited Fees for Records Released Related to Disability Claims. The allowable charges as set forth in this chapter shall be maximum amounts, and this chapter shall be construed and applied so as to be consistent with lower fees or the prohibition or absence of such fees as required by state statute or prevailing federal law. In particular, under §161.202 of the Texas Health and Safety Code, a physician may not charge a fee for a medical or mental health record requested by a

patient, former patient or authorized representative of the patient if the request is related to a benefits or assistance claim based on the patient's disability.

(l) Applicable Federal Law. Whenever federal law or applicable federal regulations affecting the release of patient information are inconsistent with provisions of this section, the provisions of federal law or federal regulations shall be controlling, unless the state law is more restrictive/stringent. Physicians are responsible for ensuring that they are in compliance with federal law and regulations including the Health Insurance Portability and Accountability Act (HIPAA) 45 C.F.R. Parts 160-164.

§165.5. Transfer and Disposal of Medical Records.

(a) Required Notification of Discontinuance of Practice. When a physician retires, terminates employment or otherwise leaves a medical practice, he or she is responsible for:

(1) ensuring that patients receive reasonable notification and are given the opportunity to obtain copies of their records or arrange for the transfer of their medical records to another physician; and

(2) notifying the board when they are terminating practice, retiring, or relocating, and no longer available to patients, specifying who has custodianship of the records, and how the medical records may be obtained.

(3) Employers of the departing physician as described in Section 165.1(b)(6) of this chapter are not required to provide notification, however, the departing physician remains responsible, for providing notification consistent with this section.

(b) Method of Notification.

(1) When a physician retires, terminates employment, or otherwise leaves a medical practice, he or she shall provide notice to patients of when the physician intends to terminate the practice, retire or relocate, and will no longer be available to patients, and offer patients the opportunity to obtain a copy of their medical records.

(2) Notification shall be accomplished by:

(A) publishing notice in the newspaper of greatest general circulation in each county in which the physician practices or practiced and in a local newspaper that serves the immediate practice area;

(B) placing written notice in the physician's office; and

(C) sending letters to patients seen in the last two years notifying them of discontinuance of practice.

(3) A copy of the notice shall be submitted to the Board within 30 days from the date of termination, sale, or relocation of the practice.

(4) Notices placed in the physician's office shall be placed in a conspicuous location in or on the facade of the physician's office, a sign, announcing the termination, sale, or relocation of the practice. The sign shall be placed at least thirty days prior to the termination, sale or relocation of practice and shall remain until the date of termination, sale or relocation.

(c) Prohibition Against Interference.

(1) Other licensed physicians remaining in the practice may not prevent the departing physician from posting notice and the sign.

(2) A physician or physician group should not withhold information from a departing physician that is necessary for notification of patients.

(d) Voluntary Surrender or Revocation of Physician's License.

(1) Physicians who have voluntarily surrendered their licenses in lieu of disciplinary action or have had their licenses revoked by the board must notify their patients, consistent with subsection (b), within 30 days of the effective date of the voluntary surrender or revocation.

(2) Physicians who have voluntarily surrendered their licenses in lieu of disciplinary action or have had their licenses revoked by the board must obtain a custodian for their records to be approved by the board within 30 days of the effective date of the voluntary surrender or revocation.

(e) Criminal Violation. A person who violates any provision of this chapter is subject to criminal penalties pursuant to §165.151 of the Act.

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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TRD-200401012
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
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For further information, please call: (512) 305-7016

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PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 281. ADMINISTRATIVE PRACTICE AND PROCEDURES

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §281.9

The Texas State Board of Pharmacy adopts amendments to §281.9, concerning Rules Governing Penalties Against a License. The amendments are adopted as published in the December 26, 2003, issue of the *Texas Register* (28 TexReg 11465).

The adopted amendments make conforming changes in the existing rule to implement the provisions of new Chapter 297, Pharmacy Technicians.

No comments were received regarding the amendments.

The amendments are adopted under §§551.002, 554.051, 554.002, 554.053 and Chapter 568 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 §554.002(6) as authorizing the agency to regulate the training, qualifications, and employment of a pharmacist-intern and pharmacy technician. The Board interprets §554.053 as

authorizing the agency to establish rules for the use and the duties of a pharmacy technician in a pharmacy licensed by the Board. The Board interprets Chapter 568 as authorizing the agency to (1) require pharmacy technicians register with the Board; (2) outline the grounds for refusal to issue or renew a pharmacy technician registration; and (3) adopt fees necessary for the registration of pharmacy technicians.

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

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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TRD-200401058
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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SUBCHAPTER D. MISCELLANEOUS

22 TAC §281.80

The Texas State Board of Pharmacy adopts new Subchapter D, Miscellaneous, §281.80, concerning Grounds for Discipline for a Pharmacy Technician. The new section is adopted without changes to the proposed text as published in the December 26, 2003, issue of the *Texas Register* (28 TexReg 11466).

The adopted new section makes conforming changes to implement the provisions of new Chapter 297, Pharmacy Technicians.

No comments were received regarding the new section.

The new section is adopted under §§551.002, 554.051, 554.002, 554.053, and Chapter 568, 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 §554.002(6) as authorizing the agency to regulate the training, qualifications, and employment of a pharmacist-intern and pharmacy technician. The Board interprets §554.053 as authorizing the agency to establish rules for the use and the duties of a pharmacy technician in a pharmacy licensed by the Board. The Board interprets Chapter 568 as authorizing the agency to (1) require pharmacy technicians register with the Board; (2) outline the grounds for refusal to issue or renew a pharmacy technician registration; and (3) adopt fees necessary for the registration of pharmacy technicians.

The statutes affected by the new section: Chapters 551 - 566, and 568 - 569, Texas Occupations Code.

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) 305-8028

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CHAPTER 283. LICENSING REQUIREMENTS FOR PHARMACISTS

22 TAC §283.5

The Texas State Board of Pharmacy adopts amendments to §283.5, concerning Pharmacist-Intern Duties. The amendments are adopted without changes to the proposed text as published in the December 26, 2003, issue of the *Texas Register* (28 TexReg 11466).

The adopted amendments make conforming changes in the existing rule to implement the provisions of new Chapter 297, Pharmacy Technicians.

No comments were received regarding the amendments.

The amendments are adopted under §§551.002, 554.051, 554.002, 554.053, and Chapter 568, 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 §554.002(6) as authorizing the agency to regulate the training, qualifications, and employment of a pharmacist-intern and pharmacy technician. The Board interprets §554.053 as authorizing the agency to establish rules for the use and the duties of a pharmacy technician in a pharmacy licensed by the Board. The Board interprets Chapter 568 as authorizing the agency to (1) require pharmacy technicians register with the Board; (2) outline the grounds for refusal to issue or renew a pharmacy technician registration; and (3) adopt fees necessary for the registration of pharmacy technicians.

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

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 State Board of Pharmacy
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For further information, please call: (512) 305-8028

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22 TAC §283.6

The Texas State Board of Pharmacy adopts amendments to §283.6, concerning Preceptor Requirements. The amendments are adopted without changes to the proposed text published in the December 26, 2003, issue of the *Texas Register* (28 TexReg 11467).

The adopted amendments provide guidelines for pharmacist petitioning the Board for approval to act as a preceptor when the individual has been the subject of disciplinary action by the Board within three years of the action.

No comments were received regarding the amendments.

The amendments are adopted 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 the amendments: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

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 291. PHARMACIES
SUBCHAPTER A. ALL CLASSES OF PHARMACIES

22 TAC §291.20

The Texas State Board of Pharmacy adopts amendments to §291.20, concerning Remote Pharmacy Services. The amendments are adopted without changes to the proposed text as published in the December 26, 2003, issue of the *Texas Register* (28 TexReg 11467).

The adopted amendments make conforming changes in the existing rule to implement the provisions of new Chapter 297, Pharmacy Technicians.

No comments were received regarding the amendments.

The amendments are adopted under §§551.002, 554.051, 554.002, 554.053, and Chapter 568, 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 §554.002(6) as authorizing the agency to regulate the training, qualifications, and employment of a pharmacist-intern and pharmacy technician. The Board interprets §554.053 as authorizing the agency to establish rules for the use and the duties of a pharmacy technician in a pharmacy licensed by the Board. The Board interprets Chapter 568 as authorizing the agency to (1) require pharmacy technicians register with the Board; (2) outline the grounds for refusal to issue or renew a pharmacy technician registration; and (3) adopt fees necessary for the registration of pharmacy technicians.

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

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 State Board of Pharmacy
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For further information, please call: (512) 305-8028

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22 TAC §291.22

The Texas State Board of Pharmacy adopts new §291.22, concerning Petition to Establish an Additional Class of Pharmacy. The new section is adopted without changes to the proposed text as published in the December 26, 2003, issue of the *Texas Register* (28 TexReg 11469).

The new section establishes procedures for a person to petition the Board to establish an additional class of pharmacy license.

One written comment was received from an individual. The individual requested that the sentence indicating that the Board will not consider applications intended only to provide a competitive advantage be deleted. The Board disagrees with this comment because the section does not exclude applications that may provide a competitive advantage. In addition, the section is intended to allow new classes of pharmacy where pharmaceutical care services contribute to positive patient outcomes.

The new section is adopted 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 the new section: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

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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SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

22 TAC §§291.31 - 291.34, 291.36

The Texas State Board of Pharmacy adopts amendments to §291.31, concerning Definitions, §291.32, concerning Personnel, §291.33, concerning Operational Standards, §291.34, concerning Records, and §291.36, concerning Pharmacies Compounding Sterile Pharmaceuticals with changes to the proposed text published in the December 26, 2003, issue of the *Texas Register* (28 TexReg 11469). The amendments are adopted with changes based on staff recommendations to clarify the duties of pharmacy technicians and to clarify the ratio of pharmacy technicians.

The adopted amendments implement the provisions of Senate Bill 939. Senate Bill 939 passed by the 2003 Texas Legislature establishes a ratio of one pharmacist for every five pharmacy technicians in a Class A pharmacy if the Class A pharmacy dispenses not more than 20 different prescription drugs and does not produce intravenous or intramuscular drugs on-site. In addition, the adopted amendments make conforming changes in existing rules to implement the provisions of new Chapter 297, Pharmacy Technicians, correct references to the Texas Pharmacy Act, amend the definition of "dangerous drug," and conform with the provisions of House Bill 1095 which gives physicians the authority to delegate the carrying out or signing of a prescription drug order for a controlled substance to advanced nurse practitioners and physician assistants.

One written comment was received from the Texas Academy of Physician Assistants (TAPA). TAPA requested that the supervising physician's DEA number not be required on the prescription. The Board agrees with this comment and has removed this requirement from the definition.

A second comment was received from Premier Pharmacy. Premier Pharmacy recommended that the Board allow at least one technician working in a pharmacy under the provision of Senate Bill 939 be allowed to be a technician trainee. The Board agrees with this comment and the rules have been modified to reflect this change.

The amendments are adopted under §§551.002, 554.051, 554.002, 554.053, and Chapter 568, 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 §554.002(6) as authorizing the agency to regulate the training, qualifications, and employment of a pharmacist-intern and pharmacy technician. The Board interprets §554.053 as authorizing the agency to establish rules for the duties of pharmacy technicians in a licensed pharmacy including ratio of pharmacists to pharmacy technicians. The Board interprets Chapter 568 as authorizing the agency to (1) require pharmacy technicians register with the Board; (2) outline the grounds for refusal to issue or renew a pharmacy technician registration; and (3) adopt fees necessary for the registration of pharmacy technicians.

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

§291.31. Definitions.

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

(1) Accurately as prescribed--Dispensing, delivering, and/or distributing a prescription drug order:

(A) to the correct patient (or agent of the patient) for whom the drug or device was prescribed;

(B) with the correct drug in the correct strength, quantity, and dosage form ordered by the practitioner; and

(C) with correct labeling (including directions for use) as ordered by the practitioner. Provided, however, that nothing herein shall prohibit pharmacist substitution if substitution is conducted in strict accordance with applicable laws and rules, including Chapters 562 and 563 of the Texas Pharmacy Act.

(2) Act--The Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Occupations Code, as amended.

(3) Advanced practice nurse--A registered nurse approved by the Texas State Board of Nurse Examiners to practice as an advanced practice nurse on the basis of completion of an advanced education program. The term includes a nurse practitioner, a nurse midwife, a nurse anesthetist, and a clinical nurse specialist.

(4) Automated compounding or counting device--An automated device that compounds, measures, counts, and/or packages a specified quantity of dosage units of a designated drug product.

(5) Automated pharmacy dispensing systems--a mechanical system that performs operations or activities, other than compounding or administration, relative to the storage, packaging, counting, labeling, dispensing, and distribution of medications, and which collects, controls, and maintains all transaction information. "Automated pharmacy dispensing systems" does not mean "Automated compounding or counting devices" or "Automated medication supply devices."

(6) Board--The Texas State Board of Pharmacy.

(7) Carrying out or signing a prescription drug order--The completion of a prescription drug order presigned by the delegating physician, or the signing of a prescription by an advanced practice nurse or physician assistant after the person has been designated with the Texas State Board of Medical Examiners by the delegating physician as a person delegated to sign a prescription. The following information shall be provided on each prescription:

(A) patient's name and address;

(B) name, strength, and quantity of the drug to be dispensed;

(C) directions for use;

(D) the intended use of the drug, if appropriate;

(E) the name, address, and telephone number of the physician;

(F) the name, address, telephone number, identification number, and if the prescription is for a controlled substance, the DEA number of the advanced practice nurse or physician assistant completing the prescription drug order;

(G) the date; and

(H) the number of refills permitted.

(8) Component--Any ingredient intended for use in the compounding of a drug product, including those that may not appear in such product.

(9) Compounding--The preparation, mixing, assembling, packaging, or labeling of a drug or device:

(A) as the result of a practitioner's prescription drug order or initiative based on the practitioner-patient-pharmacist relationship in the course of professional practice;

(B) in anticipation of prescription drug orders based on routine, regularly observed prescribing patterns; or

(C) for the purpose of or as an incident to research, teaching, or chemical analysis and not for sale or dispensing.

(10) Confidential record--Any health-related record that contains information that identifies an individual and that is maintained by a pharmacy or pharmacist, such as a patient medication record, prescription drug order, or medication order.

(11) Controlled substance--A drug, immediate precursor, or other substance listed in Schedules I - V or Penalty Groups 1 - 4 of the Texas Controlled Substances Act, as amended, or a drug, immediate precursor, or other substance included in Schedule I, II, III, IV, or V of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended (Public Law 91-513).

(12) Dangerous drug--A drug or device that:

(A) is not included in Penalty Group 1, 2, 3, or 4, Chapter 481, Health and Safety Code, and is unsafe for self-medication; or

(B) bears or is required to bear the legend:

(i) "Caution: federal law prohibits dispensing without prescription" or "Rx only" or another legend that complies with federal law; or

(ii) "Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian."

(13) Data communication device--An electronic device that receives electronic information from one source and transmits or routes it to another (e.g., bridge, router, switch or gateway).

(14) Deliver or delivery--The actual, constructive, or attempted transfer of a prescription drug or device or controlled substance from one person to another, whether or not for a consideration.

(15) Designated agent--

(A) a licensed nurse, physician assistant, pharmacist, or other individual designated by a practitioner to communicate prescription drug orders to a pharmacist;

(B) a licensed nurse, physician assistant, or pharmacist employed in a health care facility to whom the practitioner communicates a prescription drug order;

(C) an advanced practice nurse or physician assistant authorized by a practitioner to carry out or sign a prescription drug order for dangerous drugs under Chapter 157 of the Medical Practice Act (Subtitle B, Occupations Code); or

(D) a person who is a licensed vocational nurse or has an education equivalent to or greater than that required for a licensed vocational nurse designated by the practitioner to communicate prescriptions for an advanced practice nurse or physician assistant authorized by the practitioner to sign prescription drug orders under Chapter 157 of the Medical Practice Act (Subtitle B, Occupations Code).

(16) Dispense--Preparing, packaging, compounding, or labeling for delivery a prescription drug or device in the course of professional practice to an ultimate user or his agent by or pursuant to the lawful order of a practitioner.

(17) Dispensing pharmacist--The pharmacist responsible for the final check of the dispensed prescription before delivery to the patient.

(18) Distribute--The delivery of a prescription drug or device other than by administering or dispensing.

(19) Downtime--Period of time during which a data processing system is not operable.

(20) Drug regimen review--An evaluation of prescription drug orders and patient medication records for:

(A) known allergies;

(B) rational therapy-contraindications;

(C) reasonable dose and route of administration;

(D) reasonable directions for use;

(E) duplication of therapy;

(F) drug-drug interactions;

(G) drug-food interactions;

(H) drug-disease interactions;

(I) adverse drug reactions; and

(J) proper utilization, including overutilization or underutilization.

(21) Electronic prescription drug order--A prescription drug order which is transmitted by an electronic device to the receiver (pharmacy).

(22) Electronic signature--A unique security code or other identifier which specifically identifies the person entering information into a data processing system. A facility which utilizes electronic signatures must:

(A) maintain a permanent list of the unique security codes assigned to persons authorized to use the data processing system; and

(B) have an ongoing security program which is capable of identifying misuse and/or unauthorized use of electronic signatures.

(23) Full-time pharmacist--A pharmacist who works in a pharmacy from 30 to 40 hours per week or, if the pharmacy is open less than 60 hours per week, one-half of the time the pharmacy is open.

(24) Hard copy--A physical document that is readable without the use of a special device (i.e., cathode ray tube (CRT), microfiche reader, etc.).

(25) Manufacturing--The production, preparation, propagation, conversion, or processing of a drug or device, either directly or

indirectly, by extraction from substances of natural origin or independently by means of chemical or biological synthesis and includes any packaging or repackaging of the substances or labeling or relabeling of the container and the promotion and marketing of such drugs or devices. Manufacturing also includes the preparation and promotion of commercially available products from bulk compounds for resale by pharmacies, practitioners, or other persons but does not include compounding.

(26) Medical Practice Act--The Texas Medical Practice Act, Subtitle B, Occupations Code, as amended.

(27) Medication order--A written order from a practitioner or a verbal order from a practitioner or his authorized agent for administration of a drug or device.

(28) New prescription drug order--A prescription drug order that:

(A) has not been dispensed to the patient in the same strength and dosage form by this pharmacy within the last year;

(B) is transferred from another pharmacy; and/or

(C) is a discharge prescription drug order. (Note: furlough prescription drug orders are not considered new prescription drug orders.)

(29) Original prescription--The:

(A) original written prescription drug order; or

(B) original verbal or electronic prescription drug order reduced to writing either manually or electronically by the pharmacist.

(30) Part-time pharmacist--A pharmacist who works less than full-time.

(31) Patient counseling--Communication by the pharmacist of information to the patient or patient's agent in order to improve therapy by ensuring proper use of drugs and devices.

(32) Pharmaceutical care--The provision of drug therapy and other pharmaceutical services intended to assist in the cure or prevention of a disease, elimination or reduction of a patient's symptoms, or arresting or slowing of a disease process.

(33) Pharmacist-in-charge--The pharmacist designated on a pharmacy license as the pharmacist who has the authority or responsibility for a pharmacy's compliance with laws and rules pertaining to the practice of pharmacy.

(34) Pharmacy technician--An individual whose responsibility in a pharmacy is to provide technical services that do not require professional judgment regarding preparing and distributing drugs and who works under the direct supervision of and is responsible to a pharmacist. Pharmacy technician includes registered pharmacy technicians and pharmacy technician trainees.

(35) Pharmacy technician trainee--A person who is not registered as a pharmacy technician by the board and is either:

(A) participating in a pharmacy's technician training program; or

(B) currently enrolled in a:

(i) pharmacy technician training program accredited by the American Society of Health-System Pharmacists; or

(ii) health science technology education program in a Texas high school that is accredited by the Texas Education Agency.

(36) Physician assistant--A physician assistant recognized by the Texas State Board of Medical Examiners as having the specialized education and training required under Subtitle B, Chapter 157, Occupations Code, and issued an identification number by the Texas State Board of Medical Examiners.

(37) Practitioner--

(A) a person licensed or registered to prescribe, distribute, administer, or dispense a prescription drug or device in the course of professional practice in this state, including a physician, dentist, podiatrist, or veterinarian but excluding a person licensed under this subtitle;

(B) a person licensed by another state, Canada, or the United Mexican States in a health field in which, under the law of this state, a license holder in this state may legally prescribe a dangerous drug;

(C) a person practicing in another state and licensed by another state as a physician, dentist, veterinarian, or podiatrist, who has a current federal Drug Enforcement Administration registration number and who may legally prescribe a Schedule II, III, IV, or V controlled substance, as specified under Chapter 481, Health and Safety Code, in that other state; or

(D) an advanced practice nurse or physician assistant to whom a physician has delegated the authority to carry out or sign prescription drug orders under §§157.0511, 157.052, 157.053, 157.054, 157.0541, or 157.0542.

(38) Prepackaging--The act of repackaging and relabeling quantities of drug products from a manufacturer's original commercial container into a prescription container for dispensing by a pharmacist to the ultimate consumer.

(39) Prescription drug order--

(A) a written order from a practitioner or a verbal order from a practitioner or his authorized agent to a pharmacist for a drug or device to be dispensed; or

(B) a written order or a verbal order pursuant to Subtitle B, Chapter 157, Occupations Code.

(40) Prospective drug use review--A review of the patient's drug therapy and prescription drug order or medication order prior to dispensing or distributing the drug.

(41) State--One of the 50 United States of America, a U.S. territory, or the District of Columbia.

(42) Texas Controlled Substances Act--The Texas Controlled Substances Act, Health and Safety Code, Chapter 481, as amended.

(43) Written protocol--A physician's order, standing medical order, standing delegation order, or other order or protocol as defined by rule of the Texas State Board of Medical Examiners under the Texas Medical Practice Act.

§291.32. Personnel.

(a) Pharmacist-in-charge.

(1) General.

(A) Each Class A pharmacy shall have one pharmacist-in-charge who is employed on a full-time basis, who may be the pharmacist-in-charge for only one such pharmacy; provided, however, such pharmacist-in-charge may be the pharmacist-in-charge of:

(i) more than one Class A pharmacy, if the additional Class A pharmacies are not open to provide pharmacy services simultaneously; or

(ii) up to two Class A pharmacies open simultaneously if the pharmacist-in-charge works at least 10 hours per week in each pharmacy.

(B) The pharmacist-in-charge shall comply with the provisions of §291.17 of this title (relating to Inventory Requirements).

(2) Responsibilities. The pharmacist-in-charge shall have responsibility for the practice of pharmacy at the pharmacy for which he or she is the pharmacist-in-charge. The pharmacist-in-charge may advise the owner on administrative or operational concerns. The pharmacist-in-charge shall have responsibility for, at a minimum, the following:

(A) education and training of pharmacy technicians;

(B) supervising a system to assure appropriate procurement of prescription drugs and devices and other products dispensed from the Class A pharmacy;

(C) disposal and distribution of drugs from the Class A pharmacy;

(D) bulk compounding of drugs;

(E) storage of all materials, including drugs, chemicals, and biologicals;

(F) maintaining records of all transactions of the Class A pharmacy necessary to maintain accurate control over and accountability for all pharmaceutical materials required by applicable state and federal laws and sections;

(G) supervising a system to assure maintenance of effective controls against the theft or diversion of prescription drugs, and records for such drugs;

(H) adherence to policies and procedures regarding the maintenance of records in a data processing system such that the data processing system is in compliance with Class A (community) pharmacy requirements;

(I) legal operation of the pharmacy, including meeting all inspection and other requirements of all state and federal laws or sections governing the practice of pharmacy; and

(J) effective September 1, 2000, if the pharmacy uses an automated pharmacy dispensing system, shall be responsible for the following:

(i) consulting with the owner concerning and adherence to the policies and procedures for system operation, safety, security, accuracy and access, patient confidentiality, prevention of unauthorized access, and malfunction;

(ii) inspecting medications in the automated pharmacy dispensing system, at least monthly, for expiration date, misbranding, physical integrity, security, and accountability;

(iii) assigning, discontinuing, or changing personnel access to the automated pharmacy dispensing system;

(iv) ensuring that pharmacy technicians and licensed healthcare professionals performing any services in connection with an automated pharmacy dispensing system have been properly trained on the use of the system and can demonstrate comprehensive knowledge of the written policies and procedures for operation of the system; and

(v) ensuring that the automated pharmacy dispensing system is stocked accurately and an accountability record is maintained in accordance with the written policies and procedures of operation.

(b) Owner. The owner of a Class A pharmacy shall have responsibility for all administrative and operational functions of the pharmacy. The pharmacist-in-charge may advise the owner on administrative and operational concerns. The owner shall have responsibility for, at a minimum, the following, and if the owner is not a Texas licensed pharmacist, the owner shall consult with the pharmacist-in-charge or another Texas licensed pharmacist:

(1) establishment of policies for procurement of prescription drugs and devices and other products dispensed from the Class A pharmacy;

(2) establishment and maintenance of effective controls against the theft or diversion of prescription drugs;

(3) if the pharmacy uses an automated pharmacy dispensing system, reviewing and approving all policies and procedures for system operation, safety, security, accuracy and access, patient confidentiality, prevention of unauthorized access, and malfunction;

(4) providing the pharmacy with the necessary equipment and resources commensurate with its level and type of practice; and

(5) establishment of policies and procedures regarding maintenance, storage, and retrieval of records in a data processing system such that the system is in compliance with state and federal requirements.

(c) Pharmacists.

(1) General.

(A) The pharmacist-in-charge shall be assisted by sufficient number of additional licensed pharmacists as may be required to operate the Class A pharmacy competently, safely, and adequately to meet the needs of the patients of the pharmacy.

(B) All pharmacists shall assist the pharmacist-in-charge in meeting his or her responsibilities in ordering, dispensing, and accounting for prescription drugs.

(C) Pharmacists are solely responsible for the direct supervision of pharmacy technicians and for designating and delegating duties, other than those listed in paragraph (2) of this subsection, to pharmacy technicians. Each pharmacist:

(i) shall verify the accuracy of all acts, tasks, and functions performed by pharmacy technicians; and

(ii) shall be responsible for any delegated act performed by pharmacy technicians under his or her supervision.

(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 title (relating to Operational Standards), 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 title; 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) All pharmacists while on duty, shall be responsible for complying with all state and federal laws or rules governing the practice of pharmacy.

(F) 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) Duties. Duties which may only be performed by a pharmacist are as follows:

(A) receiving oral prescription drug orders and reducing these orders to writing, either manually or electronically;

(B) interpreting prescription drug orders;

(C) selection of drug products;

(D) performing the final check of the dispensed prescription before delivery to the patient to ensure that the prescription has been dispensed accurately as prescribed;

(E) communicating to the patient or patient's agent information about the prescription drug or device which in the exercise of the pharmacist's professional judgement, the pharmacist deems significant, as specified in §291.33(c) of this title;

(F) communicating to the patient or the patient's agent on his or her request information concerning any prescription drugs dispensed to the patient by the pharmacy;

(G) assuring that a reasonable effort is made to obtain, record, and maintain patient medication records;

(H) interpreting patient medication records and performing drug regimen reviews; and

(I) performing a specific act of drug therapy management for a patient delegated to a pharmacist by a written protocol from a physician licensed in this state in compliance with the Medical Practice Act.

(3) Special requirements for nonsterile compounding.

(A) All pharmacists engaged in compounding shall possess the education, training, and proficiency necessary to properly and safely perform compounding duties undertaken or supervised. Continuing education shall include training in the art and science of compounding and the legal requirements for compounding.

(B) A pharmacist shall inspect and approve all components, drug product containers, closures, labeling, and any other materials involved in the compounding process.

(C) A pharmacist shall review all compounding records for accuracy and conduct in-process and final checks to assure that errors have not occurred in the compounding process.

(D) A pharmacist is responsible for the proper maintenance, cleanliness, and use of all equipment used in the compounding process.

(d) Pharmacy Technicians.

(1) General.

(A) On June 1, 2004, all persons employed as pharmacy technicians shall be either registered pharmacy technicians or pharmacy technician trainees as follows.

(i) All persons who have passed the required pharmacy technician certification examination shall be registered with the board under the provisions of this section.

(ii) All persons who have not taken and passed the required pharmacy certification examination may be designated pharmacy technician trainees, if qualified under the provisions of §297.5 of this title (relating to Pharmacy Technician Trainees).

(B) Between January 1, 2004, and May 31, 2004, all persons employed as pharmacy technicians who are qualified for registration by the board shall register according to the schedule designated by the board. Between January 1, 2004 and May 31, 2004, persons who are awaiting their scheduled time for registration and persons who have applied for registration, but the registration has not been completed shall comply with the rules in effect prior to January 1, 2004, relating to requirements and duties for certified or exempt pharmacy technicians.

(C) All pharmacy technicians shall meet the training requirements specified in §297.6 of this title (relating to Pharmacy Technician Training).

(2) Duties.

(A) Pharmacy technicians may not perform any of the duties listed in subsection (c)(2) of this section.

(B) A pharmacist may delegate to pharmacy technicians any nonjudgmental technical duty associated with the preparation and distribution of prescription drugs provided:

(i) a pharmacist verifies the accuracy of all acts, tasks, and functions performed by pharmacy technicians;

(ii) pharmacy technicians are under the direct supervision of and responsible to a pharmacist; and

(iii) only pharmacy technicians who have been properly trained on the use of an automated pharmacy dispensing system and can demonstrate comprehensive knowledge of the written policies and procedures for the operation of the system may be allowed access to the system; and

(C) Pharmacy technicians may perform only nonjudgmental technical duties associated with the preparation and distribution of prescription drugs, including but not limited to the following:

(i) initiating and receiving refill authorization requests;

(ii) entering prescription data into a data processing system;

(iii) taking a stock bottle from the shelf for a prescription;

(iv) preparing and packaging prescription drug orders (i.e., counting tablets/capsules, measuring liquids and placing them in the prescription container);

(v) affixing prescription labels and auxiliary labels to the prescription container provided the pharmacy technician:

(I) has completed the education and training requirements outlined in §297.6 of this title; and

(II) is registered as a pharmacy technician within the provisions of §297.3 of this title (relating to Registration Requirements)

(vi) reconstituting medications;

(vii) prepackaging and labeling prepackaged drugs;

(viii) loading bulk unlabeled drugs into an automated dispensing system provided a pharmacist verifies that the system is properly loaded prior to use;

(ix) compounding non-sterile prescription drug orders; and

(x) bulk compounding.

(3) Ratio of pharmacist to pharmacy technicians.

(A) Except as provided in subparagraphs (B) and (C) of this paragraph, the ratio of pharmacists to pharmacy technicians may not exceed 1:2.

(B) The ratio of pharmacists to pharmacy technicians may be 1:3, provided at least one of the three pharmacy technicians is a registered pharmacy technician.

(C) As specified in §568.006 of the Act, a pharmacy that primarily compounds non-sterile pharmaceuticals may have a ratio of pharmacists to pharmacy technicians of 1:5 provided:

(i) the pharmacy:

(I) dispenses no more than 20 different prescription drugs; and

(II) does not produce sterile pharmaceuticals including intravenous or intramuscular drugs on-site; and

(ii) the following conditions are met:

(I) at least four of the pharmacy technicians are registered pharmacy technicians; and

(II) The pharmacy has written policies and procedures regarding the supervision of pharmacy technicians, including requirements that the registered pharmacy technicians included in a 1:5 ratio may be involved only in one process at a time. For example, a technician who is compounding non-sterile pharmaceuticals may not also call physicians for authorization of refills.

(e) Identification of pharmacy personnel. All pharmacy personnel shall be identified as follows.

(1) Pharmacy technicians. All pharmacy technicians shall wear an identification tag or badge which bears the person's name and identifies him or her as a pharmacy technician trainee, a registered pharmacy technician, or a certified pharmacy technician, if the technician maintains current certification with the Pharmacy Technician Certification Board or any other entity providing an examination approved by the Board.

(2) Pharmacist interns. All pharmacist interns shall wear an identification tag or badge which bears the person's name and identifies him or her as a pharmacist intern.

(3) Pharmacists. All pharmacists shall wear an identification tag or badge which bears the person's name and identifies him or her as a pharmacist.

§291.33. Operational Standards.

(a) Licensing requirements.

(1) A Class A pharmacy shall register annually or biennially with the board on a pharmacy license application provided by the board, following the procedures specified in §291.1 of this title (relating to Pharmacy License Application).

(2) A Class A pharmacy which changes ownership shall notify the board within ten days of the change of ownership and apply for a new and separate license as specified in §291.4 of this title (relating to Change of Ownership).

(3) A Class A pharmacy which changes location and/or name shall notify the board within ten days of the change and file for an amended license as specified in §291.2 of this title (relating to Change of Location and/or Name).

(4) A Class A pharmacy owned by a partnership or corporation which changes managing officers shall notify the board in writing of the names of the new managing officers within ten days of the change, following the procedures in §291.3 of this title (relating to Change of Managing Officers).

(5) A Class A pharmacy shall notify the board in writing within ten days of closing, following the procedures in §291.5 of this title (relating to Closed Pharmacies).

(6) A separate license is required for each principal place of business and only one pharmacy license may be issued to a specific location.

(7) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for the issuance and renewal of a license and the issuance of an amended license.

(8) A Class A pharmacy, licensed under the provisions of the Act, §560.051(a)(1), which also operates another type of pharmacy which would otherwise be required to be licensed under the Act, §560.051(a)(2) concerning Nuclear Pharmacy (Class B), is not required to secure a license for such other type of pharmacy; provided, however, such licensee is required to comply with the provisions of §291.51 of this title (relating to Purpose), §291.52 of this title (relating to Definitions), §291.53 of this title (relating to Personnel), §291.54 of this title (relating to Operational Standards), and §291.55 of this title (relating to Records), contained in Nuclear Pharmacy (Class B), to the extent such sections are applicable to the operation of the pharmacy.

(9) A Class A (community) pharmacy engaged in the compounding of sterile pharmaceuticals shall comply with the provisions of §291.36 of this title (relating to Class A Pharmacies Compounding Sterile Pharmaceuticals).

(10) A Class A (Community) pharmacy engaged in the provision of remote pharmacy services, including storage and dispensing of prescription drugs, shall comply with the provisions of §291.20 of this title (relating to Remote Pharmacy Services).

(11) A Class A (Community) pharmacy engaged in centralized prescription dispensing and/or prescription drug or medication order processing shall comply with the provisions of §291.37 of this title (relating to Centralized Prescription Dispensing) and/or §291.38 of this title (relating to Centralized Prescription Drug or Medication Order Processing).

(b) Environment.

(1) General requirements.

(A) The pharmacy shall be arranged in an orderly fashion and kept clean. All required equipment shall be clean and in good operating condition.

(B) A Class A pharmacy shall have a sink with hot and cold running water within the pharmacy, exclusive of restroom facilities, available to all pharmacy personnel and maintained in a sanitary condition.

(C) A Class A pharmacy which serves the general public shall contain an area which is suitable for confidential patient counseling.

(i) Such counseling area shall:

(I) be easily accessible to both patient and pharmacists and not allow patient access to prescription drugs;

(II) be designed to maintain the confidentiality and privacy of the pharmacist/patient communication.

(ii) In determining whether the area is suitable for confidential patient counseling and designed to maintain the confidentiality and privacy of the pharmacist/patient communication, the board may consider factors such as the following:

(I) the proximity of the counseling area to the check-out or cash register area;

(II) the volume of pedestrian traffic in and around the counseling area;

(III) the presence of walls or other barriers between the counseling area and other areas of the pharmacy; and

(IV) any evidence of confidential information being overheard by persons other than the patient or patient's agent or the pharmacist or agents of the pharmacist.

(D) The pharmacy shall be properly lighted and ventilated.

(E) The temperature of the pharmacy shall be maintained within a range compatible with the proper storage of drugs; the temperature of the refrigerator shall be maintained within a range compatible with the proper storage of drugs requiring refrigeration.

(F) Animals, including birds and reptiles, shall not be kept within the pharmacy and in immediately adjacent areas under the control of the pharmacy. This provision does not apply to fish in aquariums, guide dogs accompanying disabled persons, or animals for sale to the general public in a separate area that is inspected by local health jurisdictions.

(2) Special requirements for nonsterile compounding.

(A) Pharmacies regularly engaging in compounding shall have a designated and adequate area for the safe and orderly compounding of drug products, including the placement of equipment and materials. Pharmacies involved in occasional compounding shall prepare an area prior to each compounding activity which is adequate for safe and orderly compounding.

(B) Only personnel authorized by the responsible pharmacist shall be in the immediate vicinity of a drug compounding operation.

(C) A sink with hot and cold running water, exclusive of rest room facilities, shall be accessible to the compounding areas and be maintained in a sanitary condition. Supplies necessary for adequate washing shall be accessible in the immediate area of the sink and include:

(i) soap or detergent; and

(ii) air-driers or single-use towels.

(D) If drug products which require special precautions to prevent contamination, such as penicillin, are involved in a compounding operation, appropriate measures, including dedication of equipment for such operations or the meticulous cleaning of contaminated equipment prior to its use for the preparation of other drug products, must be utilized in order to prevent cross-contamination.

(3) Security.

(A) Each pharmacist while on duty shall be responsible for the security of the prescription department, including provisions for effective control against theft or diversion of prescription drugs, and records for such drugs.

(B) The prescription department shall be locked by key or combination so as to prevent access when a pharmacist is not on-site. However, the pharmacist-in-charge may designate persons who may enter the pharmacy to perform functions designated by the pharmacist-in-charge (e.g., janitorial services).

(4) Temporary absence of pharmacist.

(A) If a pharmacy is staffed by a single pharmacist, the pharmacist may leave the prescription department for breaks and meal periods without closing the prescription department and removing pharmacy technicians and other pharmacy personnel from the prescription department provided the following conditions are met:

(i) at least one registered pharmacy technician remains in the prescription department;

(ii) the pharmacist remains on-site at the licensed location of the pharmacy and available for an emergency;

(iii) the absence does not exceed 30 minutes at a time and a total of one hour in a 12 hour period;

(iv) the pharmacist reasonably believes that the security of the prescription department will be maintained in his or her absence. If in the professional judgment of the pharmacist, the pharmacist determines that the prescription department should close during his or her absence, then the pharmacist shall close the prescription department and remove the pharmacy technicians or other pharmacy personnel from the prescription department during his or her absence; and

(v) a notice is posted which includes the following information:

(I) the fact that pharmacist is on a break and the time the pharmacist will return; and

(II) the fact that pharmacy technicians may begin the processing of prescription drug orders or refills brought in during the pharmacist absence but the prescription or refill may not be delivered to the patient or the patient's agent until the pharmacist returns and verifies the accuracy of the prescription.

(B) During the time a pharmacist is absent from the prescription department, only pharmacy technicians who have completed

the pharmacy's training program may perform the following duties, provided a pharmacist verifies the accuracy of all acts, tasks, and functions performed by the pharmacy technicians prior to delivery of the prescription to the patient or the patient's agent:

(i) initiating and receiving refill authorization requests;

(ii) entering prescription data into a data processing system;

(iii) taking a stock bottle from the shelf for a prescription;

(iv) preparing and packaging prescription drug orders (i.e., counting tablets/capsules, measuring liquids and placing them in the prescription container);

(v) affixing prescription labels and auxiliary labels to the prescription container provided the pharmacy technician:

(I) has completed the training requirements outlined in §297.6 of this title (relating to Pharmacy Technician Training); and

(II) is registered as a pharmacy technician within the provisions of §297.3 of this title (relating to Registration Requirements); and

(vi) prepackaging and labeling prepackaged drugs.

(C) Upon return to the prescription department, the pharmacist shall:

(i) conduct a drug regimen review as specified in subsection (c)(2) of this section; and

(ii) verify the accuracy of all acts, tasks, and functions performed by the pharmacy technicians prior to delivery of the prescription to the patient or the patient's agent.

(D) An agent of the pharmacist may deliver a prescription drug order to the patient or his or her agent provided a record of the delivery is maintained containing the following information:

(i) date of the delivery;

(ii) unique identification number of the prescription drug order;

(iii) patient's name;

(iv) patient's phone number or the phone number of the person picking up the prescription; and

(v) signature of the person picking up the prescription.

(E) Any prescription delivered to a patient when a pharmacist is not in the prescription department must meet the requirements for a prescription delivered to a patient as described in subsection (c)(1)(F) of this section.

(F) During the times a pharmacist is absent from the prescription department a pharmacist intern shall be considered a registered pharmacy technician and may perform only the duties of a registered pharmacy technician.

(G) In pharmacies with two or more pharmacists on duty, the pharmacists shall stagger their breaks and meal periods so that the prescription department is not left without a pharmacist on duty.

(c) Prescription dispensing and delivery.

(1) Patient counseling and provision of drug information.

(A) To optimize drug therapy, a pharmacist shall communicate to the patient or the patient's agent, information about the prescription drug or device which in the exercise of the pharmacist's professional judgment the pharmacist deems significant, such as the following:

(i) the name and description of the drug or device;

(ii) dosage form, dosage, route of administration, and duration of drug therapy;

(iii) special directions and precautions for preparation, administration, and use by the patient;

(iv) common severe side or adverse effects or interactions and therapeutic contraindications that may be encountered, including their avoidance, and the action required if they occur;

(v) techniques for self monitoring of drug therapy;

(vi) proper storage;

(vii) refill information; and

(viii) action to be taken in the event of a missed dose.

(B) Such communication:

(i) shall be provided with each new prescription drug order, once yearly on maintenance medications, and if the pharmacist deems appropriate, with prescription drug order refills. (For the purposes of this clause, maintenance medications are defined as any medication the patient has taken for one year or longer);

(ii) shall be provided for any prescription drug order dispensed by the pharmacy on the request of the patient or patient's agent;

(iii) shall be communicated orally in person unless the patient or patient's agent is not at the pharmacy or a specific communication barrier prohibits such oral communication; and

(iv) shall be reinforced with written information. The following is applicable concerning this written information.

(I) Written information designed for the consumer such as the USP DI patient information leaflets shall be provided.

(II) When a compounded product is dispensed, information shall be provided for the major active ingredient(s), if available.

(III) For new drug entities, if no written information is initially available, the pharmacist is not required to provide information until such information is available, provided:

(-a-) the pharmacist informs the patient or the patient's agent that the product is a new drug entity and written information is not available;

(-b-) the pharmacist documents the fact that no written information was provided; and

(-c-) if the prescription is refilled after written information is available, such information is provided to the patient or patient's agent.

(C) Only a pharmacist may verbally provide drug information to a patient or patient's agent and answer questions concerning prescription drugs. Non-pharmacist personnel may not ask questions of a patient or patient's agent which are intended to screen and/or limit interaction with the pharmacist.

(D) Nothing in this subparagraph shall be construed as requiring a pharmacist to provide consultation when a patient or patient's agent refuses such consultation. The pharmacist shall document such refusal for consultation.

(E) In addition to the requirements of subparagraphs (A) - (D) of this paragraph, if a prescription drug order is delivered to the patient at the pharmacy, the following is applicable.

(i) So that a patient will have access to information concerning his or her prescription, a prescription may not be delivered to a patient unless a pharmacist is in the pharmacy, except as provided in subsection (b)(4) of this section or clause (ii) of this subparagraph.

(ii) An agent of the pharmacist may deliver a prescription drug order to the patient or his or her agent during short periods of time when a pharmacist is absent from the pharmacy, provided the short periods of time do not exceed two hours in a 24 hour period, and provided a record of the delivery is maintained containing the following information:

(I) date of the delivery;

(II) unique identification number of the prescription drug order;

(III) patient's name;

(IV) patient's phone number or the phone number of the person picking up the prescription; and

(V) signature of the person picking up the prescription.

(iii) Any prescription delivered to a patient when a pharmacist is not in the pharmacy must meet the requirements described in subparagraph (F) of this paragraph.

(iv) A Class A pharmacy shall make available for use by the public a current or updated edition of the United States Pharmacopeia Dispensing Information, Volume II (Advice to the Patient), or another source of such information designed for the consumer.

(F) In addition to the requirements of subparagraphs (A) - (D) of this paragraph, if a prescription drug order is delivered to the patient or his or her agent at the patient's residence or other designated location, the following is applicable.

(i) The information specified in subparagraph (A) of this paragraph shall be delivered with the dispensed prescription in writing.

(ii) If prescriptions are routinely delivered outside the area covered by the pharmacy's local telephone service, the pharmacy shall provide a toll-free telephone line which is answered during normal business hours to enable communication between the patient and a pharmacist.

(iii) The pharmacist shall place on the prescription container or on a separate sheet delivered with the prescription container in both English and Spanish the local and if applicable, toll-free telephone number of the pharmacy and the statement: "Written information about this prescription has been provided for you. Please read this information before you take the medication. If you have questions concerning this prescription, a pharmacist is available during normal business hours to answer these questions at (insert the pharmacy's local and toll-free telephone numbers)."

(iv) The pharmacy shall maintain and use adequate storage or shipment containers and use shipping processes to ensure drug stability and potency. Such shipping processes shall include the use of appropriate packaging material and/or devices to ensure that the drug is maintained at an appropriate temperature range to maintain the integrity of the medication throughout the delivery process.

(v) The pharmacy shall use a delivery system which is designed to assure that the drugs are delivered to the appropriate patient."

(G) The provisions of this paragraph do not apply to patients in facilities where drugs are administered to patients by a person required to do so by the laws of the state (i.e., nursing homes).

(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) known allergies;

(II) rational therapy-contraindications;

(III) reasonable dose and route of administration;

(IV) reasonable directions for use;

(V) duplication of therapy;

(VI) drug-drug interactions;

(VII) drug-food interactions;

(VIII) drug-disease interactions;

(IX) adverse drug reactions; and

(X) proper utilization, including overutilization or underutilization.

(ii) Upon identifying any clinically significant conditions, situations, or items listed in clause (i) of this subparagraph, the pharmacist shall take appropriate steps to avoid or resolve the problem including consultation with the prescribing practitioner. The pharmacist shall document such occurrences.

(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) Other pharmaceutical care services which may be provided by pharmacists include, but are not limited to, the following:

(i) managing drug therapy as delegated by a practitioner as allowed under the provisions of the Medical Practices;

(ii) administering immunizations and vaccinations under written protocol of a physician;

(iii) managing patient compliance programs;

(iv) providing preventative health care services; and

(v) providing case management of patients who are being treated with high-risk or high-cost drugs, or who are considered "high risk" due to their age, medical condition, family history, or related concern.

(3) Generic Substitution.

(A) General requirements.

(i) In accordance with Chapter 562 of the Act, a pharmacist may dispense a generically equivalent drug product if:

(I) the generic product costs the patient less than the prescribed drug product;

(II) the patient does not refuse the substitution; and

(III) the practitioner does not certify on the prescription form that a specific prescribed brand is medically necessary as specified in a dispensing directive described in subparagraph (C) of this paragraph.

(ii) If the practitioner has prohibited substitution through a dispensing directive in compliance with subparagraph (C) of this paragraph, a pharmacist shall not substitute a generically equivalent drug product unless the pharmacist obtains verbal or written authorization from the practitioner and notes such authorization on the original prescription drug order.

(B) Prescription format for written prescription drug orders.

(i) A written prescription drug order issued in Texas may:

(I) be on a form containing a single signature line for the practitioner; and

(II) contain the following reminder statement on the face of the prescription: "A generically equivalent drug product may be dispensed unless the practitioner hand writes the words 'Brand Necessary' or 'Brand Medically Necessary' on the face of the prescription."

(ii) A pharmacist may dispense a prescription that is not issued on the form specified in clause (i) of this subparagraph, however, the pharmacist may dispense a generically equivalent drug product unless the practitioner has prohibited substitution through a dispensing directive in compliance with subparagraph (C)(i) of this paragraph.

(iii) The prescription format specified in clause (i) of this subparagraph does not apply to the following types of prescription drug orders:

(I) prescription drug orders issued by a practitioner in a state other than Texas;

(II) prescriptions for dangerous drugs issued by a practitioner in the United Mexican States or the Dominion of Canada; or

(III) prescription drug orders issued by practitioners practicing in a federal facility provided they are acting in the scope of their employment.

(iv) In the event of multiple prescription orders appearing on one prescription form, the practitioner shall clearly identify to which prescription(s) the dispensing directive(s) apply. If the practitioner does not clearly indicate to which prescription(s) the dispensing directive(s) apply, the pharmacist may substitute on all prescriptions on the form.

(C) Dispensing directive.

(i) Written prescriptions.

(I) A practitioner may prohibit the substitution of a generically equivalent drug product for a brand name drug product by writing across the face of the written prescription, in the practitioner's own handwriting, the phrase "brand necessary" or "brand medically necessary."

(II) The dispensing directive shall:

(-a-) be in a format that protects confidentiality as required by the Health Insurance Portability and Accountability Act of 1996 (29 U.S.C. Section 1181 et seq.) and its subsequent amendments; and

(-b-) comply with federal and state law, including rules, with regard to formatting and security requirements.

(III) The dispensing directive specified in this paragraph may not be preprinted, rubber stamped, or otherwise reproduced on the prescription form.

(IV) After, June 1, 2002, a practitioner may prohibit substitution on a written prescription only by following the dispensing directive specified in this paragraph. Two-line prescription forms, check boxes, or other notations on an original prescription drug order which indicate "substitution instructions" are not valid methods to prohibit substitution, and a pharmacist may substitute on these types of written prescriptions.

(V) A written prescription drug order issued prior to June 1, 2002, but presented for dispensing on or after June 1, 2002, shall follow the substitution instructions on the prescription.

(ii) Verbal Prescriptions.

(I) If a prescription drug order is transmitted to a pharmacist orally, the practitioner or practitioner's agent shall prohibit substitution by specifying "brand necessary" or "brand medically necessary." The pharmacists shall note any substitution instructions by the practitioner or practitioner's agent, on the file copy of the prescription drug order. Such file copy may follow the one-line format indicated in subparagraph (B)(i) of this paragraph, or any other format that clearly indicates the substitution instructions.

(II) If the practitioner's or practitioner's agent does not clearly indicate that the brand name is medically necessary, the pharmacist may substitute a generically equivalent drug product.

(III) To prohibit substitution on a verbal prescription reimbursed through the medical assistance program specified in 42 C.F.R., §447.331:

(-a-) the practitioner or the practitioner's agent shall verbally indicate that the brand is medically necessary; and

(-b-) the practitioner shall mail or fax a written prescription to the pharmacy which complies with the dispensing directive for written prescriptions specified in clause (i) of this subparagraph within 30 days.

(iii) Electronic prescription drug orders.

(I) To prohibit substitution, the practitioner or practitioner's agent shall note "brand necessary" or "brand medically necessary" on the electronic prescription drug order.

(II) If the practitioner or practitioner's agent does not clearly indicate on the electronic prescription drug order that the brand is medically necessary, the pharmacist may substitute a generically equivalent drug product.

(III) To prohibit substitution on an electronic prescription drug order reimbursed through the medical assistance program specified in 42 C.F.R., §447.331, the practitioner shall fax a copy of the original prescription drug order which complies with the requirements of a written prescription drug order specified in clause (i) of this subparagraph within 30 days.

(iv) Prescriptions issued by out-of-state, Mexican, Canadian, or federal facility practitioners.

(I) The dispensing directive specified in this subsection does not apply to the following types of prescription drug orders:

(-a-) prescription drug orders issued by a practitioner in a state other than Texas;

(-b-) prescriptions for dangerous drugs issued by a practitioner in the United Mexican States or the Dominion of Canada; or

(-c-) prescription drug orders issued by practitioners practicing in a federal facility provided they are acting in the scope of their employment.

(II) A pharmacist may not substitute on prescription drug orders identified in subclause (I) of this clause unless the practitioner has authorized substitution on the prescription drug order. If the practitioner has not authorized substitution on the written prescription drug order, a pharmacist shall not substitute a generically equivalent drug product unless:

(-a-) the pharmacist obtains verbal or written authorization from the practitioner (such authorization shall be noted on the original prescription drug order); or

(-b-) the pharmacist obtains written documentation regarding substitution requirements from the State Board of Pharmacy in the state, other than Texas, in which the prescription drug order was issued. The following is applicable concerning this documentation.

(-1-) The documentation shall state that a pharmacist may substitute on a prescription drug order issued in such other state unless the practitioner prohibits substitution on the original prescription drug order.

(-2-) The pharmacist shall note on the original prescription drug order the fact that documentation from such other state board of pharmacy is on file.

(-3-) Such documentation shall be updated yearly.

(D) Refills.

(i) Original substitution instructions. All refills, including prescriptions issued prior to June 1, 2001, shall follow the original substitution instructions or dispensing directive, unless otherwise indicated by the practitioner or practitioner's agent.

(ii) Narrow therapeutic index drugs.

(I) The board, in consultation with the Texas State Board of Medical Examiners, has determined that no drugs shall be included on a list of narrow therapeutic index drugs as defined in §562.013, Occupations Code. The board has specified in §309.7 of this title (relating to dispensing responsibilities) that pharmacist shall use as a basis for determining generic equivalency, Approved Drug Products with Therapeutic Equivalence Evaluations and current supplements published by the Federal Food and Drug Administration, within the limitations stipulated in that publication.

(-a-) Pharmacists may only substitute products that are rated therapeutically equivalent in the Approved Drug Products with Therapeutic Equivalence Evaluations and current supplements.

(-b-) Practitioners may prohibit substitution through a dispensing directive in compliance with subparagraph (C) of this paragraph.

(II) The board shall reconsider the contents of the list if the Federal Food and Drug Administration determines a new equivalence classification which indicates that certain drug products are equivalent but special notification to the patient and practitioner is required when substituting these products.

(4) Substitution of dosage form.

(A) As specified in §562.002 of the Act, a pharmacist may dispense a dosage form of a drug product different from that prescribed, such as a tablet instead of a capsule or liquid instead of tablets, provided:

(i) the patient consents to the dosage form substitution;

(ii) the pharmacist notifies the practitioner of the dosage form substitution; and

(iii) the dosage form so dispensed:

(I) contains the identical amount of the active ingredients as the dosage prescribed for the patient;

(II) is not an enteric-coated or time release product;

(III) does not alter desired clinical outcomes;

(B) Substitution of dosage form may not include the substitution of a product that has been compounded by the pharmacist unless the pharmacist contacts the practitioner prior to dispensing and obtains permission to dispense the compounded product.

(5) Therapeutic Drug Interchange. A switch to a drug providing a similar therapeutic response to the one prescribed shall not be made without prior approval of the prescribing practitioner. This paragraph does not apply to generic substitution. For generic substitution, see the requirements of paragraph (3) of this subsection.

(A) The patient shall be notified of the therapeutic drug interchange prior to, or upon delivery, of the dispensed prescription to the patient. Such notification shall include:

(i) a description of the change;

(ii) the reason for the change;

(iii) whom to notify with questions concerning the change; and

(iv) instructions for return of the drug if not wanted by the patient.

(B) The pharmacy shall maintain documentation of patient notification of therapeutic drug interchange which shall include:

(i) the date of the notification;

(ii) the method of notification;

(iii) a description of the change; and

(iv) the reason for the change.

(6) Prescription containers.

(A) A drug dispensed pursuant to a prescription drug order shall be dispensed in a child-resistant container unless:

(i) the patient or the practitioner requests the prescription not be dispensed in a child-resistant container; or

(ii) the product is exempted from requirements of the Poison Prevention Packaging Act of 1970.

(B) A drug dispensed pursuant to a prescription drug order shall be dispensed in an appropriate container as specified on the manufacturer's container.

(C) Prescription containers or closures shall not be re-used.

(7) Labeling.

(A) At the time of delivery of the drug, the dispensing container shall bear a label with at least the following information:

(i) name, address and phone number of the pharmacy;

(ii) unique identification number of the prescription;

(iii) date the prescription is dispensed;

(iv) initials or an identification code of the dispensing pharmacist;

(v) name of the prescribing practitioner;

(vi) name of the patient or if such drug was prescribed for an animal, the species of the animal and the name of the owner;

(vii) instructions for use;

(viii) quantity dispensed;

(ix) appropriate ancillary instructions such as storage instructions or cautionary statements such as warnings of potential harmful effects of combining the drug product with any product containing alcohol;

(x) if the prescription is for a Schedules II - IV controlled substance, the statement "Caution: Federal law prohibits the transfer of this drug to any person other than the patient for whom it was prescribed";

(xi) if the pharmacist has selected a generically equivalent drug pursuant to the provisions of the Act, Chapters 562 and 563, the statement "Substituted for Brand Prescribed" or "Substituted for 'Brand Name'" where "Brand Name" is the actual name of the brand name product prescribed;

(xii) the name of the advanced practice nurse or physician assistant, if the prescription is carried out or signed by an advanced practice nurse or physician assistant in compliance with Subtitle B, Chapter 157, Occupations Code; and

(xiii) the name and strength of the actual drug product dispensed, unless otherwise directed by the prescribing practitioner.

(I) The name shall be either:

(-a-) the brand name; or

(-b-) if no brand name, then the generic name and name of the manufacturer or distributor of such generic drug. (The name of the manufacturer or distributor may be reduced to an abbreviation or initials, provided the abbreviation or initials are sufficient to identify the manufacturer or distributor. For combination drug products or non-sterile compounded drug products having no brand name, the principal active ingredients shall be indicated on the label.)

(II) Except as provided in clause (xi) of this subparagraph, the brand name of the prescribed drug shall not appear on the prescription container label unless it is the drug product actually dispensed.

(B) The dispensing container is not required to bear the label specified in subparagraph (A) of this paragraph if:

(i) the drug is prescribed for administration to an ultimate user who is institutionalized in a licensed health care institution (e.g., nursing home, hospice, hospital);

(ii) no more than a 34-day supply or 100 dosage units, whichever is less, is dispensed at one time;

(iii) the drug is not in the possession of the ultimate user prior to administration;

(iv) the pharmacist-in-charge has determined that the institution:

(I) maintains medication administration records which include adequate directions for use for the drug(s) prescribed;

(II) maintains records of ordering, receipt, and administration of the drug(s); and

(III) provides for appropriate safeguards for the control and storage of the drug(s); and

(v) the system employed by the pharmacy in dispensing the prescription drug order adequately:

(I) identifies the:

(-a-) pharmacy by name and address;

(-b-) unique identification number of the prescription;

(-c-) name and strength of the drug dispensed;

(-d-) name of the patient;

(-e-) name of the prescribing practitioner; and

(II) sets forth the directions for use and cautionary statements, if any, contained on the prescription drug order or required by law.

(d) Equipment and supplies.

(1) Class A pharmacies dispensing prescription drug orders shall have the following equipment and supplies:

(A) typewriter or comparable equipment;

(B) refrigerator;

(C) adequate supply of child-resistant, light-resistant, tight, and if applicable, glass containers;

(D) adequate supply of prescription, poison, and other applicable labels;

(E) appropriate equipment necessary for the proper preparation of prescription drug orders; and

(F) metric-apothecary weight and measure conversion charts.

(2) If the community pharmacy compounds prescription drug orders, the pharmacy shall:

(A) have a Class A prescription balance, or analytical balance and weights which shall be properly maintained and inspected at least every three years by the appropriate authority as prescribed by local, state, or federal law or regulations; and

(B) have equipment and utensils necessary for the proper compounding of prescription drug orders. Such equipment and utensils used in the compounding process shall be:

(i) of appropriate design, appropriate capacity, and be operated within designed operational limits;

(ii) of suitable composition so that surfaces that contact components, in-process material, or drug products shall not be reactive, additive, or absorptive so as to alter the safety, identity, strength, quality, or purity of the drug product beyond acceptable standards;

(iii) cleaned and sanitized immediately prior to each use; and

(iv) routinely inspected, calibrated (if necessary), or checked to ensure proper performance.

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

(1) current copies of the following:

(A) Texas Pharmacy Act and rules;

(B) Texas Dangerous Drug Act and rules;

(C) Texas Controlled Substances Act and rules; and

(D) Federal Controlled Substances Act and rules (or official publication describing the requirements of the Federal Controlled Substances Act and rules);

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

(A) patient information:

(i) United States Pharmacopeia Dispensing Information, Volume II (Advice to the Patient); or

(ii) a reference text or information leaflets which provide patient information;

(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;

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

(i) Facts and Comparisons with current supplements;

(ii) United States Pharmacopeia Dispensing Information Volume I (Drug Information for the Healthcare Provider);

(iii) Clinical Pharmacology;

(iv) American Hospital Formulary Service with current supplements; or

(v) Remington's Pharmaceutical Sciences; and

(3) basic antidote information and the telephone number of the nearest Regional Poison Control Center.

(f) Drugs.

(1) Procurement and storage.

(A) The pharmacist-in-charge shall have the responsibility for the procurement and storage of drugs, but may receive input from other appropriate staff relative to such responsibility.

(B) Prescription drugs and devices and nonprescription Schedule V controlled substances shall be stored within the prescription department or a locked storage area.

(C) All drugs shall be stored at the proper temperature, as defined by the following terms:

(i) controlled room temperature--temperature maintained thermostatically between 15 degrees and 30 degrees Celsius (59 degrees and 86 degrees Fahrenheit);

(ii) cool--temperature between 8 degrees and 15 degrees Celsius (46 degrees and 59 degrees Fahrenheit) which may, alternatively, be stored in a refrigerator unless otherwise specified on the labeling;

(iii) refrigerate--temperature maintained thermostatically between 2 degrees and 8 degrees Celsius (36 degrees and 46 degrees Fahrenheit); and

(iv) freeze--temperature maintained thermostatically between -20 degrees and -10 degrees Celsius (-4 degrees and 14 degrees Fahrenheit).

(2) Out-of-date drugs or devices.

(A) Any drug or device bearing an expiration date shall not be dispensed beyond the expiration date of the drug or device.

(B) Outdated drugs or devices shall be removed from dispensing stock and shall be quarantined together until such drugs or devices are disposed of properly.

(3) Nonprescription Schedule V controlled substances.

(A) Schedule V controlled substances containing codeine, dihydrocodeine, or any of the salts of codeine or dihydrocodeine may not be distributed without a prescription drug order from a practitioner.

(B) A pharmacist may distribute nonprescription Schedule V controlled substances which contain no more than 15 milligrams of opium per 29.5729 ml or per 28.35 Gm provided:

(i) such distribution is made only by a pharmacist; a nonpharmacist employee may not distribute a nonprescription Schedule V controlled substance even if under the supervision of a pharmacist; however, after the pharmacist has fulfilled professional and legal responsibilities, the actual cash, credit transaction, or delivery may be completed by a nonpharmacist:

(ii) not more than 240 ml (eight fluid ounces), or not more than 48 solid dosage units of any substance containing opium, may be distributed to the same purchaser in any given 48-hour period without a prescription drug order;

(iii) the purchaser is at least 18 years of age; and

(iv) the pharmacist requires every purchaser not known to the pharmacist to furnish suitable identification (including proof of age where appropriate).

(C) A record of such distribution shall be maintained by the pharmacy in a bound record book. The record shall contain the following information:

(i) true name of the purchaser;

(ii) current address of the purchaser;

(iii) name and quantity of controlled substance purchased;

(iv) date of each purchase; and

(v) signature or written initials of the distributing pharmacist.

(4) Drugs, components, and materials used in nonsterile compounding.

(A) Drugs used in nonsterile compounding shall:

(i) meet official compendia requirements; or

(ii) be of a chemical grade in one of the following categories:

(I) Chemically Pure (CP);

(II) Analytical Reagent (AR); or

(III) American Chemical Society (ACS); or

(iii) in the professional judgment of the pharmacist, be of high quality and obtained from acceptable and reliable alternative sources.

(B) All components shall be stored in properly labeled containers in a clean, dry area, under proper temperatures as defined in paragraph (1) of this subsection.

(C) Drug product containers and closures shall not be reactive, additive, or absorptive so as to alter the safety, identity, strength, quality, or purity of the compounded drug product beyond the desired result.

(D) Components, drug product containers, and closures shall be rotated so that the oldest stock is used first.

(E) Container closure systems shall provide adequate protection against foreseeable external factors in storage and use that can cause deterioration or contamination of the compounded drug product.

(5) Class A Pharmacies may not sell, purchase, trade or possess prescription drug samples, unless the pharmacy meets all of the following conditions:

(A) the pharmacy is owned by a charitable organization described in the Internal Revenue Code of 1986, or by a city, state or county government;

(B) the pharmacy is a part of a health care entity which provides health care primarily to indigent or low income patients at no or reduced cost;

(C) the samples are for dispensing or provision at no charge to patients of such health care entity; and

(D) the samples are possessed in compliance with the federal Prescription Drug Marketing Act of 1986.

(g) Prepackaging of drugs.

(1) Drugs may be prepackaged in quantities suitable for internal distribution only by a pharmacist or by supportive personnel under the direction and direct supervision of a pharmacist.

(2) The label of a prepackaged unit shall indicate:

(A) brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(B) facility's lot number;

(C) expiration date; and

(D) quantity of the drug, if the quantity is greater than one.

(3) Records of prepackaging shall be maintained to show:

(A) name of the drug, strength, and dosage form;

(B) facility's lot number;

(C) manufacturer or distributor;

(D) manufacturer's lot number;

(E) expiration date;

(F) quantity per prepackaged unit;

(G) number of prepackaged units;

(H) date packaged;

(I) name, initials, or electronic signature of the prepacker; and

(J) signature, or electronic signature of the responsible pharmacist.

(4) Stock packages, repackaged units, and control records shall be quarantined together until checked/released by the pharmacist.

(h) Customized patient medication packages.

(1) Purpose. In lieu of dispensing two or more prescribed drug products in separate containers, a pharmacist may, with the consent of the patient, the patient's caregiver, or the prescriber, provide a customized patient medication package (patient med-pak).

(2) Definition. A patient med-pak is a package prepared by a pharmacist for a specific patient comprising a series of containers and containing two or more prescribed solid oral dosage forms. The patient med-pak is so designed or each container is so labeled as to indicate the day and time, or period of time, that the contents within each container are to be taken.

(3) Label.

(A) The patient med-pak shall bear a label stating:

(i) the name of the patient;

(ii) the unique identification number for the patient med-pak itself and a separate unique identification number for each of the prescription drug orders for each of the drug products contained therein;

(iii) the name, strength, physical description or identification, and total quantity of each drug product contained therein;

(iv) the directions for use and cautionary statements, if any, contained in the prescription drug order for each drug product contained therein;

(v) if applicable, a warning of the potential harmful effect of combining any form of alcoholic beverage with any drug product contained therein;

(vi) any storage instructions or cautionary statements required by the official compendia;

(vii) the name of the prescriber of each drug product;

(viii) the date of preparation of the patient med-pak and the beyond-use date assigned to the patient med-pak (which such beyond-use date shall not be later than 60 days from the date of preparation);

(ix) the name, address, and telephone number of the pharmacy;

(x) the initials or an identification code of the dispensing pharmacist; and

(xi) any other information, statements, or warnings required for any of the drug products contained therein.

(B) If the patient med-pak allows for the removal or separation of the intact containers therefrom, each individual container shall bear a label identifying each of the drug product contained therein.

(C) The dispensing container is not required to bear the label specified in subparagraph (A) of this paragraph if:

(i) the drug is prescribed for administration to an ultimate user who is institutionalized in a licensed health care institution (e.g., nursing home, hospice, hospital);

(ii) no more than a 34-day supply or 100 dosage units, whichever is less, is dispensed at one time;

(iii) the drug is not in the possession of the ultimate user prior to administration;

(iv) the pharmacist-in-charge has determined that the institution:

(I) maintains medication administration records which include adequate directions for use for the drug(s) prescribed;

(II) maintains records of ordering, receipt, and administration of the drug(s); and

(III) provides for appropriate safeguards for the control and storage of the drug(s); and

(v) the system employed by the pharmacy in dispensing the prescription drug order adequately:

(I) identifies the:

(-a-) pharmacy name and address;

(-b-) unique identification number of the prescription;

(-c-) name and strength each drug product dispensed;

(-d-) name of the patient;

(-e-) name of the prescribing practitioner of each drug product; and

(II) for each drug product sets forth the directions for use and cautionary statements, if any contained on the prescription drug order or required by law.

(4) Labeling. The patient med-pak shall be accompanied by a patient package insert, in the event that any drug contained therein is required to be dispensed with such insert as accompanying labeling. Alternatively, such required information may be incorporated into a single, overall educational insert provided by the pharmacist for the total patient med-pak.

(5) Packaging. In the absence of more stringent packaging requirements for any of the drug products contained therein, each container of the patient med-pak shall comply with official packaging standards. Each container shall be either not reclosable or so designed as to show evidence of having been opened.

(6) Guidelines. It is the responsibility of the dispensing pharmacist when preparing a patient med-pak, to take into account any applicable compendial requirements or guidelines and the physical and chemical compatibility of the dosage forms placed within each container, as well as any therapeutic incompatibilities that may attend the simultaneous administration of the drugs.

(7) Recordkeeping. In addition to any individual prescription filing requirements, a record of each patient med-pak shall be made and filed. Each record shall contain, as a minimum:

(A) the name and address of the patient;

(B) the unique identification number for the patient med-pak itself and a separate unique identification number for each of the prescription drug orders for each of the drug products contained therein;

(C) the name of the manufacturer or distributor and lot number for each drug product contained therein;

(D) information identifying or describing the design, characteristics, or specifications of the patient med-pak sufficient to allow subsequent preparation of an identical patient med-pak for the patient;

(E) the date of preparation of the patient med-pak and the beyond-use date that was assigned;

(F) any special labeling instructions; and

(G) the initials or an identification code of the dispensing pharmacist.

(i) Nonsterile compounding.

(1) Purpose. The purpose of this subsection is to provide standards for the compounding of nonsterile drug products in licensed pharmacies for dispensing and/or administration to humans or animals. Licensed pharmacies compounding nonsterile drug products shall comply with the following paragraphs in addition to all other provisions of this section and §§291.31, 291.32, 291.34, and 291.35 of this title (relating to Definitions, Personnel, Records, and Triplicate Prescription Requirements).

(2) General requirements.

(A) Nonsterile drug products may be compounded in licensed pharmacies:

(i) when there exists a valid pharmacist/patient/prescriber relationship and upon the presentation of a valid prescription drug order; or

(ii) in anticipation of future prescription drug orders based on routine, regularly observed prescribing patterns.

(B) Nonsterile compounding in anticipation of future prescription drug orders must be based upon a history of receiving valid prescriptions issued within an established pharmacist/patient/prescriber relationship, provided that in the pharmacist's professional judgment the quantity prepared is stable for the anticipated shelf time.

(i) The pharmacist's professional judgment should be based on criteria such as:

(I) physical and chemical properties of active ingredients;

(II) use of preservatives and/or stabilizing agents;

(III) dosage form;

(IV) storage conditions; and

(V) scientific, laboratory, or reference data.

(ii) Documentation of the criteria used to determine the stability for the anticipated shelf time must be maintained with the nonsterile compounding record.

(iii) Any product compounded in anticipation of future prescription drug orders shall be labeled. Such label shall contain:

(I) name and strength of the compounded medication or list of the active ingredients and strengths;

(II) facility's lot number;

(III) "use by" date as determined by the pharmacist using appropriate documented criteria as outlined in clause (i) of this subparagraph; and

(IV) quantity or amount in the container.

(C) Commercially available drug products may be compounded for individual patients under the provisions of subparagraph (A) of this paragraph provided the prescribing practitioner has requested that the drug product be compounded.

(D) Drug products may be compounded for the exclusive use of the pharmacy where the products are compounded. Compounded drug products may not be distributed for resale, including distribution to pharmacies under common ownership or control, except that a practitioner may obtain compounded drug products for administration to patients, but not for dispensing. Products compounded for physician administration to patients shall be labeled. Such label shall contain:

(i) the statement: "For Office Use Only";

(ii) name and strength of the compounded medication or list of the active ingredients and strengths;

(iii) facility's control number;

(iv) "use by" date as determined by the pharmacist using appropriate documented criteria as outlined in subparagraph (B)(i) of this paragraph; and

(v) quantity or amount in the container.

(E) Compounding pharmacies/pharmacists may advertise and promote the fact that they provide nonsterile prescription compounding services, but shall not solicit business by promoting to compound specific drug products.

(3) Compounding process.

(A) Any person with an apparent illness or open lesion that may adversely affect the safety or quality of a drug product being compounded shall be excluded from direct contact with components, drug product containers, closures, any materials involved in the compounding process, and drug products until the condition is corrected.

(B) Personnel engaged in the compounding of drug products shall wear clean clothing appropriate to the operation being performed. Protective apparel, such as coats/jackets, aprons, hair nets, gowns, hand or arm coverings, or masks shall be worn as necessary to protect personnel from chemical exposure and drug products from contamination.

(C) At each step of the compounding process, the pharmacist shall ensure that components used in compounding are accurately weighed, measured, or subdivided as appropriate to conform to the formula being prepared.

(D) The pharmacist shall establish and conduct quality control procedures to monitor the output of compounded drug products for uniformity and consistency such as capsule weight variations, adequacy of mixing, clarity, or pH of solutions. Such procedures shall be documented in the nonsterile compounding record.

(E) Compounding records for all drugs compounded in anticipation of future prescription drug orders shall be maintained by the pharmacy electronically or manually as part of the prescription, formula record, formula book, or compounding log and shall include:

(i) the date of preparation;

(ii) facility's lot number;

(iii) manufacturer's lot number(s) and expiration date(s) for all components (if the original manufacturer's lot number(s) and expiration date(s) are not known, the pharmacy shall record the source of acquisition of the components);

(iv) a complete formula, including methodology and necessary equipment;

(v) signature or initials of the pharmacist or supportive person performing the compounding;

(vi) signature or initials of the pharmacist responsible for supervising supportive personnel and conducting in-process and finals checks of compounded products if supportive personnel perform the compounding function;

(vii) the brand name(s) of the raw materials, or if no brand name, the generic name(s) and the name(s) of the manufacturer(s) of the raw materials;

(viii) the quantity in units of finished products or grams of raw materials;

(ix) the package size and the number of units prepared;

(x) documentation of performance of quality control procedures; and

(xi) the criteria used to determine the "use by" date.

(F) Compounding records for all drugs compounded pursuant to an individual prescription and not in anticipation of future prescription drug orders shall be maintained by the pharmacy electronically or manually as part of the prescription, formula record, formula book, or compounding log and shall include:

(i) the date of preparation;

(ii) a complete formula which includes the brand name(s) of the raw materials, or if no brand name, the generic name(s) and name(s) of the manufacturer(s) of the raw materials and the quantities of each;

(iii) signature or initials of the pharmacist or supportive person performing the compounding;

(iv) signature or initials of the pharmacist responsible for supervising supportive personnel and conducting in-process and finals checks of compounded products if supportive personnel perform the compounding function;

(v) the quantity in units of finished products or grams of raw materials;

(vi) the package size and the number of units prepared; and

(vii) documentation of performance of quality control procedures. Documentation of the performance of quality control procedures is not required if the compounding process involves the mixing of two or more commercially available oral liquids or commercially available preparations when the final product is intended for external use.

(j) Automated devices and systems.

(1) Automated compounding or counting devices. If a pharmacy uses automated compounding or counting devices:

(A) the pharmacy shall have a method to calibrate and verify the accuracy of the automated compounding or counting device and document the calibration and verification on a routine basis;

(B) the devices may be loaded with bulk or unlabeled drugs only by a pharmacist or by pharmacy technicians under the direction and direct supervision of a pharmacist;

(C) the label of an automated compounding or counting device container shall indicate the brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(D) records of loading bulk or unlabeled drugs into an automated compounding or counting device shall be maintained to show:

(i) name of the drug, strength, and dosage form;

(ii) manufacturer or distributor;

(iii) manufacturer's lot number;

(iv) expiration date;

(v) date of loading;

(vi) name, initials, or electronic signature of the person loading the automated compounding or counting device; and

(vii) signature or electronic signature of the responsible pharmacist; and

(E) the automated compounding or counting device shall not be used until a pharmacist verifies that the system is properly loaded and affixes his or her signature to the record specified in subparagraph (D) of this paragraph.

(2) Automated pharmacy dispensing systems. This paragraph becomes effective September 1, 2000.

(A) Authority to use automated pharmacy dispensing systems. A pharmacy may use an automated pharmacy dispensing system to fill prescription drug orders provided that:

(i) the pharmacist-in-charge is responsible for the supervision of the operation of the system;

(ii) the automated pharmacy dispensing system has been tested by the pharmacy and found to dispense accurately. The pharmacy shall make the results of such testing available to the Board upon request; and

(iii) the pharmacy will make the automated pharmacy dispensing system available for inspection by the board for the purpose of validating the accuracy of the system.

(B) Quality assurance program. A pharmacy which uses an automated pharmacy dispensing system to fill prescription drug orders shall operate according to a written program for quality assurance of the automated pharmacy dispensing system which:

(i) requires continuous monitoring of the automated pharmacy dispensing system; and

(ii) establishes mechanisms and procedures to test the accuracy of the automated pharmacy dispensing system at least every six months and whenever any upgrade or change is made to the system and documents each such activity.

(C) Policies and procedures of operation.

(i) When an automated pharmacy dispensing system is used to fill prescription drug orders, it shall be operated according to written policies and procedures of operation. The policies and procedures of operation shall establish requirements for operation of the automated pharmacy dispensing system and shall describe policies and procedures that:

(I) include a description of the policies and procedures of operation;

(II) provide for a pharmacist's review, approval, and accountability for the transmission of each original or new prescription drug order to the automated pharmacy dispensing system before the transmission is made;

(III) provide for access to the automated pharmacy dispensing system for stocking and retrieval of medications which is limited to licensed healthcare professionals or pharmacy technicians acting under the supervision of a pharmacist;

(IV) require prior to use, that a pharmacist checks, verifies, and documents that the automated pharmacy dispensing system has been accurately filled each time the system is stocked;

(V) provide for an accountability record to be maintained which documents all transactions relative to stocking and removing medications from the automated pharmacy dispensing system;

(VI) require a prospective drug regimen review is conducted as specified in subsection (c)(2) of this section; and

(VII) establish and make provisions for documentation of a preventative maintenance program for the automated pharmacy dispensing system.

(ii) A pharmacy which uses an automated pharmacy dispensing system to fill prescription drug orders shall, at least annually, review its written policies and procedures, revise them if necessary, and document the review.

(D) Recovery Plan. A pharmacy which uses an automated pharmacy dispensing system to fill prescription drug orders shall maintain a written plan for recovery from a disaster or any other situation which interrupts the ability of the automated pharmacy dispensing system to provide services necessary for the operation of the pharmacy. The written plan for recovery shall include:

(i) planning and preparation for maintaining pharmacy services when an automated pharmacy dispensing system is experiencing downtime;

(ii) procedures for response when an automated pharmacy dispensing system is experiencing downtime;

(iii) procedures for the maintenance and testing of the written plan for recovery; and

(iv) procedures for notification of the Board, each patient of the pharmacy, and other appropriate agencies whenever an automated pharmacy dispensing system experiences downtime for more than two days of operation or a period of time which significantly limits the pharmacy's ability to provide pharmacy services.

(3) Final check of prescriptions dispensed using an automated pharmacy dispensing system. For the purpose of §291.32(b)(2) of this title, a pharmacist must perform the final check of all prescriptions prior to delivery to the patient to ensure that the prescription is dispensed accurately as prescribed.

(A) This final check shall be considered accomplished if:

(i) a check of the final product is conducted by a pharmacist after the automated system has completed the prescription and prior to delivery to the patient; or

(ii) the following checks are conducted by a pharmacist:

(I) if the automated pharmacy dispensing system contains bulk stock drugs, a pharmacist verifies that those drugs have

been accurately stocked as specified in paragraph (2)(C)(i)(IV) of this subsection; and

(II) a pharmacist checks the accuracy of the data entry of each original or new prescription drug order entered into the automated pharmacy dispensing system.

(B) If the final check is accomplished as specified in subparagraph (A)(ii) of this paragraph, the following additional requirements must be met.

(i) The dispensing process must be fully automated from the time the pharmacist releases the prescription to the automated system until a completed, labeled prescription ready for delivery to the patient is produced.

(ii) The pharmacy has conducted initial testing and has a continuous quality assurance program which documents that the automated pharmacy dispensing system dispenses accurately as specified in paragraph (2)(A) and (B) of this subsection.

(iii) The automated pharmacy dispensing system documents and maintains:

(I) the name(s), initials, or identification code(s) of each pharmacist responsible for the checks outlined in subparagraph (A)(ii) of this paragraph; and

(II) the name(s), initials, or identification code(s) and specific activity(ies) of each pharmacist or pharmacy technician who performs any other portion of the dispensing process.

(iv) The pharmacy establishes mechanisms and procedures to test the accuracy of the automated pharmacy dispensing system at least every month rather than every six months as specified in paragraph (2)(B) of this subsection.

(4) Automated checking device.

(A) For the purpose of this subsection, an automated checking device is a fully automated device which confirms, after dispensing but prior to delivery to the patient, that the correct drug and strength has been labeled with the correct label for the correct patient.

(B) For the purpose of §291.32(b)(2) of this title, the final check of a dispensed prescription shall be considered accomplished using an automated checking device provided:

(i) a check of the final product is conducted by a pharmacist prior to delivery to the patient or the following checks are performed by a pharmacist:

(I) the prepackaged drug used to fill the order is checked by a pharmacist who verifies that the drug is labeled and packaged accurately; and

(II) a pharmacist checks the accuracy of each original or new prescription drug order.

(ii) the prescription is dispensed, labeled, and made ready for delivery to the patient in compliance with Class A (Community) Pharmacy rules; and

(iii) prior to delivery to the patient:

(I) the automated checking device confirms that the correct drug and strength has been labeled with the correct label for the correct patient; and

(II) a pharmacist performs all other duties required to ensure that the prescription has been dispensed safely and accurately as prescribed.

(C) If the final check is accomplished as specified in subparagraph (B) of this paragraph, the following additional requirements must be met.

(i) The pharmacy has conducted initial testing of the automated checking device and has a continuous quality assurance program which documents that the automated checking device accurately confirms that the correct drug and strength has been labeled with the correct label for the correct patient.

(ii) The pharmacy documents and maintains:

(I) the name(s), initials, or identification code(s) of each pharmacist responsible for the checks outlined in subparagraph (B)(i) of this paragraph; and

(II) the name(s) initials, or identification code(s) and specific activity(ies) of each pharmacist or pharmacy technician who perform any other portion of the dispensing process.

(iii) The pharmacy establishes mechanisms and procedures to test the accuracy of the automated checking device at least monthly.

§291.34. Records.

(a) Maintenance of records.

(1) Every inventory or other record required to be kept under the provisions of §291.31 of this title (relating to Definitions), §291.32 of this title (relating to Personnel), §291.33 of this title (relating to Operational Standards), §291.34 of this title (relating to Records), §291.35 of this title (relating to Triplicate Prescription Records), and §291.36 of this title (relating to Class A Pharmacies Dispensing Sterile Products) contained in Community Pharmacy (Class A) shall be kept by the pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies.

(2) Records of controlled substances listed in Schedules I and II shall be maintained separately from all other records of the pharmacy.

(3) Records of controlled substances, other than prescription drug orders, listed in Schedules III - V shall be maintained separately or readily retrievable from all other records of the pharmacy. For purposes of this subsection, readily retrievable means that the controlled substances shall be asterisked, red-lined, or in some other manner readily identifiable apart from all other items appearing on the record.

(4) Records, except when specifically required to be maintained in original or hard-copy form, may be maintained in an alternative data retention system, such as a data processing system or direct imaging system provided:

(A) the records maintained in the alternative system contain all of the information required on the manual record; and

(B) the data processing system is capable of producing a hard copy of the record upon the request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(b) Prescriptions.

(1) Professional responsibility.

(A) 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.

(B) 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.

(C) Subparagraph (B) 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) Written prescription drug orders.

(A) Practitioner's signature.

(i) Except as noted in clause (ii) of this subparagraph, written prescription drug orders shall be:

(I) manually signed by the practitioner; or

(II) electronically signed by the practitioner using a system which electronically replicates the practitioner's manual signature on the written prescription, provided that security features of the system require the practitioner to authorize each use.

(ii) Prescription drug orders for Schedule II controlled substances shall be issued on an official prescription form as required by the Texas Controlled Substances Act, §481.075, and be manually signed by the practitioner.

(iii) A practitioner may sign a prescription drug order in the same manner as he would sign a check or legal document, e.g. J.H. Smith or John H. Smith.

(iv) Rubber stamped or otherwise reproduced signatures may not be used except as authorized in clause (i) of this subparagraph.

(v) The prescription drug order may not be signed by a practitioner's agent but may be prepared by an agent for the signature of a practitioner. However, the prescribing practitioner is responsible in case the prescription drug order does not conform in all essential respects to the law and regulations.

(B) Prescription drug orders written by practitioners in another state.

(i) Dangerous drug prescription orders. A pharmacist may dispense a prescription drug order for dangerous drugs issued by practitioners in a state other than Texas in the same manner as prescription drug orders for dangerous drugs issued by practitioners in Texas are dispensed.

(ii) Controlled substance prescription drug orders.

(I) A pharmacist may dispense prescription drug order for controlled substances in Schedule II issued by a practitioner in another state provided:

(-a-) the prescription is filled in compliance with a written plan approved by the Director of the Texas Department of Public Safety in consultation with the Board, which provides the manner in which the dispensing pharmacy may fill a prescription for a Schedule II controlled substance;

(-b-) the prescription drug order is an original written prescription issued by a person practicing in another state and licensed by another state as a physician, dentist, veterinarian, or podiatrist, who has a current federal Drug Enforcement Administration (DEA) registration number, and who may legally prescribe Schedule II controlled substances in such other state; and

(-c-) the prescription drug order is not dispensed after the end of the seventh day after the date on which the prescription is issued.

(II) A pharmacist may dispense prescription drug orders for controlled substances in Schedule III, IV, or V issued by a practitioner in another state provided:

(-a-) the prescription drug order is an original written prescription issued by a person practicing in another state and licensed by another state as a physician, dentist, veterinarian, or podiatrist, who has a current federal Drug Enforcement Administration (DEA) registration number, and who may legally prescribe Schedule III, IV, or V controlled substances in such other state;

(-b-) the prescription drug order is not dispensed or refilled more than six months from the initial date of issuance and may not be refilled more than five times; and

(-c-) if there are no refill instructions on the original written prescription drug order (which shall be interpreted as no refills authorized) or if all refills authorized on the original written prescription drug order have been dispensed, a new written prescription drug order is obtained from the prescribing practitioner prior to dispensing any additional quantities of controlled substances.

(C) Prescription drug orders written by practitioners in the United Mexican States or the Dominion of Canada.

(i) Controlled substance prescription drug orders. A pharmacist may not dispense a prescription drug order for a Schedule II, III, IV, or V controlled substance issued by a practitioner in the Dominion of Canada or the United Mexican States.

(ii) Dangerous drug prescription drug orders. A pharmacist may dispense a dangerous drug prescription issued by a person licensed in the Dominion of Canada or the United Mexican States as a physician, dentist, veterinarian, or podiatrist provided:

(I) the prescription drug order is an original written prescription; and

(II) if there are no refill instructions on the original written prescription drug order (which shall be interpreted as no refills authorized) or if all refills authorized on the original written prescription drug order have been dispensed, a new written prescription drug order shall be obtained from the prescribing practitioner prior to dispensing any additional quantities of dangerous drugs.

(D) Prescription drug orders carried out or signed by an advanced practice nurse or physician assistant.

(i) A pharmacist may dispense a prescription drug order which is carried out or signed by an advanced practice nurse or physician assistant provided the advanced practice nurse or physician assistant is practicing in accordance with Subtitle B, Chapter 157, Occupations Code.

(ii) Each practitioner shall designate in writing the name of each advanced practice nurse or physician assistant authorized to carry out or sign a prescription drug order pursuant to Subtitle B, Chapter 157, Occupations Code. A list of the advanced practice nurses or physician assistants designated by the practitioner must be maintained in the practitioner's usual place of business. On request by a pharmacist, a practitioner shall furnish the pharmacist with a copy of the written authorization for a specific advanced practice nurse or physician assistant.

(E) Prescription drug orders for Schedule II controlled substances. No Schedule II controlled substance may be dispensed

without a written prescription drug order of a practitioner on an official prescription form as required by the Texas Controlled Substances Act, §481.075.

(3) Verbal prescription drug orders.

(A) A verbal prescription drug order from a practitioner or a practitioner's designated agent may only be received by a pharmacist or a pharmacist-intern under the direct supervision of a pharmacist.

(B) A practitioner shall designate in writing the name of each agent authorized by the practitioner to communicate prescriptions verbally for the practitioner. The practitioner shall maintain at the practitioner's usual place of business a list of the designated agents. The practitioner shall provide a pharmacist with a copy of the practitioner's written authorization for a specific agent on the pharmacist's request.

(C) A pharmacist may not dispense a verbal prescription drug order for a Schedule III, IV, or V controlled substance issued by a practitioner licensed in another state unless the practitioner is also registered under the Texas Controlled Substances Act.

(D) A pharmacist may not dispense a verbal prescription drug order for a dangerous drug or a controlled substance issued by a practitioner licensed in the Dominion of Canada or the United Mexican States unless the practitioner is also licensed in Texas.

(4) Electronic prescription drug orders. For the purpose of this subsection, prescription drug orders shall be considered the same as verbal prescription drug orders.

(A) An electronic prescription drug order may be transmitted by a practitioner or a practitioner's designated agent:

(i) directly to a pharmacy; or

(ii) through the use of a data communication device provided:

(I) the prescription information is not altered during transmission; and

(II) confidential patient information is not accessed or maintained by the operator of the data communication device unless the operator is authorized to receive the confidential information as specified in subsection (k) of this section.

(B) A practitioner shall designate in writing the name of each agent authorized by the practitioner to electronically transmit prescriptions for the practitioner. The practitioner shall maintain at the practitioner's usual place of business a list of the designated agents. The practitioner shall provide a pharmacist with a copy of the practitioner's written authorization for a specific agent on the pharmacist's request.

(C) A pharmacist may not dispense an electronic prescription drug order for a:

(i) Schedule II controlled substance, except as authorized for faxed prescriptions in §481.074, Health and Safety Code;

(ii) Schedule III, IV, or V controlled substance issued by a practitioner licensed in another state unless the practitioner is also registered under the Texas Controlled Substances Act; or

(iii) dangerous drug or controlled substance issued by a practitioner licensed in the Dominion of Canada or the United Mexican States unless the practitioner is also licensed in Texas.

(5) Original prescription drug order records.

(A) Original prescriptions shall be maintained by the pharmacy in numerical order and remain legible for a period of two years from the date of filling or the date of the last refill dispensed.

(B) If an original prescription drug order is changed, such prescription order shall be invalid and of no further force and effect; if additional drugs are to be dispensed, a new prescription drug order with a new and separate number is required.

(C) Original prescriptions shall be maintained in three separate files as follows:

(i) prescriptions for controlled substances listed in Schedule II;

(ii) prescriptions for controlled substances listed in Schedules III - V; and

(iii) prescriptions for dangerous drugs and nonprescription drugs.

(D) Original prescription records other than prescriptions for Schedule II controlled substances may be stored on microfilm, microfiche, or other system which is capable of producing a direct image of the original prescription record, e.g., digitalized imaging system. If original prescription records are stored in a direct imaging system, the following is applicable:

(i) the record of refills recorded on the original prescription must also be stored in this system;

(ii) the original prescription records must be maintained in numerical order and separated in three files as specified in subparagraph (C) of this paragraph; and

(iii) the pharmacy must provide immediate access to equipment necessary to render the records easily readable.

(6) Prescription drug order information.

(A) All original prescriptions shall bear:

(i) name of the patient, or if such drug is for an animal, the species of such animal and the name of the owner;

(ii) address of the patient, provided, however, a prescription for a dangerous drug is not required to bear the address of the patient if such address is readily retrievable on another appropriate, uniformly maintained pharmacy record, such as medication records;

(iii) name, and if for a controlled substance, the address and DEA registration number of the practitioner;

(iv) name and strength of the drug prescribed;

(v) quantity prescribed;

(vi) directions for use;

(vii) intended use for the drug unless the practitioner determines the furnishing of this information is not in the best interest of the patient; and

(viii) date of issuance.

(B) All original electronic prescription drug orders shall bear:

(i) name of the patient, if such drug is for an animal, the species of such animal, and the name of the owner;

(ii) address of the patient, provided, however, a prescription for a dangerous drug is not required to bear the address of the patient if such address is readily retrievable on another appropriate, uniformly maintained pharmacy record, such as medication records;

(iii) name, and if for a controlled substance, the address and DEA registration number of the practitioner;

(iv) name and strength of the drug prescribed;

(v) quantity prescribed;

(vi) directions for use;

(vii) indications for use, unless the practitioner determines the furnishing of this information is not in the best interest of the patient;

(viii) date of issuance;

(ix) a statement which indicates that the prescription has been electronically transmitted, (e.g., Faxed to or electronically transmitted to:);

(x) name, address, and electronic access number of the pharmacy to which the prescription was transmitted;

(xi) telephone number of the prescribing practitioner;

(xii) date the prescription drug order was electronically transmitted to the pharmacy, if different from the date of issuance of the prescription; and

(xiii) if transmitted by a designated agent, the full name of the designated agent.

(C) All original written prescriptions for dangerous drugs carried out or signed by an advanced practice nurse or physician assistant in accordance with Subtitle B, Chapter 157, Occupations Code, shall bear:

(i) name and address of the patient;

(ii) name, address, and telephone number of the supervising practitioner;

(iii) name, identification number, original signature and if the prescription is for a controlled substance, the DEA number of the advanced practice nurse or physician assistant;

(iv) address and telephone number of the clinic at which the prescription drug order was carried out or signed;

(v) name, strength, and quantity of the dangerous drug;

(vi) directions for use;

(vii) indications for use, if appropriate;

(viii) date of issuance; and

(ix) number of refills authorized.

(D) At the time of dispensing, a pharmacist is responsible for the addition of the following information to the original prescription:

(i) unique identification number of the prescription drug order;

(ii) initials or identification code of the dispensing pharmacist;

(iii) quantity dispensed, if different from the quantity prescribed;

(iv) date of dispensing, if different from the date of issuance; and

(v) brand name or manufacturer of the drug product actually dispensed, if the drug was prescribed by generic name or if a drug product other than the one prescribed was dispensed pursuant to the provisions of the Act, Chapters 562 and 563.

(7) Refills.

(A) Refills may be dispensed only in accordance with the prescriber's authorization as indicated on the original prescription drug order.

(B) If there are no refill instructions on the original prescription drug order (which shall be interpreted as no refills authorized) or if all refills authorized on the original prescription drug order have been dispensed, authorization from the prescribing practitioner shall be obtained prior to dispensing any refills.

(C) Refills of prescription drug orders for dangerous drugs or nonprescription drugs.

(i) Prescription drug orders for dangerous drugs or nonprescription drugs may not be refilled after one year from the date of issuance of the original prescription drug order.

(ii) If one year has expired from the date of issuance of an original prescription drug order for a dangerous drug or nonprescription drug, authorization shall be obtained from the prescribing practitioner prior to dispensing any additional quantities of the drug.

(D) Refills of prescription drug orders for Schedules III - V controlled substances.

(i) Prescription drug orders for Schedules III - V controlled substances may not be refilled more than five times or after six months from the date of issuance of the original prescription drug order, whichever occurs first.

(ii) If a prescription drug order for a Schedule III, IV, or V controlled substance has been refilled a total of five times or if six months have expired from the date of issuance of the original prescription drug order, whichever occurs first, a new and separate prescription drug order shall be obtained from the prescribing practitioner prior to dispensing any additional quantities of controlled substances.

(E) A pharmacist may exercise his professional judgment in refilling a prescription drug order for a drug, other than a controlled substance listed in Schedule II, without the authorization of the prescribing practitioner, provided:

(i) failure to refill the prescription might result in an interruption of a therapeutic regimen or create patient suffering;

(ii) either:

(I) a natural or manmade disaster has occurred which prohibits the pharmacist from being able to contact the practitioner; or

(II) the pharmacist is unable to contact the practitioner after a reasonable effort;

(iii) the quantity of prescription drug dispensed does not exceed a 72-hour supply;

(iv) the pharmacist informs the patient or the patient's agent at the time of dispensing that the refill is being provided without such authorization and that authorization of the practitioner is required for future refills;

(v) the pharmacist informs the practitioner of the emergency refill at the earliest reasonable time;

(vi) the pharmacist maintains a record of the emergency refill containing the information required to be maintained on a prescription as specified in this subsection;

(vii) the pharmacist affixes a label to the dispensing container as specified in §291.33(c)(6) of this title; and

(viii) if the prescription was initially filled at another pharmacy, the pharmacist may exercise his professional judgment in refilling the prescription provided:

(I) the patient has the prescription container, label, receipt or other documentation from the other pharmacy which contains the essential information;

(II) after a reasonable effort, the pharmacist is unable to contact the other pharmacy to transfer the remaining prescription refills or there are no refills remaining on the prescription;

(III) the pharmacist, in his professional judgment, determines that such a request for an emergency refill is appropriate and meets the requirements of clauses (i) and (ii) of this subparagraph; and

(IV) the pharmacist complies with the requirements of clauses (iii) - (v) of this subparagraph.

(c) Patient medication records.

(1) A patient medication record system shall be maintained by the pharmacy for patients to whom prescription drug orders are dispensed.

(2) The patient medication record system shall provide for the immediate retrieval of information for the previous 12 months which is necessary for the dispensing pharmacist to conduct a prospective drug regimen review at the time a prescription drug order is presented for dispensing.

(3) The pharmacist-in-charge shall assure that a reasonable effort is made to obtain and record in the patient medication record at least the following information:

(A) full name of the patient for whom the drug is prescribed;

(B) address and telephone number of the patient;

(C) patient's age or date of birth;

(D) patient's gender;

(E) any known allergies, drug reactions, idiosyncrasies, and chronic conditions or disease states of the patient and the identity of any other drugs currently being used by the patient which may relate to prospective drug regimen review;

(F) pharmacist's comments relevant to the individual's drug therapy, including any other information unique to the specific patient or drug; and

(G) a list of all prescription drug orders dispensed (new and refill) to the patient by the pharmacy during the last two years. Such list shall contain the following information:

(i) date dispensed;

(ii) name, strength, and quantity of the drug dispensed;

(iii) prescribing practitioner's name;

(iv) unique identification number of the prescription; and

(v) name or initials of the dispensing pharmacists.

(4) A patient medication record shall be maintained in the pharmacy for two years. If patient medication records are maintained in a data processing system, all of the information specified in this subsection shall be maintained in a retrievable form for two years and information for the previous 12 months shall be maintained on-line.

(5) Nothing in this paragraph shall be construed as requiring a pharmacist to obtain, record, and maintain patient information other than prescription drug order information when a patient or patient's agent refuses to provide the necessary information for such patient medication records.

(d) Prescription drug order records maintained in a manual system.

(1) Original prescriptions shall be maintained in three files as specified in subsection (b)(5)(C) of this section.

(2) Refills.

(A) Each time a prescription drug order is refilled, a record of such refill shall be made:

(i) on the back of the prescription by recording the date of dispensing, the written initials or identification code of the dispensing pharmacist, and the amount dispensed. (If the pharmacist merely initials and dates the back of the prescription drug order, he or she shall be deemed to have dispensed a refill for the full face amount of the prescription drug order); or

(ii) on another appropriate, uniformly maintained, readily retrievable record, such as medication records, which indicates by patient name the following information:

(I) unique identification number of the prescription;

(II) name and strength of the drug dispensed;

(III) date of each dispensing;

(IV) quantity dispensed at each dispensing;

(V) initials or identification code of the dispensing pharmacist; and

(VI) total number of refills for the prescription.

(B) If refill records are maintained in accordance with subparagraph (A)(ii) of this paragraph, refill records for controlled substances in Schedules III - V shall be maintained separately from refill records of dangerous drugs and nonprescription drugs.

(3) Authorization of refills. Practitioner authorization for additional refills of a prescription drug order shall be noted on the original prescription, in addition to the documentation of dispensing the refill.

(4) Transfer of prescription drug order information. For the purpose of refill or initial dispensing, the transfer of original prescription drug order information is permissible between pharmacies, subject to the following requirements:

(A) the transfer of original prescription drug order information for controlled substances listed in Schedule III, IV, or V is permissible between pharmacies on a one-time basis;

(B) the transfer of original prescription drug order information for dangerous drugs is permissible between pharmacies without limitation up to the number of originally authorized refills;

(C) the transfer is communicated directly between pharmacists and/or pharmacist interns;

(D) both the original and the transferred prescription drug order are maintained for a period of two years from the date of last refill;

(E) the pharmacist or pharmacist intern transferring the prescription drug order information shall:

(i) write the word "void" on the face of the invalidated prescription drug order; and

(ii) record on the reverse of the invalidated prescription drug order the following information:

(I) the name, address, and if a controlled substance, the DEA registration number of the pharmacy to which such prescription drug order is transferred;

(II) the name of the pharmacist or pharmacist intern receiving the prescription drug order information;

(III) the name of the pharmacist or pharmacist intern transferring the prescription drug order information; and

(IV) the date of the transfer;

(F) the pharmacist or pharmacist intern receiving the transferred prescription drug order information shall:

(i) write the word "transfer" on the face of the transferred prescription drug order; and

(ii) record on the transferred prescription drug order the following information:

(I) original date of issuance and date of dispensing or receipt, if different from date of issuance;

(II) original prescription number and the number of refills authorized on the original prescription drug order;

(III) number of valid refills remaining and the date of last refill, if applicable;

(IV) name, address, and if a controlled substance, the DEA registration number of the pharmacy from which such prescription information is transferred; and

(V) name of the pharmacist or pharmacist intern transferring the prescription drug order information.

(5) A pharmacist or pharmacist intern may not refuse to transfer original prescription information to another pharmacist or pharmacist intern who is acting on behalf of a patient and who is making a request for this information as specified in paragraph (4) of this subsection.

(e) Prescription drug order records maintained in a data processing system.

(1) General requirements for records maintained in a data processing system.

(A) Compliance with data processing system requirements. If a Class A (community) pharmacy's data processing system is not in compliance with this subsection, the pharmacy must maintain a manual recordkeeping system as specified in subsection (c) of this section.

(B) Original prescriptions. Original prescriptions shall be maintained in three files as specified in subsection (b)(5)(C) of this section.

(C) Requirements for backup systems.

(i) The pharmacy shall maintain a backup copy of information stored in the data processing system using disk, tape, or other electronic backup system and update this backup copy on a regular basis, at least monthly, to assure that data is not lost due to system failure.

(ii) Data processing systems shall have a workable (electronic) data retention system which can produce an audit trail of drug usage for the preceding two years as specified in paragraph (2)(G) of this subsection.

(D) Change or discontinuance of a data processing system.

(i) Records of dispensing. A pharmacy that changes or discontinues use of a data processing system must:

(I) transfer the records of dispensing to the new data processing system; or

(II) purge the records of dispensing to a printout which contains the same information required on the daily printout as specified in paragraph (2)(B) of this subsection. The information on this hard-copy printout shall be sorted and printed by prescription number and list each dispensing for this prescription chronologically.

(ii) Other records. A pharmacy that changes or discontinues use of a data processing system must:

(I) transfer the records to the new data processing system; or

(II) purge the records to a printout which contains all of the information required on the original document.

(iii) Maintenance of purged records. Information purged from a data processing system must be maintained by the pharmacy for two years from the date of initial entry into the data processing system.

(E) Loss of data. The pharmacist-in-charge shall report to the board in writing any significant loss of information from the data processing system within 10 days of discovery of the loss.

(2) Records of dispensing.

(A) Each time a prescription drug order is filled or refilled, a record of such dispensing shall be entered into the data processing system.

(B) The data processing system shall have the capacity to produce a daily hard-copy printout of all original prescriptions dispensed and refilled. This hard-copy printout shall contain the following information:

(i) unique identification number of the prescription;

(ii) date of dispensing;

(iii) patient name;

(iv) prescribing practitioner's name;

(v) name and strength of the drug product actually dispensed; if generic name, the brand name or manufacturer of drug dispensed;

(vi) quantity dispensed;

(vii) initials or an identification code of the dispensing pharmacist; and

(viii) if not immediately retrievable via CRT display, the following shall also be included on the hard-copy printout:

(I) patient's address;

(II) prescribing practitioner's address;

(III) practitioner's DEA registration number, if the prescription drug order is for a controlled substance;

(IV) quantity prescribed, if different from the quantity dispensed;

(V) date of issuance of the prescription drug order, if different from the date of dispensing; and

(VI) total number of refills dispensed to date for that prescription drug order.

(C) The daily hard-copy printout shall be produced within 72 hours of the date on which the prescription drug orders were dispensed and shall be maintained in a separate file at the pharmacy. Records of controlled substances shall be readily retrievable from records of noncontrolled substances.

(D) Each individual pharmacist who dispenses or refills a prescription drug order shall verify that the data indicated on the daily hard-copy printout is correct, by dating and signing such document in the same manner as signing a check or legal document (e.g., J.H. Smith, or John H. Smith) within seven days from the date of dispensing.

(E) In lieu of the printout described in subparagraph (B) of this paragraph, the pharmacy shall maintain a log book in which each individual pharmacist using the data processing system shall sign a statement each day, attesting to the fact that the information entered into the data processing system that day has been reviewed by him or her and is correct as entered. Such log book shall be maintained at the pharmacy employing such a system for a period of two years after the date of dispensing; provided, however, that the data processing system can produce the hard-copy printout on demand by an authorized agent of the Texas State Board of Pharmacy, the Texas Department of Public Safety, or the Drug Enforcement Administration. If no printer is available on site, the hard-copy printout shall be available within 48 hours with a certification by the individual providing the printout, which states that the printout is true and correct as of the date of entry and such information has not been altered, amended, or modified.

(F) The pharmacist-in-charge is responsible for the proper maintenance of such records and responsible that such data processing system can produce the records outlined in this section and that such system is in compliance with this subsection.

(G) The data processing system shall be capable of producing a hard-copy printout of an audit trail for all dispensings (original and refill) of any specified strength and dosage form of a drug (by either brand or generic name or both) during a specified time period.

(i) Such audit trail shall contain all of the information required on the daily printout as set out in subparagraph (B) of this paragraph.

(ii) The audit trail required in this subparagraph shall be supplied by the pharmacy within 48 hours, if requested by an authorized agent of the Texas State Board of Pharmacy, Department of Public Safety, or Drug Enforcement Administration.

(H) Failure to provide the records set out in this subsection, either on site or within 48 hours for whatever reason, constitutes prima facie evidence of failure to keep and maintain records.

(I) The data processing system shall provide on-line retrieval (via CRT display or hard-copy printout) of the information set out in subparagraph (B) of this paragraph of:

(i) the original controlled substance prescription drug orders currently authorized for refilling; and

(ii) the current refill history for Schedules III, IV, and V controlled substances for the immediately preceding six-month period.

(J) In the event that a pharmacy which uses a data processing system experiences system downtime, the following is applicable:

(i) an auxiliary procedure shall ensure that refills are authorized by the original prescription drug order and that the maximum number of refills has not been exceeded or authorization from the prescribing practitioner shall be obtained prior to dispensing a refill; and

(ii) all of the appropriate data shall be retained for on-line data entry as soon as the system is available for use again.

(3) Authorization of refills. Practitioner authorization for additional refills of a prescription drug order shall be noted as follows:

(A) on the hard-copy prescription drug order;

(B) on the daily hard-copy printout; or

(C) via the CRT display.

(4) Transfer of prescription drug order information. For the purpose of refill or initial dispensing, the transfer of original prescription drug order information is permissible between pharmacies, subject to the following requirements.

(A) The transfer of original prescription drug order information for controlled substances listed in Schedule III, IV, or V is permissible between pharmacies on a one-time basis only. However, pharmacies electronically sharing a real-time, on-line database may transfer up to the maximum refills permitted by law and the prescriber's authorization.

(B) The transfer of original prescription drug order information for dangerous drugs is permissible between pharmacies without limitation up to the number of originally authorized refills.

(C) The transfer is communicated directly between pharmacists and/or pharmacist interns or as authorized in paragraph (5) of this subsection.

(D) Both the original and the transferred prescription drug orders are maintained for a period of two years from the date of last refill.

(E) The pharmacist or pharmacist intern transferring the prescription drug order information shall:

(i) write the word "void" on the face of the invalidated prescription drug order; and

(ii) record on the reverse of the invalidated prescription drug order the following information:

(I) the name, address, and if a controlled substance, the DEA registration number of the pharmacy to which such prescription is transferred;

(II) the name of the pharmacist or pharmacist intern receiving the prescription drug order information;

(III) the name of the pharmacist or pharmacist intern transferring the prescription drug order information; and

(IV) the date of the transfer.

(F) The pharmacist or pharmacist intern receiving the transferred prescription drug order information shall:

(i) write the word "transfer" on the face of the transferred prescription drug order; and

(ii) record on the transferred prescription drug order the following information:

(I) original date of issuance and date of dispensing or receipt, if different from date of issuance;

(II) original prescription number and the number of refills authorized on the original prescription drug order;

(III) number of valid refills remaining and the date of last refill, if applicable;

(IV) name, address, and if a controlled substance, the DEA registration number of the pharmacy from which such prescription drug order information is transferred; and

(V) name of the pharmacist or pharmacist intern transferring the prescription drug order information.

(G) Prescription drug orders may not be transferred by non-electronic means during periods of downtime except on consultation with and authorization by a prescribing practitioner; provided however, during downtime, a hard copy of a prescription drug order may be made available for informational purposes only, to the patient, a pharmacist or pharmacist intern, and the prescription may be read to a pharmacist or pharmacist intern by telephone.

(H) The original prescription drug order shall be invalidated in the data processing system for purposes of filling or refilling, but shall be maintained in the data processing system for refill history purposes.

(I) If the data processing system has the capacity to store all the information required in subparagraphs (E) and (F) of this paragraph, the pharmacist is not required to record this information on the original or transferred prescription drug order.

(J) The data processing system shall have a mechanism to prohibit the transfer or refilling of controlled substance prescription drug orders which have been previously transferred.

(5) Electronic transfer of prescription drug order information between pharmacies. Pharmacies electronically accessing the same prescription drug order records may electronically transfer prescription information if the following requirements are met.

(A) The original prescription is voided and the following information is documented in the records of the transferring pharmacy:

(i) the name, address, and if a controlled substance, the DEA registration number of the pharmacy to which such prescription is transferred;

(ii) the name of the pharmacist or pharmacist intern receiving the prescription drug order information; and

(iii) the date of the transfer.

(B) Pharmacies not owned by the same person may electronically access the same prescription drug order records, provided the owner or chief executive officer of each pharmacy signs an agreement allowing access to such prescription drug order records.

(6) A pharmacist or pharmacist intern may not refuse to transfer original prescription information to another pharmacist or pharmacist intern who is acting on behalf of a patient and who is making a request for this information as specified in paragraphs (4) and (5) of this subsection.

(f) Limitation to one type of recordkeeping system. When filing prescription drug order information a pharmacy may use only one of the two systems described in subsection (d) or (e) of this section.

(g) Distribution of controlled substances to another registrant. A pharmacy may distribute controlled substances to a practitioner, another pharmacy, or other registrant, without being registered to distribute, under the following conditions.

(1) The registrant to whom the controlled substance is to be distributed is registered under the Controlled Substances Act to dispense that controlled substance.

(2) The total number of dosage units of controlled substances distributed by a pharmacy may not exceed 5.0% of all controlled substances dispensed and distributed by the pharmacy during the 12-month period in which the pharmacy is registered; if at any time it does exceed 5.0%, the pharmacy is required to obtain an additional registration to distribute controlled substances.

(3) If the distribution is for a Schedule III, IV, or V controlled substance, a record shall be maintained which indicates:

(A) the actual date of distribution;

(B) the name, strength, and quantity of controlled substances distributed;

(C) the name, address, and DEA registration number of the distributing pharmacy; and

(D) the name, address, and DEA registration number of the pharmacy, practitioner, or other registrant to whom the controlled substances are distributed.

(4) If the distribution is for a Schedule I or II controlled substance, the following is applicable.

(A) The pharmacy, practitioner, or other registrant who is receiving the controlled substances shall issue Copy 1 and Copy 2 of a DEA order form (DEA 222C) to the distributing pharmacy.

(B) The distributing pharmacy shall:

(i) complete the area on the DEA order form (DEA 222C) titled "To Be Filled in by Supplier";

(ii) maintain Copy 1 of the DEA order form (DEA 222C) at the pharmacy for two years; and

(iii) forward Copy 2 of the DEA order form (DEA 222C) to the Divisional Office of the Drug Enforcement Administration.

(h) Other records. Other records to be maintained by a pharmacy:

(1) a permanent log of the initials or identification codes which will identify each dispensing pharmacist by name (the initials or identification code shall be unique to ensure that each pharmacist can be identified, i.e., identical initials or identification codes shall not be used);

(2) Copy 3 of DEA order form (DEA 222C) which has been properly dated, initialed, and filed, and all copies of each unaccepted or defective order form and any attached statements or other documents;

(3) a hard copy of the power of attorney to sign DEA 222C order forms (if applicable);

(4) suppliers' invoices of dangerous drugs and controlled substances; pharmacists or other responsible individuals shall verify that the controlled drugs listed on the invoices were actually received by clearly recording their initials and the actual date of receipt of the controlled substances;

(5) suppliers' credit memos for controlled substances and dangerous drugs;

(6) a hard copy of inventories required by §291.17 of this title (relating to Inventory Requirements);

(7) hard-copy reports of surrender or destruction of controlled substances and/or dangerous drugs to an appropriate state or federal agency;

(8) a hard copy of the Schedule V nonprescription register book;

(9) records of distribution of controlled substances and/or dangerous drugs to other pharmacies, practitioners, or registrants; and

(10) a hard copy of any notification required by the Texas Pharmacy Act or the sections in this chapter, including, but not limited to, the following:

(A) reports of theft or significant loss of controlled substances to DEA, Department of Public Safety, and the board;

(B) notifications of a change in pharmacist-in-charge of a pharmacy; and

(C) reports of a fire or other disaster which may affect the strength, purity, or labeling of drugs, medications, devices, or other materials used in the diagnosis or treatment of injury, illness, and disease.

(i) Permission to maintain central records. Any pharmacy that uses a centralized recordkeeping system for invoices and financial data shall comply with the following procedures.

(1) Controlled substance records. Invoices and financial data for controlled substances may be maintained at a central location provided the following conditions are met.

(A) Prior to the initiation of central recordkeeping, the pharmacy submits written notification by registered or certified mail to the divisional director of the Drug Enforcement Administration as required by Title 21, Code of Federal Regulations, §1304.04(a), and submits a copy of this written notification to the Texas State Board of Pharmacy. Unless the registrant is informed by the divisional director of the Drug Enforcement Administration that permission to keep central records is denied, the pharmacy may maintain central records commencing 14 days after receipt of notification by the divisional director.

(B) The pharmacy maintains a copy of the notification required in subparagraph (A) of this paragraph.

(C) The records to be maintained at the central record location shall not include executed DEA order forms, prescription drug orders, or controlled substance inventories, which shall be maintained at the pharmacy.

(2) Dangerous drug records. Invoices and financial data for dangerous drugs may be maintained at a central location.

(3) Access to records. If the records are kept on microfilm, computer media, or in any form requiring special equipment to render the records easily readable, the pharmacy shall provide access to such equipment with the records.

(4) Delivery of records. The pharmacy agrees to deliver all or any part of such records to the pharmacy location within two business days of written request of a board agent or any other authorized official.

(j) Ownership of pharmacy records. For the purposes of these sections, a pharmacy licensed under the Act is the only entity which may legally own and maintain prescription drug records.

(k) Confidentiality.

(1) A pharmacist shall provide adequate security of prescription drug orders, and patient medication records to prevent indiscriminate or unauthorized access to confidential health information. If prescription drug orders, requests for refill authorization, or other confidential health information are not transmitted directly between a pharmacy and a physician but are transmitted through a data communication device, confidential health information may not be accessed or maintained by the operator of the data communication device unless specifically authorized to obtain the confidential information by this subsection.

(2) Confidential records are privileged and may be released only to:

(A) the patient or the patient's agent;

(B) a practitioner or another pharmacist if, in the pharmacist's professional judgement, the release is necessary to protect the patient's health and well being;

(C) the board or to a person or another state or federal agency authorized by law to receive the confidential record;

(D) a law enforcement agency engaged in investigation of a suspected violation of Chapter 481 or 483, Health and Safety Code, or the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. Section 801 et seq.);

(E) a person employed by a state agency that licenses a practitioner, if the person is performing the person's official duties; or

(F) an insurance carrier or other third party payor authorized by a patient to receive such information.

§291.36 Class A Pharmacies Compounding Sterile Pharmaceuticals

(a) Purpose. The purpose of this section is to provide standards for the preparation, labeling, and distribution of compounded sterile pharmaceuticals by licensed pharmacies, pursuant to a prescription drug order. The intent of these standards is to provide a minimum level of pharmaceutical care to the patient so that the patient's health is protected while striving to produce positive patient outcomes.

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

(1) ACPE--The American Council on Pharmaceutical Education.

(2) Act--The Texas Pharmacy Act, Chapter 551 - 566 and 568 - 569, Occupations Code, as amended.

(3) Accurately as prescribed--Dispensing, delivering, and/or distributing a prescription drug order:

(A) to the correct patient (or agent of the patient) for whom the drug or device was prescribed;

(B) with the correct drug in the correct strength, quantity, and dosage form ordered by the practitioner; and

(C) with correct labeling (including directions for use) as ordered by the practitioner. Provided, however, that nothing herein shall prohibit pharmacist substitution if substitution is conducted in strict accordance with applicable laws and rules, including Chapters 562 and 563 of the Texas Pharmacy Act.

(4) Advanced practice nurse--A registered nurse approved by the Texas State Board of Nurse Examiners to practice as an advanced practice nurse on the basis of completion of an advanced education program. The term includes a nurse practitioner, a nurse midwife, a nurse anesthetist, and a clinical nurse specialist.

(5) Airborne particulate cleanliness class--The level of cleanliness specified by the maximum allowable number of particles per cubic foot of air as specified in Federal Standard 209E, et seq. For example:

(A) Class 100 is an atmospheric environment which contains less than 100 particles 0.5 microns in diameter per cubic foot of air;

(B) Class 10,000 is an atmospheric environment which contains less than 10,000 particles 0.5 microns in diameter per cubic foot of air; and

(C) Class 100,000 is an atmospheric environment which contains less than 100,000 particles 0.5 microns in diameter per cubic foot of air.

(6) Ancillary supplies--Supplies necessary for the administration of compounded sterile pharmaceuticals.

(7) Aseptic preparation--The technique involving procedures designed to preclude contamination of drugs, packaging, equipment, or supplies by microorganisms during processing.

(8) Automated compounding or counting device--An automated device that compounds, measures, counts, and or packages a specified quantity of dosage units for a designated drug product.

(9) Batch preparation compounding--Compounding of multiple sterile-product units, in a single discrete process, by the same individual(s), carried out during one limited time period. Batch preparation/compounding does not include the preparation of multiple sterile-product units pursuant to patient specific medication orders.

(10) Biological Safety Cabinet--Containment unit suitable for the preparation of low to moderate risk agents where there is a need for protection of the product, personnel, and environment, according to National Sanitation Foundation (NSF) Standard 49.

(11) Board--The Texas State Board of Pharmacy.

(12) Carrying out or signing a prescription drug order--The completion of a prescription drug order presigned by the delegating physician, or the signing of a prescription by an advanced practice nurse or physician assistant after the person has been designated with the Texas State Board of Medical Examiners by the delegating physician as a person delegated to sign a prescription. The following information shall be provided on each prescription:

(A) patient's name and address;

(B) name, strength, and quantity of the drug to be dispensed;

(C) directions for use;

(D) the intended use of the drug, if appropriate;

(E) the name, address, and telephone number of the physician;

(F) the name, address, telephone number, identification number, and if the prescription is for a controlled substance, the DEA number; of the advanced practice nurse or physician assistant completing the prescription drug order;

(G) the date; and

(H) the number of refills permitted.

(13) Clean room--A room in which the concentration of airborne particles is controlled and there are one or more clean zones according to Federal Standard 209E, et seq.

(14) Clean zone--A defined space in which the concentration of airborne particles is controlled to meet a specified airborne particulate cleanliness class.

(15) Compounding--The preparation, mixing, assembling, packaging, or labeling of a drug or device:

(A) as the result of a practitioner's prescription drug or medication order or initiative based on the practitioner-patient pharmacist relationship in the course of professional practice;

(B) in anticipation of prescription drug or medication orders based on routine, regularly observed prescribing patterns; or

(C) for the purpose of or as an incident to research, teaching, or chemical analysis and not for sale or dispensing.

(16) Confidential record--Any health related record that contains information that identifies an individual and that is maintained by a pharmacy or pharmacist such as a patient medication record, prescription drug order, or medication drug order.

(17) Controlled area--A controlled area is the area designated for preparing sterile pharmaceuticals.

(18) Controlled substance--A drug, immediate precursor, or other substance listed in Schedules I - V or Penalty Groups 1 - 4 of the Texas Controlled Substances Act, as amended, or a drug, immediate precursor, or other substance included in Schedule I, II, III, IV, or V of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended (Public Law 91-513).

(19) Critical areas--Any area in the controlled area where products or containers are exposed to the environment.

(20) Cytotoxic--A pharmaceutical that has the capability of killing living cells.

(21) Dangerous drug--A drug or device that:

(A) is not included in Penalty Group 1, 2, 3, or 4, Chapter 481, Health and Safety Code, and is unsafe for self-medication; or

(B) bears or is required to bear the legend:

(i) "Caution: federal law prohibits dispensing without prescription" or "Rx only" or another legend that complies with federal law; or

(ii) "Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian."

(22) Data communication device--An electronic device that receives electronic information from one source and transmits or routes it to another (e.g., bridge, router, switch or gateway).

(23) Deliver or delivery--The actual, constructive, or attempted transfer of a prescription drug or device or controlled substance from one person to another, whether or not for a consideration.

(24) Designated agent--

(A) a licensed nurse, physician assistant, pharmacist, or other individual designated by a practitioner, and for whom the practitioner assumes legal responsibility, who communicates prescription drug orders to a pharmacist;

(B) a licensed nurse, physician assistant, or pharmacist employed in a health care facility to whom the practitioner communicates a prescription drug order;

(C) an advanced practice nurse or physician assistant authorized by a practitioner to carry out or sign a prescription drug order for dangerous drugs under Chapter 157 of the Medical Practice Act (Subtitle B, Occupations Code); or

(D) a person who is a licensed vocational nurse or has an education equivalent to or greater than that required for a licensed vocational nurse designated by the practitioner to communicate prescriptions for an advanced practice nurse or physician assistant authorized by the practitioner to sign prescription drug orders under Chapter 157 of the Medical Practice Act (Subtitle B, Occupations Code).

(25) Device--An instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component part or accessory, that is required under federal or state law to be ordered or prescribed by a practitioner.

(26) Dispense--Preparing, packaging, compounding, or labeling for delivery a prescription drug or device in the course of professional practice to an ultimate user or his agent by or pursuant to the lawful order of a practitioner.

(27) Dispensing pharmacist--The pharmacist responsible for the final check of the dispensed prescription before delivery to the patient.

(28) Distribute--The delivery of a prescription drug or device other than by administering or dispensing.

(29) Downtime--Period of time during which a data processing system is not operable.

(30) Drug regimen review--An evaluation of prescription drug or medication orders and patient medication records for:

(A) known allergies;

(B) rational therapy--contraindications;

(C) reasonable dose and route of administration;

(D) reasonable directions for use;

(E) duplication of therapy;

(F) drug-drug interactions;

(G) drug-food interactions;

(H) drug-disease interactions;

(I) adverse drug reactions; and

(J) proper utilization, including overutilization or underutilization.

(31) Electronic prescription drug order--A prescription drug order which is transmitted by an electronic device to the receiver (pharmacy).

(32) Electronic signature--A unique security code or other identifier which specifically identifies the person entering information into a data processing system. A facility which utilizes electronic signatures must:

(A) maintain a permanent list of the unique security codes assigned to persons authorized to use the data processing system; and

(B) have an ongoing security program which is capable of identifying misuse and/or unauthorized use of electronic signatures.

(33) Expiration date--The date (and time, when applicable) beyond which a product should not be used.

(34) Full-time pharmacist--A pharmacist who works in a pharmacy from 30 to 40 hours per week or if the pharmacy is open less than 60 hours per week, one-half of the time the pharmacy is open.

(35) Hard copy--A physical document that is readable without the use of a special device (i.e., cathode ray tube (CRT), microfiche reader, etc.).

(36) Medical Practice Act--The Texas Medical Practice Act, Subtitle B, Occupations Code, as amended.

(37) New prescription drug order--A prescription drug order that:

(A) has not been dispensed to the patient in the same strength and dosage form by this pharmacy within the last year;

(B) is transferred from another pharmacy; and/or

(C) is a discharge prescription drug order. (Note: furlough prescription drug orders are not considered new prescription drug orders.)

(38) Original prescription--The:

(A) original written prescription drug orders; or

(B) original verbal or electronic prescription drug orders reduced to writing either manually or electronically by the pharmacist.

(39) Part-time pharmacist--A pharmacist who works less than full-time.

(40) Patient counseling--Communication by the pharmacist of information to the patient or patient's agent, in order to improve therapy by ensuring proper use of drugs and devices.

(41) Pharmacist-in-charge--The pharmacist designated on a pharmacy license as the pharmacist who has the authority or responsibility for a pharmacy's compliance with laws and rules pertaining to the practice of pharmacy.

(42) Pharmaceutical care--The provision of drug therapy and other pharmaceutical services intended to assist in the cure or prevention of a disease, elimination or reduction of a patient's symptoms, or arresting or slowing of a disease process.

(43) Pharmacy technicians--An individual whose responsibility in a pharmacy is to provide technical services that do not require professional judgment regarding preparing and distributing drugs and who works under the direct supervision of and is responsible to a pharmacist. Pharmacy technician includes registered pharmacy technicians and pharmacy technician trainees.

(44) Pharmacy technician trainee--A person who is not registered as a pharmacy technician by the board and is either:

(A) participating in a pharmacy's technician training program; or

(B) currently enrolled in a:

(i) pharmacy technician training program accredited by the American Society of Health-System Pharmacists; or

(ii) health science technology education program in a Texas high school that is accredited by the Texas Education Agency.

(45) Physician assistant--A physician assistant recognized by the Texas State Board of Medical Examiners as having the specialized education and training required under Subtitle B, Chapter 157, Occupations Code, and issued an identification number by the Texas State Board of Medical Examiners.

(46) Practitioner--

(A) A person licensed or registered to prescribe, distribute, administer, or dispense a prescription drug or device in the course of professional practice in this state, including a physician, dentist, podiatrist, or veterinarian but excluding a person licensed under this subtitle;

(B) A person licensed by another state, Canada, or the United Mexican States in a health field in which, under the law of this state, a license holder in this state may legally prescribe a dangerous drug;

(C) A person practicing in another state and licensed by another state as a physician, dentist, veterinarian, or podiatrist, who has a current federal Drug Enforcement Administration registration number and who may legally prescribe a Schedule II, III, IV, or V controlled substance, as specified under Chapter 481, Health and Safety Code, in that other state; or

(D) An advanced practice nurse or physician assistant to whom a physician has delegated the authority to carry out or sign prescription drug orders under §§157.0511, 157.052, 157.053, 157.054, 157.0541, or 157.0542.

(47) Prepackaging--The act of repackaging and relabeling quantities of drug products from a manufacturer's original commercial container into a prescription container for dispensing by a pharmacist to the ultimate consumer.

(48) Prescription drug--

(A) a substance for which federal or state law requires a prescription before it may be legally dispensed to the public;

(B) a drug or device that under federal law is required, prior to being dispensed or delivered, to be labeled with either of the following statements:

(i) "Caution: federal law prohibits dispensing without prescription"; or

(ii) "Caution: federal law restricts this drug to use by or on order of a licensed veterinarian"; or

(C) a drug or device that is required by any applicable federal or state law or regulation to be dispensed on prescription only or is restricted to use by a practitioner only.

(49) Prescription drug order--

(A) an order from a practitioner or a practitioner's designated agent to a pharmacist for a drug or device to be dispensed; or

(B) an order pursuant to the Subtitle B, Chapter 157, Occupations Code.

(50) Process validation--Documented evidence providing a high degree of assurance that a specific process will consistently produce a product meeting its predetermined specifications and quality attributes.

(51) Quality assurance--The set of activities used to assure that the process used in the preparation of sterile drug products lead to products that meet predetermined standards of quality.

(52) Quality control--The set of testing activities used to determine that the ingredients, components (e.g., containers), and final sterile pharmaceuticals prepared meet predetermined requirements with respect to identity, purity, non-pyrogenicity, and sterility.

(53) Sample--A prescription drug which is not intended to be sold and is intended to promote the sale of the drug.

(54) State--One of the 50 United States of America, a U.S. territory, or the District of Columbia.

(55) Sterile pharmaceutical--A dosage form free from living micro-organisms.

(56) Texas Controlled Substances Act--The Texas Controlled Substances Act, Health and Safety Code, Chapter 481, as amended.

(57) Unit-dose packaging--The ordered amount of drug in a dosage form ready for administration to a particular patient, by the prescribed route at the prescribed time, and properly labeled with name, strength, and expiration date of the drug.

(58) Unusable drugs--Drugs or devices that are unusable for reasons such as they are adulterated, misbranded, expired, defective, or recalled.

(59) Written protocol--A physicians order, standing medical order, standing delegation order, or other order or protocol as defined by rule of the Texas State Board of Medical Examiners under the Texas Medical Practice Act.

(c) Personnel.

(1) Pharmacist-in-charge.

(A) General.

(i) Each Class A pharmacy compounding sterile pharmaceuticals shall have one pharmacist-in-charge who is employed on a full-time basis, who may be the pharmacist-in-charge for only one such pharmacy; provided, however, such pharmacist-in-charge may be the pharmacist-in-charge of:

(I) more than one Class A pharmacy, if the additional Class A pharmacies are not open to provide pharmacy services simultaneously; or

(II) up to two Class A pharmacies open simultaneously if the pharmacist-in-charge works at least 10 hours per week in each pharmacy.

(ii) The pharmacist-in-charge shall comply with the provisions of §291.17 of this title (relating to Inventory Requirements).

(B) Responsibilities. The pharmacist-in-charge shall have responsibility for the practice of pharmacy at the pharmacy for which he or she is the pharmacist-in-charge. The pharmacist-in-charge may advise the owner on administrative and operational concerns. The pharmacist-in-charge shall have the responsibility for, at a minimum, the following:

(i) developing a system to assure that all pharmacy personnel responsible for compounding and/or supervising the compounding of sterile pharmaceuticals within the pharmacy receive appropriate education and training and competency evaluation;

(ii) supervising a system to assure appropriate procurement of drugs and devices and storage of all pharmaceutical materials including pharmaceuticals, components used in the compounding of pharmaceuticals, and drug delivery devices;

(iii) developing a system for the disposal and distribution of drugs from the Class A pharmacy;

(iv) developing a system for bulk compounding or batch preparation of drugs;

(v) developing a system for the compounding, sterility assurance, quality assurance and quality control of sterile pharmaceuticals;

(vi) participating in those aspects of the patient care evaluation program relating to pharmaceutical material utilization and effectiveness;

(vii) implementing the policies and decisions relating to pharmaceutical services;

(viii) maintaining records of all transactions of the Class A pharmacy necessary to maintain accurate control over and accountability for all pharmaceutical materials required by applicable state and federal laws and rules;

(ix) supervising a system to assure maintenance of effective controls against the theft or diversion of prescription drugs, and records for such drugs;

(x) adherence to policies and procedures regarding the maintenance of records in a data processing system such that the data processing system is in compliance with this section;

(xi) assuring that the pharmacy has a system to dispose of cytotoxic waste in a manner so as not to endanger the public health; and

(xii) legal operation of the pharmacy, including meeting all inspection and other requirements of all state and federal laws or rules governing the practice of pharmacy.

(2) Owner. The owner of a Class A pharmacy shall have responsibility for all administrative and operational functions of the pharmacy. The pharmacist-in-charge may advise the owner on administrative and operational concerns. The owner shall have responsibility for, at a minimum, the following, and if the owner is not a Texas licensed pharmacist, the owner shall consult with the pharmacist-in-charge or another Texas licensed pharmacist:

(A) establishment of policies for procurement of prescription drugs and devices and other products dispensed from the Class A pharmacy;

(B) establishment and maintenance of effective controls against the theft or diversion of prescription drugs;

(C) if the pharmacy uses an automated pharmacy dispensing system, reviewing and approving all policies and procedures for system operation, safety, security, accuracy and access, patient confidentiality, prevention of unauthorized access, and malfunction;

(D) providing the pharmacy with the necessary equipment and resources commensurate with its level and type of practice; and

(E) establishment of policies and procedures regarding maintenance, storage, and retrieval of records in a data processing system such that the system is in compliance with state and federal requirements.

(3) Pharmacists.

(A) General.

(i) The pharmacist-in-charge shall be assisted by sufficient number of additional licensed pharmacists as may be required to operate the pharmacy competently, safely, and adequately to meet the needs of the patients of the pharmacy.

(ii) All pharmacists shall assist the pharmacist-in-charge in meeting his or her responsibilities in ordering, dispensing, and accounting for prescription drugs.

(iii) Pharmacists are solely responsible for the direct supervision of pharmacy technicians and for designating and delegating duties, other than those listed in subparagraph (B) of this paragraph, to pharmacy technicians. Each pharmacist:

(I) shall verify the accuracy of all acts, tasks, and functions performed by pharmacy technicians; and

(II) shall be responsible for any delegated act performed by pharmacy technicians under his or her supervision.

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

(v) A pharmacist shall be accessible at all times to respond to patients' and other health professionals' questions and needs. Such access may be through a telephone which is answered 24 hours a day.

(vi) 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.

(B) Duties. Duties which may only be performed by a pharmacist are as follows:

(i) receiving verbal prescription drug orders and reducing these orders to writing, either manually or electronically;

(ii) interpreting and evaluating prescription drug orders;

(iii) selection of drug products;

(iv) interpreting patient medication records and performing drug regimen reviews;

(v) performing the final check of the dispensed prescription before delivery to the patient to ensure that the prescription has been dispensed accurately as prescribed;

(vi) communicating to the patient or patient's agent information about the prescription drug or device which in the exercise of the pharmacist's professional judgment, the pharmacist deems significant as specified in this paragraph;

(vii) communicating to the patient or the patient's agent on his or her request, information concerning any prescription drugs dispensed to the patient by the pharmacy;

(viii) assuring that a reasonable effort is made to obtain, record, and maintain patient medication records; and

(ix) performing a specific act of drug therapy management for a patient delegated to a pharmacist by a written protocol

from a physician licensed in this state in compliance with the Medical Practice Act.

(4) Pharmacy technicians.

(A) General.

(i) On June 1, 2004, all persons employed as pharmacy technicians shall be either registered pharmacy technicians or pharmacy technician trainees as follows.

(I) All persons who have passed the required pharmacy technician certification examination shall be registered with the board under the provisions this section.

(II) All persons who have not taken and passed the required pharmacy certification examination may be designated pharmacy technician trainees, if qualified under the provisions of §297.5 of this title (relating to Pharmacy Technician Trainees).

(ii) Between January 1, 2004, and May 31, 2004, all persons employed as pharmacy technicians who are qualified for registration by the board shall register according to the schedule designated by the board. Between January 1, 2004 and May 31, 2004, persons who are awaiting their scheduled time for registration and persons who have applied for registration, but the registration has not been completed shall comply with the rules in effect prior to January 1, 2004, relating to requirements and duties for certified or exempt pharmacy technicians.

(iii) All pharmacy technicians shall meet the training requirements specified in §297.6 of this title (relating to Pharmacy Technician Training).

(B) Duties.

(i) pharmacy technicians may not perform any of the duties listed in paragraph (2)(B) of this subsection.

(ii) A pharmacist may delegate to pharmacy technicians any nonjudgmental technical duty associated with the preparation and distribution of prescription drugs provided:

(I) a pharmacist verifies the accuracy of all acts, tasks, and functions performed by pharmacy technicians; and

(II) pharmacy technicians are under the direct supervision of and responsible to a pharmacist.

(iii) Pharmacy technicians may perform only nonjudgmental technical duties associated with the preparation and distribution of prescription drugs, including but not limited to the following.

(I) initiating and receiving refill authorization requests;

(II) entering prescription data into a data processing system;

(III) taking a stock bottle from the shelf for a prescription;

(IV) preparing and packaging prescription drug orders (i.e., counting tablets/capsules, measuring liquids and placing them in the prescription container);

(V) affixing prescription labels and auxiliary labels to the prescription container provided the pharmacy technician:

(-a-) has completed the training requirements outlined in §297.6 of this title; and

(-b-) is registered as pharmacy technician within the provisions of §297.3 of this title (relating to Registration Requirements).

(VI) reconstituting medications;

(VII) prepackaging and labeling prepackaged drugs;

(VIII) loading bulk unlabeled drugs into an automated dispensing system provided a pharmacist verifies that the system is properly loaded prior to use;

(IX) compounding sterile pharmaceuticals provided the pharmacy technician:

(-a-) has completed the training specified in this paragraph; and

(-b-) is supervised by a pharmacist who has completed the training specified in this paragraph who conducts in-process and final checks, and affixes his or her initials to the appropriate quality control records.

(X) compounding non-sterile prescription drug orders; and

(XI) bulk compounding.

(iv) Certified pharmacy technicians. Effective January 1, 2001, only certified pharmacy technicians may:

(I) affix a label to a prescription container; and

(II) compound sterile pharmaceuticals.

(C) Ratio of pharmacist to pharmacy technicians.

(i) The ratio of pharmacists to pharmacy technicians may not exceed 1:2 provided that only one pharmacy technician may be engaged in the compounding of sterile pharmaceuticals.

(ii) The ratio of pharmacists to pharmacy technicians may be 1:3 provided that at least one of the three technicians is a registered pharmacy technician and only one may be engaged in the compounding of sterile pharmaceuticals.

(5) Special education, training, and evaluation requirements for pharmacy personnel compounding or responsible for the direct supervision of pharmacy personnel compounding sterile pharmaceuticals.

(A) General.

(i) All pharmacy personnel preparing sterile pharmaceuticals shall receive didactic and experiential training and competency evaluation through demonstration, testing (written or practical) as outlined by the pharmacist-in-charge and described in the policy and procedure or training manual. Such training shall include instruction and experience in the following areas:

(I) aseptic technique;

(II) critical area contamination factors;

(III) environmental monitoring;

(IV) facilities;

(V) equipment and supplies;

(VI) sterile pharmaceutical calculations and terminology;

(VII) sterile pharmaceutical compounding documentation;

(VIII) quality assurance procedures;

(IX) aseptic preparation procedures including proper gowning and gloving technique;

(X) handling of cytotoxic and hazardous drugs, if applicable; and

(XI) general conduct in the controlled area.

(ii) The aseptic technique of each person compounding or responsible for the direct supervision of personnel compounding sterile pharmaceuticals shall be observed and evaluated as satisfactory through written or practical tests and process validation and such evaluation documented.

(iii) Although process validation may be incorporated into the experiential portion of a training program, process validation must be conducted at each pharmacy where an individual compounds sterile pharmaceuticals. No product intended for patient use shall be compounded by an individual until the on-site process validation test indicates that the individual can competently perform aseptic procedures, except that a pharmacist may temporarily compound sterile pharmaceuticals and supervise pharmacy technicians compounding sterile pharmaceuticals without process validation provided the pharmacist:

(I) has completed a recognized course in an accredited college of pharmacy or a course sponsored by an American Council on Pharmaceutical Education approved provider which provides 20 hours of instruction and experience in the areas listed in this subparagraph; and

(II) completes the on-site process validation within seven days of commencing work at the pharmacy.

(iv) Process validation procedures for assessing the preparation of specific types of sterile pharmaceuticals shall be representative of all types of manipulations, products, and batch sizes that personnel preparing that type of pharmaceutical are likely to encounter.

(v) The pharmacist-in-charge shall assure continuing competency of pharmacy personnel through in-service education, training, and process validation to supplement initial training. Personnel competency shall be evaluated:

(I) during orientation and training prior to the regular performance of those tasks;

(II) whenever the quality assurance program yields an unacceptable result;

(III) whenever unacceptable techniques are observed; and

(IV) at least on an annual basis.

(B) Pharmacists.

(i) All pharmacists who compound sterile pharmaceuticals or supervise pharmacy technicians compounding sterile pharmaceuticals shall:

(I) complete through a single course, a minimum of 20 hours of instruction and experience in the areas listed in subparagraph (A) of this paragraph. Such training may be through:

(-a-) completion of a structured on-the-job didactic and experiential training program at this pharmacy which provides 20 hours of instruction and experience in the areas listed in paragraph (1) of this subsection. Such training may not be transferred to another pharmacy unless the pharmacies are under common ownership and control and use a common training program; or

(-b-) completion of a recognized course in an accredited college of pharmacy or a course sponsored by an American Council on Pharmaceutical Education approved provider which provides 20 hours of instruction and experience in the areas listed in subparagraph (A) of this paragraph; and

(II) possess knowledge about:

(-a-) aseptic processing;

(-b-) quality control and quality assurance as related to environmental, component, and end-product testing;

(-c-) chemical, pharmaceutical, and clinical properties of drugs;

(-d-) container, equipment, and closure system selection; and

(-e-) sterilization techniques.

(ii) The required experiential portion of the training programs specified in this subparagraph must be supervised by an individual who has already completed training as specified in subparagraph (B) or (C) of this paragraph.

(C) Pharmacy technicians. In addition to the qualifications and training outlined in paragraph (3) of this subsection, all pharmacy technicians who compound sterile pharmaceuticals shall:

(i) have a high school or equivalent education;

(ii) either:

(I) complete through a single course, a minimum of 40 hours of instruction and experience in the areas listed in subparagraph (A) of this paragraph. Such training may be obtained through the:

(-a-) completion of a structured on-the-job didactic and experiential training program at this pharmacy which provides 40 hours of instruction and experience in the areas listed in subparagraph (A) of this paragraph. Such training may not be transferred to another pharmacy unless the pharmacies are under common ownership and control and use a common training program; or

(-b-) completion of a course sponsored by an ACPE approved provider which provides 40 hours of instruction and experience in the areas listed in subparagraph (A) of this paragraph; or

(II) completion of a training program which is accredited by the American Society of Health-System Pharmacists (formerly the American Society of Hospital Pharmacists). Individuals enrolled in training programs accredited by the American Society of Health-System Pharmacists may compound sterile pharmaceuticals in a licensed pharmacy provided:

(-a-) the compounding occurs only during times the individual is assigned to a pharmacy as a part of the experiential component of the American Society of Health-System Pharmacists training program;

(-b-) the individual is under the direct supervision of and responsible to a pharmacist who has completed training as specified in subparagraph (B) of this paragraph; and

(-c-) the supervising pharmacist conducts in-process and final checks; and

(iii) acquire the required experiential portion of the training programs specified in this subparagraph under the supervision of an individual who has already completed training as specified in subparagraph (B) or (C) of this paragraph.

(D) Documentation of Training. A written record of initial and in-service training and the results of written or practical testing and process validation of pharmacy personnel shall be maintained and contain the following information:

(i) name of the person receiving the training or completing the testing or process validation;

(ii) date(s) of the training, testing, or process validation;

(iii) general description of the topics covered in the training or testing or of the process validated;

(iv) name of the person supervising the training, testing, or process validation; and

(v) signature (first initial and last name or full signature) of the person receiving the training or completing the testing or process validation and the pharmacist-in-charge or other pharmacist employed by the pharmacy and designated by the pharmacist-in-charge as responsible for training, testing, or process validation of personnel.

(6) Identification of pharmacy personnel. Pharmacy personnel shall be identified as follows.

(A) Pharmacy technicians. All pharmacy technicians shall wear an identification tag or badge which bears the person's name and identifies him or her as a pharmacy technician trainee a registered pharmacy technician, or a certified pharmacy technician, if the technician maintains current certification with the Pharmacy Technician Certification Board or any other entity providing an examination approved by the Board.

(B) Pharmacist interns. All pharmacist interns shall wear an identification tag or badge which bears the person's name and identifies him or her as a pharmacist intern.

(C) Pharmacists. All pharmacists shall wear an identification tag or badge which bears the person's name and identifies him or her as a pharmacist.

(d) Operational standards.

(1) Licensing requirements.

(A) A Class A pharmacy compounding sterile pharmaceuticals shall register annually or biennially with the board on a pharmacy license application provided by the board, following the procedures specified in §291.1 of this title (relating to Pharmacy License Application).

(B) A Class A pharmacy compounding sterile pharmaceuticals which changes ownership shall notify the board within ten days of the change of ownership and apply for a new and separate license as specified in §291.4 of this title (relating to Change of Ownership).

(C) A Class A pharmacy compounding sterile pharmaceuticals which changes location and/or name shall notify the board within ten days of the change and file for an amended license as specified in §291.2 of this title (relating to Change of Location and/or Name).

(D) A Class A pharmacy compounding sterile pharmaceuticals owned by a partnership or corporation which changes managing officers shall notify the board in writing of the names of the new managing officers within ten days of the change, following the procedures in §291.3 of this title (relating to Change of Managing Officers).

(E) A Class A pharmacy compounding sterile pharmaceuticals shall notify the board in writing within ten days of closing, following the procedures in §291.5 of this title (relating to Closed Pharmacies).

(F) A separate license is required for each principal place of business and only one pharmacy license may be issued to a specific location.

(G) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for the issuance and renewal of a license and the issuance of an amended license.

(H) A Class A pharmacy compounding sterile pharmaceuticals, licensed under the provisions of the Act, §560.051(a)(1), which also operates another type of pharmacy which would otherwise be required to be licensed under the Act, §560.051(a)(2), concerning nuclear pharmacy (Class B), is not required to secure a license for such other type of pharmacy; provided, however, such licensee is required to comply with the provisions of §291.51 of this title (relating to Purpose), §291.52 of this title (relating to Definitions), §291.53 of this title (relating to Personnel), §291.54 of this title (relating to Operational Standards), and §291.55 of this title (relating to Records), contained in Nuclear Pharmacy (Class B), to the extent such sections are applicable to the operation of the pharmacy.

(I) A Class A pharmacy engaged in nonsterile compounding of drug products shall comply with the provisions of §§291.31 - 291.34 of this title (relating to Definitions, Personnel, Operational Standards, and Records for Class A (Community) Pharmacies) to the extent such rules are applicable to nonsterile compounding of drug products.

(J) A Class A (Community) pharmacy compounding sterile pharmaceuticals which is engaged in the provision of remote pharmacy services, including storage and dispensing of prescription drugs, shall comply with the provisions of §291.20 of this title (relating to Remote Pharmacy Services).

(K) A Class A (Community) pharmacy compounding sterile pharmaceuticals engaged in centralized prescription dispensing and/or prescription drug or medication order processing shall comply with the provisions of §291.37 of this title (relating to Centralized Prescription Dispensing) and/or §291.38 of this title (relating to Centralized Prescription Drug or Medication Order Processing).

(2) Environment.

(A) General requirements.

(i) The pharmacy shall be enclosed and lockable.

(ii) The pharmacy shall have adequate space necessary for the storage, compounding, labeling, dispensing, and sterile preparation of drugs prepared in the pharmacy, and additional space, depending on the size and scope of pharmaceutical services.

(iii) The pharmacy shall be arranged in an orderly fashion and shall be kept clean. All required equipment shall be clean and in good operating condition.

(iv) A sink with hot and cold running water, exclusive of restroom facilities, designated primarily for use of admixtures, shall be available within the pharmacy facility to all pharmacy personnel and shall be maintained in a sanitary condition at all times.

(v) The pharmacy shall be properly lighted and ventilated.

(vi) The temperature of the pharmacy shall be maintained within a range compatible with the proper storage of drugs; the temperature of the refrigerator shall be maintained within a range compatible with the proper storage of drugs requiring refrigeration.

(vii) If prescription drug orders are delivered to the patient at the pharmacy, the pharmacy shall contain an area which is suitable for confidential patient counseling.

(I) Such counseling area shall:

(-a-) be easily accessible to both patient and pharmacists and not allow patient access to prescription drugs;

(-b-) be designed to maintain the confidentiality and privacy of the pharmacist/patient communication.

(II) In determining whether the area is suitable for confidential patient counseling and designed to maintain the confidentiality and privacy of the pharmacist/patient communication, the board may consider factors such as the following:

(-a-) the proximity of the counseling area to the check-out or cash register area;

(-b-) the volume of pedestrian traffic in and around the counseling area;

(-c-) the presence of walls or other barriers between the counseling area and other areas of the pharmacy; and

(-d-) any evidence of confidential information being overheard by persons other than the patient or patient's agent or the pharmacist or agents of the pharmacist.

(viii) Animals, including birds and reptiles, shall not be kept within the pharmacy and in immediately adjacent areas under the control of the pharmacy. This provision does not apply to fish in aquariums, guide dogs accompanying disabled persons, or animals for sale to the general public in a separate area that is inspected by local health jurisdictions.

(B) Special requirements for the compounding of sterile pharmaceuticals. When the pharmacy compounds sterile pharmaceuticals, the following is applicable.

(i) Aseptic environment control device(s). The pharmacy shall prepare sterile pharmaceuticals in an appropriate aseptic environmental control device(s) or area, such as a laminar air flow hood, biological safety cabinet, or clean room which is capable of maintaining at least Class 100 conditions during normal activity. The aseptic environmental control device(s) shall:

(I) be certified by an independent contractor according to Federal Standard 209E, et seq, for operational efficiency at least every six months or when it is relocated; and

(II) have pre-filters inspected periodically and replaced as needed, in accordance with written policies and procedures, and the inspection and/or replacement date documented.

(ii) Controlled area. The pharmacy shall have a designated controlled area for the compounding of sterile pharmaceuticals that is functionally separate from areas for the preparation of non-sterile pharmaceuticals and is constructed to minimize the opportunities for particulate and microbial contamination. This controlled area for the preparation of sterile pharmaceuticals shall:

(I) have a controlled environment that is aseptic or contains an aseptic environmental control device(s);

(II) be clean, well lighted, and of sufficient size to support sterile compounding activities;

(III) be used only for the compounding of sterile pharmaceuticals;

(IV) be designed to avoid outside traffic and air flow;

(V) have non-porous and washable floors or floor covering to enable regular disinfection;

(VI) be ventilated in a manner not interfering with aseptic environmental control conditions;

(VII) have hard cleanable walls and ceilings (acoustical ceiling tiles that are coated with an acrylic paint are acceptable);

(VIII) have drugs and supplies stored on shelving areas above the floor to permit adequate floor cleaning;

(IX) contain only the appropriate compounding supplies and not be used for bulk storage for supplies and materials.

(iii) End-product evaluation.

(I) The responsible pharmacist shall verify that the sterile pharmaceutical was compounded accurately with respect to the use of correct ingredients, quantities, containers, and reservoirs.

(II) end product sterility testing according to policies and procedures, which include a statistically valid sampling plan and acceptance criteria for the sampling and testing, shall be performed if deemed appropriate by the pharmacist-in-charge;

(III) the pharmacist-in-charge shall establish a mechanism for recalling all products of a specific batch if end-product testing procedures yield unacceptable results.

(iv) Automated compounding or counting device. If automated compounding or counting devices are used, the pharmacy shall have a method to calibrate and verify the accuracy of automated compounding or counting devices used in aseptic processing and document the calibration and verification on a routine basis.

(v) Cytotoxic drugs. In addition to the requirements specified in clause (i) of this subparagraph, if the product is also cytotoxic, the following is applicable.

(I) General.

(-a-) All personnel involved in the compounding of cytotoxic products shall wear appropriate protective apparel, such as masks, gloves, and gowns or coveralls with tight cuffs.

(-b-) Appropriate safety and containment techniques for compounding cytotoxic drugs shall be used in conjunction with aseptic techniques required for preparing sterile pharmaceuticals.

(-c-) Disposal of cytotoxic waste shall comply with all applicable local, state, and federal requirements.

(-d-) Prepared doses of cytotoxic drugs must be dispensed, labeled with proper precautions inside and outside, and distributed in a manner to minimize patient contact with cytotoxic agents.

(II) Aseptic environment control device(s).

(-a-) Cytotoxic drugs must be prepared in a vertical flow biological safety cabinet.

(-b-) If the vertical flow biological safety cabinet is also used to prepare non-cytotoxic sterile pharmaceuticals, the cabinet must be thoroughly cleaned prior to its use to prepare non-cytotoxic sterile pharmaceuticals.

(C) Security requirements.

(i) The pharmacy shall have locked storage for Schedule II controlled substances and other controlled drugs requiring additional security.

(ii) All areas occupied by a pharmacy shall be capable of being locked by key or combination, so as to prevent access by unauthorized personnel when a pharmacist is not on-site.

(iii) The pharmacy may authorize personnel to gain access to that area of the pharmacy containing dispensed sterile pharmaceuticals, in the absence of the pharmacist, for the purpose of retrieving dispensed prescriptions to deliver to patients. If the pharmacy allows such after-hours access, the area containing the dispensed sterile pharmaceuticals shall be an enclosed and lockable area separate from the area containing undispensed prescription drugs. A list of the authorized personnel having such access shall be in the pharmacy's policy and procedure manual.

(iv) Each pharmacist while on duty shall be responsible for the security of the prescription department, including provisions for effective control against theft or diversion of prescription drugs, and records for such drugs.

(D) Temporary absence of pharmacist.

(i) If a pharmacy is staffed by a single pharmacist, the pharmacist may leave the prescription department for breaks and meal periods without closing the prescription department and removing pharmacy technicians and other pharmacy personnel from the prescription department provided the following conditions are met:

(I) at least one registered pharmacy technician remains in the prescription department;

(II) the pharmacist remains on-site at the licensed location of the pharmacy and available for an emergency;

(III) the absence does not exceed 30 minutes at a time and a total of one hours in a 12 hour period;

(IV) the pharmacist reasonably believes that the security of the prescription department will be maintained in his or her absence. If in the professional judgment of the pharmacist, the pharmacist determines that the prescription department should close during his or her absence, then the pharmacist shall close the prescription department and remove the pharmacy technicians and other pharmacy personnel from the prescription department during his or her absence; and

(V) a notice is posted which includes the following information:

(-a-) the fact that pharmacist is on a break and the time the pharmacist will return; and

(-b-) the fact that pharmacy technicians may begin the processing of prescription drug orders or refills brought in during the pharmacist absence but the prescription or refill may not be delivered to the patient or the patient's agent until the pharmacist returns and verifies the accuracy of the prescription.

(ii) During the time a pharmacist is absent from the prescription department, only pharmacy technicians who have completed the pharmacy's training program may perform the following duties, provided a pharmacist verifies the accuracy of all acts, tasks, and functions performed by the pharmacy technicians prior to delivery of the prescription to the patient or the patient's agent:

(I) initiating and receiving refill authorization requests;

(II) entering prescription data into a data processing system;

(III) taking a stock bottle from the shelf for a prescription;

(IV) preparing and packaging prescription drug orders (i.e., counting tablets/capsules, measuring liquids and placing them in the prescription container);

(V) affixing prescription labels and auxiliary labels to the prescription container provided the pharmacy technician:

(-a-) has completed the training requirements outlined in §297.6 of this title; and

(-b-) is registered as a pharmacy technician within the provisions of §297.3 of this title; and

(VI) prepackaging and labeling prepackaged drugs.

(iii) Upon return to the prescription department, the pharmacist shall:

(I) conduct a drug regimen review as specified in paragraph (4)(A)(ii) of this subsection; and

(II) verify the accuracy of all acts, tasks, and functions performed by pharmacy technicians prior to delivery of the prescription to the patient or the patient's agent.

(iv) An agent of the pharmacist may deliver a prescription drug order to the patient or his or her agent provided a record of the delivery is maintained containing the following information:

(I) date of the delivery;

(II) unique identification number of the prescription drug order;

(III) patient's name;

(IV) patient's phone number or the phone number of the person picking up the prescription; and

(V) signature of the person picking up the prescription.

(v) Any prescription delivered to a patient when a pharmacist is not in the prescription department must meet the requirements for a prescription delivered to a patient as described in paragraph (3)(A)(v) of this subsection.

(vi) During the times a pharmacist is absent from the prescription department a pharmacist intern shall be considered a registered pharmacy technician and may perform only the duties of a registered pharmacy technician.

(vii) In pharmacies with two or more pharmacists on duty, the pharmacists shall stagger their breaks and meal periods so that the prescription department is not left without a pharmacist on duty.

(3) Prescription dispensing and delivery.

(A) Patient counseling and provision of drug information.

(i) To optimize drug therapy, a pharmacist shall communicate to the patient or the patient's agent, information about the prescription drug or device which in the exercise of the pharmacist's professional judgment the pharmacist deems significant, such as the following:

(I) the name and description of the drug or device;

(II) dosage form, dosage, route of administration, and duration of drug therapy;

(III) special directions and precautions for preparation, administration, and use by the patient;

(IV) common severe side or adverse effects or interactions and therapeutic contraindications that may be encountered, including their avoidance, and the action required if they occur;

(V) techniques for self monitoring of drug therapy;

(VI) proper storage;

(VII) refill information; and

(VIII) action to be taken in the event of a missed dose.

(ii) Such communication:

(I) shall be provided with each new prescription drug order, once yearly on maintenance medications, and if the pharmacist deems appropriate, with prescription drug order refills. (For the purposes of this clause, maintenance medications are defined as any medication the patient has taken for one year or longer);

(II) shall be provided for any prescription drug order dispensed by the pharmacy on the request of the patient or patient's agent;

(III) shall be communicated orally in person unless the patient or patient's agent is not at the pharmacy or a specific communication barrier prohibits such oral communication; and

(IV) shall be reinforced with written information. The following is applicable concerning this written information.

(-a-) Written information designed for the consumer such as the USP DI Patient Information Leaflets shall be provided.

(-b-) When a compounded product is dispensed, information shall be provided for the major active ingredient(s), if available.

(-c-) For new drug entities, if no written information is initially available, the pharmacist is not required to provide information until such information is available, provided:

(-1-) the pharmacist informs the patient or the patient's agent that the product is a new drug entity and written information is not available;

(-2-) the pharmacist documents the fact that no written information was provided; and

(-3-) if the prescription is refilled after written information is available, such information is provided to the patient or patient's agent.

(iii) Only a pharmacist may verbally provide drug information to a patient or patient's agent and answer questions concerning prescription drugs. Non-pharmacist personnel may not ask questions of a patient or patient's agent which are intended to screen and/or limit interaction with the pharmacist.

(iv) Nothing in this subparagraph shall be construed as requiring a pharmacist to provide consultation when a patient or patient's agent refuses such consultation. The pharmacist shall document such refusal for consultation.

(v) In addition to the requirements of clauses (i) - (iv) of this subparagraph, if a prescription drug order is delivered to the patient at the pharmacy, the following is applicable.

(I) So that a patient will have access to information concerning his or her prescription, a prescription may not be delivered to a patient unless a pharmacist is in the pharmacy, except as provided in paragraph (2)(D) of this subsection or subclause (II) of this clause.

(II) An agent of the pharmacist may deliver a prescription drug order to the patient or his or her agent during short periods of time when a pharmacist is absent from the pharmacy, provided the short periods of time do not exceed two hours, and provided a record of the delivery is maintained containing the following information:

(-a-) date of the delivery;

(-b-) unique identification number of the prescription drug order;

(-c-) patient's name;

(-d-) patient's phone number or the phone number of the person picking up the prescription; and

(-e-) signature of the person picking up the prescription.

(III) Any prescription delivered to a patient when a pharmacist is not in the pharmacy must meet the requirements described in clause (vi) of this subparagraph.

(IV) A Class A pharmacy compounding sterile pharmaceuticals that delivers prescriptions to patients or their agents on-site shall make available for use by the public a current or updated edition of the United States Pharmacopeia Dispensing Information, Volume II (Advice to the Patient), or another source of such information, such as patient information leaflets.

(vi) In addition to the requirements of clauses (i) - (iv) of this subparagraph, if a prescription drug order is delivered to the patient or his or her agent at the patient's residence or other designated location, the following is applicable.

(I) The information specified in clause (i) of this subparagraph shall be delivered with the dispensed prescription in writing.

(II) If prescriptions are routinely delivered outside the area covered by the pharmacy's local telephone service, the pharmacy shall provide a toll-free telephone line which is answered during normal business hours to enable communication between the patient and a pharmacist.

(III) The pharmacist shall place on the prescription container or on a separate sheet delivered with the prescription container in both English and Spanish the local and if applicable, toll-free telephone number of the pharmacy and the statement: "Written information about this prescription has been provided for you. Please read this information before you take the medication. If you have questions concerning this prescription, a pharmacist is available during normal business hours to answer these questions at (insert the pharmacy's local and toll-free telephone numbers)."

(IV) The pharmacist-in-charge shall assure that:

(-a-) the pharmacy maintain and use adequate storage or shipment containers and shipping processes to ensure drug stability and potency. Such shipping processes shall include the use of appropriate packaging material and/or devices to ensure that the drug is maintained at an appropriate temperature range to maintain the integrity of the medication throughout the delivery process; and

(-b-) the pharmacy uses a delivery system which is designed to assure that the drugs are delivered to the appropriate patient.

(vii) The provisions of this subparagraph do not apply to patients in facilities where drugs are administered to patients by a person authorized to do so by the laws of the state (i.e., nursing homes).

(B) Generic Substitution. A pharmacist may substitute on a prescription drug order issued for a brand name product provided the substitution is authorized and performed in compliance with Chapter 309 of this title (relating to Generic Substitution).

(C) Therapeutic Drug Interchange. A switch to a drug providing a similar therapeutic response to the one prescribed shall not be made without prior approval of the prescribing practitioner. This subparagraph does not apply to generic substitution. For generic substitution, see the requirements of subparagraphs (E) and (F) of this paragraph.

(i) The patient shall be notified of the therapeutic drug interchange prior to, or upon delivery, of the dispensed prescription to the patient. Such notification shall include:

(I) a description of the change;

(II) the reason for the change;

(III) whom to notify with questions concerning the change; and

(IV) instructions for return of the drug if not wanted by the patient.

(ii) The pharmacy shall maintain documentation of patient notification of therapeutic drug interchange which shall include:

(I) the date of the notification;

(II) the method of notification;

(III) a description of the change; and

(IV) the reason for the change.

(D) Prescription containers.

(i) A drug dispensed pursuant to a prescription drug order shall be dispensed in an appropriate container as specified on the manufacturer's container.

(ii) Prescription containers or closures shall not be re-used.

(E) Labeling.

(i) At the time of delivery of the drug, the dispensing container of a sterile pharmaceutical shall bear a label with at least the following information:

(I) name, address and phone number of the pharmacy, including a phone number which is answered 24 hours a day;

(II) date dispensed;

(III) name of prescribing practitioner;

(IV) name of patient;

(V) directions for use, including infusion rate and directions to the patient for the addition of additives, if applicable;

(VI) unique identification number of the prescription;

(VII) name and amount of the base solution and of each drug added unless otherwise directed by the prescribing practitioner;

(VIII) initials or identification code of the person preparing the product and the pharmacist who checked and released the final product;

(IX) expiration date of the preparation based on published data;

(X) appropriate ancillary instructions, such as storage instructions or cautionary statements, including cytotoxic/biohazardous warning labels where applicable;

(XI) if the prescription is for a Schedules II - IV controlled substance, the statement "Caution: Federal law prohibits the transfer of this drug to any person other than the patient for whom it was prescribed";

(XII) if the pharmacist has selected a generically equivalent drug pursuant to the provisions of the Act, Chapters 562 and 563, the statement "Substituted for Brand Prescribed" or "Substituted for 'Brand Name'" where "Brand Name" is the actual name of the brand name product prescribed; and

(XIII) the name of the advanced practice nurse or physician assistant, if the prescription is carried out by an advanced practice nurse or physician assistant in compliance with Subtitle B, Chapter 157, Occupations Code.

(ii) The dispensing container is not required to bear the label specified in clause (i) of this subparagraph if:

(I) the drug is prescribed for administration to an ultimate user who is institutionalized in a licensed health care facility (e.g., nursing home, hospice, hospital);

(II) no more than a 34-day supply or 100 dosage units, whichever is less, is dispensed at one time;

(III) the drug is not in the possession of the ultimate user prior to administration;

(IV) the pharmacist-in-charge has determined that the institution:

(-a-) maintains medication administration records which include adequate directions for use for the drug(s) prescribed;

(-b-) maintains records of ordering, receipt, and administration of the drug(s); and

(-c-) provides for appropriate safeguards for the control and storage of the drug(s);

(V) the system employed by the pharmacy in dispensing the prescription drug order adequately identifies the:

(-a-) pharmacy by name and address;

(-b-) unique identification number of the prescription;

(-c-) name and strength of the drug dispensed;

(-d-) the name of the patient;

(-e-) name of the prescribing practitioner; and

(VI) the system employed by the pharmacy in dispensing the prescription drug order adequately sets forth the directions for use and cautionary statements, if any, contained on the prescription drug order or required by law.

(4) Pharmaceutical care services.

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

(i) Drug utilization review. A systematic ongoing process of drug utilization review shall be designed, followed, and documented to increase the probability of desired patient outcomes and decrease the probability of undesired outcomes from drug therapy.

(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-) known allergies;

(-b-) rational therapy--contraindications;

(-c-) reasonable dose and route of administration;

(-d-) reasonable directions for use;

(-e-) duplication of therapy;

(-f-) drug-drug interactions;

(-g-) drug-food interactions;

(-h-) drug-disease interactions;

(-i-) adverse drug reactions;

(-j-) proper utilization, including overutilization or underutilization; and

(-k-) clinical laboratory or clinical monitoring methods to monitor and evaluate drug effectiveness, side effects, toxicity, or adverse effects, and appropriateness to continued use of the drug in its current regimen.

(II) Upon identifying any clinically significant conditions, situations, or items listed in subclause (I) of this clause, the pharmacist shall take appropriate steps to avoid or resolve the problem including consultation with the prescribing practitioner. The pharmacist shall document such occurrences.

(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) Patient care guidelines.

(I) Primary provider. There shall be a designated physician primarily responsible for the patient's medical care. There shall be a clear understanding between the physician, the patient, and the pharmacy of the responsibilities of each in the areas of the delivery of care, and the monitoring of the patient. This shall be documented in the patient medication record (PMR).

(II) Patient training. The pharmacist-in-charge shall develop policies that assure that the patient and/or patient's caregiver receives information regarding drugs and their safe and appropriate use, including instruction regarding:

(-a-) appropriate disposition of hazardous solutions and ancillary supplies;

(-b-) proper disposition of controlled substances in the home;

(-c-) self-administration of drugs, where appropriate;

(-d-) emergency procedures, including how to contact an appropriate individual in the event of problems or emergencies related to drug therapy; and

(-e-) if the patient or patient's caregiver prepares sterile preparations in the home, the following additional information shall be provided:

(-1-) safeguards against microbial contamination, including aseptic techniques for compounding intravenous admixtures and aseptic techniques for injecting additives to premixed intravenous solutions;

(-2-) appropriate storage methods, including storage durations for sterile pharmaceuticals and expirations of self-mixed solutions;

(-3-) handling and disposition of premixed and self-mixed intravenous admixtures; and

(-4-) proper disposition of intravenous admixture compounding supplies such as syringes, vials, ampules, and intravenous solution containers.

(III) Pharmacist-patient relationship. It is imperative that a pharmacist-patient relationship be established and maintained throughout the patient's course of therapy. This shall be documented in the patient's medication record (PMR).

(IV) Patient monitoring. The pharmacist-in-charge shall develop policies to ensure that:

(-a-) the patient's response to drug therapy is monitored and conveyed to the appropriate health care provider; and

(-b-) the first dose of any new drug therapy is administered in the presence of an individual qualified to monitor for and respond to adverse drug reactions.

(B) Other pharmaceutical care services which may be provided by pharmacists include, but are not limited to, the following:

(i) managing drug therapy as delegated by a practitioner as allowed under the provisions of the Medical Practice Act;

(ii) administering immunizations and vaccinations under written protocol of a physician;

(iii) managing patient compliance programs;

(iv) providing preventative health care services; and

(v) providing case management of patients who are being treated with high-risk or high-cost drugs, or who are considered "high risk" due to their age, medical condition, family history, or related concern.

(5) Equipment and supplies. Class A pharmacies compounding sterile pharmaceuticals shall have the following equipment and supplies:

(A) typewriter or comparable equipment;

(B) refrigerator and, if sterile pharmaceuticals are stored in the refrigerator, a system or device (i.e., thermometer) to monitor the temperature daily to ensure that proper storage requirements are met;

(C) adequate supply of prescription, poison, and other applicable labels;

(D) appropriate equipment necessary for the proper preparation of prescription drug orders;

(E) metric-apothecary weight and measure conversion charts;

(F) if the pharmacy compounds prescription drug orders which require the use of a balance, a Class A prescription balance, or analytical balance and weights. Such balance shall be properly maintained and inspected at least every three years by the appropriate authority as prescribed by local, state, or federal law or regulations.

(G) appropriate disposal containers for used needles, syringes, etc., and if applicable, cytotoxic waste from the preparation of chemotherapeutic agents, and/or biohazardous waste;

(H) temperature controlled delivery containers;

(I) infusion devices, if applicable;

(J) all necessary supplies, including:

(i) disposable needles, syringes, and other aseptic mixing;

(ii) disinfectant cleaning solutions;

(iii) hand washing agents with bacteriocidal action;

(iv) disposable, lint free towels or wipes;

(v) appropriate filters and filtration equipment;

(vi) cytotoxic spill kits, if applicable; and

(vii) masks, caps, coveralls or gowns with tight cuffs, shoe covers, and gloves, as applicable.

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

(A) current copies of the following:

(i) Texas Pharmacy Act and rules;

(ii) Texas Dangerous Drug Act and rules;

(iii) Texas Controlled Substances Act and rules; and

(iv) Federal Controlled Substances Act and rules (or official publication describing the requirements of the Federal Controlled Substances Act and rules);

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

(i) patient information (if prescriptions are delivered to patients or their agents on-site):

(I) United States Pharmacopeia Dispensing Information, Volume II (Advice to the Patient); or

(II) a reference text or information leaflets which provide patient information;

(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;

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

(I) Facts and Comparisons with current supplements;

(II) United States Pharmacopeia Dispensing Information, Volume I (Drug Information for the Healthcare Provider);

(III) AHFS Drug Information with current supplements;

(IV) Remington's Pharmaceutical Sciences; or

(V) Clinical Pharmacology;

(iv) sterile pharmaceuticals. A current or updated reference text on injectable drug products, such as Handbook on Injectable Drug Products;

(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 on the preparation and safe handling of cytotoxic drugs;

(D) patient education manuals; and

(E) basic antidote information and the telephone number of the nearest regional poison control center.

(7) Drugs.

(A) Procurement and storage.

(i) The pharmacist-in-charge shall have the responsibility for the procurement and storage of drugs, but may receive input from other appropriate staff relative to such responsibility.

(ii) Prescription drugs and devices shall be stored within the prescription department or a locked storage area.

(iii) All drugs shall be stored at the proper temperature, as defined by the following terms.

(I) Cold--Any temperature not exceeding 8 degrees Centigrade (46 degrees Fahrenheit). A refrigerator is a cold place in which the temperature is maintained thermostatically between 2 and 8 degrees Centigrade (36 and 46 degrees Fahrenheit). A freezer is a cold place in which the temperature is maintained thermostatically between -20 and -10 degrees Centigrade (-4 and -14 degrees Fahrenheit).

(II) Cool--Any temperature between 8 and 15 degrees Centigrade (46 and 59 degrees Fahrenheit). An article for which storage in a cool place is directed may, alternatively, be stored in a refrigerator unless otherwise specified in the labeling.

(III) Room temperature--The temperature prevailing in a working area. Controlled room temperature is a temperature thermostatically between 15 and 30 degrees Centigrade (59 and 86 degrees Fahrenheit).

(IV) Warm--Any temperature between 30 and 40 degrees Centigrade (86 and 104 degrees Fahrenheit).

(V) Excessive heat--Temperature above 40 degrees Centigrade (104 degrees Fahrenheit).

(VI) Protection from freezing where, in addition to the risk of breakage of the container, freezing subjects a product to loss of strength or potency, or to destructive alteration of the dosage form, the container label bears an appropriate instruction to protect the product from freezing.

(B) Out-of-date and other unusable drugs or devices.

(i) Any drug or device bearing an expiration date shall not be dispensed beyond the expiration date of the drug or device.

(ii) Outdated and other unusable drugs or devices shall be removed from dispensing stock and shall be quarantined together until such drugs or devices are disposed of properly.

(C) Class A Pharmacies may not sell, purchase, trade or possess prescription drug samples, unless the pharmacy meets all of the following conditions:

(i) the pharmacy is owned by a charitable organization described in the Internal Revenue Code of 1986, or by a city, state or county government;

(ii) the pharmacy is a part of a health care entity which provides health care primarily to indigent or low income patients at no or reduced cost;

(iii) the samples are for dispensing or provision at no charge to patients of such health care entity; and

(iv) the samples are possessed in compliance with the federal Prescription Drug Marketing Act of 1986.

(8) Prepackaging of drugs and loading bulk drugs into automated compounding or counting devices.

(A) Prepackaging of drugs.

(i) Drugs may be prepackaged in quantities suitable for internal distribution only by a pharmacist or by pharmacy technicians under the direction and direct supervision of a pharmacist.

(ii) The label of a prepackaged unit shall indicate:

(I) brand name and strength of the drug; or if no brand name then the generic name, strength, and name of the manufacturer or distributor;

(II) facility's unique lot number;

(III) expiration date based on currently available literature; and

(IV) quantity of the drug, if the quantity is greater than one.

(iii) Records of prepackaging shall be maintained to show:

(I) name of the drug, strength, and dosage form;

(II) facility's unique lot number;

(III) manufacturer or distributor;

(IV) manufacturer's lot number;

(V) expiration date;

(VI) quantity per prepackaged unit;

(VII) number of prepackaged units;

(VIII) date packaged;

(IX) name, initials, signature, or electronic signature of the prepacker; and

(X) signature or electronic signature of the responsible pharmacist.

(iv) Stock packages, repackaged units, and control records shall be quarantined together until checked/released by the pharmacist.

(B) Loading bulk drugs into automated compounding or counting devices.

(i) Automated compounding or counting devices may be loaded with bulk drugs only by a pharmacist or by pharmacy technicians under the direction and direct supervision of a pharmacist.

(ii) The label of an automated compounding or counting device container shall indicate the brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor.

(iii) Records of loading bulk drugs into an automated compounding or counting device shall be maintained to show:

(I) name of the drug, strength, and dosage form;

(II) manufacturer or distributor;

(III) manufacturer's lot number;

(IV) expiration date;

(V) date of loading;

(VI) name, initials, signature, or electronic signature of the person loading the automated compounding or counting device; and

(VII) signature or electronic signature of the responsible pharmacist.

(iv) The automated compounding or counting device shall not be used until a pharmacist verifies that the system is properly loaded and affixes his or her signature or electronic signature to the record specified in clause (iii) of this subparagraph.

(9) Sterile pharmaceuticals.

(A) Batch preparation.

(i) Master work sheet. A master work sheet shall be developed and approved by a pharmacist for each batch of sterile pharmaceuticals to be prepared. Once approved, a duplicate of the master work sheet shall be used as the preparation work sheet from which each batch is prepared and on which all documentation for that batch occurs. The master work sheet shall contain at a minimum:

(I) the formula;

(II) the components;

(III) the compounding directions;

(IV) a sample label;

(V) evaluation and testing requirements;

(VI) sterilization method(s);

(VII) specific equipment used during aseptic preparation (e.g., specific automated compounding or counting device); and

(VIII) storage requirements.

(ii) Preparation work sheet. The preparation work sheet for each batch of sterile pharmaceuticals shall document the following:

(I) identity of all solutions and ingredients and their corresponding amounts, concentrations, or volumes;

(II) manufacturer lot number for each component;

(III) component manufacturer or suitable identifying number;

(IV) container specifications (e.g., syringe, pump cassette);

(V) unique lot or control number assigned to batch;

(VI) expiration date of batch-prepared products;

(VII) date of preparation;

(VIII) name, initials, or electronic signature of the person(s) involved in the preparation;

(IX) name, initials, or electronic signature of the responsible pharmacist;

(X) end-product evaluation and testing specifications, if applicable; and

(XI) comparison of actual yield to anticipated yield, when appropriate.

(iii) Label. The label of each batch prepared sterile pharmaceutical shall bear at a minimum:

(I) the unique lot number assigned to the batch;

(II) all solution and ingredient names, amounts, strengths, and concentrations, when applicable;

(III) quantity;

(IV) expiration date and time, when applicable;

(V) appropriate ancillary instructions, such as storage instructions or cautionary statements, including cytotoxic warning labels where appropriate; and

(VI) device-specific instructions, when appropriate.

(B) Expiration date.

(i) The expiration date assigned shall be based on currently available drug stability information and sterility considerations or appropriate in-house or contract service stability testing.

(ii) Sources of drug stability information shall include the following:

(I) references (e.g., Remington's Pharmaceutical Sciences, Handbook on Injectable Drugs);

(II) manufacturer recommendations; and

(III) reliable, published research.

(iii) When interpreting published drug stability information, the pharmacist shall consider all aspects of the final sterile product being prepared (e.g., drug reservoir, drug concentration, storage conditions).

(iv) Methods used for establishing expiration dates shall be documented.

(C) Quality control. There shall be a documented, ongoing quality control program that monitors and evaluates personnel performance, equipment and facilities. Procedures shall be in place to assure that the pharmacy is capable of consistently preparing pharmaceuticals which are sterile and stable. Quality control procedures shall include, but are not limited to, the following:

(i) recall procedures;

(ii) storage and dating;

(iii) documentation of appropriate functioning of refrigerator, freezer, and other equipment;

(iv) documentation of aseptic environmental control device(s) certification at least every six months and the regular replacement of pre-filters as necessary; and

(v) a process to evaluate and confirm the quality of the prepared pharmaceutical product.

(D) Quality assurance.

(i) There shall be a documented, ongoing quality assurance program for monitoring and evaluating personnel performance and patient outcomes to assure an efficient drug delivery process, patient safety, and positive clinical outcomes.

(ii) There shall be documentation of quality assurance audits at regular, planned intervals including infection control, sterile technique, delivery systems/times, order transcription accuracy, drug administration systems, adverse drug reactions, and drug therapy appropriateness.

(iii) A plan for corrective action of program of problems identified by quality assurance audits shall be developed which includes procedures for documentation of identified problems and action taken.

(iv) A periodic evaluation of the effectiveness of the quality assurance activities shall be completed and documented.

(e) Records.

(1) Maintenance of records.

(A) Every inventory or other record required to be kept under this section shall be kept by the pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative, and other authorized local, state, or federal law enforcement agencies.

(B) Records of controlled substances listed in Schedules I and II shall be maintained separately from all other records of the pharmacy.

(C) Records of controlled substances, other than original prescription drug orders, listed in Schedules III - V shall be maintained separately or readily retrievable from all other records of the pharmacy. For purposes of this subsection, "readily retrievable" means that the controlled substances shall be asterisked, red-lined, or in some other manner readily identifiable apart from all other items appearing on the record.

(D) Records, except when specifically required to be maintained in original or hard-copy form, may be maintained in an alternative data retention system, such as a data processing system or direct imaging system provided:

(i) the records maintained in the alternative system contain all of the information required on the manual record; and

(ii) the data processing system is capable of producing a hard copy of the record upon the request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(2) Prescriptions.

(A) Professional responsibility.

(i) 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.

(ii) 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.

(iii) Clause (ii) of this subparagraph 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).

(B) Written prescription drug orders.

(i) Practitioner's signature.

(I) Except as noted in subclause (II) of this clause, written prescription drug orders shall be:

(-a-) manually signed by the practitioner; or

(-b-) electronically signed by the practitioner using a system which electronically replicates the practitioner's manual signature on the written prescription, provided that security features of the system require the practitioner to authorize each use.

(II) Prescription drug orders for Schedule II controlled substances shall be issued on an official prescription form as required by the Texas Controlled Substances Act, §481.075, and be manually signed by the practitioner.

(III) A practitioner may sign a prescription drug order in the same manner as he would sign a check or legal document, e.g., J.H. Smith or John H. Smith.

(IV) Rubber stamped or otherwise reproduced signatures may not be used except as authorized in subclause (I) of this clause.

(V) The prescription drug order may not be signed by a practitioner's agent but may be prepared by an agent for the signature of a practitioner. However, the prescribing practitioner is responsible in case the prescription drug order does not conform in all essential respects to the law and regulations.

(ii) Prescription drug orders written by practitioners in another state.

(I) Dangerous drug prescription orders. A pharmacist may dispense a prescription drug order for dangerous drugs issued by practitioners in a state other than Texas in the same manner as prescription drug orders for dangerous drugs issued by practitioners in Texas are dispensed.

(II) Controlled substance prescription drug orders.

(-a-) A pharmacist may dispense prescription drug order for controlled substances in Schedule II issued by a practitioner in another state provided:

(-1-) the prescription is filled in compliance with a written plan approved by the Director of the Texas Department of Public Safety in consultation with the Board, which provides the manner in which the dispensing pharmacy may fill a prescription for a Schedule II controlled substance;

(-2-) the prescription drug order is an original written prescription issued by a person practicing in another state and licensed by another state as a physician, dentist, veterinarian, or podiatrist, who has a current federal Drug Enforcement Administration (DEA) registration number, and who may legally prescribe Schedule II controlled substances in such other state; and

(-3-) the prescription drug order is not dispensed after the end of the seventh day after the date on which the prescription is issued.

(-b-) A pharmacist may dispense prescription drug orders for controlled substances in Schedule III, IV, or V issued by a practitioner in another state provided:

(-1-) the prescription drug order is an original written prescription issued by a person practicing in another state and licensed by another state as a physician, dentist, veterinarian, or podiatrist, who has a current federal Drug Enforcement Administration registration number, and who may legally prescribe Schedule III, IV, or V controlled substances in such other state;

(-2-) the prescription drug order is not dispensed or refilled more than six months from the initial date of issuance and may not be refilled more than five times; and

(-3-) if there are no refill instructions on the original written prescription drug order (which shall be interpreted as no refills authorized) or if all refills authorized on the original written prescription drug order have been dispensed, a new written prescription drug order is obtained from the prescribing practitioner prior to dispensing any additional quantities of controlled substances.

(iii) Prescription drug orders written by practitioners in the United Mexican States or the Dominion of Canada.

(I) Controlled substance prescription drug orders. A pharmacist may not dispense a prescription drug order for a Schedule II, III, IV, or V controlled substance issued by a practitioner licensed in the Dominion of Canada or the United Mexican States.

(II) Dangerous drug prescription drug orders. A pharmacist may dispense a dangerous drug prescription issued by a person licensed in the Dominion of Canada or the United Mexican States as a physician, dentist, veterinarian, or podiatrist provided:

(-a-) the prescription drug order is an original written prescription; and

(-b-) if there are no refill instructions on the original written prescription drug order (which shall be interpreted as no refills authorized) or if all refills authorized on the original written prescription drug order have been dispensed, a new written prescription drug order shall be obtained from the prescribing practitioner prior to dispensing any additional quantities of dangerous drugs.

(iv) Prescription drug orders carried out or signed by an advanced practice nurse or physician assistant.

(I) A pharmacist may dispense a prescription drug order which is carried out or signed by an advanced practice nurse or physician assistant provided the advanced practice nurse or physician assistant is practicing in accordance with Subtitle B, Chapter 157, Occupations Code.

(II) Each practitioner shall designate in writing the name of each advanced practice nurse or physician assistant authorized to carry out or sign a prescription drug order pursuant to Subtitle B, Chapter 157, Occupations Code. A list of the advanced practice nurses or physician assistants designated by the practitioner must be maintained in the practitioner's usual place of business. On request by a pharmacist, a practitioner shall furnish the pharmacist with a copy of the written authorization for a specific advanced practice nurse or physician assistant.

(v) Prescription drug orders for Schedule II controlled substances. No Schedule II controlled substance may be dispensed without a written prescription drug order of a practitioner on an official prescription form as required by the Texas Controlled Substances Act, §481.075.

(C) Verbal prescription drug orders.

(i) A verbal prescription drug order from a practitioner or a practitioner's designated agent may only be received by a pharmacist or a pharmacist-intern under the direct supervision of a pharmacist.

(ii) A practitioner shall designate in writing the name of each agent authorized by the practitioner to communicate prescriptions verbally for the practitioner. The practitioner shall maintain at the practitioner's usual place of business a list of the designated agents. The practitioner shall provide a pharmacist with a copy of the practitioner's written authorization for a specific agent on the pharmacist's request.

(iii) A pharmacist may not dispense a verbal prescription drug order for a Schedule III, IV, or V controlled substance issued by a practitioner licensed in another state unless the practitioner is also registered under the Texas Controlled Substances Act.

(iv) A pharmacist may not dispense a verbal prescription drug order for a dangerous drug or a controlled substance issued by a practitioner licensed in the Dominion of Canada or the United Mexican States unless the practitioner is also licensed in Texas.

(D) Electronic prescription drug orders. For the purpose of this subparagraph, electronic prescription drug orders shall be considered the same as verbal prescription drug orders.

(i) An electronic prescription drug order may be transmitted by a practitioner or a practitioner's designated agent:

(I) directly to a pharmacy; or

(II) through the use of a data communication device provided:

(-a-) the prescription information is not altered during transmission; and

(-b-) confidential patient information is not accessed or maintained by the operator of the data communication device unless the operator is authorized to receive the confidential information as specified in paragraph (11) of this subsection.

(ii) A practitioner shall designate in writing the name of each agent authorized by the practitioner to electronically transmit prescriptions for the practitioner. The practitioner shall maintain at the practitioner's usual place of business a list of the designated agents. The practitioner shall provide a pharmacist with a copy of the practitioner's written authorization for a specific agent on the pharmacist's request.

(iii) A pharmacist may not dispense an electronic prescription drug order for a:

(I) Schedule II controlled substance except as authorized for faxed prescriptions in §481.074, Health and Safety Code;

(II) Schedule III, IV, or V controlled substance issued by a practitioner licensed in another state unless the practitioner is also registered under the Texas Controlled Substances Act; or

(III) dangerous drug or controlled substance issued by a practitioner licensed in the Dominion of Canada or the United Mexican States unless the practitioner is also licensed in Texas.

(E) Original prescription drug order records.

(i) Original prescriptions shall be maintained by the pharmacy in numerical order and remain legible for a period of two years from the date of filling or the date of the last refill dispensed.

(ii) If an original prescription drug order is changed, such prescription order shall be invalid and of no further force and effect; if additional drugs are to be dispensed, a new prescription drug order with a new and separate number is required.

(iii) Original prescriptions shall be maintained in one of the following formats:

(I) in three separate files as follows:

(-a-) prescriptions for controlled substances listed in Schedule II;

(-b-) prescriptions for controlled substances listed in Schedules III - V; and

(-c-) prescriptions for dangerous drugs and nonprescription drugs; or

(II) within a patient medication record system provided that original prescriptions for controlled substances are maintained separate from original prescriptions for noncontrolled substances and official prescriptions for Schedule II controlled substances are maintained separate from all other original prescriptions.

(iv) Original prescription records other than prescriptions for Schedule II controlled substances may be stored on microfilm, microfiche, or other system which is capable of producing a direct image of the original prescription record, e.g., digitalized imaging system. If original prescription records are stored in a direct imaging system, the following is applicable.

(I) The record of refills recorded on the original prescription must also be stored in this system.

(II) The original prescription records must be maintained in numerical order and as specified in clause (iii) of this subparagraph.

(III) The pharmacy must provide immediate access to equipment necessary to render the records easily readable.

(F) Prescription drug order information.

(i) All original prescriptions shall bear:

(I) name of the patient;

(II) address of the patient, provided, however, a prescription for a dangerous drug is not required to bear the address of the patient if such address is readily retrievable on another appropriate, uniformly maintained pharmacy record, such as medication records;

(III) name, and if for a controlled substance, the address and DEA registration number of the practitioner;

(IV) name and strength of the drug prescribed;

(V) quantity prescribed;

(VI) directions for use;

(VII) intended use for the drug unless the practitioner determines the furnishing of this information is not in the best interest of the patient;

(VIII) date of issuance; and

(IX) if telephoned to the pharmacist by a designated agent, the full name of the designated agent.

(ii) All original prescriptions for dangerous drugs carried out by an advanced practice nurse or physician assistant in accordance with Subtitle B, Chapter 157, Occupations Code, shall bear:

(I) name and address of the patient;

(II) name, address, and telephone number of the supervising practitioner;

(III) name, identification number, original signature and if the prescription is for a controlled substance, the DEA number of the advanced practice nurse or physician assistant;

(IV) name, strength, and quantity of the dangerous drug;

(V) directions for use;

(VI) the intended use of the drug, if appropriate;

(VII) date of issuance; and

(VIII) number of refills authorized.

(iii) All original electronic prescription drug orders shall bear:

(I) name of the patient;

(II) address of the patient, provided, however, a prescription for a dangerous drug is not required to bear the address of the patient if such address is readily retrievable on another appropriate, uniformly maintained pharmacy record, such as patient medication records;

(III) name and strength of the drug prescribed;

(IV) quantity prescribed;

(V) directions for use;

(VI) intended use for the drug unless the practitioner determines the furnishing of this information is not in the best interest of the patient;

(VII) date of issuance;

(VIII) a statement which indicates that the prescription has been electronically transmitted (e.g., Faxed to or electronically transmitted to:);

(IX) name, address, and electronic access number of the pharmacy to which the prescription was transmitted;

(X) telephone number of the prescribing practitioner;

(XI) date the prescription drug order was electronically transmitted to the pharmacy, if different from the date of issuance of the prescription; and

(XII) if transmitted by a designated agent, the full name of the designated agent.

(iv) At the time of dispensing, a pharmacist is responsible for the addition of the following information to the original prescription:

(I) unique identification number of the prescription drug order;

(II) initials or identification code of the person who compounded the sterile pharmaceutical and the pharmacist who checked and released the product;

(III) name, quantity, lot number, and expiration date of each product used in compounding the sterile pharmaceutical; and

(IV) date of dispensing, if different from the date of issuance.

(G) Refills.

(i) Refills may be dispensed only in accordance with the prescriber's authorization as indicated on the original prescription drug order. Such refills may be indicated as authorization to refill the prescription drug order a specified number of times or for a specified period of time period, such as the duration of therapy.

(ii) If there are no refill instructions on the original prescription drug order (which shall be interpreted as no refills authorized) or if all refills authorized on the original prescription drug order have been dispensed, authorization from the prescribing practitioner shall be obtained prior to dispensing any refills.

(iii) Refills of prescription drug orders for dangerous drugs or nonprescription drugs shall be dispensed as follows.

(I) Prescription drug orders for dangerous drugs or nonprescription drugs may not be refilled after one year from the date of issuance of the original prescription order.

(II) If one year has expired from the date of issuance of an original prescription drug order for a dangerous drug or nonprescription drug, authorization shall be obtained from the prescribing practitioner prior to dispensing any additional quantities of the drug.

(iv) Refills of prescription drug orders for Schedules III - V controlled substances shall be dispensed as follows.

(I) Prescription drug orders for Schedules III - V controlled substances may not be refilled more than five times or after six months from the date of issuance of the original prescription drug order, whichever occurs first.

(II) If a prescription drug order for a Schedule III, IV, or V controlled substance has been refilled a total of five times or if six months have expired from the date of issuance of the original prescription drug order, whichever comes first, a new and separate prescription drug order shall be obtained from the prescribing practitioner prior to dispensing any additional quantities of controlled substances.

(v) A pharmacist may exercise his professional judgment in refilling a prescription drug order for a drug, other than a controlled substance listed in Schedule II, without the authorization of the prescribing practitioner, provided:

(I) failure to refill the prescription might result in an interruption of a therapeutic regimen or create patient suffering;

(II) either:

(-a-) a natural or manmade disaster has occurred which prohibits the pharmacist from being able to contact the practitioner; or

(-b-) the pharmacist is unable to contact the practitioner after a reasonable effort;

(III) the quantity of prescription drug dispensed does not exceed a 72-hour supply;

(IV) the pharmacist informs the patient or the patient's agent at the time of dispensing that the refill is being provided without such authorization and that authorization of the practitioner is required for future refills;

(V) the pharmacist informs the practitioner of the emergency refill at the earliest reasonable time;

(VI) the pharmacist maintains a record of the emergency refill containing the information required to be maintained on a prescription as specified in this paragraph;

(VII) the pharmacist affixes a label to the dispensing container as specified in this paragraph; and

(VIII) if the prescription was initially filled at another pharmacy, the pharmacist may exercise his professional judgment in refilling the prescription provided:

(-a-) the patient has the prescription container, label, receipt or other documentation from the other pharmacy which contains the essential information;

(-b-) after a reasonable effort, the pharmacist is unable to contact the other pharmacy to transfer the remaining prescription refills or there are no refills remaining on the prescription;

(-c-) the pharmacist, in his professional judgment, determines that such a request for an emergency refill is appropriate and meets the requirements of subclauses (I) and (II) of this clause; and

(IX) the pharmacist complies with the requirements of subclauses (III) - (V) of this clause.

(3) Prescription drug order records maintained in a manual system.

(A) Original prescriptions. Original prescriptions shall be maintained in three files as specified in paragraph (2)(E)(iii) of this subsection.

(B) Refills.

(i) Each time a prescription drug order is refilled, a record of such refill shall be made:

(I) on the back of the prescription by recording the date of dispensing, the written initials or identification code of the dispensing pharmacist and the amount dispensed. (If the pharmacist merely initials and dates the back of the prescription drug order, he or she shall be deemed to have dispensed a refill for the full face amount of the prescription drug order); or

(II) on another appropriate, uniformly maintained, readily retrievable record, such as patient medication records, which indicates by patient name the following information:

(-a-) unique identification number of the prescription;

(-b-) name, strength, and lot number of each drug product used in compounding the sterile pharmaceutical;

(-c-) date of each dispensing;

(-d-) quantity dispensed at each dispensing;

(-e-) initials or identification code of person who compounded the sterile pharmaceutical and the pharmacist who checks and releases the final product; and

(-f-) total number of refills for the prescription.

(ii) If refill records are maintained in accordance with clause (i)(II) of this subparagraph, refill records for controlled substances in Schedules III - V shall be maintained separately from refill records of dangerous drugs and nonprescription drugs.

(C) Authorization of refills. Practitioner authorization for additional refills of a prescription drug order shall be noted on the original prescription, in addition to the documentation of dispensing the refill.

(D) Transfer of prescription drug order information. For the purpose of refill or initial dispensing, the transfer of original prescription drug order information is permissible between pharmacies, subject to the following requirements.

(i) The transfer of original prescription drug order information for controlled substances listed in Schedule III, IV, or V is permissible between pharmacies on a one-time basis.

(ii) The transfer of original prescription drug order information for dangerous drugs is permissible between pharmacies without limitation up to the number of originally authorized refills.

(iii) The transfer is communicated directly between pharmacists and/or pharmacist interns.

(iv) Both the original and the transferred prescription drug order are maintained for a period of two years from the date of last refill.

(v) The pharmacist or pharmacist intern transferring the prescription drug order information shall:

(I) write the word "void" on the face of the invalidated prescription drug order; and

(II) record on the reverse of the invalidated prescription drug order the following information:

(-a-) the name, address, and, if a controlled substance, the DEA registration number of the pharmacy to which such prescription drug order is transferred;

(-b-) the name of the pharmacist or pharmacist intern receiving the prescription drug order information;

(-c-) the name of the pharmacist or pharmacist intern transferring the prescription drug order information; and

(-d-) the date of the transfer.

(vi) The pharmacist or pharmacist intern receiving the transferred prescription drug order information shall:

(I) write the word "transfer" on the face of the transferred prescription drug order; and

(II) record on the transferred prescription drug order the following information:

(-a-) original date of issuance and date of dispensing or receipt, if different from date of issuance;

(-b-) original prescription number and the number of refills authorized on the original prescription drug order;

(-c-) number of valid refills remaining and the date of last refill, if applicable;

(-d-) name, address, and, if a controlled substance, the DEA registration number of the pharmacy from which such prescription information is transferred; and

(-e-) name of the pharmacist or pharmacist intern transferring the prescription drug order information.

(E) A pharmacist or pharmacist intern may not refuse to transfer original prescription information to another pharmacist or pharmacist intern who is acting on behalf of a patient and who is making a request for this information as specified in subparagraph (D) of this paragraph.

(4) Prescription drug order records maintained in a data processing system.

(A) General requirements for records maintained in a data processing system.

(i) Compliance with data processing system requirements. If a pharmacy's data processing system is not in compliance with this subsection, the pharmacy must maintain a manual recordkeeping system as specified in paragraph (3) of this subsection.

(ii) Original prescriptions. Original prescriptions shall be maintained as specified in paragraph (2)(E)(iii) of this subsection.

(iii) Requirements for backup systems.

(I) The pharmacy shall maintain a backup copy of information stored in the data processing system using disk, tape, or other electronic backup system and update this backup copy on a regular basis, at least monthly, to assure that data is not lost due to system failure.

(II) Data processing systems shall have a workable (electronic) data retention system which can produce an audit trail of drug usage for the preceding two years as specified in subparagraph (B)(vii) of this paragraph.

(iv) Change or discontinuance of a data processing system.

(I) Records of dispensing. A pharmacy that changes or discontinues use of a data processing system must:

(-a-) transfer the records of dispensing to the new data processing system; or

(-b-) purge the records of dispensing to a printout which contains the same information required on the daily printout as specified in subparagraph (B) of this paragraph. The information on this hard-copy printout shall be sorted and printed by prescription number and list each dispensing for this prescription chronologically.

(II) Other records. A pharmacy that changes or discontinues use of a data processing system must:

(-a-) transfer the records to the new data processing system; or

(-b-) purge the records to a printout which contains all of the information required on the original document.

(III) Maintenance of purged records. Information purged from a data processing system must be maintained by the pharmacy for two years from the date of initial entry into the data processing system.

(v) Loss of data. The pharmacist-in-charge shall report to the board in writing any significant loss of information from the data processing system within 10 days of discovery of the loss.

(B) Records of dispensing.

(i) Each time a prescription drug order is filled or refilled, a record of such dispensing shall be entered into the data processing system.

(ii) The data processing system shall have the capacity to produce a daily hard-copy printout of all original prescriptions dispensed and refilled. This hard-copy printout shall contain the following information:

(I) unique identification number of the prescription;

(II) date of dispensing;

(III) patient name;

(IV) prescribing practitioner's name;

(V) name and amount of each drug product used in compounding the sterile pharmaceutical;

(VI) total quantity dispensed;

(VII) initials or an identification code of the dispensing pharmacist; and

(VIII) if not immediately retrievable via CRT display, the following shall also be included on the hard-copy printout:

(-a-) patient's address;

(-b-) prescribing practitioner's address;

(-c-) practitioner's DEA registration number, if the prescription drug order is for a controlled substance;

(-d-) quantity prescribed, if different from the quantity dispensed;

(-e-) date of issuance of the prescription drug order, if different from the date of dispensing; and

(-f-) total number of refills dispensed to date for that prescription drug order.

(iii) The daily hard-copy printout shall be produced within 72 hours of the date on which the prescription drug orders were dispensed and shall be maintained in a separate file at the pharmacy. Records of controlled substances shall be readily retrievable from records of noncontrolled substances.

(iv) Each individual pharmacist who dispenses or refills a prescription drug order shall verify that the data indicated on the daily hard-copy printout is correct, by dating and signing such document in the same manner as signing a check or legal document (e.g., J.H. Smith or John H. Smith) within seven days from the date of dispensing.

(v) In lieu of the printout described in clause (ii) of this subparagraph, the pharmacy shall maintain a log book in which each individual pharmacist using the data processing system shall sign a statement each day, attesting to the fact that the information entered into the data processing system that day has been reviewed by him or her and is correct as entered. Such log book shall be maintained at the pharmacy employing such a system for a period of two years after the date of dispensing; provided, however, that the data processing system can produce the hard-copy printout on demand by an authorized agent of the Texas State Board of Pharmacy, Texas Department of Public Safety, or Drug Enforcement Administration. If no printer is available on site, the hard-copy printout shall be available within 48 hours with a certification by the individual providing the printout which states that the printout is true and correct as of the date of entry and such information has not been altered, amended, or modified.

(vi) The pharmacist-in-charge is responsible for the proper maintenance of such records and responsible that such data processing system can produce the records outlined in this section and that such system is in compliance with this subsection.

(vii) The data processing system shall be capable of producing a hard-copy printout of an audit trail for all dispensings (original and refill) of any specified strength and dosage form of a drug (by either brand or generic name or both) during a specified time period.

(I) Such audit trail shall contain all of the information required on the daily printout as set out in clause (ii) of this subparagraph.

(II) The audit trail required in this subparagraph shall be supplied by the pharmacy within 48 hours, if requested by an authorized agent of the Texas State Board of Pharmacy, Texas Department of Public Safety, or Drug Enforcement Administration.

(viii) Failure to provide the records set out in this paragraph, either on site or within 48 hours for whatever reason, constitutes prima facie evidence of failure to keep and maintain records.

(ix) The data processing system shall provide on-line retrieval (via CRT display or hard-copy printout) of the information set out in clause (ii) of this subparagraph of:

(I) the original controlled substance prescription drug orders currently authorized for refilling; and

(II) the current refill history for Schedules III - V controlled substances for the immediately preceding six-month period.

(x) In the event that a pharmacy which uses a data processing system experiences system downtime, the following is applicable:

(I) an auxiliary procedure shall ensure that refills are authorized by the original prescription drug order and that the maximum number of refills has not been exceeded or authorization from the prescribing practitioner shall be obtained prior to dispensing a refill; and

(II) all of the appropriate data shall be retained for on-line data entry as soon as the system is available for use again.

(C) Authorization of refills. Practitioner authorization for additional refills of a prescription drug order shall be noted as follows:

(i) on the hard-copy prescription drug order;

(ii) on the daily hard-copy printout; or

(iii) via the CRT display.

(D) Transfer of prescription drug order information. For the purpose of refill or initial dispensing, the transfer of original prescription drug order information is permissible between pharmacies, subject to the following requirements.

(i) The transfer of original prescription drug order information for controlled substances listed in Schedule III, IV, or V is permissible between pharmacies on a one-time basis only. However, pharmacies electronically sharing a real-time, on-line database may transfer up to the maximum refills permitted by law and the prescriber's authorization.

(ii) The transfer of original prescription drug order information for dangerous drugs is permissible between pharmacies without limitation up to the number of originally authorized refills.

(iii) The transfer is communicated directly between pharmacists and/or pharmacist interns or as authorized in paragraph (3)(D) of this subsection.

(iv) Both the original and the transferred prescription drug orders are maintained for a period of two years from the date of last refill.

(v) The pharmacist or pharmacist intern transferring the prescription drug order information shall:

(I) write the word "void" on the face of the invalidated prescription drug order; and

(II) record on the reverse of the invalidated prescription drug order the following information:

(-a-) the name, address, and, if a controlled substance, the DEA registration number of the pharmacy to which such prescription is transferred;

(-b-) the name of the pharmacist or pharmacist intern receiving the prescription drug order information;

(-c-) the name of the pharmacist or pharmacist intern transferring the prescription drug order information; and

(-d-) the date of the transfer.

(vi) The pharmacist or pharmacist intern receiving the transferred prescription drug order information shall:

(I) write the word "transfer" on the face of the transferred prescription drug order; and

(II) record on the transferred prescription drug order the following information:

(-a-) original date of issuance and date of dispensing or receipt, if different from date of issuance;

(-b-) original prescription number and the number of refills authorized on the original prescription drug order;

(-c-) number of valid refills remaining and the date of last refill, if applicable;

(-d-) name, address, and, if a controlled substance, the DEA registration number of the pharmacy from which such prescription drug order information is transferred; and

(-e-) name of the pharmacist or pharmacist intern transferring the prescription drug order information.

(vii) Prescription drug orders may not be transferred by non-electronic means during periods of downtime except on consultation with and authorization by a prescribing practitioner; provided however, during downtime, a hard copy of a prescription drug order may be made available for informational purposes only, to the patient, a pharmacist or pharmacist intern, and the prescription may be read to a pharmacist or pharmacist intern by telephone.

(viii) The original prescription drug order shall be invalidated in the data processing system for purposes of filling or refilling, but shall be maintained in the data processing system for refill history purposes.

(ix) If the data processing system has the capacity to store all the information required in clauses (v) and (vi) of this subparagraph, the pharmacist is not required to record this information on the original or transferred prescription drug order.

(x) The data processing system shall have a mechanism to prohibit the transfer or refilling of controlled substance prescription drug orders which have been previously transferred.

(E) Electronic transfer of prescription drug order information between pharmacies. Pharmacies electronically accessing the same prescription drug order records may electronically transfer prescription information if the following requirements are met.

(i) The original prescription is voided and the following information is documented in the records of the transferring pharmacy;

(I) the name, address, and if a controlled substance, the DEA registration number of the pharmacy to which such prescription is transferred;

(II) the name of the pharmacist or pharmacist intern receiving the prescription drug order information; and

(III) the date of the transfer.

(ii) Pharmacies not owned by the same person may electronically access the same prescription drug order records, provided the owner or chief executive officer of each pharmacy signs an agreement allowing access to such prescription drug order records.

(F) A pharmacist or pharmacist intern may not refuse to transfer original prescription information to another pharmacist or pharmacist intern who is acting on behalf of a patient and who is making a request for this information as specified in subparagraph (D) of this paragraph.

(5) Limitation to one type of recordkeeping system. When filing prescription drug order information a pharmacy may use only one of the two systems described in paragraph (3) or (4) of this subsection.

(6) Policy and procedure manual. A policy and procedure manual as it relates to the sterile pharmaceuticals shall be maintained at the pharmacy and be available for inspection. The manual shall include policies and procedures for:

(A) pharmaceutical care services;

(B) handling, storage, and disposal of cytotoxic/biohazardous drugs and waste;

(C) disposal of unusable drugs, supplies, and returns;

(D) security;

(E) equipment;

(F) sanitation;

(G) reference materials;

(H) drug selection and procurement;

(I) drug storage;

(J) drug administration to include infusion devices, drug delivery systems, and first dose monitoring;

(K) drug labeling;

(L) delivery of drugs;

(M) recordkeeping;

(N) controlled substances;

(O) investigational drugs, including the obtaining of protocols from the principal investigator;

(P) quality assurance/quality control;

(Q) duties and education and training of professional and nonprofessional staff; and

(R) emergency preparedness plan, to include continuity of patient and public safety.

(7) Patient Medication Record (PMR). A PMR shall be maintained for each patient of the pharmacy. The PMR shall contain at a minimum the following.

(A) Patient information:

(i) patient's full name, gender, and date of birth;

(ii) weight and height;

(iii) known drug sensitivities and allergies to drugs and/or food;

(iv) primary diagnosis and chronic conditions;

(v) other drugs the patient is receiving;

(vi) documentation of patient training;

(vii) pharmacist's comments relevant to the individual's drug therapy, including any other information unique to the specific patient or drug.

(B) Prescription drug order information:

(i) date of dispensing each sterile pharmaceutical;

(ii) unique identification number of the prescription;

(iii) physician's name;

(iv) name, quantity, and lot number of each product used in compounding the sterile pharmaceutical;

(v) quantity dispensed; and

(vi) directions for use and method of administration, including infusion rate if applicable.

(C) Nothing in this paragraph shall be construed as requiring a pharmacist to obtain, record, and maintain patient information other than prescription drug order information when a patient or patient's agent refuses to provide the necessary information for such patient medication records.

(8) Distribution of controlled substances to another registrant. A pharmacy may distribute controlled substances to a practitioner, another pharmacy or other registrant, without being registered to distribute, under the following conditions.

(A) The registrant to whom the controlled substance is to be distributed is registered under the Controlled Substances Act to dispense that controlled substance.

(B) The total number of dosage units of controlled substances distributed by a pharmacy may not exceed 5.0% of all controlled substances dispensed and distributed by the pharmacy during each calendar year in which the pharmacy is registered; if during the same calendar year it does exceed 5.0%, the pharmacy is required to obtain an additional registration to distribute controlled substances.

(C) If the distribution is for a Schedule III, IV, or V controlled substance, a record shall be maintained which indicates:

(i) the actual date of distribution;

(ii) the name, strength, and quantity of controlled substances distributed;

(iii) the name, address, and DEA registration number of the distributing pharmacy; and

(iv) the name, address, and DEA registration number of the pharmacy, practitioner, or other registrant to whom the controlled substances are distributed.

(D) If the distribution is for a Schedule I or II controlled substance, the following is applicable.

(i) The pharmacy, practitioner or other registrant who is receiving the controlled substances shall issue copy 1 and copy 2 of a DEA order form (DEA 222) to the distributing pharmacy.

(ii) The distributing pharmacy shall:

(I) complete the area on the DEA order form (DEA 222) titled TO BE FILLED IN BY SUPPLIER;

(II) maintain copy 1 of the DEA order form (DEA 222) at the pharmacy for two years; and

(III) forward copy 2 of the DEA order form (DEA 222) to the divisional office of the Drug Enforcement Administration at the close of the month during which the order is filled.

(9) Other records. Other records to be maintained by a pharmacy:

(A) a permanent log of the initials or identification codes which will identify each dispensing pharmacist by name (the initials or identification code shall be unique to ensure that each pharmacist can be identified, i.e., identical initials or identification codes shall not be used);

(B) copy 3 of DEA order form (DEA 222) which has been properly dated, initialed, and filed, and all copies of each unaccepted or defective order form and any attached statements or other documents;

(C) a hard copy of the power of attorney to sign DEA 222 order forms (if applicable);

(D) suppliers' invoices of dangerous drugs and controlled substances; pharmacists or other responsible individuals shall verify that the controlled drugs listed on the invoices were actually received by clearly recording their initials and the actual date of receipt of the controlled substances;

(E) suppliers' credit memos for controlled substances and dangerous drugs;

(F) a hard copy of inventories required by §291.17 of this title;

(G) hard-copy reports of surrender or destruction of controlled substances and/or dangerous drugs to an appropriate state or federal agency;

(H) records of distribution of controlled substances and/or dangerous drugs to other pharmacies, practitioners, or registrants; and

(I) a hard copy of any notification required by the Texas Pharmacy Act or these sections, including, but not limited to, the following:

(i) reports of theft or significant loss of controlled substances to DEA, DPS, and the board;

(ii) notifications of a change in pharmacist-in-charge of a pharmacy; and

(iii) reports of a fire or other disaster which may affect the strength, purity, or labeling of drugs, medications, devices, or other materials used in the diagnosis or treatment of injury, illness, and disease.

(10) Permission to maintain central records. Any pharmacy that uses a centralized recordkeeping system for invoices and financial data shall comply with the following procedures.

(A) Controlled substance records. Invoices and financial data for controlled substances may be maintained at a central location provided the following conditions are met.

(i) Prior to the initiation of central recordkeeping, the pharmacy submits written notification by registered or certified mail to the divisional director of the Drug Enforcement Administration as required by the Code of Federal Regulations, Title 21, §1304.04(a), and submits a copy of this written notification to the Texas State Board of Pharmacy. Unless the registrant is informed by the divisional director of the Drug Enforcement Administration that permission to keep central records is denied, the pharmacy may maintain central records commencing 14 days after receipt of notification by the divisional director.

(ii) The pharmacy maintains a copy of the notification required in clause (i) of this subparagraph.

(iii) The records to be maintained at the central record location shall not include executed DEA order forms, prescription drug orders, or controlled substance inventories, which shall be maintained at the pharmacy.

(B) Dangerous drug records. Invoices and financial data for dangerous drugs may be maintained at a central location.

(C) Access to records. If the records are kept on microfilm, computer media, or in any form requiring special equipment to render the records easily readable, the pharmacy shall provide access to such equipment with the records.

(D) Delivery of records. The pharmacy agrees to deliver all or any part of such records to the pharmacy location within two business days of written request of a board agent or any other authorized official.

(E) Ownership of pharmacy records. For purposes of these sections, a pharmacy licensed under the Act is the only entity which may legally own and maintain prescription drug records.

(11) Confidentiality.

(A) A pharmacist shall provide adequate security of prescription drug order and patient medication records to prevent indiscriminate or unauthorized access to confidential health information. If prescription drug orders, requests for refill authorization, or other confidential health information are not transmitted directly between a pharmacy and a physician but are transmitted through a data communication device, confidential health information may not be accessed or maintained by the operator of the data communication device unless specifically authorized to obtain the confidential information by this subsection.

(B) Confidential records are privileged and may be released only to:

(i) the patient or the patient's agent;

(ii) a practitioner or another pharmacist if, in the pharmacist's professional judgement, the release is necessary to protect the patient's health and well being;

(iii) the board or to a person or another state or federal agency authorized by law to receive the confidential record;

(iv) a law enforcement agency engaged in investigation of a suspected violation of Chapter 481 or 483, Health and Safety Code, or the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. Section 801 et seq.);

(v) a person employed by a state agency that licenses a practitioner, if the person is performing the person's official duties; or

(vi) an insurance carrier or other third party payor authorized by a patient to receive such information.

(f) Triplicate prescription requirements. The Texas State Board of Pharmacy adopts by reference the rules promulgated by the Texas Department of Public Safety, which are set forth in Subchapter F of 37 TAC §§13.101 - 13.113 concerning triplicate prescriptions.

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 February 13, 2004.

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Executive Director/Secretary
Texas State Board of Pharmacy
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Proposal publication date: December 26, 2003
For further information, please call: (512) 305-8028

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SUBCHAPTER C. NUCLEAR PHARMACY (CLASS B)

22 TAC §291.52, §291.53

The Texas State Board of Pharmacy adopts amendments to §291.52, concerning Definitions and §291.53, concerning Personnel in a Nuclear Pharmacy (Class B). The amendments are adopted without changes to the proposed text as published in the December 26, 2003, issue of the *Texas Register* (28 TexReg 11483).

The adopted amendments to §291.52 and §291.53 make conforming changes in existing rules to implement the provisions of new Chapter 297, Pharmacy Technicians. In addition, the adopted amendments correct references to the Texas Pharmacy Act, and amend the definition of "dangerous drug."

No comments were received regarding the amendments.

The amendments are adopted under §551.002 and §554.051(a) 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 statutes affected by the amendments: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

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 State Board of Pharmacy
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SUBCHAPTER D. INSTITUTIONAL PHARMACY (CLASS C)

22 TAC §§291.72, 291.73, 291.76

The Texas State Board of Pharmacy adopts amendments to §291.72, concerning Definitions without changes to the proposed text as published in the December 26, 2003, issue of the *Texas Register* (28 TexReg 11485). The Board adopts amendments to §291.73, concerning Personnel in a Class C (Institutional) Pharmacy and §291.76, concerning Class C Pharmacies Located in a Freestanding Ambulatory Surgical Center with changes to the proposed text based on staff recommendations to clarify the duties of pharmacy technicians.

The adopted amendments to §§291.72, 291.73 and 291.76 make conforming changes in existing rules to implement the provisions of new Chapter 297, Pharmacy Technicians. In addition, the adopted amendments correct references to the Texas Pharmacy Act, amend the definition of "dangerous drug," and conform with the provisions of House Bill 1095 which gives physicians the authority to delegate the carrying out or signing of a prescription drug order for a controlled substance to advanced nurse practitioners and physician assistants.

No comments were received regarding the amendments.

The amendments are adopted under §551.002 and §554.051(a) 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 statutes affected by the amendments: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.73. Personnel.

(a) Requirements for pharmacist services.

(1) A Class C pharmacy in a facility licensed for 101 beds or more shall be under the continuous on-site supervision of a pharmacist during the time it is open for pharmacy services; provided, however, that pharmacy technicians may distribute prepackaged and prelabeled drugs from a satellite pharmacy in the absence of on-site supervision of a pharmacist, under the following conditions:

(A) the distribution is under the control of a pharmacist; and

(B) a pharmacist is on duty in the facility.

(2) A Class C pharmacy in a facility licensed for 100 beds or less shall have the services of a pharmacist at least on a part-time or consulting basis according to the needs of the facility.

(3) A pharmacist shall be accessible at all times to respond to other health professional's questions and needs. Such access may be through a telephone which is answered 24 hours a day, e.g., answering or paging service, a list of phone numbers where the pharmacist may be reached, or any other system which accomplishes this purpose.

(b) Pharmacist-in-charge.

(1) General.

(A) Each institutional pharmacy in a facility with 101 beds or more shall have one full-time pharmacist-in-charge, who may be pharmacist-in-charge for only one such pharmacy.

(B) Each institutional pharmacy in a facility with 100 beds or less shall have one pharmacist-in-charge who is employed or under contract, at least on a consulting or part-time basis, but may be employed on a full-time basis, if desired, and who may be pharmacist-in-charge for no more than three facilities or 150 beds.

(C) The pharmacist-in-charge shall be assisted by additional pharmacists and pharmacy technicians commensurate with the scope of services provided.

(D) If the pharmacist-in-charge is employed on a part-time or consulting basis, a written agreement shall exist between the facility and the pharmacist, and a copy of the written agreement shall be made available to the board upon request.

(2) Responsibilities. The pharmacist-in-charge shall have the responsibility for, at a minimum, the following:

(A) providing the appropriate level of pharmaceutical care services to patients of the facility;

(B) ensuring that drugs and/or devices are prepared for distribution safely, and accurately as prescribed;

(C) developing a system for the compounding, sterility assurance, quality assurance and quality control of sterile pharmaceuticals compounded within the institutional pharmacy;

(D) developing a system to assure that all pharmacy personnel responsible for compounding and/or supervising the compounding of sterile pharmaceuticals within the pharmacy receive appropriate education and training and competency evaluation;

(E) providing written guidelines and approval of the procedure to assure that all pharmaceutical requirements are met when any part of preparing, sterilizing, and labeling of sterile pharmaceuticals is not performed under direct pharmacy supervision;

(F) developing a system for bulk compounding or batch preparation of drugs;

(G) establishing specifications for procurement and storage of all pharmaceutical materials including pharmaceuticals, components used in the compounding of pharmaceuticals, and drug delivery devices;

(H) participating in the development of a formulary for the facility, subject to approval of the appropriate committee of the facility;

(I) developing a system to assure that drugs to be administered to inpatients are distributed pursuant to an original or direct copy of the practitioner's medication order;

(J) developing a system for the filling and labeling of all containers from which drugs are to be distributed or dispensed;

(K) assuring that the pharmacy maintains and makes available a sufficient inventory of antidotes and other emergency drugs as well as current antidote information, telephone numbers of regional poison control center and other emergency assistance organizations, and such other materials and information as may be deemed necessary by the appropriate committee of the facility;

(L) maintaining records of all transactions of the institutional pharmacy as may be required by applicable law, state and federal, and as may be necessary to maintain accurate control over and accountability for all pharmaceutical materials including pharmaceuticals, components used in the compounding of pharmaceuticals, and drug delivery devices;

(M) participating in those aspects of the facility's patient care evaluation program which relate to pharmaceutical utilization and effectiveness;

(N) participating in teaching and/or research programs in the facility;

(O) implementing the policies and decisions of the appropriate committee(s) relating to pharmaceutical services of the facility;

(P) providing effective and efficient messenger or delivery service to connect the institutional pharmacy with appropriate areas of the facility on a regular basis throughout the normal workday of the facility;

(Q) developing a system for the labeling, storage, and distribution of investigational new drugs, including maintenance of information in the pharmacy and nursing station where such drugs are being administered, concerning the dosage form, route of administration, strength, actions, uses, side effects, adverse effects, interactions and symptoms of toxicity of investigational new drugs;

(R) assuring that records in a data processing system are maintained such that the data processing system is in compliance with Class C (Institutional) pharmacy requirements;

(S) assuring that a reasonable effort is made to obtain, record, and maintain patient medication records;

(T) assuring the legal operation of the pharmacy, including meeting all inspection and other requirements of all state and federal laws or rules governing the practice of pharmacy; and

(U) if the pharmacy uses an automated medication supply system, shall be responsible for the following:

(i) reviewing and approving all policies and procedures for system operation, safety, security, accuracy and access, patient confidentiality, prevention of unauthorized access, and malfunction;

(ii) inspecting medications in the automated medication supply system, at least monthly, for expiration date, misbranding, physical integrity, security, and accountability;

(iii) assigning, discontinuing, or changing personnel access to the automated medication supply system;

(iv) ensuring that pharmacy technicians and licensed healthcare professionals performing any services in connection with an automated medication supply system have been properly trained on the use of the system and can demonstrate comprehensive knowledge of the written policies and procedures for operation of the system; and

(v) ensuring that the automated medication supply system is stocked accurately and an accountability record is maintained in accordance with the written policies and procedures of operation.

(c) Consultant pharmacist.

(1) The consultant pharmacist may be the pharmacist-in-charge.

(2) A written agreement shall exist between the facility and any consultant pharmacist, and a copy of the written agreement shall be made available to the board upon request.

(d) Pharmacists.

(1) General.

(A) The pharmacist-in-charge shall be assisted by a sufficient number of additional licensed pharmacists as may be required to operate the institutional pharmacy competently, safely, and adequately to meet the needs of the patients of the facility.

(B) All pharmacists shall assist the pharmacist-in-charge in meeting the responsibilities as outlined in subsection (b)(2) of this section and in ordering, administering, and accounting for pharmaceutical materials.

(C) All pharmacists shall be responsible for any delegated act performed by pharmacy technicians under his or her supervision.

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

(E) A distributing pharmacist shall ensure that the drug is prepared for distribution safely, and accurately as prescribed. In addition, if multiple pharmacists participate in the preparation of medication orders for distribution, each pharmacist shall ensure the safety and accuracy of the portion of the process the pharmacist is performing. The preparation and distribution process for medication orders shall include, but not be limited to, drug regimen review, and verification of accurate medication order data entry, preparation, and distribution, and performance of the final check of the prepared medication.

(2) Duties. Duties of the pharmacist-in-charge and all other pharmacists shall include, but need not be limited to the following:

(A) providing those acts or services necessary to provide pharmaceutical care;

(B) receiving, interpreting, and evaluating prescription drug orders, and reducing verbal medication orders to writing either manually or electronically;

(C) participating in drug and/or device selection as authorized by law, drug and/or device supplier selection, drug administration, drug regimen review, or drug or drug-related research;

(D) performing a specific act of drug therapy management for a patient delegated to a pharmacist by a written protocol from a physician licensed in this state in compliance with the Medical Practice Act Subtitle B, Chapter 157, Occupations Code;

(E) accepting the responsibility for:

(i) distributing drugs and devices pursuant to medication orders;

(ii) compounding and labeling of drugs and devices;

(iii) proper and safe storage of drugs and devices; and

(iv) maintaining proper records for drugs and devices.

(e) Pharmacy technicians.

(1) General.

(A) On June 1, 2004, all persons employed as pharmacy technicians must be either registered pharmacy technicians or pharmacy technician trainees as follows.

(i) All persons who have passed the required pharmacy technician certification examination must be registered with the board under the provisions of this section.

(ii) All persons who have not taken and passed the required pharmacy certification examination shall be designated pharmacy technician trainees under the provisions of §297.5 of this title (relating to Pharmacy Technician Trainees).

(B) Between January 1, 2004, and May 31, 2004, all persons employed as pharmacy technicians who are qualified for registration by the board shall register according to the schedule designated by the board. Between January 1, 2004 and May 31, 2004, persons who are awaiting their scheduled time for registration and persons who have applied for registration, but the registration has not been completed shall comply with the rules in effect prior to January 1, 2004, relating to requirements and duties for certified or exempt pharmacy technicians.

(C) All pharmacy technicians shall meet the training requirements specified in §297.6 of this title (relating to Pharmacy Technician Training).

(2) Duties.

(A) providing those acts or services necessary to provide pharmaceutical care;

(B) Sterile pharmaceuticals. Pharmacy technicians may compound sterile pharmaceuticals pursuant to medication orders provided the pharmacy technicians:

(i) have completed the training specified in subsection (f) of this section; and

(ii) are supervised by a pharmacist who has completed the training specified in subsection (f) of this section and who conducts in-process and final checks, and affixes his or her initials to the label or if batch prepared, to the appropriate quality control records. (The initials are not required on the label if it is maintained in a permanent record of the pharmacy)

(3) Procedures.

(A) pharmacy technicians shall handle medication orders in accordance with standard, written procedures and guidelines.

(B) pharmacy technicians shall handle prescription drug orders in the same manner as those working in a Class A pharmacy.

(f) Special education, training, and evaluation requirements for pharmacy personnel compounding or responsible for the direct supervision of pharmacy personnel compounding sterile pharmaceuticals.

(1) General.

(A) All pharmacy personnel preparing sterile pharmaceuticals shall receive didactic and experiential training and competency evaluation through demonstration, testing (written or practical) as outlined by the pharmacist-in-charge and described in the policy and procedure or training manual. Such training shall include instruction and experience in the following areas:

(i) aseptic technique;

(ii) critical area contamination factors;

(iii) environmental monitoring;

(iv) facilities;

(v) equipment and supplies;

(vi) sterile pharmaceutical calculations and terminology;

(vii) sterile pharmaceutical compounding documentation;

(viii) quality assurance procedures;

(ix) aseptic preparation procedures, including proper gowning and gloving technique;

(x) the handling of cytotoxic and hazardous drugs; and

(xi) general conduct in the controlled area.

(B) The aseptic technique of each person compounding or responsible for the direct supervision of personnel compounding sterile pharmaceuticals shall be observed and evaluated as satisfactory through written or practical tests and process validation and such evaluation documented.

(C) Although process validation may be incorporated into the experiential portion of a training program, process validation must be conducted at each pharmacy where an individual compounds sterile pharmaceuticals. No product intended for patient use shall be compounded by an individual until the on-site process validation test indicates that the individual can competently perform aseptic procedures, except that a pharmacist may compound sterile pharmaceuticals and supervise pharmacy technicians compounding sterile pharmaceuticals without process validation provided the pharmacist:

(i) has completed a recognized course in an accredited college of pharmacy or a course sponsored by an American Council on Pharmaceutical Education approved provider which provides 20 hours of instruction and experience in the areas listed in this paragraph; and

(ii) completes the on-site process validation within seven days of commencing work at the pharmacy.

(D) Process validation procedures for assessing the preparation of specific types of sterile pharmaceuticals shall be representative of all types of manipulations, products, and batch sizes that personnel preparing that type of pharmaceutical are likely to encounter.

(E) The pharmacist-in-charge shall assure continuing competency of pharmacy personnel through in-service education, training, and process validation to supplement initial training. Personnel competency shall be evaluated:

(i) during orientation and training prior to the regular performance of those tasks;

(ii) whenever the quality assurance program yields an unacceptable result;

(iii) whenever unacceptable techniques are observed; and

(iv) at least on an annual basis.

(2) Pharmacists.

(A) All pharmacists who compound sterile pharmaceuticals or supervise pharmacy technicians compounding sterile pharmaceuticals shall:

(i) complete through a single course, a minimum 20 hours of instruction and experience in the areas listed in paragraph (1) of this subsection. Such training may be evidenced by either:

(I) completion of a structured on-the-job didactic and experiential training program at this pharmacy which provides 20 hours of instruction and experience in the areas listed in paragraph (1) of this subsection. Such training may not be transferred to another pharmacy unless the pharmacies are under common ownership and control and use a common training program; or

(II) completion of a recognized course in an accredited college of pharmacy or a course sponsored by an American Council on Pharmaceutical Education approved provider which provides 20 hours of instruction and experience in the areas listed in paragraph (1) of this subsection; and

(ii) possess knowledge about:

(I) aseptic processing;

(II) quality control and quality assurance as related to environmental, component, and end-product testing;

(III) chemical, pharmaceutical, and clinical properties of drugs;

(IV) container, equipment, and closure system selection; and

(V) sterilization techniques.

(B) The required experiential portion of the training programs specified in this paragraph must be supervised by an individual who has already completed training as specified in paragraph (2) or (3) of this subsection.

(3) Pharmacy technicians. In addition to the qualifications and training outlined in subsection (e) of this section, all pharmacy technicians who compound sterile pharmaceuticals shall:

(A) have a high school or equivalent education;

(B) either:

(i) complete through a single course, a minimum of 40 hours of instruction and experience in the areas listed in paragraph (1) of this subsection. Such training may be obtained through the:

(I) completion of a structured on-the-job didactic and experiential training program at this pharmacy which provides 40 hours of instruction and experience in the areas listed in paragraph (1) of this subsection. Such training may not be transferred to another pharmacy unless the pharmacies are under common ownership and control and use a common training program; or

(II) completion of a course sponsored by an ACPE approved provider which provides 40 hours of instruction and experience in the areas listed in paragraph (1) of this subsection; or

(ii) complete a training program which is accredited by the American Society of Health-System Pharmacists (formerly the American Society of Hospital Pharmacists). Individuals enrolled in training programs accredited by the American Society of Health-System Pharmacists may compound sterile pharmaceuticals in a licensed pharmacy provided:

(I) the compounding occurs only during times the individual is assigned to a pharmacy as a part of the experiential component of the American Society of Health-System Pharmacists training program;

(II) the individual is under the direct supervision of and responsible to a pharmacist who has completed training as specified in paragraph (2) of this subsection; and

(III) the supervising pharmacist conducts in-process and final checks; and

(C) on January 1, 2001, discontinue preparation of sterile pharmaceuticals if the technician has not taken and passed the National Pharmacy Technician Certification Exam or other examination approved during an open meeting by the Board. Such pharmacy technicians may continue to compound sterile pharmaceuticals during the interim between the effective date of these rules and January 1, 2001, if they maintain documentation of completion of the training specified in subparagraph (B) of this paragraph.

(D) acquire the required experiential portion of the training programs specified in this paragraph under the supervision of an individual who has already completed training as specified in this paragraph or paragraph (2) of this subsection.

(4) Documentation of Training. A written record of initial and in-service training and the results of written or practical testing and process validation of pharmacy personnel shall be maintained and contain the following information:

(A) name of the person receiving the training or completing the testing or process validation;

(B) date(s) of the training, testing, or process validation;

(C) general description of the topics covered in the training or testing or of the process validated;

(D) name of the person supervising the training, testing, or process validation; and

(E) signature (first initial and last name or full signature) of the person receiving the training or completing the testing or process validation and the pharmacist-in-charge or other pharmacist employed by the pharmacy and designated by the pharmacist-in-charge as responsible for training, testing, or process validation of personnel.

(g) Identification of pharmacy personnel. All pharmacy personnel shall wear an identification tag or badge which bears the person's name and identifies him or her by title or function as follows:

(1) Pharmacy technicians. All pharmacy technicians shall wear an identification tag or badge which bears the person's name and identifies him or her as a pharmacy technician trainee a registered pharmacy technician, or a certified pharmacy technician, if the technician maintains current certification with the Pharmacy Technician Certification Board or any other entity providing an examination approved by the Board.

(2) Pharmacist interns. All pharmacist interns shall wear an identification tag or badge which bears the person's name and identifies him or her as a pharmacist intern.

(3) Pharmacists. All pharmacists shall wear an identification tag or badge which bears the person's name and identifies him or her as a pharmacist.

§291.76. Class C Pharmacies Located in a Freestanding Ambulatory Surgical Center.

(a) Purpose. The purpose of this section is to provide standards in the conduct, practice activities, and operation of a pharmacy located in a freestanding ambulatory surgical center that is licensed by the Texas Department of Health. Class C pharmacies located in a freestanding ambulatory surgical center shall comply with this section, in lieu of §§291.71 - 291.75 of this title (relating to Purpose; Definitions; Personnel; Operational Standards; and Records).

(b) Definitions. The following words and terms, when used in these sections, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Texas Pharmacy Act, Chapters 551 - 566 and 568 - 569, Occupations Code, as amended.

(2) Ambulatory surgical center (ASC)--A freestanding facility that is licensed by the Texas Department of Health to provide surgical services to patients who do not require overnight hospital care.

(3) Automated drug dispensing system--An automated device that measures, counts, and/or packages a specified quantity of dosage units for a designated drug product.

(4) Board--The Texas State Board of Pharmacy.

(5) Consultant pharmacist--A pharmacist retained by a facility on a routine basis to consult with the ASC in areas that pertain to the practice of pharmacy.

(6) Controlled substance--A drug, immediate precursor, or other substance listed in Schedules I-V or Penalty Groups 1-4 of the Texas Controlled Substances Act, as amended, or a drug immediate precursor, or other substance included in Schedule I-V of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended (Public Law 91-513).

(7) Direct copy--Electronic copy or carbonized copy of a medication order including a facsimile (FAX), tele-autograph, or a copy transmitted between computers.

(8) Dispense--Preparing, packaging, compounding, or labeling for delivery a prescription drug or device in the course of professional practice to an ultimate user or his agent by or pursuant to the lawful order of a practitioner.

(9) Distribute--The delivery of a prescription drug or device other than by administering or dispensing.

(10) Downtime--Period of time during which a data processing system is not operable.

(11) Electronic signature--A unique security code or other identifier which specifically identifies the person entering information into a data processing system. A facility which utilizes electronic signatures must:

(A) maintain a permanent list of the unique security codes assigned to persons authorized to use the data processing system; and

(B) have an ongoing security program which is capable of identifying misuse and/or unauthorized use of electronic signatures.

(12) Floor stock--Prescription drugs or devices not labeled for a specific patient and maintained at a nursing station or other ASC department (excluding the pharmacy) for the purpose of administration to a patient of the ASC.

(13) Formulary--List of drugs approved for use in the ASC by an appropriate committee of the ambulatory surgical center.

(14) Hard copy--A physical document that is readable without the use of a special device (i.e., cathode ray tube (CRT), microfiche reader, etc.).

(15) Investigational new drug--New drug intended for investigational use by experts qualified to evaluate the safety and effectiveness of the drug as authorized by the federal Food and Drug Administration.

(16) Medication order--A written order from a practitioner or a verbal order from a practitioner or his authorized agent for administration of a drug or device.

(17) Pharmacist-in-charge--Pharmacist designated on a pharmacy license as the pharmacist who has the authority or responsibility for a pharmacy's compliance with laws and rules pertaining to the practice of pharmacy.

(18) Pharmacy--Area or areas in a facility, separate from patient care areas, where drugs are stored, bulk compounded, delivered, compounded, dispensed, and/or distributed to other areas or departments of the ASC, or dispensed to an ultimate user or his or her agent.

(19) Prescription drug--

(A) A substance for which federal or state law requires a prescription before it may be legally dispensed to the public;

(B) A drug or device that under federal law is required, prior to being dispensed or delivered, to be labeled with either of the following statements:

(i) Caution: federal law prohibits dispensing without prescription; or

(ii) Caution: federal law restricts this drug to use by or on order of a licensed veterinarian; or

(C) A drug or device that is required by any applicable federal or state law or regulation to be dispensed on prescription only or is restricted to use by a practitioner only.

(20) Prescription drug order--

(A) A written order from a practitioner or verbal order from a practitioner or his authorized agent to a pharmacist for a drug or device to be dispensed; or

(B) A written order or a verbal order pursuant to Subtitle B, Chapter 157, Occupations Code.

(21) Full-time pharmacist--A pharmacist who works in a pharmacy from 30 to 40 hours per week or if the pharmacy is open less than 60 hours per week, one-half of the time the pharmacy is open.

(22) Part-time pharmacist--A pharmacist who works less than full-time.

(23) Pharmacy technician--An individual whose responsibility in a pharmacy is to provide technical services that do not require professional judgment regarding preparing and distributing drugs and who works under the direct supervision of and is responsible to a pharmacist. Pharmacy technician includes registered pharmacy technicians and pharmacy technician trainees.

(24) Pharmacy technician trainee--A person who is:

(A) not registered as a pharmacy technician by the board, and either:

(B) participating in a pharmacy's technician training program; or

(C) currently enrolled in a:

(i) pharmacy technician training program accredited by the American Society of Health-System Pharmacists; or

(ii) health science technology education program in a Texas high school that is accredited by the Texas Education Agency.

(25) Texas Controlled Substances Act--The Texas Controlled Substances Act, the Health and Safety Code, Chapter 481, as amended.

(c) Personnel.

(1) Pharmacist-in-charge.

(A) General. Each ambulatory surgical center shall have one pharmacist-in-charge who is employed or under contract, at least on a consulting or part-time basis, but may be employed on a full-time basis.

(B) Responsibilities. The pharmacist-in-charge shall have the responsibility for, at a minimum, the following:

(i) preparation and sterilization of parenteral medications compounded within the ASC pharmacy;

(ii) admixture of parenteral products, including education and training of nursing personnel concerning incompatibility and provision of proper incompatibility information when the admixture of parenteral products is not performed within the ASC pharmacy;

(iii) bulk compounding of drugs;

(iv) establishment of specifications for procurement and storage of all materials, including drugs, chemicals, and biologicals;

(v) participation in the development of a formulary for the ASC, subject to approval of the appropriate committee of the ASC;

(vi) distribution of drugs to be administered to inpatients pursuant to an original or direct copy of the practitioner's medication order;

(vii) filling and labeling all containers from which drugs are to be distributed or dispensed;

(viii) maintaining and making available a sufficient inventory of antidotes and other emergency drugs, both in the pharmacy and inpatient care areas, as well as current antidote information, telephone numbers of regional poison control center and other emergency assistance organizations, and such other materials and information as may be deemed necessary by the appropriate committee of the ASC;

(ix) records of all transactions of the ASC pharmacy as may be required by applicable state and federal law, and as may be necessary to maintain accurate control over and accountability for all pharmaceutical materials;

(x) participation in those aspects of the ASC's patient care evaluation program which relate to pharmaceutical material utilization and effectiveness;

(xi) participation in teaching and/or research programs in the ASC;

(xii) implementation of the policies and decisions of the appropriate committee(s) relating to pharmaceutical services of the ASC;

(xiii) effective and efficient messenger and delivery service to connect the ASC pharmacy with appropriate areas of the ASC on a regular basis throughout the normal workday of the ASC;

(xiv) labeling, storage, and distribution of investigational new drugs, including maintenance of information in the pharmacy and nursing station where such drugs are being administered, concerning the dosage form, route of administration, strength, actions, uses, side effects, adverse effects, interactions, and symptoms of toxicity of investigational new drugs;

(xv) meeting all inspection and other requirements of the Texas Pharmacy Act and this subsection; and

(xvi) maintenance of records in a data processing system such that the data processing system is in compliance with the requirements for a Class C (institutional) pharmacy located in a freestanding ASC.

(2) Consultant pharmacist.

(A) The consultant pharmacist may be the pharmacist-in-charge.

(B) A written contract shall exist between the ASC and any consultant pharmacist, and a copy of the written contract shall be made available to the board upon request.

(3) Pharmacists.

(A) General.

(i) The pharmacist-in-charge shall be assisted by a sufficient number of additional licensed pharmacists as may be required to operate the ASC pharmacy competently, safely, and adequately to meet the needs of the patients of the facility.

(ii) All pharmacists shall assist the pharmacist-in-charge in meeting the responsibilities as outlined in paragraph (1)(B) of this subsection and in ordering, administering, and accounting for pharmaceutical materials.

(iii) All pharmacists shall be responsible for any delegated act performed by pharmacy technicians under his or her supervision.

(iv) All pharmacists while on duty shall be responsible for complying with all state and federal laws or rules governing the practice of pharmacy.

(B) Duties. Duties of the pharmacist-in-charge and all other pharmacists shall include, but need not be limited to, the following:

(i) receiving and interpreting prescription drug orders and oral medication orders and reducing these orders to writing either manually or electronically;

(ii) selection of prescription drugs and/or devices and/or suppliers; and

(iii) interpreting patient profiles.

(C) Special requirements. All pharmacists who compound sterile parenteral and/or enteral products shall meet minimal standards of training and experience in the preparation, sterilization, and admixture of parenteral and/or enteral products; such standards of training and experience may be evidenced by either:

(i) documentation of completion of a minimum of 20 hours of on-the-job training in the preparation, sterilization, and admixture of parenteral and/or enteral products; or

(ii) documentation of completion of a recognized course in an accredited college of pharmacy or a course sponsored by an ACPE approved provider. The course must provide a minimum of 20 hours of education or experience in the preparation, sterilization, and admixture of parenteral and/or enteral products.

(4) Pharmacy technicians.

(A) General

(i) On June 1, 2004, all persons employed as pharmacy technicians must be either registered pharmacy technicians or pharmacy technician trainees as follows.

(I) All persons who have passed the required pharmacy technician certification examination must be registered with the board under the provisions this section.

(II) All persons who have not taken and passed the required pharmacy certification examination shall be designated pharmacy technician trainees under the provisions of §297.5 of this title (relating to Pharmacy Technician Trainees).

(ii) Between January 1, 2004, and May 31, 2004, all persons employed as pharmacy technicians who are qualified for registration by the board shall register according to the schedule designated by the board. Between January 1, 2004 and May 31, 2004, persons who are awaiting their scheduled time for registration and persons who have applied for registration, but the registration has not been completed shall comply with the rules in effect prior to January 1, 2004, relating to requirements and duties for certified or exempt pharmacy technicians.

(iii) All pharmacy technicians shall meet the training requirements specified in §297.6 of this title (relating to Pharmacy Technician Training).

(B) Duties. Duties may include, but need not be limited to, the following functions, under the direct supervision of a pharmacist:

(i) prepacking and labeling unit and multiple dose packages, provided a pharmacist supervises and conducts in-process and final checks and affixes his or her signature or electronic signature to the appropriate quality control records;

(ii) preparing, packaging, compounding, or labeling prescription drugs pursuant to medication orders, provided a pharmacist supervises and checks the preparation;

(iii) compounding sterile pharmaceuticals pursuant to medication orders provided the pharmacy technicians:

(I) have completed the training specified in §291.73 of this title (relating to Personnel); and

(II) are supervised by a pharmacist who has completed the sterile products training specified in §291.73 of this title, conducts in-process and final checks, and affixes his or her initials to the label or if batch prepared, to the appropriate quality control records (The initials are not required on the label if it is maintained in a permanent record of the pharmacy.).

(iv) bulk compounding, provided a pharmacist supervises and conducts in-process and final checks and affixes his or her initials to the appropriate quality control records;

(v) distributing routine orders for stock supplies to patient care areas;

(vi) entering medication order and drug distribution information into a data processing system, provided judgmental decisions are not required and a pharmacist checks the accuracy of the information entered into the system prior to releasing the order or in compliance with the absence of pharmacist requirements contained in subsection (d)(6)(E) and (F) of this section;

(vii) maintaining inventories of drug supplies;

(viii) maintaining pharmacy records; and

(ix) loading bulk unlabeled drugs into an automated drug dispensing system provided a pharmacist supervises, verifies that the system was properly loaded prior to use, and affixes his or her signature or electronic signature to the appropriate quality control records.

(C) Procedures.

(i) Pharmacy technicians shall handle medication orders in accordance with standard written procedures and guidelines.

(ii) Pharmacy technicians shall handle prescription drug orders in the same manner as pharmacy technicians working in a Class A pharmacy.

(5) Identification of pharmacy personnel. All pharmacy personnel shall wear an identification tag or badge which bears the person's name and identifies him or her by title or function as follows:

(A) Pharmacy technicians. All pharmacy technicians shall wear an identification tag or badge which bears the person's name and identifies him or her as a pharmacy technician trainee a registered pharmacy technician, or a certified pharmacy technician, if the technician maintains current certification with the Pharmacy Technician Certification Board or any other entity providing an examination approved by the Board.

(B) Pharmacist interns. All pharmacist interns shall wear an identification tag or badge which bears the person's name and identifies him or her as a pharmacist intern.

(C) Pharmacists. All pharmacists shall wear an identification tag or badge which bears the person's name and identifies him or her as a pharmacist.

(d) Operational standards.

(1) Licensing requirements.

(A) An ASC pharmacy shall register annually with the board on a pharmacy license application provided by the board, following the procedures specified in §291.1 of this title (relating to Pharmacy License Application).

(B) If the ASC pharmacy is owned or operated by a pharmacy management or consulting firm, the following conditions apply.

(i) The pharmacy license application shall list the pharmacy management or consulting firm as the owner or operator.

(ii) The pharmacy management or consulting firm shall obtain DEA and DPS controlled substances registrations that are issued in the name of the firm, unless the following occur:

(I) the pharmacy management or consulting firm and the facility cosign a contractual pharmacy service agreement which assigns overall responsibility for controlled substances to the facility; and

(II) such pharmacy management or consulting firm maintains dual responsibility for the controlled substances.

(C) An ASC pharmacy which changes ownership shall notify the board within 10 days of the change of ownership and apply for a new and separate license as specified in §291.4 of this title (relating to Change of Ownership).

(D) An ASC pharmacy which changes location and/or name shall notify the board of the change within 10 days and file for an amended license as specified in §291.2 of this title (relating to Change of Location and/or Name).

(E) An ASC pharmacy owned by a partnership or corporation which changes managing officers shall notify the board in writing of the names of the new managing officers within 10 days of the change, following the procedures in §291.3 of this title (relating to Change of Managing Officers).

(F) An ASC pharmacy shall notify the board in writing within 10 days of closing, following the procedures in §291.5 of this title (relating to Closed Pharmacies).

(G) A fee as specified in §291.6 of this title (relating to Pharmacy License Fees) will be charged for issuance and renewal of a license and the issuance of an amended license.

(H) A separate license is required for each principal place of business and only one pharmacy license may be issued to a specific location.

(I) An ASC pharmacy, licensed under the Act, §560.051(a)(3), concerning institutional pharmacy (Class C), which also operates another type of pharmacy which would otherwise be required to be licensed under the Act, §560.051(a)(1), concerning community pharmacy (Class A), or the Act, §560.051(a)(2), concerning nuclear pharmacy (Class B), is not required to secure a license for the other type of pharmacy; provided, however, such license is required to comply with the provisions of §291.31 of this title (relating to Definitions), §291.32 of this title (relating to Personnel), §291.33 of this title (relating to Operational Standards), §291.34 of this title (relating to Records), §291.35 of this title (relating to Triplicate Prescription Records), and §291.36 of this title (relating to Class A Pharmacies Dispensing Sterile Products) contained in Community Pharmacy (Class A), or §291.51 of this title (relating to Purpose), §291.52 of this title (relating to Definitions), §291.53 of this title (relating to Personnel), §291.54 of this title (relating to Operational Standards), and §291.55 of this title (relating to Records), contained in Nuclear Pharmacy (Class B), to the extent such sections are applicable to the operation of the pharmacy.

(2) Environment.

(A) General requirements.

(i) Each ambulatory surgical center shall have a designated work area separate from patient areas, and which shall have space adequate for the size and scope of pharmaceutical services and shall have adequate space and security for the storage of drugs.

(ii) The ASC pharmacy shall be arranged in an orderly fashion and shall be kept clean. All required equipment shall be clean and in good operating condition.

(B) Special requirements.

(i) The ASC pharmacy shall have locked storage for Schedule II controlled substances and other controlled drugs requiring additional security.

(ii) The ASC pharmacy shall have a designated area for the storage of poisons and externals separate from drug storage areas.

(iii) If the ASC pharmacy prepares sterile products, the ASC pharmacy shall have a designated area for the laminar air flow hood for the preparation of sterile products, which shall:

(I) be designed to avoid outside traffic and air flow;

(II) have cleanable surfaces, walls, and floors;

(III) be ventilated in a manner not interfering with laminar flow hood conditions; and

(IV) not be used for bulk storage for supplies and materials.

(C) Security.

(i) Only authorized personnel may have access to storage areas for prescription drugs and/or devices.

(ii) All storage areas for prescription drugs and/or devices shall be locked by key or combination, so as to prevent access by unauthorized personnel.

(iii) The pharmacist-in-charge shall consult with ASC personnel with respect to security of the drug storage areas, including provisions for adequate safeguards against theft or diversion of prescription drugs and/or devices.

(3) Equipment and supplies. Ambulatory surgical centers supplying drugs for postoperative use shall have the following equipment and supplies:

(A) typewriter or comparable equipment; and

(B) adequate supply of child-resistant, moisture-proof, and light-proof containers;

(C) adequate supply of prescription labels and other applicable identification labels;

(D) special equipment according to the following requirements which shall be maintained:

(i) if the ASC pharmacy compounds prescriptions or medication orders, a Class A prescription balance or analytical balance with weights. Such balance shall be properly maintained and inspected at least every three years by the appropriate authority as prescribed by local, state, or federal law or regulations; and

(ii) if the ASC pharmacy prepares sterile parenteral and enteral products, an annually certified laminar air flow hood and other equipment necessary for manipulation of sterile products.

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

(A) current copies of the following:

(i) Texas Pharmacy Act and rules;

(ii) Texas Dangerous Drug Act and rules;

(iii) Texas Controlled Substances Act and rules;

(iv) Federal Controlled Substances Act and rules or official publication describing the requirements of the Federal Controlled Substances Act and rules;

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

(i) Facts and Comparisons with current supplements;

(ii) United States Pharmacopeia Dispensing Information Volume I (Drug Information for the Healthcare Provider);

(iii) AHFS Drug Information with current supplements;

(iv) Remington's Pharmaceutical Sciences; or

(v) Micromedex;

(C) a reference on injectable drug products, such as, Handbook on Injectable Drugs (if sterile parenteral or enteral products are compounded in the facility);

(D) basic antidote information and the telephone number of the nearest regional poison control center.

(5) Drugs.

(A) Procurement, preparation, and storage.

(i) The pharmacist-in-charge shall have the responsibility for the procurement and storage of drugs, but may receive input from other appropriate staff of the facility, relative to such responsibility.

(ii) The pharmacist-in-charge shall have the responsibility for determining specifications of all drugs procured by the facility.

(iii) All drugs shall be stored at the proper temperatures, as defined by the following terms.

(I) Room temperature--temperature maintained between 15 degrees Celsius (59 degrees Fahrenheit) and 30 degrees Celsius (86 degrees Fahrenheit).

(II) Cool--temperature between 8 degrees Celsius (46 degrees Fahrenheit) and 15 degrees Celsius (59 degrees Fahrenheit) which may, alternatively, be stored in a refrigerator unless otherwise specified on the labeling.

(III) Refrigerate--temperature that is thermostatically maintained between 2 degrees Celsius (36 degrees Fahrenheit) and 8 degrees Celsius (46 degrees Fahrenheit).

(IV) Freeze--temperature that is thermostatically maintained between -20 degrees Celsius (-4 degrees Fahrenheit) and -10 degrees Celsius (14 degrees Fahrenheit).

(iv) Any drug bearing an expiration date may not be dispensed or distributed beyond the expiration date of the drug.

(v) Outdated drugs shall be removed from dispensing stock and shall be quarantined together until such drugs are disposed of.

(B) Formulary.

(i) A formulary may be developed by an appropriate committee of the ambulatory surgical center.

(ii) The pharmacist-in-charge or consultant pharmacist shall be a full voting member of any committee which involves pharmaceutical services.

(C) Prepackaging of drugs and loading of bulk unlabeled drugs into automated drug dispensing system.

(i) Prepackaging of drugs.

(I) Drugs may be prepackaged in quantities suitable for internal distribution only by a pharmacist or by pharmacy technicians under the direction and direct supervision of a pharmacist.

(II) The label of a prepackaged unit shall indicate:

(-a-) brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor;

(-b-) facility's lot number;

(-c-) expiration date; and

(-d-) quantity of the drug, if quantity is greater than one.

(III) Records of prepackaging shall be maintained to show:

(-a-) the name of the drug, strength, and dosage form;

(-b-) facility's lot number;

(-c-) manufacturer or distributor;

(-d-) manufacturer's lot number;

(-e-) expiration date;

(-f-) quantity per prepackaged unit;

(-g-) number of prepackaged units;

(-h-) date packaged;

(-i-) name, initials, or electronic signature of the prepacker; and

(-j-) signature or electronic signature of the responsible pharmacist.

(IV) Stock packages, repackaged units, and control records shall be quarantined together until checked/released by the pharmacist.

(ii) Loading bulk unlabeled drugs into automated drug dispensing systems.

(I) Automated drug dispensing systems may be loaded with bulk unlabeled drugs only by a pharmacist or by pharmacy technicians under the direction and direct supervision of a pharmacist.

(II) The label of an automated drug dispensing system container shall indicate the brand name and strength of the drug; or if no brand name, then the generic name, strength, and name of the manufacturer or distributor.

(III) Records of loading bulk unlabeled drugs into an automated drug dispensing system shall be maintained to show:

(-a-) name of the drug, strength, and dosage form;

(-b-) manufacturer or distributor;

(-c-) manufacturer's lot number;

(-d-) expiration date;

(-e-) date of loading;

(-f-) name, initials, or electronic signature of the person loading the automated drug dispensing system; and

(-g-) signature or electronic signature of the responsible pharmacist.

(IV) The automated drug dispensing system shall not be used until a pharmacist verifies that the system is properly loaded and affixes his or her signature or electronic signature to the record specified in subclause (III) of this clause.

(D) IV admixtures. Policies shall be established by the pharmacist-in-charge, with approval of the appropriate committee, which govern the proper preparation and sterility assurance of parenteral products compounded within the ambulatory surgical center.

(6) Medication orders.

(A) Drugs may be administered to patients in ASCs only on the order of a practitioner. No change in the order for drugs may be made without the approval of a practitioner.

(B) Drugs may be distributed only pursuant to the original or a direct copy of the practitioner's medication order.

(C) Pharmacy technicians may not receive oral medication orders.

(D) ASC pharmacies shall be exempt from the labeling provisions and patient notification requirements of the Act, §40(d) and (f), as respects drugs distributed pursuant to medication orders.

(E) In ASCs with a full-time pharmacist, if a practitioner orders a drug for administration to a bona fide patient of the facility when the pharmacy is closed, the following is applicable.

(i) Prescription drugs and devices only in sufficient quantities for immediate therapeutic needs of a patient may be removed from the ASC pharmacy.

(ii) Only a designated licensed nurse or practitioner may remove such drugs and devices.

(iii) A record shall be made at the time of withdrawal by the authorized person removing the drugs and devices. The record shall contain the following information:

(I) name of the patient;

(II) name of device or drug, strength, and dosage form;

(III) dose prescribed;

(IV) quantity taken;

(V) time and date; and

(VI) signature or electronic signature of person making withdrawal.

(iv) The original or direct copy of the medication order may substitute for such record, provided the medication order meets all the requirements of clause (iii) of this subparagraph.

(v) The pharmacist shall verify the withdrawal as soon as practical, but in no event more than 72 hours from the time of such withdrawal.

(F) In ASCs with a part-time or consultant pharmacist, if a practitioner orders a drug for administration to a bona fide patient of the ASC when the pharmacist is not on duty, or when the pharmacy is closed, the following is applicable.

(i) Prescription drugs and devices only in sufficient quantities for therapeutic needs may be removed from the ASC pharmacy.

(ii) Only a designated licensed nurse or practitioner may remove such drugs and devices.

(iii) A record shall be made at the time of withdrawal by the authorized person removing the drugs and devices; the record shall meet the same requirements as specified in subparagraph (E)(iii) of this paragraph.

(iv) The pharmacist shall verify each distribution after a reasonable interval, but in no event may such interval exceed seven days.

(7) Floor stock. In facilities using a floor stock method of drug distribution, the following is applicable for removing drugs or devices in the absence of a pharmacist.

(A) Prescription drugs and devices may be removed from the pharmacy only in the original manufacturer's container or prepackaged container.

(B) Only a designated licensed nurse or practitioner may remove such drugs and devices.

(C) A record shall be made at the time of withdrawal by the authorized person removing the drug or device; the record shall contain the following information:

(i) name of the drug, strength, and dosage form;

(ii) quantity removed;

(iii) location of floor stock;

(iv) date and time; and

(v) signature or electronic signature of person making the withdrawal.

(D) A pharmacist shall verify the withdrawal according to the following schedule.

(i) In facilities with a full-time pharmacist, the withdrawal shall be verified as soon as practical, but in no event more than 72 hours from the time of such withdrawal.

(ii) In facilities with a part-time or consultant pharmacist, the withdrawal shall be verified after a reasonable interval, but in no event may such interval exceed seven days.

(8) Policies and procedures. Written policies and procedures for a drug distribution system, appropriate for the ambulatory surgical center, shall be developed and implemented by the pharmacist-in-charge with the advice of the appropriate committee. The written policies and procedures for the drug distribution system shall include, but not be limited to, procedures regarding the following:

(A) controlled substances;

(B) investigational drugs;

(C) prepackaging and manufacturing;

(D) medication errors;

(E) orders of physician or other practitioner;

(F) floor stocks;

(G) adverse drug reactions;

(H) drugs brought into the facility by the patient;

(I) self-administration;

(J) emergency drug tray;

(K) formulary, if applicable;

(L) drug storage areas;

(M) drug samples;

(N) drug product defect reports;

(O) drug recalls;

(P) outdated drugs;

(Q) preparation and distribution of IV admixtures;

(R) procedures for supplying drugs for postoperative use, if applicable;

(S) use of automated drug dispensing systems; and

(T) use of data processing systems.

(9) Drugs supplied for postoperative use. Drugs supplied to patients for postoperative use shall be supplied according to the following procedures.

(A) Drugs may only be supplied to patients who have been admitted to the ambulatory surgical center.

(B) Drugs may only be supplied in accordance with the system of control and accountability established for drugs supplied from the ambulatory surgical center; such system shall be developed and supervised by the pharmacist-in-charge or staff pharmacist designated by the pharmacist-in-charge.

(C) Only drugs listed on the approved postoperative drug list may be supplied; such list shall be developed by the pharmacist-in-charge and the medical staff and shall consist of drugs of the nature and type to meet the immediate postoperative needs of the ambulatory surgical center patient.

(D) Drugs may only be supplied in prepackaged quantities not to exceed a 72-hour supply in suitable containers and appropriately prelabeled (including necessary auxiliary labels) by the pharmacy, provided, however that topicals and ophthalmics in original manufacturer's containers may be supplied in a quantity exceeding a 72-hour supply.

(E) At the time of delivery of the drug, the practitioner shall complete the label, such that the prescription container bears a label with at least the following information:

(i) date supplied;

(ii) name of practitioner;

(iii) name of patient;

(iv) directions for use;

(v) brand name and strength of the drug; or if no brand name, then the generic name of the drug dispensed, strength, and the name of the manufacturer or distributor of the drug; and

(vi) unique identification number.

(F) After the drug has been labeled by the practitioner, the practitioner or a licensed nurse under the supervision of the practitioner shall give the appropriately labeled, prepackaged medication to the patient.

(G) A perpetual record of drugs which are supplied from the ASC shall be maintained which includes:

(i) name, address, and phone number of the facility;

(ii) date supplied;

(iii) name of practitioner;

(iv) name of patient;

(v) directions for use;

(vi) brand name and strength of the drug; or if no brand name, then the generic name of the drug dispensed, strength, and the name of the manufacturer or distributor of the drug; and

(vii) unique identification number.

(H) The pharmacist-in-charge, or a pharmacist designated by the pharmacist-in-charge, shall review the records at least once every seven days.

(e) Records.

(1) Maintenance of records.

(A) Every inventory or other record required to be kept under the provisions of §291.76 of this title (relating to Institutional Pharmacy (Class C)) shall be kept by the pharmacy and be available, for at least two years from the date of such inventory or record, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement agencies.

(B) Records of controlled substances listed in Schedules I and II shall be maintained separately from all other records of the pharmacy.

(C) Records of controlled substances listed in Schedules III - V shall be maintained separately or readily retrievable from all other records of the pharmacy. For purposes of this subsection, readily retrievable means that the controlled substances shall be asterisked, red-lined, or in some other manner readily identifiable apart from all other items appearing on the record.

(D) Records, except when specifically required to be maintained in original or hard-copy form, may be maintained in an alternative data retention system, such as a data processing or direct imaging system, e.g., microfilm or microfiche, provided:

(i) the records in the alternative data retention system contain all of the information required on the manual record; and

(ii) the alternative data retention system is capable of producing a hard copy of the record upon the request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(2) Outpatient records.

(A) Only a registered pharmacist may receive, certify, and receive prescription drug orders.

(B) Outpatient records shall be maintained as provided in §§291.34 - 291.36 of this title (relating to Records; Triplicate Prescription Records; and Class A Pharmacies Dispensing Sterile Products).

(C) Outpatient prescriptions, including, but not limited to, discharge prescriptions, that are written by the practitioner, must be written on a form which meets the requirements of the Act, §562.006. Medication order forms or copies thereof do not meet the requirements for outpatient forms.

(D) Controlled substances listed in Schedule II must be written on an electronic prescription form in accordance with the Texas Controlled Substances Act, §481.075, and rules promulgated pursuant to the Texas Controlled Substances Act, unless exempted by the Texas Controlled Substances Rules, 37 TAC §13.47, entitled to "Exceptions to Use of Triplicate Prescription Forms." Outpatient prescriptions for Schedule II controlled substances that are exempted from the triplicate prescription requirement must be manually signed by the practitioner.

(3) Inpatient records.

(A) Each original medication order or set of orders issued together shall bear the following information:

(i) patient name;

(ii) drug name, strength, and dosage form;

(iii) directions for use;

(iv) date; and

(v) signature or electronic signature of the practitioner or that of his or her authorized agent, defined as a licensed nurse employee or consultant/full or part-time pharmacist of the ASC.

(B) Original medication orders shall be maintained with the medication administration record in the medical records of the patient.

(C) Controlled substances records shall be maintained as follows.

(i) All records for controlled substances shall be maintained in a readily retrievable manner.

(ii) Controlled substances records shall be maintained in a manner to establish receipt and distribution of all controlled substances.

(D) Records of controlled substances listed in Schedule II shall be maintained as follows.

(i) Records of controlled substances listed in Schedule II shall be maintained separately from records of controlled substances in Schedules III, IV, and V, and all other records.

(ii) An ASC pharmacy shall maintain a perpetual inventory of any controlled substance listed in Schedule II.

(iii) Distribution records for Schedule II-V controlled substances floor stock shall include the following information:

(I) patient's name;

(II) practitioner who ordered drug;

(III) name of drug, dosage form, and strength;

(IV) time and date of administration to patient and quantity administered;

(V) signature or electronic signature of individual administering controlled substance;

(VI) returns to the pharmacy; and

(VII) waste (waste is required to be witnessed and cosigned, manually or electronically, by another individual).

(E) Floor stock records shall be maintained as follows.

(i) Distribution records for Schedules III - V controlled substances floor stock shall include the following information:

(I) patient's name;

(II) practitioner who ordered controlled substance;

(III) name of controlled substance, dosage form, and strength;

(IV) time and date of administration to patient;

(V) quantity administered;

(VI) signature or electronic signature of individual administering drug;

(VII) returns to the pharmacy; and

(VIII) waste (waste is required to be witnessed and cosigned, manually or electronically, by another individual).

(ii) The record required by clause (i) of this subparagraph shall be maintained separately from patient records.

(iii) A pharmacist shall review distribution records with medication orders on a periodic basis to verify proper usage of drugs, not to exceed 30 days between such reviews.

(F) General requirements for records maintained in a data processing system are as follows.

(i) If an ASC pharmacy's data processing system is not in compliance with the board's requirements, the pharmacy must maintain a manual recordkeeping system.

(ii) Requirements for backup systems. The facility shall maintain a backup copy of information stored in the data processing system using disk, tape, or other electronic backup system and update this backup copy on a regular basis to assure that data is not lost due to system failure.

(iii) Change or discontinuance of a data processing system.

(I) Records of distribution and return for all controlled substances, nalbuphine (Nubain), and tripelennamine (PBZ). A pharmacy that changes or discontinues use of a data processing system must:

(-a-) transfer the records to the new data processing system; or

(-b-) purge the records to a printout which contains the same information as required on the audit trail printout as specified in subparagraph (G)(ii) of this paragraph. The information on this printout shall be sorted and printed by drug name and list all distributions/returns chronologically.

(II) Other records. A pharmacy that changes or discontinues use of a data processing system must:

(-a-) transfer the records to the new data processing system; or

(-b-) purge the records to a printout which contains all of the information required on the original document.

(III) Maintenance of purged records. Information purged from a data processing system must be maintained by the pharmacy for two years from the date of initial entry into the data processing system.

(iv) Loss of data. The pharmacist-in-charge shall report to the board in writing any significant loss of information from the data processing system within 10 days of discovery of the loss.

(G) Data processing system maintenance of records for the distribution and return of all controlled substances, nalbuphine (Nubain), or tripelennamine (PBZ) to the pharmacy.

(i) Each time a controlled substance, nalbuphine (Nubain), or tripelennamine (PBZ) is distributed from or returned to the pharmacy, a record of such distribution or return shall be entered into the data processing system.

(ii) The data processing system shall have the capacity to produce a hard-copy printout of an audit trail of drug distribution and return for any strength and dosage form of a drug (by either brand or generic name or both) during a specified time period. This printout shall contain the following information:

(I) patient's name and room number or patient's facility identification number;

(II) prescribing or attending practitioner's name;

(III) name, strength, and dosage form of the drug product actually distributed;

(IV) total quantity distributed from and returned to the pharmacy;

(V) if not immediately retrievable via CRT display, the following shall also be included on the printout:

(-a-) prescribing or attending practitioner's address; and

(-b-) practitioner's DEA registration number, if the medication order is for a controlled substance.

(iii) An audit trail printout for each strength and dosage form of these drugs distributed during the preceding month shall be produced at least monthly and shall be maintained in a separate file at the facility. The information on this printout shall be sorted by drug name and list all distributions/returns for that drug chronologically.

(iv) The pharmacy may elect not to produce the monthly audit trail printout if the data processing system has a workable (electronic) data retention system which can produce an audit trail of drug distribution and returns for the preceding two years. The audit trail required in this clause shall be supplied by the pharmacy within 72 hours, if requested by an authorized agent of the Texas State Board of Pharmacy, or other authorized local, state, or federal law enforcement or regulatory agencies.

(H) Failure to maintain records. Failure to provide records set out in this subsection, either on site or within 72 hours for whatever reason, constitutes prima facie evidence of failure to keep and maintain records.

(I) Data processing system downtime. In the event that an ASC pharmacy which uses a data processing system experiences system downtime, the pharmacy must have an auxiliary procedure which will ensure that all data is retained for on-line data entry as soon as the system is available for use again.

(4) Distribution of controlled substances to another registrant. A pharmacy may distribute controlled substances to a practitioner, another pharmacy, or other registrant, without being registered to distribute, under the following conditions.

(A) The registrant to whom the controlled substance is to be distributed is registered under the Controlled Substances Act to dispense that controlled substance.

(B) The total number of dosage units of controlled substances distributed by a pharmacy may not exceed 5.0% of all controlled substances dispensed by the pharmacy during the 12-month period in which the pharmacy is registered; if at any time it does exceed 5.0%, the pharmacy is required to obtain an additional registration to distribute controlled substances.

(C) If the distribution is for a Schedule III, IV, or V controlled substance, a record shall be maintained which indicates:

(i) the actual date of distribution;

(ii) the name, strength, and quantity of controlled substances distributed;

(iii) the name, address, and DEA registration number of the distributing pharmacy; and

(iv) the name, address, and DEA registration number of the pharmacy, practitioner, or other registrant to whom the controlled substances are distributed.

(D) If the distribution is for a Schedule I or II controlled substance, the following is applicable.

(i) The pharmacy, practitioner, or other registrant who is receiving the controlled substances shall issue Copy 1 and Copy 2 of a DEA order form (DEA 222C) to the distributing pharmacy.

(ii) The distributing pharmacy shall:

(I) complete the area on the DEA order form (DEA 222C) titled "To Be Filled in by Supplier";

(II) maintain Copy 1 of the DEA order form (DEA 222C) at the pharmacy for two years; and

(III) forward Copy 2 of the DEA order form (DEA 222C) to the divisional office of the Drug Enforcement Administration.

(5) Other records. Other records to be maintained by the pharmacy include:

(A) a permanent log of the initials or identification codes which will identify each pharmacist by name. The initials or identification code shall be unique to ensure that each pharmacist can be identified, i.e., identical initials or identification codes cannot be used;

(B) Copy 3 of DEA order form (DEA 222C), which has been properly dated, initialed, and filed, and all copies of each unaccepted or defective order form and any attached statements or other documents;

(C) a hard copy of the power of attorney to sign DEA 222C order forms (if applicable);

(D) suppliers' invoices of dangerous drugs and controlled substances; pharmacists or other responsible individuals shall verify that the controlled drugs listed on the invoices were actually received by clearly recording their initials and the actual date of receipt of the controlled substances;

(E) supplier's credit memos for controlled substances and dangerous drugs;

(F) a hard copy of inventories required by §291.17 of this title (relating to Inventory Requirements) except that a perpetual inventory of controlled substances listed in Schedule II may be kept in a data processing system if the data processing system is capable of producing a hard copy of the perpetual inventory on-site;

(G) hard-copy reports of surrender or destruction of controlled substances and/or dangerous drugs to an appropriate state or federal agency;

(H) a hard-copy Schedule V nonprescription register book;

(I) records of distribution of controlled substances and/or dangerous drugs to other pharmacies, practitioners, or registrants; and

(J) a hard copy of any notification required by the Texas Pharmacy Act or these rules, including, but not limited to, the following:

(i) reports of theft or significant loss of controlled substances to DEA, DPS, and the board;

(ii) notification of a change in pharmacist-in-charge of a pharmacy; and

(iii) reports of a fire or other disaster which may affect the strength, purity, or labeling of drugs, medications, devices, or other materials used in the diagnosis or treatment of injury, illness, and disease.

(6) Permission to maintain central records. Any pharmacy that uses a centralized recordkeeping system for invoices and financial data shall comply with the following procedures.

(A) Controlled substance records. Invoices and financial data for controlled substances may be maintained at a central location provided the following conditions are met.

(i) Prior to the initiation of central recordkeeping, the pharmacy submits written notification by registered or certified mail to the divisional director of the Drug Enforcement Administration

as required by the Code of Federal Regulations, Title 21, §1304(a), and submits a copy of this written notification to the Texas State Board of Pharmacy. Unless the registrant is informed by the divisional director of the Drug Enforcement Administration that permission to keep central records is denied, the pharmacy may maintain central records commencing 14 days after receipt of notification by the divisional director.

(ii) The pharmacy maintains a copy of the notification required in this subparagraph.

(iii) The records to be maintained at the central record location shall not include executed DEA order forms, prescription drug orders, or controlled substance inventories, which shall be maintained at the pharmacy.

(B) Dangerous drug records. Invoices and financial data for dangerous drugs may be maintained at a central location.

(C) Access to records. If the records are kept on microfilm, computer media, or in any form requiring special equipment to render the records easily readable, the pharmacy shall provide access to such equipment with the records.

(D) Delivery of records. The pharmacy agrees to deliver all or any part of such records to the pharmacy location within two business days of written request of a board agent or any other authorized official.

(7) Confidentiality.

(A) A pharmacist shall provide adequate security of prescription drug orders, medication orders, and patient medication records to prevent indiscriminate or unauthorized access to confidential health information.

(B) Confidential records are privileged and may be released only to:

(i) the patient or the patient's agent;

(ii) a practitioner or another pharmacist if, in the pharmacist's professional judgement, the release is necessary to protect the patient's health and well being;

(iii) the board or to a person or another state or federal agency authorized by law to receive the confidential record;

(iv) a law enforcement agency engaged in investigation of a suspected violation of Chapter 481 or 483, Health and Safety Code, or the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. Section 801 et seq.);

(v) a person employed by a state agency that licenses a practitioner, if the person is performing the person's official duties; or

(vi) an insurance carrier or other third party payor authorized by a patient to receive such information.

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 February 13, 2004.

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Texas State Board of Pharmacy
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CHAPTER 303. DESTRUCTION OF DANGEROUS DRUGS AND CONTROLLED SUBSTANCES

22 TAC §303.1

The Texas State Board of Pharmacy adopts amendments to §303.1, concerning Destruction of Dispensed Drugs. The amendments are adopted without changes to the proposed text published in the December 26, 2003, issue of the *Texas Register* (28 TexReg 11492).

The adopted amendments allow the destruction of drugs in a nursing home to be witnessed by any combination of two of the individuals listed.

No comments were received regarding the amendments.

The amendments are adopted under §551.002 and §554.051 of the Texas Pharmacy Act (Chapters 551 - 566 and 568 - 569, Texas Occupations Code) and §483.002 of the Dangerous Drug Act (Chapter 483, Health and Safety 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 §483.002 as authorizing the agency to adopt rules for the proper administration and enforcement of the Dangerous Drug Act.

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

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 February 13, 2004.

TRD-200401065
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: March 4, 2004
Proposal publication date: December 26, 2003
For further information, please call: (512) 305-8028

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PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 537. PROFESSIONAL AGREEMENTS AND STANDARD CONTRACTS

22 TAC §§537.11, 537.22, 537.43, 537.47, 537.49

The Texas Real Estate Commission (TREC) adopts amendments to §§537.11, 537.22, 537.43, and 537.47, and adopts new §537.49, concerning standard contract forms, with changes to the proposed text as published in the October 31, 2003, issue of the *Texas Register* (28 TexReg 9386).

The amendments and new section would adopt by reference four revised contract forms to be used by Texas real estate licensees. The contract forms are published by TREC and available at the TREC web site (www.trec.state.tx.us) or at the Texas Real Estate Commission, P.O. Box 12188, 1101 Camino La Costa, Austin, Texas 78711-2188. The effective date for mandatory use of the adopted contract forms is April 1, 2004; however, the forms may be used by licensees on a voluntary basis prior to the effective date. Changes were made to the text of the contract forms in response to comments as described further below. The text of §537.11(a) was revised to correct typographical errors to reflect current form numbers for TREC Nos. 15-3 and 16-3.

Texas real estate licensees are generally required to use forms promulgated by TREC when negotiating contacts for the sale of real property. These forms are drafted by the Texas Real Estate Broker-Lawyer Committee, an advisory body consisting of six attorneys appointed by the President of the State Bar of Texas, six brokers appointed by TREC, and a public member appointed by the governor.

The amendment to §537.11 renumbers the revised forms promulgated by TREC.

The amendment to §537.22 adopts by reference Standard Contract Form TREC No. 11-5, Addendum for "Back-up" Contract. The addendum is revised to clarify paragraph B regarding the contingency date and paragraph E regarding the time for giving notice of termination. Under paragraph B, if the first contract terminates, the effective date of the Back-Up Contract automatically changes to the date the buyer receives notice of termination of the first contract or the contingency date, whichever is earlier and is called the Amended Effective Date. The time for giving notice of termination in paragraph E is clarified to conform to the changes in paragraph B.

The amendment to §537.43 adopts by reference Standard Contract Form TREC No. 36-3, Addendum for Property Subject to Mandatory Membership in an Owners' Association, a form that a seller may use to provide certain statutory notices regarding membership in an owners' association. Paragraph A.3. is changed to delete the language which states that buyer waives the right of termination under the addendum if buyer does not require delivery of the subdivision information.

The amendment to §537.47 adopts by reference Standard Contract Form TREC No. 40-1, Third Party Financing Condition Addendum. The form is revised to clarify that "every reasonable effort to obtain financing approval" includes but is not limited to furnishing all information and documents required by lender for approval. The sentence in the introductory paragraph regarding the date by which the buyer must obtain financing approval is revised for buyer to provide written notice to seller within a stated period of days after the effective date if buyer cannot obtain financing approval within the time period. If buyer gives notice within the time period, the contract will terminate and the earnest money will be refunded to buyer. If buyer does not give the notice within the time period, the contract will not be subject to buyer financing approval as described in the addendum. The revised form deletes the options in subparagraphs A.1. and A.2. as to whether the loan will or will not include private mortgage insurance (PMI). The revised form delete the second part of paragraph C. of the current addendum to avoid a potential conflict between the language in the first part of paragraph C regarding the appraised value of the property.

New §537.49 adopts by reference Standard Contract Form TREC No. 42-0, Notice Pursuant to Third Party Financing Condition Addendum. The form provides a notice to seller that the buyer is unable to obtain financing approval according to the terms of the Third Party Financing Addendum.

Drafts of the contract forms were released for comment and displayed on the TREC web site during the notice and comment period after posting in the *Texas Register*. Approximately 20 comments were received and considered by the Commission during this period, and some changes were made in the drafts as a result of the comments. The Greater Dallas Association of Realtors (GDAR) commented on the proposed forms.

The Commission has made typographical corrections to the forms adopted by reference, and other changes were made to the text of the forms in response to one comment and review by the Broker Lawyer Committee. The commenter recommends that the last sentence in the first paragraph of the Third Party Financing Condition Addendum should be bolded. In addition the Broker Lawyer Committee recommends that the first paragraph of the Third Party Financing Condition Addendum include an additional bolded sentence at the end of the paragraph, to read as follows: "For purposes of this paragraph, time is of the essence; strict compliance with the times for performance herein stated is required." The Commission agrees to these changes to the Third Party Financing Condition Addendum.

A number of comments did not result in changes to the text of the forms. The comments and Commission responses to those comments are summarized as follows.

Comment: Several commenters express approval of the revisions.

Response: The Commission appreciates the comments in support of the changes.

Comment: One commenter requests that the Commission include a blank line in the Third Party Financing Condition Addendum to identify the type of Texas Veteran financing involved in the transaction.

Response: The Commission has determined that it is unnecessary to include another blank line in the addenda for that purpose.

Comment: One commenter suggests additional verbiage in the Third Party Financing Condition Addendum to state that if the buyer does not receive financing approval and fails to notify the seller, the seller is paid the earnest money.

Response: The Commission believes that the public interest is best served by the proposed text of the forms without the suggested change because under the terms of the Third Party Financing Condition Addendum, the contract continues but will no longer be subject to buyer being approved for the financing described in the addendum. Also, paragraph 15 of the One to Four Residential Contract form sufficiently addresses default remedies.

Comment: One commenter suggests that TREC No. 20-6 (One to Four Residential Contract) should be revised to remove all financing contingencies, the Third Party Financing Condition Addendum should be revised to eliminate the financing contingencies, and paragraph 23 (the Termination Option) of TREC No. 20-6 be used for all contingencies, including financing and loan approval.

Response: The Commission appreciates the commenter's suggestions and concerns; however, it believes that the public interest is best served at this time by the proposed text of the forms without the suggested changes as it would require additional changes to contract forms not currently under revision.

Comment: One commenter suggests that the Third Party Financing Condition Addendum should be revised to include language in a previous iteration of the One to Four Residential Contract that required buyer to apply for financing within a specific number of days.

Response: The Commission determined that the proposed change was unnecessary and the public interest was best served by the proposed text of the forms without the suggested change.

Comment: One commenter suggests that a buyer should have to supply the seller with documentation such as a rejection letter along with the Notice to Seller (TREC No. 42-0).

Response: The Commission determined that the proposed change was unnecessary and the public interest was best served by the proposed text of the forms without the suggested change.

Comment: One commenter proposes that the Commission make grammatical changes to two of the contract forms.

Response: The Commission determined that the suggested changes are stylistic preference and therefore unnecessary.

Comment: The Greater Dallas Association of Realtors suggests that the verbiage: "Failure to give written notice with in the time allowed does not affect the provisions in paragraph 4A" be added to the end of the first paragraph in the Third Party Financing Condition Addendum. They also suggested that the verbiage "and assumes full responsibility for the information contained therein" be added to the end of A(3) in the Addendum for Property Subject to Mandatory Membership in an Owners' Association.

Response: The Commission declined to make the suggested changes as it is sufficiently clear from the text of the financing paragraph of the TREC contract forms (4A) and the proposed revisions to the Third Party Financing Condition Addendum that even if the Buyer fails to provide the written notice that financing cannot be obtained, the contract continues to be subject to the Property satisfying the lender's underwriting requirements for the loan. The Commission also has concluded that the public interest is best served by the proposed text of the Addendum for Property Subject to Mandatory Membership in an Owners' Association forms without the suggested change.

Comment: One commenter suggests that the Commission should revise paragraph A in the Third Party Financing Condition Addendum to further clarify that the buyer remains subject to the terms of the contract in situations where the buyer is approved for a loan at the interest rate in the addendum but chooses not to lock the loan and later tries to terminate the contract because the interest rate is no longer available.

Response: The commission declines to further revise the Third Party Financing Condition Addendum as the revised form sufficiently addresses the concerns raised. It is clear from the terms of the revised addendum that if the buyer chooses not to lock the loan by the time he must give notice to the Seller regarding financing approval, and does not give the notice to terminate the contract, the contract will no longer be subject to the financing described in the addendum, which includes the stated interest rate.

Comment: Several comments raised concerns or suggestions about other contract forms not currently subject to revision.

Response: The commission appreciates the input on the contract forms in general and has forwarded the comments to the Broker Lawyer Committee for possible action in the future.

Adoption of these amendments is necessary for TREC to update the contract forms used by Texas real estate licensees when negotiating the sale of real estate and to modify the forms to reflect changes in the real estate market and the law. The actions also are necessary for TREC to comply with the mandate in Texas Occupations Code, §1101.254, for the Broker-Lawyer Committee to revise forms to expedite real estate transactions and reduce controversies to a minimum while safeguarding the interests of the principals to the transaction.

The amendments are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102; and to establish standards of conduct and ethics for its licensees to fulfill the purposes of Chapters 1101 and 1102 and ensure compliance with Chapters 1101 and 1102; and Texas Occupations Code, §1101.158 which authorizes the commission to adopt rules and regulations requiring real estate brokers and salesperson to use contract forms which have been prepared by the Texas Real Estate Broker-Lawyer Committee and promulgated by the commission.

The statute affected by this proposal is Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the proposed amendments.

§537.11. Use of Standard Contract Forms.

(a) Standard Contract Form TREC No. 9-5 is promulgated for use in the sale of unimproved property where intended use is for one to four family residences. Standard Contract Form TREC No. 10-4 is promulgated for use as an addendum concerning sale of other property by a buyer to be attached to promulgated forms of contracts. Standard Contract Form TREC No. 11-5 is promulgated for use as an addendum to be attached to promulgated forms of contracts which are second or "back-up" contracts. Standard Contract Form TREC No. 12-1 is promulgated for use as an addendum to be attached to promulgated forms of contracts where there is a Veterans Administration release of liability or restoration entitlement. Standard Contract Form TREC No. 15-3 is promulgated for use as a residential lease when a seller temporarily occupies property after closing. Standard Contract Form TREC No. 16-3 is promulgated for use as a residential lease when a buyer temporarily occupies property prior to closing. Standard Contract Form 20-6 is promulgated for use in the resale of residential real estate. Standard Contract Form TREC No. 23-5 is promulgated for use in the sale of a new home where construction is incomplete. Standard Contract Form TREC No. 24-5 is promulgated for use in the sale of a new home where construction is completed. Standard Contract Form TREC No. 25-4 is promulgated for use in the sale of a farm or ranch. Standard Contract

Form TREC No. 26-4 is promulgated for use as an addendum concerning seller financing. Standard Contract Form TREC No. 28-0 is promulgated for use as an addendum to be attached to promulgated forms of contracts where reports are to be obtained relating to environmental assessments, threatened or endangered species, or wetlands. Standard Contract Form TREC No. 30-4 is promulgated for use in the resale of a residential condominium unit Standard Contract Form TREC No. 32-0 is promulgated for use as a condominium resale certificate. Standard Contract Form TREC No. 33-0 is promulgated for use as an addendum to be added to promulgated forms of contracts in the sale of property adjoining and sharing a common boundary with the tidally influenced submerged lands of the state. Standard Contract Form TREC Form No. 34-1 is promulgated for use as an addendum to be added to promulgated forms of contracts in the sale of property located seaward of the Gulf Intracoastal Waterway. Standard Contract Form TREC Form No. 36-3 is promulgated for use as an addendum to be added to promulgated forms in the sale of property subject to mandatory membership in an owners' association. Standard Contract Form TREC Form No. 37-1 is promulgated for use as a resale certificate when the property is subject to mandatory membership in an owners' association. Standard Contract Form TREC Form No. 38-1 is promulgated for use as a notice of termination of contract. Standard Contract Form TREC Form No. 39-4 is promulgated for use as an amendment to promulgated forms of contracts. TREC Form No. 40-1 is promulgated for use as an addendum to be added to promulgated forms of contracts when there is a condition for third party financing. TREC Form No. 41-0 is promulgated for use as an addendum to be added to promulgated forms of contracts when there is an assumption of a loan. TREC Form No. 42-0 is promulgated for use as a notice that buyer cannot obtain financing pursuant to the Third Party Financing Condition Addendum.

(b) When negotiating contracts binding the sale, exchange, option, lease or rental of any interest in real property, a real estate licensee shall use only those contract forms promulgated by the Texas Real Estate Commission for that kind of transaction with the following exceptions:

(1) transactions in which the licensee is functioning solely as a principal, not as an agent;

(2) transactions in which an agency of the United States government requires a different form to be used;

(3) transactions for which a contract form has been prepared by the property owner or prepared by an attorney and required by the property owner;

(4) transactions for which no standard contract form has been promulgated by the Texas Real Estate Commission, and the licensee uses a form prepared by an attorney at law licensed by this state and approved by the attorney for the particular kind of transactions involved or prepared by the Texas Real Estate Broker-Lawyer Committee and made available for trial use by licensees with the consent of the Texas Real Estate Commission.

(c) A licensee may not practice law, offer, give nor attempt to give advice, directly or indirectly; the licensee may not act as a public conveyancer nor give advice or opinions as to the legal effect of any contracts or other such instruments which may affect the title to real estate; the licensee may not give opinions concerning the status or validity of title to real estate; and the licensee may not attempt to prevent nor in any manner whatsoever discourage any principal to a real estate transaction from employing a lawyer. However, nothing herein shall be deemed to limit the licensee's fiduciary obligation to disclose to the licensee's principals all pertinent facts which are within the knowledge of the licensee, including such facts which might affect the status of or title to real estate.

(d) A licensee may not undertake to draw or prepare documents fixing and defining the legal rights of the principals to a transaction. In negotiating real estate transactions, the licensee may fill in forms for such transactions, using exclusively forms which have been approved and promulgated by the Texas Real Estate Commission or such forms as are otherwise permitted by these rules. When filling in such a form, the licensee may only fill in the blanks provided and may not add to or strike matter from such form, except that licensees shall add factual statements and business details desired by the principals and shall strike only such matter as is desired by the principals and as is necessary to conform the instrument to the intent of the parties. A licensee may not add to a promulgated earnest money contract form factual statements or business details for which a contract addendum, lease or other form has been promulgated by the commission for mandatory use. Nothing herein shall be deemed to prevent the licensee from explaining to the principals the meaning of the factual statements and business details contained in the said instrument so long as the licensee does not offer or give legal advice. It is not the practice of law as defined in this Act for a real estate licensee to complete a contract form which is either promulgated by the Texas Real Estate Commission or prepared by the Texas Real Estate Broker-Lawyer Committee and made available for trial use by licensees with the consent of the Texas Real Estate Commission. Contract forms prepared by the Texas Real Estate Broker-Lawyer Committee for trial use may be used on a voluntary basis after being approved by the commission. Contract forms prepared by the Texas Real Estate Broker-Lawyer Committee and approved by the commission to replace previously promulgated forms may be used by licensees on a voluntary basis prior to the effective date of rules requiring use of the replacement forms.

(e) Where it appears that, prior to the execution of any such instrument, there are unusual matters involved in the transaction which should be resolved by legal counsel before the instrument is executed or that the instrument is to be acknowledged and filed for record, the licensee shall advise the principals that each should consult a lawyer of the principal's choice before executing same.

(f) A licensee may not employ, directly or indirectly, a lawyer nor pay for the services of a lawyer to represent any principal to a real estate transaction in which the licensee is acting as an agent. The licensee may employ and pay for the services of a lawyer to represent only the licensee in a real estate transaction, including preparation of the contract, agreement, or other legal instruments to be executed by the principals to the transactions.

(g) A licensee shall advise the principals that the instrument they are about to execute is binding on them.

(h) Forms approved or promulgated by the commission may be reproduced only from the following sources:

(1) numbered copies obtained from the commission, whether in a printed format or electronically reproduced from the files available on the commission's Internet site;

(2) printed copies made from copies obtained from the commission;

(3) legible photocopies made from such copies; or

(4) computer-driven printers following these guidelines.

(A) The computer file or program containing the form text must not allow the end-user direct access to the text of the form and may only permit the user to insert language in blanks in the forms or to strike through language at the direction of the parties to the contract.

(B) Typefaces or fonts must appear to be identical to those used by the commission in printed copies of the particular form.

(C) The text and number of pages must be identical to that used by the commission in printed copies of the particular form.

(D) The spacing, length of blanks, borders and placement of text on the page must appear to be identical to that used by the commission in printed copies of the form.

(E) The name and address of the person or firm responsible for developing the software program must be legibly printed below the border at the bottom of each page in no less than six point type and in no larger than 10 point type.

(F) The text of the form must be obtained from a copy of the form bearing a control number assigned by the commission.

(i) The control number of each copy must appear on all forms reproduced from the copy, including forms reproduced by computer-driven printers.

(j) Forms approved or promulgated by the commission must be reproduced on the same size of paper used by the commission with the following changes or additions only.

(1) The business name or logo of a broker, organization or printer may appear at the top of a form outside the border.

(2) The broker's name may be inserted in any blank provided for that purpose.

§537.22. Standard Contract Form TREC No. 11-5.

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 11-5 approved by the Texas Real Estate Commission in 2004. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

§537.43. Standard Contract Form TREC No. 36-3.

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 36-3 approved by the Texas Real Estate Commission in 2004. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

§537.47. Standard Contract Form TREC No. 40-1.

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 40-1 approved by the Texas Real Estate Commission in 2004. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

§537.49. Standard Contract Form TREC No. 42-0.

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 42-0 approved by the Texas Real Estate Commission in 2004. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

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 February 10, 2004.

TRD-200400934

Loretta DeHay
General Counsel
Texas Real Estate Commission
Effective date: April 1, 2004
Proposal publication date: October 31, 2003
For further information, please call: (512) 465-3900

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 3. TEXAS COMMISSION ON ALCOHOL AND DRUG ABUSE

CHAPTER 145. FAITH BASED CHEMICAL DEPENDENCY PROGRAMS

40 TAC §§145.11, 145.21 - 145.25

The Texas Commission on Alcohol and Drug Abuse (Commission) adopts the repeal of Chapter 145, concerning Faith Based Chemical Dependency Programs, §§145.11, 145.21, 145.22, 145.23, 145.24, and 145.25, without changes to the proposed text as published in the August 29, 2003, issue of the *Texas Register* (28 TexReg 7225).

The repeal of Chapter 145 is necessary because the Commission is adopting new rules. The new rules have been reorganized to provide a more functional and logical framework that is more closely aligned with the rules of other agencies operating under the Health and Human Services Commission.

The Commission received one comment regarding the repeal of these sections. An interested individual expressed concern that repeal of Chapter 145 would mean that faith-based organizations would become subject to excessive governmental regulation. The Commission responds that the text of Chapter 145 was moved to Subchapter O of the new Chapter 148 rules with no substantive changes.

The repeal is adopted under the TEX. HEALTH & SAFETY CODE §461.012(a)(15) which provides the Commission authority to adopt rules governing its functions, including rules that prescribe the policies and procedures followed by the Commission in administering its programs.

The code affected by the repeal is Chapter 461 of the Texas Health and Safety Code.

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 February 13, 2004.

TRD-200401044
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2004
Proposal publication date: August 29, 2003
For further information, please call: (512) 349-6668

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CHAPTER 148. FACILITY LICENSURE

The Texas Commission on Alcohol and Drug Abuse (Commission) adopts the repeal of Chapter 148, §§148.1, 148.11, 148.21-148.28, 148.31, 148.101-148.103, 148.105, 148.106, 148.111-148.113, 148.115, 148.201-148.203, 148.205, 148.301-148.303, 148.311-148.313, 148.315, 148.316, 148.401, 148.403, 148.405, 148.406, 148.411-148.413, 148.421-148.424, 148.426, 148.501-148.504, 148.601-148.607, concerning Facility Licensure, without changes to the proposed text as published in the August 29, 2003, issue of the *Texas Register* (28 TexReg 7236).

The repeal of Chapter 148 is necessary because of extensive changes to the existing rules. Commission staff incorporated portions of other existing rules relating to standards of care for substance abuse services into a new Chapter 148 in an effort to improve the consistency of substance abuse services in the state and to comply with the legislative mandate that the Commission develop model program standards for substance abuse services.

There were no comments regarding the repeal of these sections.

SUBCHAPTER A. DEFINITIONS

40 TAC §148.1

The repeal is adopted under the TEX. HEALTH & SAFETY CODE §461.012(a)(15) which provides the Commission authority to adopt rules governing its functions and §461.0141 which provides the Commission authority to adopt rules regarding purchase of services. The repeal is also adopted under Texas Health and Safety Code Chapter 464, which provides the Commission authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the repeal is Chapters 461 and 464 of the Texas Health and Safety Code.

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 February 13, 2004.

TRD-200401020
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Texas Commission on Alcohol and Drug Abuse
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For further information, please call: (512) 349-6668

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SUBCHAPTER B. LICENSURE INFORMATION

40 TAC §§148.11, 148.21 - 148.28, 148.31

The repeal is adopted under the TEX. HEALTH & SAFETY CODE §461.012(a)(15) which provides the Commission authority to adopt rules governing its functions and §461.0141 which provides the Commission authority to adopt rules regarding purchase of services. The repeal is also adopted under Texas Health and Safety Code Chapter 464, which provides the Commission authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the repeal is Chapters 461 and 464 of the Texas Health and Safety Code.

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 February 13, 2004.

TRD-200401022
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General Counsel
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Effective date: September 1, 2004
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For further information, please call: (512) 349-6668

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SUBCHAPTER C. FACILITY MANAGEMENT

40 TAC §§148.101 - 148.103, 148.105, 148.106, 148.111 - 148.113, 148.115

The repeal is adopted under the TEX. HEALTH & SAFETY CODE §461.012(a)(15) which provides the Commission authority to adopt rules governing its functions and §461.0141 which provides the Commission authority to adopt rules regarding purchase of services. The repeal is also adopted under Texas Health and Safety Code Chapter 464, which provides the Commission authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the repeal is Chapters 461 and 464 of the Texas Health and Safety Code.

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 February 13, 2004.

TRD-200401021
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2004
Proposal publication date: August 29, 2003
For further information, please call: (512) 349-6668

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SUBCHAPTER D. PERSONNEL AND STAFF DEVELOPMENT

40 TAC §§148.201 - 148.203, 148.205

The repeal is adopted under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows when funding services and §461.0141 which provides TCADA with authority to adopt rules

regarding purchase of services. The repeal is also proposed under Texas Health & Safety Code Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed repeal is the Texas Health and Safety Code, Chapters 461 and 464.

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 February 13, 2004.

TRD-200401024
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2004
Proposal publication date: August 29, 2003
For further information, please call: (512) 349-6668

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SUBCHAPTER E. CLIENT RIGHTS

40 TAC §§148.301 - 148.303, 148.311 - 148.313, 148.315, 148.316

The repeal is adopted under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows when funding services and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The repeal is also proposed under Texas Health & Safety Code Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed repeal is the Texas Health and Safety Code, Chapters 461 and 464.

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 February 13, 2004.

TRD-200401025
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
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Proposal publication date: August 29, 2003
For further information, please call: (512) 349-6668

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SUBCHAPTER F. PROGRAM SERVICES

40 TAC §§148.401, 148.403, 148.405, 148.406, 148.411 - 148.413, 148.421 - 148.424, 148.426

The repeal is adopted under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows when funding services and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The repeal is also proposed under Texas Health & Safety Code Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed repeal is the Texas Health and Safety Code, Chapters 461 and 464.

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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TRD-200401026
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2004
Proposal publication date: August 29, 2003
For further information, please call: (512) 349-6668

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SUBCHAPTER G. MEDICATION

40 TAC §§148.501 - 148.504

The repeal is adopted under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows when funding services and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The repeal is also proposed under Texas Health & Safety Code Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed repeal is the Texas Health and Safety Code, Chapters 461 and 464.

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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TRD-200401027
Thomas F. Best
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Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2004
Proposal publication date: August 29, 2003
For further information, please call: (512) 349-6668

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SUBCHAPTER H. RESIDENTIAL PHYSICAL PLANT REQUIREMENTS

40 TAC §§148.601 - 148.607

The repeal is adopted under the Texas Health and Safety Code, §461.012(a)(15) which provides TCADA with the authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows when funding services and §461.0141 which provides TCADA with authority to adopt rules regarding purchase of services. The repeal is also proposed under Texas Health & Safety Code Chapter 464, which provides TCADA with the authority to adopt rules and standards for the licensure of chemical dependency treatment facilities.

The code affected by the proposed repeal is the Texas Health and Safety Code, Chapters 461 and 464.

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 148. STANDARD OF CARE

The Texas Commission on Alcohol and Drug Abuse (Commission) adopts new Chapter 148, §§148.101-148.103, 148.201-148.218, 148.301, 148.401-148.409, 148.501-148.510, 148.601-148.603, 148.701-148.708, 148.801-148.805, 148.901-148.911, 148.1001-148.1004, 148.1101-148.1104, 148.1201-148.1207, 148.1301, 148.1401, and 148.1501-148.1506 pertaining to a Standard of Care, with changes to the text that was published in the August 29, 2003, *Texas Register* (28 TexReg 7240).

The new chapter 148 incorporates portions of existing rules relating to a standard of care for substance abuse services. The new rules are designed to ensure consistent, effective and efficient delivery of substance abuse services in the state. This standard of care is applicable to the provision of services throughout the state as a function of Commission licensure without regard to whether a licensee is funded by the Commission. In addition, these rules also provide a model standard of care for all programs funded by the State, whether licensed or not, and include guidelines for prevention programs and therapeutic communities.

The new rules contain information on facility licensure requirements, personnel practices and development, client rights, specific requirements for different types of program services, as well as information on food and nutrition, screening and assessment, medication, and residential physical plant requirements. Additionally, the new rules contain requirements that licensees initiate a quality management process for self evaluation.

The new rules clarify requirements for reporting incidents, staff training, and program services. The new rules adopt terminology that accurately reflects the treatment continuum. The detoxification provisions of the new rules are improved to clarify general requirements as well as to require 24-hour staff coverage in all residential detoxification programs. Screening, admission, consent and assessment processes have been revised.

Changes have been made to Chapter 148 as proposed. Rules for therapeutic communities, the use of LVNs during the screening process, and the care of children who are housed in treatment facilities where their parents receive treatment have been expanded or added. Clarification of the required number of service hours related to the intensity of treatment has been provided. The proposed section requiring the purchase a bond to cover the storage of client records in the event of facility closure has been eliminated. In addition, the section on hiring practices has been clarified to allow for new staff to start work before their criminal background check has been completed as long as they do not have any direct client contact until the check has been completed and the results assessed. In adopting Chapter 148, the Commission makes other grammatical and non-substantive changes for the purpose of clarifying its intent.

The public comment period began on August 29, 2003, with the publication of the proposed rules in the *Texas Register* and on the Commission's website, and ended October 15, 2003. Public meetings to discuss the rules were held during the comment period in Austin, Dallas and Houston. The Commission received the majority of comments in writing by email, fax and U.S. mail. Commission staff summarized the comments received and published draft responses for review on the Commission's website in advance of its November 12, 2003, open meeting. The draft included a number of changes in response to the concerns expressed. As directed by the Commissioners at the November 12 meeting, the rules were revised further and published along with a draft final order on the Commission's website in advance of the December 9, 2003, open meeting. Chapter 148 was approved for adoption during that meeting.

The Commission received comments on the proposed rules from Alcohol and Drug Abuse Council - Concho Valley; Alcohol and Drug Education Services; Alcoholic Rehabilitation Center; Alpha Home, Inc.; Amarillo Council on Alcoholism and Drug Abuse; The Association of Substance Abuse Programs (ASAP); Austin Recovery Center; Austin Travis County MHMR; Avenues Counseling Center; Bay Area Recovery Center; Brazos Valley Council on Alcohol and Substance Abuse; Cenikor; CiviGenics; Fort Bend Council on Family and Community Development, Inc.; Gateway Foundation, Inc.; Gulf Coast Center; Jefferson County Council on Alcohol and Drug Abuse; La Hacienda Treatment Center; Land Manor; Managed Care Center for Addictive/Other Disorders, Inc.; Memorial Hermann Prevention and Recovery Center; Montrose Counseling Center; Nexus; Permian Basin MHMR; Phoenix House; Reyes Law Firm; The Right Step - Houston; Riverside General Hospital; Sabine Valley Center; Sandstone Health Care, Inc. (Sandstone); Serenity Foundation of Texas; Serving Children and Adolescents in Need, Inc.; Shoreline, Inc.; South Texas Council on Alcohol and Drug Abuse; Southeast Texas Regional Planning Commission; Special Health Resources for Texas, Inc.; Sundown Ranch; Tarrant County MHMR; Texas Association of Addiction Professionals (TAAP); Texas Department of Criminal Justice (TDCJ); Texas Youth Commission; Travis County Juvenile Probation/CHOICES; Turning Point; Volunteers of America; and various individual commenters. The specific comments received and the Commission's responses appear below in rule number order.

§148.207. Discrimination. La Hacienda Treatment Center comments that as a for-profit, privately funded facility, they are

concerned that discrimination due to economic condition might mean they must admit anyone regardless of his/her ability to pay for services. The Commission agrees and has revised §148.207 accordingly.

§148.214. Duty to Report. Brazos Valley Council on Alcohol and Substance Abuse requests the addition of language to this rule regarding illegal, unethical or unprofessional conduct. It suggests that the rule only apply to conduct that is judged to significantly impact the safety, confidentiality and well being of clients. The Commission disagrees because it believes that to include such a caveat would unacceptably dilute the duty to report and fail to ensure that unethical practices and conduct be reported.

§148.215. Impaired Providers. CiviGenics; Jefferson County Council on Alcohol and Drug Abuse; TAAP; and interested individuals comment that this rule should be strengthened. Most of the commenters support the creation of a peer assistance program funded by an increase in the licensure fee for Licensed Chemical Dependency Counselors (LCDC). The Commission believes the wording in this rule is sufficient. Mandatory reporting of impairment may work against the Commission's goals of encouraging impaired providers to seek help. An increase in the license fees for LCDC's to fund a peer assistance program would not necessarily increase access to substance abuse services. LCDC's, more so than other professionals, are aware of the services available to them by virtue of their training, education and involvement in the field of services. It is not clear how a licensee funded administrative entity would facilitate greater access to those services. The Commission does believe that employers may play a significant role in facilitating access to treatment. Therefore, the rule has been amended to require that the employer of an impaired employee provide information regarding available services.

§148.217(l). Specific Acts Prohibited. Amarillo Council on Alcoholism and Drug Abuse; ASAP; Austin Travis County MHMR; Avenues Counseling Center; Fort Bend Council on Family and Community Development, Inc.; Gateway Foundation, Inc.; La Hacienda Treatment Center; Land Manor; Managed Care Center for Addictive/Other Disorders, Inc.; Memorial Hermann Prevention and Recovery Center; Permian Basin Centers for MHMR; The Right Step- Houston; Serenity Foundation of Texas; and interested individuals comment on smoking restrictions. Several commenters note the contradiction between this rule, which prohibits clients from using tobacco products on site and §148.505(g), which establishes rules for smoking. The Commission agrees and has amended §148.217(l) to resolve this conflict.

§148.301. Standards for Evidence-Based Prevention Programs. A commenter expresses confusion regarding how to interpret §148.301. Another commenter questions why §148.301 was included in 40 TEX. ADMIN. CODE ch. 148 instead of 40 TEX. ADMIN. CODE ch. 147, Contract Program Requirements. The Commission responds that it issues this rule to provide general guidance for the provision of prevention services.

§148.301(9). Standards for Evidence-Based Prevention Programs. Avenues Counseling Center comments that it is often difficult to include parents in prevention activities. The Commission responds that the new rule does not require the inclusion of parents. Instead, the rule instructs that parents should be involved as appropriate.

§148.401. License Required. Land Manor; Jefferson County Council on Alcohol and Drug Abuse; Amarillo Council on Alcoholism and Drug Abuse; ASAP; Serenity Foundation of Texas; Alpha Home; Volunteers of America; and Austin Travis County MHMR comment regarding requiring outpatient sites to be licensed. The revised language used in the new rules represents a clarification of the current rule provision. The rule itself and Commission policy have not materially changed. Facilities are currently required to have a permit for each treatment site, including outpatient sites.

Additionally, ASAP commented that the Commission should recognize Joint Commission on Accreditation of Healthcare Organizations (JCAHO) accredited organizations by adopting a "deemed status" in the new rules to waive inspection of certain aspects of Commission licensed facilities. The Commission responds that due to the complexity of the issues involved and the need to coordinate with outside entities to ensure the continued protection of client health and safety, it declines to adopt a deemed status rule at this time.

The Commission has also deleted §148.409(g) regarding the requirement that providers purchase a bond sufficient in value to provide for the storage and protection of records if it closes its business operations. The provision is unnecessarily burdensome for providers.

§148.502(d). Operational Plan, Policies and Procedures. Riverside General Hospital and an interested individual comment that the previous rules regarding facilities housing children are sufficient to meet safety requirements. The new rules may interfere with a mother's ability to learn and assume responsibility for her child. The new rules should only apply if the facility has daycare. There is no current licensing rule regarding facilities housing children. To establish appropriate standards for these facilities, the Commission has decided to require compliance with certain rules relating to child-care. The Commission has deleted the requirement in the proposed rules that all facilities housing children obtain a day care license in lieu of complying with the minimum standards. The Commission has also narrowed the subject areas of the Texas Department of Protective and Regulatory Services child-care rules that apply to facilities housing children and those providing child-care. As a result, the language contained in the proposed §148.502(d) has been amended and moved to §148.910 of the rules, pertaining to women and children's services.

§148.503. Reporting Measures. ASAP; Land Manor; CiviGenics, Inc; Gateway Foundation, Inc; Texas Department of Criminal Justice (TDCJ); The Right Step-Houston; and Serenity Foundation of Texas comment that the phrase "in format provided by the Commission" is too restrictive for non-funded facilities and question the fiscal burden that non-funded providers will face to comply with this rule. They suggest adding "or via any reasonable alternative means" to the sentence. The Commission declines to make the suggested change and further responds that the intent of the rule is to ensure standardization of the terms and information being submitted. To accommodate concerns regarding the fiscal impact of compliance, the Commission will accept both electronic and hard copy submissions and has amended the new rule to reflect this.

§148.505(g). General Environment. Permian Basin MHMR; ASAP; Land Manor; Managed Care Center for Addictive/Other Disorders, Inc.; Amarillo Council on Alcoholism and Drug Abuse; Fort Bend Council on Family & Community Development, Inc.; The Right Step-Houston; and La Hacienda Treatment Center

comment on this rule. One commenter feels requiring smoking areas be at least 15 feet from the building infringes on client rights and dignity and may not attract people to treatment. Others comment generally that 15 feet is too restrictive. One commenter states that its physical plant setup would require clients to stand in the street or on a neighbor's property to maintain compliance. Several commenters note the contradiction between §148.217(l) which prohibits clients from using tobacco products on site and this rule which establishes rules for smoking areas. The Commission disagrees that this rule infringes on client rights and dignity. The Commission also finds that reasonable restrictions on smoking will provide a more appropriate environment to a larger number of people and thereby increase participation in services. The Commission has revised §148.505(g) to address the identified discrepancy and has made minor amendments to the rule to allow greater flexibility regarding the location of smoking areas.

§148.507(c)(1)(2). General Documentation Requirements. As an alternative to the required electronic authentication, Brazos Valley Council on Alcohol and Substance Abuse suggests that service providers be permitted to maintain an in-house list of approved signatures and that counselors input their name and credentials into the Commission's Behavioral Health Integrated Provider System (BHIPS). The Commission disagrees. The suggested procedure would not be sufficient to authenticate electronic signatures or provide the required security regarding access. BHIPS has the necessary capability to authenticate electronic records, but it is a tool currently available only to Commission-funded agencies and therefore it is not specifically referenced in new 40 TEX. ADMIN. CODE. ch. 148. If a non-funded provider chooses to maintain electronic records, §148.507(c)(2) applies.

§148.508(h). Client Records. ASAP; Amarillo Council on Alcoholism and Drug Abuse; Fort Bend Council on Family & Community Development, Inc; Land Manor; TDCJ; The Right Step-Houston; and Serenity Foundation of Texas suggest changing the requirement for record retention from five to six years to be consistent with HIPAA regulations. The Commission agrees and has amended the rule.

§148.509(a),(b)(6), (b)(14). Incident Reporting. Brazos Valley Council on Alcohol and Substance Abuse comments on the current, not proposed rules by requesting the addition of the phrase "...directly related to an action or inaction by the facility..." to the rule regarding reporting medical and psychiatric emergencies. The commenter also suggests reporting illegal or unethical conduct only when it significantly impacts the clients. The Commission disagrees. In the new rules, medical and psychiatric emergencies are documented in an internal incident report and there is no longer a requirement to report said incidents to the Commission. Additionally, in the new rules, specifically §148.214, when a provider or its personnel have knowledge of an unethical conduct or practice on the part of a person or provider, they have a responsibility to report the conduct or practices to appropriate funding or regulatory bodies or to the public. The duty to report unethical conduct or practices is standard procedure for license holders and funding recipients. The Commission believes that including a caveat to the reporting requirements would dilute the duty to report and not ensure that unethical practices and conduct would be reported as required.

§148.509(b)(13), (c). Incident Reporting. ASAP; Land Manor; CiviGenics, Inc; Amarillo Council on Alcoholism and Drug Abuse; and Serenity Foundation of Texas comment that the incident report deadline for client suicide attempts should be within 24 hours of the facility becoming aware of the event. The Commission agrees and has revised §148.509(c) to include this requirement.

§148.601(b). Hiring Practices. The Right Step-Houston requests adding the Internet as a method for verifying credentials to this rule. The Commission agrees and has revised §148.601(b) to permit verification via the Internet.

§148.601(d). Hiring Practices. Land Manor; ASAP, Southwest Texas Regional Planning Commission; Gateway Foundation; Amarillo Council on Alcoholism and Drug Abuse; Alpha Home, TDCJ Jester Unit I; and Serenity Foundation of Texas comment regarding the length of time to receive a response to the criminal background check and the subsequent impact on the operation and staffing of the organizations. The commenters also mention these problems as a possible financial burden. Most commenters request keeping the wording in the current rules. In response to the expressed concerns, the Commission has made reasonable accommodations for the completion of criminal background checks. A facility may hire staff prior to receiving the results of a criminal background check. However, to protect the health and safety of clients, the new rule requires that staff not be allowed to have client contact until the background check is completed and assessed. The Commission has revised §148.601(d) accordingly.

§148.601(e). Hiring Practices. Shoreline, Inc. comments that newly hired employees should not have contact with clients until they have passed the urine drug screen. Also, new hires that test positive on the urine drug screen should be immediately terminated for cause. The Commission believes that it is important to receive the drug test results prior to employment and therefore declines to make the requested change.

§148.601(g). Hiring Practices. An individual commenter asks for a definition of "volunteer" under this provision. The Commission responds that the definition of "volunteer" under these rules follows the common usage of the term. For the purposes of §148.601(g), the term "volunteer" does not include volunteer speakers associated with 12 Step or similar programs.

§148.603(c). Training. La Hacienda Treatment Center and Sandstone question the intent and timeframe of the initial orientation provision. There are concerns regarding providing this orientation prior to performing duties and adding Commission rules and organization policies and procedures to the items that must be addressed. The commenters also inquire as to the removal of client abuse, neglect and exploitation topics from this section. The intent of this provision is to require that training address topics that employees need to know before they start performing their duties. The Commission feels that it is important for employees to understand Commission rules, which form the basis for policies and procedures and client health and safety guidelines. Organizational policies and procedures are similarly important and should be reviewed prior to performing job functions. Not knowing such information represents a risk management issue for the organization and a potential safety risk for the clients. The client abuse, neglect and exploitation training requirements remain, yet are incorporated by reference in Appendix A as set forth in §148.603(d)(1).

§148.603(d). Training. Land Manor; ASAP; Travis Co. Juvenile Probation; Southwest Texas Regional Planning Commission; Jefferson Co. Council on Alcohol and Drug Abuse; CiviGenics; Gateway Foundation; Amarillo Council on Alcoholism and

Drug Abuse; Fort Bend Council on Alcohol and Drug Abuse; TDCJ; TAAP; Alpha Home, Volunteers of America; ARC of Bexar County; La Hacienda Treatment Center; Special Health Resources; Sandstone; Austin-Travis Co. MHMR; Texas Youth Commission; Serenity Foundation of Texas; and interested individuals express concerns relating to the time period for initial staff training to be completed. The comments state that the proposed timeframe of 30 days is unrealistic and would be burdensome to the facilities operationally and financially. Most commenters request that 90 days be given to complete the required initial trainings. One commenter feels that completing two hours of abuse, neglect and exploitation training within the first 30 days was sufficient with completion of the rest within the year. The Commission has revised the language of the new rule and returned the deadline for initial training to within 90 days of employment. The Commission has added a provision that employees cannot perform certain functions until they have received the appropriate training.

§148.603(d)(1). Training. The Right Step-Houston comments that eight hours of abuse, neglect and exploitation training is unnecessary and should not apply to all employees and suggests each full-time employee receive an initial training of eight hours and a three-hour refresher annually. The Commission disagrees. The abuse, neglect and exploitation training requirement is based on statutory requirements contained in TEX. HEALTH & SAFETY CODE ch. 161. The law requires TCADA, the Texas Department of Health and the Texas Department of Mental Health and Mental Retardation to agree and adopt standards for this training by rule. Appendix A of new Commission rules, 40 TEX. ADMIN. CODE ch.148, contains the agreement between these agencies. It sets out standards for training which include the requirement that staff receive eight hours of abuse and neglect training annually. The Commission has amended §148.603 to distinguish the training requirements for outpatient programs from that of residential programs. The required eight hours of training apply only to residential services. The Commission requires two hours of training for outpatient programs.

§148.603(d)(2). Training. Brazos Valley Council on Alcohol and Substance Abuse and Sabine Valley Center comment on current rule sections requiring direct care staff to complete four hours of training in Tuberculosis, HIV, Hepatitis B and C and Sexually Transmitted Diseases. They believe the training is excessive and should be changed to two hours of training. The Commission responds that the new rules for training in HIV, Hepatitis B and C, Tuberculosis and Sexually Transmitted Diseases require three hours of initial training and annual updates, which is reduced from the requirement of four hours in the current rules. The Commission believes the three hours of training are necessary to protect the health and safety of provider staff and service recipients.

§148.603(d)(3)(B). Training. Shoreline, Inc. suggests the addition of language regarding licensed health professionals being exempt from CPR and first aid certification, if emergency resuscitation equipment and trained response teams are available 24 hours a day. The commenter believes that licensed health professionals, i.e. RNs and LVNs, should be exempt from maintaining current First Aid certification under the condition that the licensed health professional has maintained recent uninterrupted employment in a health care facility where first aid skills are utilized (i.e. hospital, long term care, adolescent or adult residential facility) for at least two years. The Commission believes that providers should maintain current CPR and first aid certification regardless of place of employment. However, as reflected in the new rules, if emergency resuscitation equipment and trained response teams are available 24 hours a day, licensed health professionals and personnel in medical facilities are exempt from this requirement.

§148.603(d)(4). Training. Avenues Counseling Center comments that requiring formally trained instructors to conduct non-violent crisis intervention training is unrealistic as formally trained instructors are scarce. The Commission acknowledges that finding formally trained instructors may be difficult; however, this training is important to the client health and safety and the risk management of the facility. Because of the nature of the training, it must be provided by trained, competent individuals. Therefore, the Commission declines to amend the rule.

§148.603(d)(6). Training. Brazos Valley Council on Alcohol and Substance Abuse; Sabine Valley Center; ASAP; Southeast Regional Planning Commission; CiviGenics; Gateway Foundation; Amarillo Council on Alcoholism and Substance Abuse; Riverside General Hospital; Right Step-Houston; La Hacienda, Volunteers of America; Avenues Counseling Center; Memorial Hermann Hospital; Austin-Travis Co. MHMR; TDCJ Jester Unit I; Serenity Foundation of Texas; and the Texas Youth Commission comment regarding the eight hours of required intake and screening training. Suggestions range from an initial eight hour training with shorter annual follow-up trainings to a total reduction in the duration of intake and screening training. Additional suggestions are to exempt or require different levels of training depending on staff duties or credentials and to include a separate requirement for mental health diagnosis training. The Commission disagrees. The eight hours of training in intake and screening is a requirement outlined in TEX. HEALTH & SAFETY CODE §462.025. The Commission is unable to change rules that are based on statutory requirements. The statute does not set forth any exemptions from this training requirement. Additionally, the new rules include two hours of training in DSM diagnostic criteria for substance-related disorders and other mental health diagnoses as part of the intake, screening and admission authorization training.

§148.603(d)(7)(A). Training. Jefferson County Council on Alcohol and Drug Abuse comments that self administration of medication training should be taken at least annually rather than as two hours of initial, one-time training. The Commission disagrees. The rules are minimum requirements and a facility may choose to provide more training than is required based on staff proficiencies and client needs.

§148.603(d)(8). Training. Jefferson Co. Council on Alcohol and Drug Abuse; Riverside General Hospital; Right Step-Houston; La Hacienda; Avenues Counseling Center; Special Health Resources; and interested individuals comment that the proposed adolescent training for staff is too excessive and all necessary information could be provided within a shorter timeframe without affecting quality of care. A commenter also asks whether the adolescent training requirement in §148.603(d)(8) includes prevention and intervention programs. One commenter states that the hours are difficult to complete when on-the-job training is not accepted. The Commission has moved the adolescent training provision from this section of the rules to the adolescent treatment section, §148.905(d)(3), and required that the facility have a process in place that ensures that all staff are trained and competent to work in that area. This should also clarify that the adolescent training requirement is intended to apply only to treatment programs serving adolescents.

§148.603(d)(9)(A). Training. ASAP, La Hacienda, Austin-Travis Co. MHMR, and Serenity Foundation of Texas comment that four hours of detoxification training for staff is excessive. Commenters recommend changing the requirement to reflect a minimum of two hours for the detoxification training, particularly for those with a medical or nursing background. The Commission responds by moving the detoxification training provision from this section of the rules to the detoxification treatment section, §148.902(f), and requiring that the facility have a process in place that ensures that all staff are trained and competent to work in that area.

§148.603(d)(10). Training. Volunteers of America asks for clarification on how staff and program administrators shall demonstrate expertise in addressing the needs of women and children. The Commission has moved the women and children's training provision from this section of the rules to the women and children's treatment section, §148.910, which now requires that the facility have a process in place that ensures that all staff are trained and competent to work in that area. Expertise may be demonstrated by showing that staff are adequately trained or skilled to ensure competence and thereby protect clients.

§148.703(b), (c), (f). Abuse, Neglect, and Exploitation. Gateway Foundation, Inc.; Shoreline, Inc; Land Manor; Gateway Foundation, Inc; ASAP; La Hacienda Treatment Center; Austin Travis County MHMR; Serenity Foundation of Texas; TAAP; and the Texas Youth Commission comment that the references in these sections to the chief executive officer (CEO) being required to perform all of the functions for reporting abuse, neglect or exploitation should include the phrase "or designee." The Commission agrees and has revised the text for §148.703(b), (c) and (f) to include this alternative.

§148.703(e). Abuse, Neglect, and Exploitation. Gateway Foundation, Inc.; Shoreline, Inc; Land Manor; Gateway Foundation, Inc; ASAP; La Hacienda Treatment Center; Austin Travis County MHMR; Serenity Foundation of Texas; TAAP; and the Texas Youth Commission comment that this section should include the phrase "or designee." The Commission disagrees and therefore will not change §148.703(e) to include a designee. Requiring a report be made to the CEO protects clients and participants.

§148.703(g). Abuse, Neglect, and Exploitation. Montrose Counseling Center expresses concerns regarding the notification of the consenter when the consenter is the alleged abuser. The Commission agrees and has revised §148.703(g) to address this concern.

§148.706(a). Restraint and Seclusion. Land Manor, ASAP, and Serenity Foundation of Texas comment that adolescent residential programs should not be required to authorize the use of personal restraint, but detoxification programs should. The Commission disagrees. The current rules require adolescent residential programs to authorize the use of personal restraint. Adolescent residential populations tend to require greater levels of external guidance and, at times, behavioral control to ensure a safe environment is maintained. Detoxification programs may authorize personal restraint but the decision to do so depends on the client population served, acuity of clients and an evaluation by the clinical director and/or physician as to the necessity for such behavioral controls.

§148.708(b). Searches. TDCJ comments that searches should protect the health, safety and welfare of staff and facility, as well as clients. The Commission agrees and has revised the rule accordingly.

§148.708(e). Searches. TDCJ comments that the new rule requires same-sex searches. TDCJ policy allows for female correctional officers to search male inmates. The Commission believes that same gender searches are required to protect the health and safety of clients as well as to preserve the dignity of clients. It therefore declines to permit the proposed alternative.

§148.708(f). Searches. Land Manor, ASAP, Serenity Foundation of Texas, CiviGenics, and Gateway Foundation, Inc. comment that the documentation of all client searches in the client records is excessive. Instead, they suggest documenting routine searches of possessions such as purses and bags in a central log (for example, when a client returns from a pass) and documenting the more thorough, incident-based client searches in the client record. The Commission agrees and has revised §148.708(f) accordingly.

§148.801(a). Screening. Sundown Ranch; La Hacienda Treatment Center; Brazos Valley Council on Alcohol and Drug Abuse; and other interested individuals comment on this rule. One commenter asks if an American Society of Addiction Medicine certified child and adolescent psychiatrist and/or physician who also is on staff with the admitting facility determines diagnosis and refers an admission to that facility for treatment, would it still be necessary to conduct an additional screening on that admission? Another commenter references §148.422 of the current rules, regarding collecting information about the client's financial resources and insurance benefits. Other comments concern the use of the phrase "validated screening instrument." The Commission responds that if a qualified staff member meets with the prospective client, determines a diagnosis and type of services required, and authorizes admission according to the rules, no "additional" screening is required. Section 148.801(a) includes a requirement that an assessment of the client's financial resources and insurance benefits be conducted. The phrase "validated screening instrument" has been replaced with "screening process" in §148.801(a).

§148.801(e). Screening. Permian Basin MHMR; ASAP; CiviGenics; Serenity Foundation of Texas; Managed Care Center for Addictive/Other Disorders, Inc; Land Manor; The Right Step-Houston; and Memorial Hermann Prevention and Recovery Center request LVNs be allowed to screen admissions to a detoxification program. The Commission agrees and has revised §148.801(e) to permit LVNs to perform screening under certain conditions.

§148.802(a). Admission Authorization and Consent to Treatment. ASAP; CiviGenics; Land Manor; Serenity Foundation of Texas; Gateway Foundation; Amarillo Council on Alcoholism and Drug Abuse; Volunteers of America; Avenues Counseling Center; Austin Travis County MHMR; and the Texas Youth Commission comment that the face-to-face meeting with a QCC requirement is too restrictive and is not necessary. The Commission agrees and has revised §148.802(a) to eliminate this requirement.

§148.802(b)(8). Admission Authorization and Consent to Treatment. Alcoholic Rehabilitation Center of Bexar County objects to the requirement that the client be given the name of the primary counselor at admission, suggesting that the primary counselor designation would best take place in the first three individual service days after admission. The Commission declines to make this change to the new rule. The new rule reflects no change from the current rule. Giving the client the name of their primary counselor as soon as they are admitted into the program allows

the client to have a single point of contact should they have therapeutic or clinical issues they need addressed. The assignment of a primary counselor may change as needed, but the client must be provided the name of their counselor upon admission.

§148.802(b)(14). Admission Authorization and Consent to Treatment. Brazos Valley Council for Alcohol and Substance Abuse references the current rule regarding assessment of the client's financial resources. The commenter states that many insured clients have disaster insurance with very high deductibles and co-pays. These individuals "fall through the cracks." The Commission has revised §148.802(b)(14) in response to include an evaluation of the client's insurance benefits to determine estimated daily charges. Additionally, §148.801(a) requires that the provider consider a person's financial resources and insurance benefits when screening that person to determine admission eligibility.

§148.802(g). Admission Authorization and Consent to Treatment. La Hacienda Treatment Center requests clarification of this rule. The commenter states that there are many potential clients who contact programs to inquire about admission who do not meet the programs' financial eligibility criteria. They are given appropriate referral options, and the process is documented, but they may never actually be screened by a QCC. The new rule would apply to those clients who actually complete the screening process and are determined inappropriate for admission. The Commission has revised §148.802(g) to clarify the rule.

§148.803(a). Assessment. South Texas Council on Alcohol and Drug Abuse (STCADA); Permian Basin MHMR; Land Manor; ASAP Workgroup; CiviGenics, Inc.; Gateway Foundation; Managed Care Center for Addictive/Other Disorders, Inc.; Amarillo Council; Riverside General Hospital; Fort Bend Council on Family & Community Development, Inc.; Association of Substance Abuse Service Providers (ASAP) ; Texas Department of Criminal Justice; The Right Step-Houston; Volunteers of America Texas, Inc.; Avenues Counseling Center; Texas Youth Commission; Austin Travis County MHMR; Sandstone Health Care, Inc.; Brazos Valley Council of Alcohol and Drug Abuse; and other interested individuals request that counselor interns be allowed to conduct initial assessments. One commenter spoke of family assessments and family service plans which are not addressed in the new rules. The Commission agrees that counselor interns may perform this function provided they have the required training and supervision. To clarify, it has revised §148.803(a).

§148.803(a)(4). Assessment. La Hacienda Treatment Center requests that medical history and current health status be exempted from the initial assessment if a history and physical, completed by a physician at admission, is in the client record. The Commission responds that if such a history and physical are documented in the client record within the required time frame for the assessment (three individual service days of admission), this will meet the intent of the rule.

§148.803(a)(4). Assessment. La Hacienda Treatment Center comments that the inclusion of HIV information in the client record is a violation of client rights and in direct conflict with their interpretation of the law. The Commission has revised §148.803(a)(4) in response.

§148.803(a)(6). Assessment. La Hacienda Treatment Center requests that leisure activities be exempted from the initial assessment if a Certified Therapeutic Recreational Specialist (CTRS) has completed a leisure activities assessment. The Commission responds that a CTRS assessment may be used to meet the requirement in the rule if done by a QCC. If not, a QCC must still review the information in the assessment with the client.

§148.803(c). Assessment. Austin Travis County MHMR questions the requirement for Axes II and III diagnoses if not all QCC's are able to give them. The Commission responds that while a QCC's license may limit his or her scope of practice in terms of generating diagnoses, the intent of the rule was to encourage an understanding of the client's problems and needs that is as complete as possible given the scope of practice under which the QCC operates.

§148.804(a). Treatment Planning, Implementation and Review. Jefferson County Council on Alcohol and Drug Abuse; and La Hacienda Treatment Center comment on the language of this rule. One commenter requests that the Commission check the wording in this subsection. Another commenter felt some of the language of the rule was redundant, inconsistent, and unnecessary and should be removed. The Commission responds that the wording appears appropriate. The intent of the rule is to ensure that treatment plans will be developed and implemented with the client's involvement, will involve the family when appropriate, and address issues identified in the assessment.

§148.804(c). Treatment Planning, Implementation and Review. An interested individual requests that the rule be more specific regarding initial plans for discharge in the treatment plan, perhaps including or addressing Texas Department of Insurance (TDI) discharge criteria. The Commission responds that the wording of the new rules has been clarified regarding the distinction between discharge criteria and discharge planning. Sections 148.804(c) and 148.805(a) have been revised in response.

§148.804(d). Treatment Planning, Implementation and Review. La Hacienda Treatment Center comments that the projected length of stay should be placed in the assessment rather than the treatment plan. The Commission declines to make this change since the projected length of stay is based on best estimates as to how long it will take the client to accomplish identified goals, objectives, and other discharge criteria that are not addressed in the assessment. However, a projected length of stay may be included in the assessment, subject to later revision in the treatment plan.

§148.804(f). Treatment Planning, Implementation and Review. Land Manor; Shoreline, Inc.; Alcoholic Rehabilitation Center; CiviGenics, Inc.; Gateway Foundation; Riverside General Hospital; Managed Care Center for Addictive/Other Disorders, Inc.; Fort Bend Council on Family & Community Development, Inc.; Association of Substance Abuse Service Providers (ASAP); Texas Department of Criminal Justice; Alpha Home, Inc.; The Right Step-Houston; Volunteers of America Texas, Inc.; Alcoholic Rehabilitation Center of Bexar County; La Hacienda Treatment Center; Austin Recovery; Avenues Counseling Center; Memorial Hermann Prevention and Recovery Center; Serenity Foundation of Texas; Texas Youth Commission; Austin Travis County MHMR; Sandstone Health Care, Inc.; and other interested individuals request that the treatment plan be completed and filed in the client record within five individual service days rather than the proposed three days. The Commission agrees and has revised §148.804(f) to require the plan be completed within five days.

§148.804(g-j). Treatment Planning, Implementation and Review. La Hacienda Treatment Center, Land Manor; Shoreline,

Inc.; Alcoholic Rehabilitation Center; CiviGenics, Inc.; Gateway Foundation; Amarillo Council; Managed Care Center for Addictive/Other Disorders, Inc.; Fort Bend Council on Family & Community Development, Inc.; ASAP; Avenues Counseling Center; Texas Department of Criminal Justice; Serenity Foundation of Texas; Texas Youth Commission; Austin Travis County MHMR; Sandstone Health Care, Inc., and an interested individual note conflicting statements regarding requirements for treatment plan reviews, in that §148.804(g) states the treatment plan shall be evaluated on a regular basis, and §148.804(h) specifies timelines, which are felt to be too restrictive. It is also suggested that §148.804(g) might be interpreted as a requirement separate and apart from §148.804(h), (i) and (j). The Commission responds that §§148.804(g)(h)(i) and (j) all refer to the treatment plan review process and §148.804(h) has been amended to clarify expectations.

§148.804(k). Treatment Planning, Implementation and Review. La Hacienda Treatment Center requests that this rule not apply when a client changes the level of care within the same program site. The Commission responds that a change in the level of care involves different interventions from the provider and assumptions that client needs are such that the previous level of care is no longer either needed or sufficient. A documented treatment plan review is required in this situation even if the client remains at the same program site.

§148.804(l)(1)(2). Treatment Planning, Implementation and Review. La Hacienda Treatment Center states that the new rules require that individual counseling notes include the goals addressed, whereas the previous rules include the problems addressed. The commenter believes this change would require significant changes in established documentation practices, and that including problems addressed is more consistent with established clinical documentation practices. The Commission responds that the previous rules require that all progress notes include the goals addressed. The new rules require that only individual counseling notes include the goals addressed which is less burdensome than the previous rule. The Commission believes it is necessary for individual notes to address the goals in the treatment plan, which serve to help target solutions to the problems identified. A provider may set forth a projected length of stay in its assessment document, however, it must also be contained in the treatment plan and be subject to change as the treatment plan and the client's progress is reviewed.

§148.804(l)(1). Treatment Planning, Implementation and Review. ASAP; Land Manor; and TDCJ comment on this rule. One commenter is concerned that the requirements of BHIPS are excessive. There is also a comment that requiring documentation of all treatment services is ill-suited to the therapeutic community model. The Commission responds that use of BHIPS is only required for funded providers and its use is not addressed in this rule. Rules specific to therapeutic communities are contained in §148.1401 which sets forth specific requirements for that modality.

§148.805(a). Discharge. An interested individual suggests leaving in the wording that requires discharge plans to be completed prior to discharge. The Commission responds that this is addressed in §148.805(e).

§148.805(j). Discharge. An interested individual suggests follow-up contacts be made no sooner than 60 days after discharge. The Commission agrees and has amended the discharge provisions accordingly.

§148.901(b). Requirements Applicable to All Treatment Services. Turning Point; Land Manor; ASAP; CiviGenics; Gateway Foundation, Inc; TDCJ; Avenues Counseling Center; Jefferson Co. COADA; Austin Travis Co. MHMR; Serenity Foundation of Texas, and two interested individuals comment that group size restrictions do not allow for appropriate clinical interventions as utilized in accepted treatment methodologies and as required by certain correctional setting space limitations. The Commission disagrees with the commenters regarding group size limitations. This rule specifically addresses limiting the group sizes for counseling groups and educational/life skills groups. The Commission believes it is clinically sound to limit the group sizes to ensure there is adequate opportunity for clinicians to intervene as necessary. Large groups of clients do not allow for appropriate clinical interaction. These restrictions do not interfere with treatment modalities that use encounter groups and community groups as they do not apply to that type of group setting.

§148.901(h). Requirements Applicable to All Treatment Services. An interested individual recommends including wording in this rule that individuals taking methadone must be admitted to a program. The Commission declines to make this change because an individual taking methadone, which is a prescribed medication, is covered under the rule as written.

§148.901(n). Requirements Applicable to All Treatment Services. CiviGenics comments that in correctional settings, some clients are required to work early morning shifts and then make up the sleep time missed before attending treatment thereby denying the client eight continuous hours of sleep. The commenter suggests revising wording to "clients have an opportunity for sleep daily." The Commission declines to make this change as it believes that requiring eight hours of uninterrupted sleep is in the best interest of the client and increases the likelihood of successful treatment outcomes.

148.901(p). Requirements Applicable to All Treatment Services. Land Manor requests an interpretation of this section regarding specialized education and expertise for teaching chemical dependency education groups and asks how this impacts counselor interns. The Commission responds that counselor interns are no different from other individuals conducting the educational and life skills training in that they must have specialized education and required expertise in the subject matter being taught.

§148.901(r). Requirements Applicable to All Treatment Services. Austin Travis Co. MHMR and an interested individual comment that the rule requiring that qualified mental health professionals obtain work experience under the supervision of an LCDC creates an adversarial relationship and is too restrictive. The Commission responds that it has deleted this section.

§148.902. Requirements Applicable to Detoxification Services. TDCJ comments that stated tasks are now significantly detailed. These new specifications will have a fiscal impact on the vendors. Recommendations for specific changes were not included in the comment. The Commission responds that it has clarified the duties and responsibilities of staff working in detoxification programs, setting forth what services are to be provided and by whom. The Commission believes that the rules represent the best practice standards for treatment of clients receiving detoxification services. Fiscal impact will vary depending on the services currently being provided.

§148.902(e). Requirements Applicable to Detoxification Services. ASAP, La Hacienda Treatment Center, Austin-Travis County MHMR, and Serenity Foundation of Texas comment that four hours of detoxification training for staff is excessive. Comments recommend changing the requirement to a minimum of two hours for the detoxification training, particularly for those with a medical or nursing background. The Commission has moved the detoxification training provision from §148.603(d)(9)(A) of the rules to the detoxification treatment section, §148.902(f) of the rules to address this issue. The new rule now requires that the facility have a process in place that ensures that all staff are trained and competent to work in that area.

§148.902(e). Requirements Applicable to Detoxification Services. The Right Step-Houston commented that this rule is too restrictive and suggests that a licensed health professional should be able to authorize detoxification admissions as well as a certified addictions registered nurse or registered nurse with at least two years experience. The Commission disagrees. Commission staff have researched the scope and limitations of medical licenses to determine what practices fall under the different medical licenses. This rule is based on that research.

§148.902(e)(6). Requirements Applicable to Detoxification Services. Land Manor comments that addition of this section was not approved by the Commission for publication in the Texas Register. The Commission responds that the provisions in §148.902(e)(6) were given to the Commissioners prior to the August 12, 2003, open meeting. The proposed rules, including this section, were approved by the Commissioners for posting in the Texas Register. The provisions were published in the Texas Register as required by law on August 29, 2003.

§148.902(g)(5). Requirements Applicable to Detoxification Services. Turning Point expresses a concern that medical staff cannot perform the individual counseling session with the client in detoxification services. The Commission has revised what is now §148.902(h)(5) to permit a registered nurse to provide this service as well.

§148.903(b). Requirements Applicable to Intensive Residential and Day Treatment Services. Land Manor, TDCJ, and Austin Travis Co. MHMR comment that ensuring access to the entire continuum of care may place an unrealistic burden on the program. The Commission responds that the intent of the rule is to ensure that providers identify appropriate services and provide information and assistance needed to access them. It does not require that the services be directly provided.

§148.903(d). Requirements Applicable to Intensive Residential and Day Treatment Services. Phoenix House, Serving Children and Adolescents in Need, Inc; Land Manor; Shoreline; Alcoholic Rehabilitation Center; Travis Co. Juvenile Probation; Alcohol & Drug Abuse Council-Concho Valley; Cenikor; Austin Recovery; CiviGenics; Gateway Foundation, Inc; Riverside General Hospital; ASAP; TDCJ; The Right Step; ARC of Bexar County; Volunteers of America; Avenues Counseling Center; Austin Travis Co. MHMR; Texas Youth Commission, and several interested individuals disagree with the increase in service hours to 30 per week, which must include two individual sessions, for Intensive Residential services. It is anticipated that the increased service hours will create a financial burden, require hiring additional staff, and increase the workload for counselors. Requiring two individual sessions per week also increases the workload for counselors and will require hiring additional staff. The commenters suggest leaving the 20-hour requirement as is. The Commission responds by revising the rule to address the commenters' concerns. Specifically, the Commission has reduced the requirement to one individual counseling session per week and expanded the number of activities that will count toward the 30 hour requirement set forth in §148.903(d).

§148.903(g). Requirements Applicable to Intensive Residential and Day Treatment Services. Phoenix House, Serving Children and Adolescents in Need, Inc; Land Manor; Shoreline; Alcoholic Rehabilitation Center; Travis Co. Juvenile Probation; Alcohol & Drug Abuse Council-Concho Valley; Cenikor; Austin Recovery; CiviGenics; Gateway Foundation, Inc.; Riverside General Hospital; ASAP; TDCJ; The Right Step; ARC of Bexar County; Volunteers of America; Avenues Counseling Center; Austin Travis Co. MHMR; Texas Youth Commission; and several interested individuals disagree with the increase in service hours for supportive residential, because it is expected to create a financial burden, require the hiring of additional staff, and increase the workload for counselors. The Commission has reduced the number of service hours in §148.903(g) in response to this concern.

§148.903(h). Requirements Applicable to Intensive Residential and Day Treatment Services. TDCJ comments that the proposed staff ratios are cost prohibitive and recommends maintaining the current rule. The Commission responds that the new staff-to-client ratios in supportive residential services are the same as current level III and IV ratios. The Commission believes that the ratio helps ensure staff are available to supervise clients and protect their health and safety and that the ratio represents sound clinical practice, increasing the likelihood of positive treatment outcomes.

§148.903(i). Requirements Applicable to Intensive Residential and Day Treatment Services. ASAP; Land Manor; CiviGenics; Gateway Foundation, Inc; TDCJ; Alpha Home, Inc; and Serenity Foundation of Texas comment that the proposed rule does not allow for methodological differences in program design. They recommend deleting caseload restrictions in adult supportive residential programs and returning to current rules allowing programs to justify and set their own caseload limits. They believe the new rule places unnecessary financial burden on programs. One commenter believes supportive residential specialized female programs should limit caseloads to ten clients per counselor. The Commission agrees and will allow programs to set their own limits on caseload sizes and has revised §148.903(i) as a result.

Additionally, the Commission has renamed and revised §148.903 to read Requirements Applicable to Residential Treatment Services to clarify that this section of the rules applies to both intensive and supportive residential. It has also moved references to day treatment to §148.905 relating to Additional Requirements for Adolescent Programs to set out requirements for this type of service and to clarify when attendance in school can and cannot be counted toward service hour requirements.

§148.904. Requirements for Outpatient Treatment Programs. La Hacienda Treatment Center and an interested individual suggest establishing a minimum number of hours and maximum caseload size for outpatient programs. They are concerned that facilities will only offer "bare bones" treatment at the expense of their clients. They believe there should be a distinction between outpatient and intensive outpatient services. They ask what distinguishes outpatient programs from private practice. The Commission responds that minimum hours are not specified to allow facilities to provide individualized treatment based on client needs. Private practice and chemical dependency treatment are

defined in 40 TEX. ADMIN. CODE §141.101 and provide the basis for differentiating between outpatient programs and private practice.

Additionally, La Hacienda requested that the Commission replace the term 'residential' with 'inpatient' throughout its rules. The Commission declines to make this change as the term inpatient carries with it certain medical connotations and block grant restrictions that may not be appropriate for services in residential chemical dependency treatment facilities. However, this choice of this term should not be construed to imply a lower level of service.

§148.904(b). Requirements for Outpatient Treatment Programs. ASAP; Land Manor; and Serenity Foundation of Texas comment that requiring facilities to ensure access to the full continuum of care is unrealistic. The Commission responds that facilities will not be expected to provide a full continuum of care. The intent of the rule is to ensure that providers identify appropriate services and provide information and assistance needed to access them.

§148.905(a)(4). Additional Requirements for Adolescent Programs. Phoenix House - Austin and La Hacienda Treatment Center comment that fifteen hours of additional planned, structured activities in addition to the required treatment services are too much for adolescents. The Commission has revised §148.903 regarding requirements for residential services and §148.905 regarding additional requirements for adolescent programs to clarify the number of hours required for residential versus day treatment for adolescents as well as additional hours for planned structured activities. Additionally, it has added a provision to allow residential programs to count attendance in school toward meeting the requirements for additional hours of planned, structured activities.

§148.905(c)(3). Additional Requirements for Adolescent Programs. Jefferson Co. Council on Alcohol and Drug Abuse; Riverside General Hospital; Right Step-Houston; La Hacienda; Avenues Counseling Center; Special Health Resources for Texas; and interested individuals comment that the proposed adolescent training for staff is too excessive and all necessary information could be provided within a shorter timeframe without affecting quality of care. A commenter also asks whether the adolescent training requirement in §148.603(d)(8) includes prevention and intervention programs. One commenter stated that the hours were difficult to complete when on-the-job training is not accepted. The Commission responds by moving the language of proposed §148.603(d)(8) training requirement to the §148.905(d)(3) (adolescent treatment), which applies to treatment facilities, not prevention programs. It now requires that facilities develop and implement a mechanism to ensure that staff are proficient in adolescent services instead of specifying the hours of training required.

§148.906(c). Access to Services for COPSD Clients. ASAP; Land Manor; Serenity Foundation of Texas; and Austin Travis Co. MHMR comment that the requirement for facilities to ensure continuity of services may place an unrealistic burden on the program. The commenters recommend replacing the word "ensure" with "facilitate." The Commission disagrees. The Commission believes that it is realistic to require providers to establish and implement procedures to ensure continuity of the treatment process within the program. The word change suggested would not clarify the rule.

§148.908. Specialty Competencies of Staff Providing Services to Clients with COPSD. Shoreline, Inc. asks if both TCADA and TDPRS licenses are required in COPSD programs. The Commission is unclear what the commenter is asking. No TDPRS licensure is required for treatment facilities. TCADA and TDMHMR purchase COPSD services. A TCADA license is required for any facility providing chemical dependency treatment services, regardless of any additional services offered.

§148.909. Screening, Assessment, and Treatment Planning of Services to Clients with COPSD. Avenues Counseling Center suggests changing the title of this section to better reflect its contents. The Commission agrees and has revised the title of §148.909 to delete "Screening, Assessment, and." The new title will read "Treatment Planning of Services to Clients with COPSD."

§148.910(d). Treatment Services for Women and Children. Volunteers of America asks for clarification on how staff and program administrators shall demonstrate expertise in addressing the needs of women and children. The Commission has moved the women and children's training provision from §148.603(d)(10), to the women and children's treatment section (§148.910) of the rules to address this issue stating that the organization must have a process in place that ensures all direct care staff have appropriate competencies to provide services to women and children.

§148.911. Treatment Services Provided by Electronic Means. A commenter from Alcohol and Drug Educational Services comments that she is strongly opposed to treatment via the Internet and believes it is not ethical, moral, or beneficial to the client. The Commission responds that, in proposing rules to address the provision of services via the Internet, the Commission establishes a required level of compliance for entities that decide to engage in this type of treatment. There are entities in other states that are providing treatment services via electronic means and the Commission seeks to establish guidelines for those engaging in this practice in Texas.

§148.1002(b). Medication Storage. Managed Care Center for Addictive/Other Disorders, Inc. comments that allowing clients to keep their medications with them risks abuse by the client and/or theft by other clients. The Commission responds that this rule is intended to allow clients, with the approval of the program director, to keep medications (such as insulin, asthma inhalers, and nitroglycerine) with them to use as needed. The program director should assess the risk associated with letting a particular client keep medications before granting approval to do so.

§148.1002(e). Medication Storage. Land Manor comments that sample medications provided by a physician are not labeled by a pharmacy. The Commission responds that sample medications provided by physicians must be stored with client specific labeling information, including dosing instructions.

§148.1003(b). Medication Inventory and Disposal. Shoreline, Inc. asks if this rule means daily inventory and inspection of drugs that do not fall under controlled substance categories are no longer necessary? The Commission responds that the commenter is correct. Daily inventories of medications are required only for the Schedule II, III, and IV drugs. Section 148.1003(a) requires the program to be responsible for developing "an effective system to track and account for" all other prescription medications.

§148.1004(c). Administration of Medication. An interested individual comments that the new rule needs to stipulate that adolescent residential programs cannot allow self administration of medication. The Commission disagrees. The self-administration

rule does not allow the adolescent client to take medications unsupervised or in a way other than prescribed. Each dose taken and each dose missed must be clearly documented.

§148.1205(b). Space, Furniture and Supplies. An interested individual requests that square footage requirements for infants and toddlers be included in the new rules as they are in the current rules. The Commission has revised §148.1205(b) to include this requirement.

§148.1205(f). Space, Furniture and Supplies. TDCJ comments that since TDCJ facility requirements differ from this rule, retaining the previous language in §148.412 regarding exemptions from these requirements for TDCJ correctional facilities is recommended. The Commission responds that the requirements are necessary to protect the health and safety of clients as well as to preserve the dignity of clients served in treatment facilities. As a result, it declines to modify these requirements. Additionally, the Commission has deleted the previous §148.412 language regarding correctional facilities and replaced it with a section regarding requirements for therapeutic communities which is now §148.1401 under the new rules. Correctional facilities located in TDCJ facilities are statutorily exempt from licensure by the Commission, and thus are not subject to Commission rules that apply to licensed facilities.

§148.1207(a), (d), (f), (h). Other Physical Plant Requirements. TDCJ comments that since its facility requirements differ from this rule, retaining the current language in §148.412 is recommended. The Commission responds that the requirements regarding temperature control, bedroom and bathroom window coverings, toilet, sinks and tubs/showers are designed to protect the health and safety of clients as well as to preserve the dignity of clients served in treatment facilities. As a result, it declines to modify these requirements.

§148.1401. Correctional Facilities. Phoenix House of Dallas; ASAP; Serenity Foundation of TX; 28 comments from Gateway Foundation, Inc.; CiviGenics; Land Manor; TDCJ; TAAP; and Volunteers of America express concerns with this subchapter of the rules. Issues of concern are the increased costs associated with the reduction in caseload sizes, increased service hours and increased work requirements that will result in the need for increased staffing. In addition, those commenting do not believe that it is necessary to increase service delivery requirements, especially while attempting to simultaneously decrease counselor-client caseload ratios. Decreasing counselor-client caseload sizes is not fiscally feasible and is much more labor intensive. It does not allow for any methodological differences in program design. The commenters also suggest that the Commission delete proposed caseloads of 20 per counselor for supportive residential programs and leave as it exists in current §148.403(c). Those commenting believe that the group size restrictions do not allow for appropriate clinical interventions utilized in accepted research-based treatment modalities. Those commenting also recommend that the Commission delete adult supportive residential services as proposed and consider a modification to existing levels III and IV requiring both direct and indirect structured activities according to program design. The Commission agrees that it should establish rules relating to therapeutic communities. These rules will apply to non-institutional facilities that are not directly operated by the state. Institutional facilities that are directly operated by the state are exempt from Commission license requirements by statute. Services provided in TDCJ institutions fall within this exception. Substance abuse services provided by community corrections facilities as defined by TEX. GOV'T CODE, ch. 509 (Vernon 1998), that are subject to the rules and standards adopted by the Texas Board of Criminal Justice are also not required to hold a Commission license. The rules regarding therapeutic communities are in §148.1401.

§148.1502. Exemption for Faith-Based Programs. Reyes Law Firm expresses concern that faith-based rules are being repealed. The Commission responds that this revision is made to improve the organization of the rules. The repeal removes the current freestanding chapter (former 40 TEX. ADMIN. CODE ch. 145) of faith-based exemption rules and transfers the text to the new rules as Subchapter O of 40 TEX. ADMIN. CODE ch. 148 (§148.1501-1506).

All comments, including any not specifically referenced herein, were fully considered by the Commission. In adopting 40 TEX. ADMIN. CODE ch. 148, the Commission makes other grammatical and non-substantive changes for the purpose of clarifying its intent.

SUBCHAPTER A. DEFINITIONS

40 TAC §§148.101 - 148.103

The new rules are adopted pursuant to the Texas Health and Safety Code, §461.012(a)(15) which provides the Commission authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission program and §461.0141 which provides the Commission authority to adopt rules regarding purchase of services.

The code affected by the adoption of these rules is Chapter 461 of the Health and Safety Code.

§148.101. Definitions.

The words and terms used in this chapter shall have meanings set forth in 40 TEX. ADMIN. CODE ch. 141 (2004), of this title (relating to General Provisions) unless the context clearly indicates otherwise.

§148.102. Purpose.

The purpose of these rules is to ensure that individuals seeking substance abuse services are offered an efficient, effective, and appropriate continuum of services that will enable them to lead a normal life as a productive member of society. These rules further serve to protect the health, safety, and welfare of those receiving substance abuse services.

§148.103. Scope of Rule.

(a) All providers shall comply with the provisions of Subchapter B in all matters related to the provision of services.

(b) Providers who offer or purport to offer chemical dependency treatment and are not exempt from licensure under TEX. HEALTH & SAFETY CODE ANN. ch. 464 (Vernon 2001) are also required to comply with the provisions of Subchapter D through Subchapter N.

(c) Providers who engage in prevention or intervention activities shall also comply with the requirements of Subchapter C, and §148.703 of this title (relating to Abuse, Neglect and Exploitation).

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 February 13, 2004.

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SUBCHAPTER B. STANDARD OF CARE APPLICABLE TO ALL PROVIDERS

40 TAC §§148.201 - 148.218

The new rules are adopted pursuant to the Texas Health and Safety Code, §461.012(a)(15) which provides the Commission authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission program and §461.0141 which provides the Commission authority to adopt rules regarding purchase of services.

The code affected by the adoption of these rules is Chapter 461 of the Health and Safety Code.

§148.201. General Standard.
The provider shall provide adequate and appropriate services consistent with best practices and industry standards. The provider shall maintain objectivity. The provider shall respect each individual's dignity, and shall not engage in any action that may cause injury and shall always act with integrity in providing services.

§148.202. Scope of Practice.
The provider shall recognize the limitations of their ability and shall not offer services outside the provider's scope of practice or use techniques that exceed their professional competence. The provider shall not make any claim, directly or by implication, that they possess professional qualifications or affiliations that they do not possess.

§148.203. Competence and Due Care.
Providers shall plan, supervise adequately, and evaluate any activity for which they are responsible. Providers shall render services carefully and promptly. Providers shall follow the technical and ethical standards related to the provision of services, strive continually to improve personal competence and quality of service delivery, and discharge their professional responsibility to the best of their abilities. Providers are responsible for assessing the adequacy of their own competence for the responsibility to be assumed. Services shall be designed and administered as to do no harm to recipients. The provider shall always act in the best interest of the individual being served. The provider shall terminate any professional relationship that is not beneficial, or is in any way detrimental, to the individual being served.

§148.204. Appropriate Services.
Services should be appropriate for the individual's needs and circumstances, including age and developmental level, and should be culturally sensitive. Providers shall possess an understanding of the cultural norms of the individuals receiving services. Services shall be respectful and non exploitative.

§148.205. Accuracy.
The provider shall report information fairly, professionally, and accurately when providing services and when communicating with other professionals, the Commission, and the general public. Each provider shall document and assign credit to all contributing sources used in published material or public statements. Providers shall not misrepresent either directly or by implication professional qualifications or affiliations.

§148.206. Documentation.
The provider shall maintain required documentation of services provided and related transactions including financial records.

§148.207. Discrimination.
The provider shall not discriminate against any individual on the basis of gender, race, religion, age, national origin, disability (physical or mental), sexual orientation, medical condition, including HIV diagnosis or because an individual is perceived as being HIV infected. The provider may consider economic condition and financial resources in admission criteria, but economic condition shall not affect the services once an individual is admitted.

§148.208. Access to Services.
The provider shall provide access to services, including providing information about other services and alternative providers, taking into account an individual's financial constraints and special needs.

§148.209. Location.
The provider shall not offer or provide services in settings or locations that are inappropriate or harmful to individuals served or others.

§148.210. Confidentiality.
The provider shall protect the privacy of individuals served and shall not disclose confidential information without express written consent, except as permitted by law. The provider shall remain knowledgeable of, and obey, all State and Federal laws and regulations relating to confidentiality of records relating to the provision of services. The provider shall not discuss or divulge information obtained in clinical or consulting relationships except in appropriate settings and for professional purposes that demonstrably relate to the case. Confidential information acquired during delivery of services shall be safeguarded from illegal or inappropriate use, access and disclosure or from loss, destruction or tampering. These safeguards shall protect against verbal disclosure, prevent unsecured maintenance of records, or recording of an activity or presentation without appropriate releases.

§148.211. Environment.
The provider shall provide an appropriate, safe, clean, and well-maintained environment.

§148.212. Communications.
The provider shall inform the individual receiving services about all relevant and important aspects of the service relationship.

§148.213. Exploitation.
The provider shall not exploit relationships with individuals receiving services for personal or financial gain of the provider or its personnel. The provider shall not charge exorbitant or unreasonable fees for any service. The provider shall not pay or receive any commission, consideration, or benefit of any kind related to the referral of an individual for services.

§148.214. Duty to Report.
When a provider or its personnel have knowledge of unethical conduct or practice on the part of a person or provider, they have a responsibility to report the conduct or practices to appropriate funding or regulatory bodies or to the public. Any provider or provider personnel who receive an allegation or have reason to suspect that an individual has been, is, or will be subject to abuse, neglect or exploitation by any provider shall immediately inform TCADA's investigations division. The provider shall also take immediate action to prevent or stop the abuse, neglect, or exploitation and provide appropriate care and treatment. The provider shall report allegations of child abuse or neglect to the Texas Department of Protective and Regulatory Services as required by the TEX. FAM. CODE ANN. §261.101 (Vernon 2002 &

Supp. 2004). The provider shall report allegations of abuse, neglect or exploitation of elderly or disabled individuals to the Texas Department of Protective and Regulatory Services as required by the TEX. HUM. RES. CODE ANN. §48.051 (Vernon 2001 & Supp. 2004). If the allegation involves sexual exploitation, the service provider shall comply with reporting requirements listed in the TEX. CIV. PRAC. & REM. CODE ANN. §81.006 (Vernon 1997 & Supp. 2004).

§148.215. Impaired Providers.

Providers should recognize the effect of impairment on professional performance and should be willing to seek needed treatment. Where there is evidence of impairment in a colleague, a provider should be supportive of assistance or treatment. An employer shall provide access to information regarding available services to impaired employees.

§148.216. Ethics.

Providers shall adhere to established professional codes of ethics. These codes of ethics define the professional context within which the provider works, in order to maintain professional standards and safeguard the client or participant. Provider and all of its personnel shall protect consumers and act in an ethical manner at all times.

§148.217. Specific Acts Prohibited.

In addition to the provider's general duty to provide services in a professional manner, the following acts are specifically prohibited and shall constitute a violation of these rules:

(1) Providers shall not provide services, interact with individuals receiving services, or perform any job duties while under the influence or impaired by the use of alcohol, or mood altering substances, including prescription medications not used in accordance with a physician's order.

(2) Providers shall not commit an illegal, unprofessional or unethical act (including acts constituting abuse, neglect, or exploitation).

(3) Providers shall not assist or knowingly allow another person to commit an illegal, unprofessional, or unethical act.

(4) Providers shall not falsify, alter, destroy or omit significant information from required reports and records or interfere with their preservation.

(5) Providers shall not retaliate against anyone who reports a violation of these rules or cooperates during a review, inspection, investigation, hearing, or other related activity.

(6) Providers shall not interfere with Commission reviews, inspections, investigations, hearings, or related activities. This includes taking action to discourage or prevent someone else from cooperating with the activity.

(7) Providers shall not enter into a personal or business relationship of any type with an individual receiving services until at least two years after the last date an individual receives services from the provider.

(8) Providers shall not discourage, intimidate, harass, or retaliate against individuals who try to exercise their rights or file a grievance.

(9) Providers shall not restrict, discourage, or interfere with any communication with law enforcement, an attorney, or with the Commission for the purposes of filing a grievance.

(10) Providers shall not allow unqualified persons or entities to provide services.

(11) Provider shall not hire or utilize known sex offenders in adolescent programs or programs that house children.

(12) Providers shall prohibit adolescent clients and participants from using tobacco products on the program site. Staff and other adults (volunteers, clients, participants and visitors) shall not use tobacco products in the presence of adolescent clients or participants.

§148.218. Standards of Conduct.

(a) The facility and all of its personnel shall protect clients' rights and provide competent services.

(b) Any person associated with the facility that receives an allegation or has reason to suspect that a person associated with the facility has been, is, or will be engaged in illegal, unethical, or unprofessional conduct shall immediately inform the Commission's investigations division and the facility's chief executive officer or designee. If the allegation involves the chief executive officer, it shall be reported to the Commission and the facility's governing body.

(c) The facility and its personnel shall comply with TEX. HEALTH & SAFETY CODE ANN. ch. 164 (Vernon 2001 & Supp. 2003)(relating to Treatment Facilities Marketing and Admission Practices).

(d) The facility shall have written policies on staff conduct that complies with 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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SUBCHAPTER C. STANDARDS FOR EVIDENCE-BASED PREVENTION PROGRAMS

40 TAC §148.301

The new rule is adopted pursuant to the Texas Health and Safety Code, §461.012(a)(15) which provides the Commission authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission program and §461.0141 which provides the Commission authority to adopt rules regarding purchase of services.

The code affected by the adoption of this rule is Chapter 461 of the Health and Safety Code.

§148.301. Standards for Evidence-Based Prevention Programs.

As is appropriate, prevention providers shall implement programs and provide services that incorporate the following principles:

(1) Programs are designed to enhance protective factors and move toward reversing or reducing known risk factors. Program providers are trained in risk factor and protective factor theory and research.

(2) Programs are provided in a way that preserves the protective factors inherent in each culture and individual.

(3) Prevention programs are age, developmentally and culturally appropriate.

(4) Programs determine the level of risk of the target population. More intense prevention programs are required for target populations with a recognized higher level of risk.

(5) Programs implement evidence-based prevention programs appropriate for the target population(s) using universal, selective and indicated criteria. Programs have proven outcomes for the target population and are implemented with integrity and fidelity.

(6) When an evidence-based program is adapted to address the specific nature of the drug use or abuse problem in the local community, care is taken to adapt the program appropriately. The adaptation does not affect the integrity and fidelity of the program as it was designed.

(7) Programs teach skills to resist drugs when offered, strengthen personal commitments against drug use, and increase social competency. Social competency skills, as they relate to reinforcement of attitudes against drug use, include skills related to communications, peer relationships, self-efficacy, and assertiveness.

(8) Programs for adolescents include interactive methods, such as peer discussion groups, in addition to lecture-style teaching techniques.

(9) Programs include a component which targets parents or caregivers. The parent/caregiver component reinforces what the youth participants are learning, such as facts about drugs and their harmful effects. This component opens opportunities for family discussions about use of legal and illegal substances and family policies related to their use.

(10) Programs are long-term, over the school career, including the repetition necessary to reinforce the original prevention goals. School-based efforts directed at elementary and middle school students, for example, include booster sessions to help with critical transitions from middle to high school.

(11) Community programs that include media campaigns and policy changes, such as new regulations that restrict access to alcohol, tobacco, or other drugs, are accompanied by school and family interventions.

(12) Community programs strengthen norms against drug use in all drug abuse prevention settings, including the family, the school, and the community.

(13) Schools offer opportunities to reach all populations and serve as important settings for specific sub-populations at risk for drug abuse, such as children with behavior problems or learning disabilities and those who are at risk of leaving school before graduation.

(14) Programs should use formal and informal structures to receive and incorporate input from service recipients in the development, implementation and evaluation of prevention services.

(15) Programs are evaluated to determine outcomes and impact on the participants.

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SUBCHAPTER D. FACILITY LICENSURE INFORMATION

40 TAC §§148.401 - 148.409

The new rules are adopted pursuant to the Texas Health and Safety Code, §461.012(a)(15) which provides the Commission authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission program and §461.0141 which provides the Commission authority to adopt rules regarding purchase of services.

The code affected by the adoption of these rules is Chapter 461 of the Health and Safety Code.

§148.401. License Required.

(a) A facility providing or offering chemical dependency treatment in Texas shall have a license issued by the Commission unless it is:

(1) a facility maintained or operated by the Federal government or its agencies;

(2) a facility directly operated by the State of Texas;

(3) a chemical dependency treatment program approved by the Texas Department of Health within a licensed general hospital, specialty hospital, or private psychiatric facility;

(4) a pharmacotherapy program licensed by the Texas Department of Health;

(5) an educational program for intoxicated drivers;

(6) an individual who personally provides support services to chemically dependent individuals but does not offer or purport to offer chemical dependency treatment;

(7) the private practice of a licensed health care practitioner or licensed chemical dependency counselor who personally renders individual or group services within the scope of the practitioner's license and in the practitioner's office;

(8) a religious organization registered under Tex. Health & Safety Code Ann. §§464.051-.061 (Vernon 2001 & Supp. 2004);

(9) a 12-step or similar self-help chemical dependency recovery program:

(A) that does not offer or purport to offer a chemical dependency treatment program;

(B) that does not charge program participants; and

(C) in which program participants may maintain anonymity; or

(10) a substance abuse facility or program operating under the standards adopted by the Texas Board of Criminal Justice pursuant to Chapter 509 of the TEXAS GOV'T. CODE (Vernon 1998 & Supp. 2003)

(b) The facility shall have a license for each physical location at which it provides residential services or outpatient services.

(c) A license is not transferable to a separate legal entity or to a different physical address.

§148.402. Variances.

(a) The Commission's executive director or designee may grant a temporary variance to a facility or group of facilities.

(b) To be eligible for a variance, a facility shall show:

(1) an alternative method is used to meet the intent of the rule; and

(2) the variance will not jeopardize the health, safety, or welfare of clients or compromise substance abuse services.

(c) The Commission's executive director or designee will determine if an alternative is equivalent to the written rule and when it will be accepted during licensure reviews.

(d) A variance cannot be granted for a statutory requirement.

(e) The grounds for, and term of, the variance shall be set forth in writing.

§148.403. New Licensure Application.

(a) An applicant for initial licensure shall submit a complete licensure application, operational plan as described in §148.502 of this title (relating to Operational Plan, Policies and Procedures), items outlined on the new applicant checklist, proof of liability insurance, and an application fee.

(b) Within 45 days of receipt of the application, the Commission will notify the applicant that the application is materially complete or specify the additional information required.

(c) The applicant shall submit all requested materials and correct any deficiencies identified by the Commission within specified time frames.

(d) If an on-site inspection is necessary, the Commission will conduct the inspection within 45 days of receiving a materially complete application packet. The Commission will notify the provider of any deficiencies identified during an on-site inspection within 30 days, and the provider shall provide evidence of sufficient corrective action within the timeframe specified in the inspection report.

(e) The Commission will issue the license within 45 days of receiving all required evidence of compliance and all required fees.

(f) If an applicant fails to provide evidence of compliance within six months from the date the application is received, the application will be denied. Six months after the date of denial, the applicant may reapply by submitting a new application and application fee.

(g) The applicant shall not provide chemical dependency treatment before receiving written notice of licensure approval.

(h) The facility shall display its licensure certificate prominently at each outpatient location and each approved residential site.

§148.404. Licensure Renewal.

(a) A license issued by the Commission expires two years from the date of issuance.

(b) The licensee shall file a request for renewal and pay the renewal fee at least 60 days before the license expires. Failure to file the required renewal and pay the renewal fee as specified may delay approval.

(c) The facility shall not provide services after the license expiration date unless it has submitted the application update and fee by the date of expiration.

§148.405. Changes in Status.

(a) A facility shall submit the appropriate application and fees and receive written approval before:

(1) adding a new detoxification service;

(2) adding a new residential site;

(3) moving to a new residential site; or

(4) increasing the number of beds in a residential program.

(b) If the facility fails to provide the information the Commission requires to process the change in status application within six months from the date of application, the application may be denied. The facility shall not reapply for six months from the date of denial.

(c) A facility shall also notify the Commission's licensure department in writing before adding a new residential service, day treatment service or outpatient service; adding a new outpatient site or moving an outpatient site to a new location; or providing services to a new age group or gender.

(d) A facility shall notify the Commission's facility licensure department prior to, or immediately after, a change in the organization's name, closure of a residential or outpatient location, decrease in the number of residential beds or discontinuance of a service.

§148.406. Inactive Status and Closure.

(a) Inactive Status. The Commission will automatically retire the license of a facility site in which services are suspended or not provided for more than 60 days, unless the facility sends a written request to place the license on inactive status. To be eligible for inactive status, the facility must be in good standing with no pending legal actions or investigations.

(1) If granted, inactive status is limited to 60 days. The licensee is responsible for all licensure fees and for proper maintenance of client records while on inactive status.

(2) To reactivate the license, the facility shall submit a written request to reactivate the license no later than the date the inactivation period expires.

(3) If the license is not reactivated, it will be automatically retired at the end of the 60 day deactivation period.

(b) Closure. The facility shall notify the Commission's facility licensure department in writing prior to or immediately upon closure of a chemical dependency treatment program.

(1) A license becomes invalid when a program closes. The licensure certificate shall be returned to the Commission's licensure department within 30 days.

(2) When a facility closes, the provider shall ensure that all clients are appropriately discharged or transferred before the program closes and make appropriate arrangements for properly maintaining client records in compliance with Federal and State law and Commission rules.

§148.407. Licensure Inspection.

The Commission may conduct a scheduled or unannounced inspection or request materials for review at reasonable times, including any time treatment services are provided. The facility shall allow Commission staff to access the facility's grounds, buildings, and records. The facility shall allow Commission staff to interview members of the governing

body, staff, and clients. The facility shall make all property, records, and documents available upon request for examination, copy, or reproduction, on or off premises.

§148.408. Licensure Fees.

(a) A facility shall pay the full licensure fee for any licensure period during which it provides chemical dependency treatment. Failure to notify the Commission's licensure department of closure does not excuse a licensee from paying fees.

(b) Fees shall be paid in full by cashier's check, or money order.

(c) The schedule for licensure fees is:

(1) application fee--$100;

(2) base fee--$1,000;

(3) fee per residential site--$100;

(4) fee per bed--$30;

(5) maximum fee per facility (excluding application fees)--$4,000.

(d) A $25 fee is charged for a printed list of licensed facilities, a set of mailing labels for licensed facilities, or a replacement certificate.

(e) Licensure fees are not refundable.

§148.409. Action Against a License.

(a) The Commission may take action as described herein against an applicant for licensure or a facility if the applicant, licensee, owner, member of the governing body, administrator, or clinical staff member, or any other personnel associated with the applicant or licensee:

(1) has a documented history of client abuse, exploitation, or neglect;

(2) violates any provision of TEX. HEALTH & SAFETY CODE ANN. ch. 464 (Vernon 2001 & Supp. 2004), or any other applicable statute, or a Commission rule; or

(3) owes the Commission money.

(b) Action taken may include:

(1) suspending or revoking a license;

(2) refusing to issue or renew a license;

(3) placing a facility on probation when the facility's license has been suspended;

(4) imposing an administrative penalty; and

(5) any other action allowed under the law or these rules.

(c) The Commission will determine the length of probation or suspension. The Commission may hold a hearing at any time and revoke probation or suspension.

(d) Surrender or expiration of a license does not interrupt an investigation or action taken against a license. The facility is not eligible to regain the license until all outstanding investigations, disciplinary proceedings, or hearings are resolved and the licensee is found to have acted in compliance with these rules.

(e) If a facility has its license revoked, its governing body, administrators, and management are not eligible to apply for, or be associated with an application for facility licensure until they have petitioned the Commission and demonstrated the following:

(1) they were not directly involved in, aware of, or responsible for the acts or omissions that were the basis of the revocation; or

(2) sufficient time has passed to allow the events that led to the revocation to no longer serve as the basis of denial of application for licensure.

(f) After an investigation has been initiated by the Commission, or a facility's license has been revoked or surrendered, a facility is not eligible to receive a faith-based exemption under Subchapter O of this title (relating to Faith-Based Chemical Dependency Programs) until two years have elapsed.

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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SUBCHAPTER E. FACILITY REQUIREMENTS

40 TAC §§148.501 - 148.510

The new rules are adopted pursuant to the Texas Health and Safety Code, §461.012(a)(15) which provides the Commission authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission program and §461.0141 which provides the Commission authority to adopt rules regarding purchase of services.

The code affected by the adoption of these rules is Chapter 461 of the Health and Safety Code.

§148.501. Facility Organization.

(a) Governing Body. If incorporated, the facility shall have a governing body and shall have legal authority to operate in the State of Texas. If the organization is governed by a board of directors, the board shall meet with sufficient frequency to monitor the quality of care provided and maintain minutes for each meeting. The governing body shall ensure that members are provided training regarding their responsibilities and liabilities.

(b) Organizational Structure. The facility shall maintain current documentation of the organization's staffing structure, including lines of supervision and the number of staff members for each position.

(c) Facility Contact Information. The facility shall provide the Commission's facility licensure department with a current mailing address, electronic mail address (if any), contact name, and contact phone number in writing or through electronic mail and shall update that information in writing or through electronic mail when there are changes. The facility is deemed to have received any correspondence or notice mailed to the address provided.

§148.502. Operational Plan, Policies and Procedures.

(a) The facility shall operate according to an operational plan. The operational plan shall reflect:

(1) program purpose or mission statement;

(2) services and how they are provided;

(3) description of the population to be served; and

(4) goals and objectives of the program.

(b) The facility shall adopt and implement written policies and procedures as deemed necessary by the facility and as required herein. The policies and procedures shall contain sufficient detail to ensure compliance with all applicable Commission rules.

(c) The policy and procedure manual shall be current, consistent with program practices, individualized to the program, and easily accessible to all staff at all times.

§148.503. Reporting Measures.

Facilities shall submit the following information annually, electronically or in paper form, in a format provided by the Commission, unless a current contract with TCADA is in effect:

(1) total number of clients served by diagnosis;

(2) gender of clients served;

(3) ethnicity of clients served;

(3) ages of clients served;

(4) primary and secondary drug at admission;

(5) discharge reason per treatment episode, including length of stay at time of discharge; and

(6) average percent of occupancy for each residential program.

§148.504. Quality Management.

The facility shall develop procedures and implement a quality management process. The procedures shall address at a minimum:

(1) goals and objectives that relate to the program purpose or mission statement;

(2) methods to review the progress toward the goals and a documented process to implement corrections or changes;

(3) a mechanism to review and analyze incident reports, monitor compliance with rules and other requirements, identify areas where quality is not optimal and procedures to analyze identified issues, implement corrections, and evaluate and monitor their ongoing effectiveness;

(4) methods of utilization review to ensure appropriate client placement, adequacy of services provided and length of stay; and

(5) documentation of the activities of the quality management process.

§148.505. General Environment.

(a) The facility shall comply with applicable requirements of the Americans with Disabilities Act (ADA). The facility shall maintain documentation that it has conducted a self-inspection to evaluate compliance and implemented a corrective action plan, as necessary, with reasonable time frames to address identified deficiencies.

(b) The facility shall have a certificate of occupancy from the local authority that reflects the current use by the occupant or documentation that the locality does not issue occupancy certificates.

(c) The site, including grounds, buildings, electrical and mechanical systems, appliances, equipment, and furniture shall be structurally sound, in good repair, clean, and free from health and safety hazards.

(d) The facility shall provide a safe, clean, well-lighted and well-maintained environment.

(e) The facility shall have adequate space, furniture, and supplies.

(f) The facility shall have private space for confidential interactions, including all group counseling sessions.

(g) The facility shall prohibit smoking inside facility buildings and vehicles and during structured program activities. If smoking areas are permitted, they shall be clearly marked as designated smoking areas and shall not be less than 15 feet from any entrance to any building(s) and comply with local codes and ordinances. Staff shall not provide or facilitate client access to tobacco products.

(h) The facility shall prohibit firearms and other weapons, alcohol, illegal drugs, illegal activities, and violence on the program site.

(i) Animals shall be properly vaccinated and supervised.

§148.506. Required Postings.

(a) The facility shall post a legible copy of the following documents in a prominent public location that is readily available to clients, visitors, and staff:

(1) the Client Bill of Rights;

(2) the Commission's current poster on reporting complaints and violations; and

(3) the client grievance procedure.

(b) These documents shall be displayed in English and in a second language(s) appropriate to the population(s) served at every location where services are provided.

§148.507. General Documentation Requirements.

(a) The facility shall keep complete, current documentation.

(b) All documents shall be factual and accurate.

(c) All documents and entries shall be dated and authenticated by the person responsible for the content.

(1) Authentication of paper records shall be an original signature that includes at least the first initial, last name, and credentials. Initials may be used if the client record includes a document that identifies all individuals initialing entries, including the full printed name, signature, credentials, and initials.

(2) Authentication of electronic records shall be by a digital authentication key.

(d) Documentation shall be permanent and legible.

(e) When it is necessary to correct a client record, incident report, or other document, the error shall be marked through with a single line, dated, and initialed by the writer.

(f) Records shall contain only those abbreviations included on the facility's list of approved abbreviations.

§148.508. Client Records.

(a) The facility shall establish and maintain a single record for every client beginning at the time of admission. The content of client records shall be complete, current, and well organized.

(b) The facility shall protect all client records and other client-identifying information from destruction, loss, tampering, and unauthorized access, use or disclosure.

(1) All active client records shall be stored at the facility. Inactive records, if stored off-site, shall be fully protected. All original client records shall be maintained in the State of Texas.

(2) Information that identifies those seeking services shall be protected to the same degree as information that identifies clients.

(3) Electronic client information shall be protected to the same degree as paper records and shall have a reliable backup system.

(c) Only personnel whose job duties require access to client records shall have such access.

(d) Personnel shall keep records locked at all times unless authorized staff is continuously present in the immediate area.

(e) The facility shall ensure that all client records can be located and retrieved upon request at all times.

(f) The facility shall comply with Federal and State confidentiality laws and regulations, including 42 C.F.R pt. 2 (Federal regulations on the Confidentiality of Alcohol and Drug Abuse Patient Records), TEX. HEALTH & SAFETY CODE ANN. ch. 611 (Vernon Supp. 2004)(relating to Mental Health Records) and the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The facility shall also protect the confidentiality of HIV information as required in TEX. HEALTH & SAFETY CODE ANN. §81.103 (Vernon 2001) (relating to Confidentiality; Criminal Penalty).

(g) The facility shall not deny clients access to the content of their records except as provided by TEX. HEALTH & SAFETY CODE ANN. §611.0045 (Vernon Supp. 2004) and HIPAA.

(h) Client records shall be maintained for at least six years. Records of adolescent clients shall be maintained for at least five years after the client turns 18.

(i) If client records are microfilmed, scanned, or destroyed, the facility shall take steps to protect confidentiality. The facility shall maintain a record of all client records destroyed on or after September 1, 1999, including the client's name, record number, birth date, and dates of admission and discharge.

§148.509. Incident Reporting.

(a) The facility shall report to the Commission's investigations division, all allegations of client abuse, neglect, and exploitation. Acts constituting client abuse, neglect and exploitation are specifically described in §148.703 of this title (relating to Abuse, Neglect, and Exploitation).

(b) The facility shall complete an internal incident report for all client incidents, including:

(1) a violation of a client rights, including but not limited to, allegations of abuse, neglect and exploitation;

(2) accidents and injuries;

(3) medical emergencies;

(4) psychiatric emergencies;

(5) medication errors;

(6) illegal or violent behavior;

(7) loss of a client record;

(8) personal or mechanical restraint or seclusion;

(9) release of confidential information without client consent;

(10) fire;

(11) death of an active outpatient or residential client (on or off the program site);

(12) clients absent without permission from a residential program;

(13) suicide attempt by an active client (on or off the program site);

(14) medical and psychiatric emergencies that result in admission to an inpatient unit of a medical or psychiatric facility; and

(15) any other significant disruptions.

(c) The incident report shall be completed within 24 hours of the occurrence of an incident on-site, or within 24 hours of when the facility became aware of, or reasonably should have known of an incident that occurred off-site. The incident report shall provide a detailed description of the event, including the date, time, location, individuals involved, and action taken.

(d) The individual writing the report shall sign it and record the date and time it was completed.

(e) All incident reports shall be stored in a single, separate file.

(f) The facility shall have a designated individual responsible for reviewing incident reports and all incidents should be evaluated through the quality management process to determine opportunities to improve or address program and staff performance.

§148.510. Client Transportation.

(a) The facility shall have a written policy on the use of facility vehicles and/or staff to transport clients.

(b) If the facility allows the use of facility vehicles and/or staff to transport clients, it shall adopt transportation procedures which include the following.

(1) Any vehicle used to transport a client must have appropriate insurance coverage for business use with a current safety inspection sticker and license.

(2) All vehicles used to transport clients must be maintained in safe driving condition.

(3) Drivers must have a valid driver's license.

(4) Drivers and passengers must wear seatbelts at all times the vehicle is in operation as required by law.

(5) A vehicle shall not be used to transport more passengers than designated by the manufacturer.

(6) Drivers shall not use cell phones while driving.

(7) Use of tobacco products shall not be allowed in the vehicle.

(8) Every vehicle used for client transportation shall have a fully stocked first aid kit and an A:B:C fire extinguisher that are easily accessible.

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SUBCHAPTER F. PERSONNEL PRACTICES AND DEVELOPMENT

40 TAC §§148.601 - 148.603

The new rules are adopted pursuant to the Texas Health and Safety Code, §461.012(a)(15) which provides the Commission authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission program and §461.0141 which provides the Commission authority to adopt rules regarding purchase of services.

The code affected by the adoption of these rules is Chapter 461 of the Health and Safety Code.

§148.601. Hiring Practices.

(a) A facility whose personnel includes counselor interns shall be registered with the Commission as a clinical training institution and comply with all applicable requirements.

(b) The facility shall verify by Internet, telephone or letter and document the current status of all required credentials with the credentialing authority.

(c) The facility shall be aware of its obligations under TEX. CIV. PRAC. & REM. CODE ANN. §81.003 (Vernon 1997 & Supp. 2004).

(d) The facility shall obtain and assess the results of a criminal background check from the Department of Public Safety on all staff within four weeks of the hiring date. Individuals hired may not have any client contact until the results of the criminal background check are assessed. The facility shall use the criteria listed in TEX. OCC. CODE ANN. §53.022, §53.023 (Vernon 2004) to evaluate criminal history reports and make related employment decisions.

(e) The facility shall not hire an individual who has not passed a pre-employment drug test that meets criteria established by the Commission. This requirement does not restrict facilities from implementing random drug testing of its staff as permitted by law.

(f) The facility shall develop a job description which outlines job duties and minimum qualifications for all personnel.

(g) The facility shall maintain a personnel file for each employee, and all contractors, students and volunteers with any direct client contact which contains documentation demonstrating compliance with this section.

§148.602. Students and Volunteers.

(a) The facility shall ensure that students and volunteers comply with all applicable rules.

(b) Students and volunteers shall be qualified to perform assigned duties.

(c) Students and volunteers shall receive orientation and training appropriate to their qualifications and responsibilities.

(d) Students and volunteers shall be appropriately supervised.

§148.603. Training.

(a) Unless otherwise specified, video, manual, or computer-based training is acceptable if the supervisor discusses and documents the material with the staff person in a face-to-face session to highlight key issues and answer questions.

(b) The facility shall maintain documentation of all required training.

(1) Documentation of external training shall include:

(A) date;

(B) number of hours;

(C) topic;

(D) instructor's name; and

(E) signature of the instructor (or equivalent verification).

(2) The facility shall maintain documentation of all internal training. For each topic, the file shall include:

(A) an outline of the contents;

(B) the name, credentials, relevant qualifications of the person providing the training, and

(C) the method of delivery.

(3) For each group training session, the facility shall maintain on file a dated attendee sign-in sheet.

(c) Prior to performing their duties and responsibilities, the facility shall provide orientation to staff, volunteers, and students. This orientation shall include information addressing:

(1) TCADA rules;

(2) facility policies and procedures;

(3) client rights;

(4) client grievance procedures;

(5) confidentiality of client-identifying information (42 C.F.R. pt. 2; HIPAA);

(6) standards of conduct; and

(7) emergency and evacuation procedures.

(d) The following initial training(s) must be received within the first 90 days of employment and must be completed before the employee can perform a function to which the specific training is applicable. Subsequent training must be completed as specified.

(1) Abuse, Neglect, and Exploitation. All residential program personnel with any direct client contact shall receive eight hours of face-to-face training as described in Figure: 40 TAC §148.603(d)(1) which is attached hereto and incorporated herein as if set forth at length. All outpatient program personnel with any direct client contact shall received two hours of abuse, neglect and exploitation training.
Figure: 40 TAC §148.603(d)(1)

(2) HIV, Hepatitis B and C, Tuberculosis and Sexually Transmitted Diseases. All personnel with any direct client contact shall receive this training. The training shall be based on the Texas Commission on Alcohol and Drug Abuse Workplace and Education Guidelines for HIV and Other Communicable Diseases.

(A) The initial training shall be three hours in length.

(B) Staff shall receive annual updated information about these diseases.

(3) Cardio Pulmonary Resuscitation (CPR).

(A) All direct care staff in a residential program shall maintain current CPR and First Aid certification.

(B) Licensed health professionals and personnel in licensed medical facilities are exempt if emergency resuscitation equipment and trained response teams are available 24 hours a day.

(4) Nonviolent Crisis Intervention. All direct care staff in residential programs and outpatient programs shall receive this training. The face-to-face training shall teach staff how to use verbal and other non-physical methods for prevention, early intervention, and crisis management. The instructor shall have documented successful completion of a course for crisis intervention instructors or have equivalent documented training and experience.

(A) The initial training shall be four hours in length.

(B) Staff shall complete two hours of annual training thereafter.

(5) Restraint and/or Seclusion. All direct care staff in residential programs that use restraint or seclusion shall have face-to-face training and demonstrate competency in the safe methods of the specific procedures. This includes programs that accept adolescent residential and emergency detentions.

(A) The initial training must be four hours in length.

(B) Staff shall complete four hours of annual training thereafter.

(C) The training shall include hands-on practice under the supervision of a qualified instructor.

(6) Intake, Screening and Admission Authorization. All staff who conduct intake, screening and authorize admission for applicants to receive program services shall complete training in the program's screening and admission procedures. The training shall include two hours of DSM diagnostic criteria for substance-related disorders, and other mental health diagnoses.

(A) The initial training shall be eight hours in length.

(B) Staff shall complete eight hours of annual training thereafter.

(C) The training shall be completed before staff screen or authorize applicants for admission.

(7) Self-administration of Medication. All personnel responsible for supervising clients in self-administration of medication, who are not credentialed to administer medication, shall complete this training before performing this task.

(A) Staff shall complete two hours initial one time training.

(B) The training shall be provided by a physician, pharmacist, physician assistant, or registered nurse before administering medication and shall include:

(i) prescription labels;

(ii) medical abbreviations;

(iii) routes of administration;

(iv) use of drug reference materials;

(v) storage, maintenance, handling, and destruction of medication;

(vi) documentation requirements; and

(vii) procedures for medication errors, adverse reactions, and side effects.

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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SUBCHAPTER G. CLIENT RIGHTS

40 TAC §§148.701 - 148.708

The new rules are adopted pursuant to the Texas Health and Safety Code, §461.012(a)(15) which provides the Commission authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission program and §461.0141 which provides the Commission authority to adopt rules regarding purchase of services.

The code affected by the adoption of these rules is Chapter 461 of the Health and Safety Code.

§148.701. Client Bill of Rights.

(a) The facility shall respect and protect clients' rights. The Client Bill of Rights for all facilities shall include:

(1) You have the right to accept or refuse treatment after receiving this explanation.

(2) If you agree to treatment or medication, you have the right to change your mind at any time (unless specifically restricted by law).

(3) You have the right to a humane environment that provides reasonable protection from harm and appropriate privacy for your personal needs.

(4) You have the right to be free from abuse, neglect, and exploitation.

(5) You have the right to be treated with dignity and respect.

(6) You have the right to appropriate treatment in the least restrictive setting available that meets your needs.

(7) You have the right to be told about the program's rules and regulations before you are admitted.

(8) You have the right to be told before admission:

(A) the condition to be treated;

(B) the proposed treatment;

(C) the risks, benefits, and side effects of all proposed treatment and medication;

(D) the probable health and mental health consequences of refusing treatment;

(E) other treatments that are available and which ones, if any, might be appropriate for you; and

(F) the expected length of stay.

(9) You have the right to a treatment plan designed to meet your needs, and you have the right to take part in developing that plan.

(10) You have the right to meet with staff to review and update the plan on a regular basis.

(11) You have the right to refuse to take part in research without affecting your regular care.

(12) You have the right not to receive unnecessary or excessive medication.

(13) You have the right to have information about you kept private and to be told about the times when the information can be released without your permission.

(14) You have the right to be told in advance of all estimated charges and any limitations on the length of services of which the facility is aware.

(15) You have the right to receive an explanation of your treatment or your rights if you have questions while you are in treatment.

(16) You have the right to make a complaint and receive a fair response from the facility within a reasonable amount of time.

(17) You have the right to complain directly to the Texas Commission on Alcohol and Drug Abuse at any reasonable time.

(18) You have the right to get a copy of these rights before you are admitted, including the address and phone number of the Texas Commission on Alcohol and Drug Abuse.

(19) You have the right to have your rights explained to you in simple terms, in a way you can understand, within 24 hours of being admitted.

(b) For residential sites, the Client Bill of Rights shall also include:

(1) You have the right not to be restrained or placed in a locked room by yourself unless you are a danger to yourself or others.

(2) You have the right to communicate with people outside the facility. This includes the right to have visitors, to make telephone calls, and to send and receive sealed mail. This right may be restricted on an individual basis by your physician or the person in charge of the program if it is necessary for your treatment or for security, but even then you may contact an attorney or the Texas Commission on Alcohol and Drug Abuse at any reasonable time.

(3) If you consented to treatment, you have the right to leave the facility within four hours of requesting release unless a physician determines that you pose a threat of harm to yourself and others.

(c) If a client's right to free communication is restricted under the provisions of subsection (b)(2) of this section, the physician or program director shall document the clinical reasons for the restriction and the duration of the restriction in the client record. The physician or program director shall also inform the client, and, if appropriate, the client's consenter of the clinical reasons for the restriction and the duration of the restriction.

§148.702. Client Grievances.

(a) The facility shall have a written client grievance procedure.

(b) Staff shall give each client and consenter a copy of the grievance procedure within 24 hours of admission and explain it in clear, simple terms that the client understands.

(c) The grievance procedure shall tell clients that they can:

(1) file a grievance about any violation of client rights or Commission rules;

(2) submit a grievance in writing and get help writing it if they are unable to read or write; and

(3) request writing materials, postage, and access to a telephone for the purpose of filing a grievance.

(d) The procedure shall also inform clients that they can submit a complaint directly to the Commission at any time and include the current mailing address and toll-free telephone number of the Commission's investigations division.

(e) The facility shall have a written procedure for staff to follow when responding to client grievances. The facility shall:

(1) evaluate the grievance thoroughly and objectively, obtaining additional information as needed;

(2) provide a written response to the client within seven days of receiving the grievance;

(3) take action to resolve all grievances promptly and fairly; and

(4) document all grievances, including the final disposition, and keep the documentation in a central file.

(f) The facility shall not:

(1) retaliate against clients who try to exercise their rights or file a grievance; or

(2) restrict, discourage, or interfere with client communication with an attorney or with the Commission for the purposes of filing a grievance.

§148.703. Abuse, Neglect, and Exploitation.

(a) Any person who receives an allegation or has reason to suspect that a client or participant has been, is, or will be abused, neglected, or exploited by any person shall immediately inform the Commission's investigations division and the provider's chief executive officer or designee. If the allegation involves the chief executive officer, it shall be reported directly to the provider's governing body.

(1) The person shall also report allegations of child abuse or neglect to the Texas Department of Protective and Regulatory Services as required by TEX. FAM. CODE ANN. §261.101 (Vernon 2002 & Supp. 2004).

(2) The person shall also report allegations of abuse or neglect of an elderly or disabled individual to the Texas Department of Protective and Regulatory Services as required by TEX. HUM. RES. CODE ANN. §48.051 (Vernon 2001 & Supp. 2004).

(b) If the allegation involves sexual exploitation, the chief executive officer or designee shall comply with reporting requirements listed in TEX. CIV. PRAC. & REM. CODE ANN. §81.006 (Vernon 1997 & Supp. 2004).

(c) The chief executive officer or designee shall take immediate action to prevent or stop the abuse, neglect, or exploitation and provide appropriate care.

(d) The chief executive officer or designee shall ensure that a verbal report has been or is made to the Commission's investigations division as required in subsection (a) of this section.

(e) The person who reported the incident shall submit a written incident report to the chief executive officer within 24 hours.

(f) The chief executive officer or designee shall send a written report to the Commission's investigations division within two business days after receiving notification of the incident. This report shall include:

(1) the name of the client or participant and the person the allegations are against;

(2) the information required in the incident report or a copy of the incident report; and

(3) other individuals, organizations, and law enforcement notified.

(g) The chief executive officer or designee shall also notify the consenter. If the client is the consenter, family members may be notified only if the client gives written consent. If the consenter is not the client, the chief executive officer may withhold notification to the consenter if this action may place the client at additional risk. In this situation, the chief executive officer will notify the Commission's investigations division in writing of this decision.

(h) The provider shall investigate the complaint and take appropriate action unless otherwise directed by the Commission's investigations division. The investigation and the results shall be documented.

(i) The governing body or its designee shall take action needed to prevent any confirmed incident from recurring.

(j) The provider shall:

(1) document all investigations and resulting actions and keep the documentation in a single, segregated file;

(2) have a written policy that clearly prohibits the abuse, neglect, and exploitation of clients and/or participants;

(3) enforce appropriate sanctions for confirmed violations; including, but not limited to, termination of personnel with confirmed violations of client or participant physical or sexual abuse or instances of neglect that result in client or participant harm.

§148.704. Program Rules.

(a) The facility shall establish therapeutically sound written program rules addressing client behavior designed to protect their health, safety, and welfare.

(b) The consequences for violating program rules shall be defined in writing and shall include clear identification of violations that may result in discharge. The consequences shall be reasonable, take into account the client's diagnosis and progress in treatment, and shall not include:

(1) physical discipline or measures involving the denial of food, water, sleep, or bathroom privileges; or

(2) discipline that is authorized, supervised, or carried out by clients.

(c) At the time of admission, every client shall be informed verbally, and in writing, of the program rules and consequences for violating the rules.

(d) The facility shall enforce the rules fairly and objectively and shall not implement consequences for the convenience of staff.

§148.705. Client Labor and Interactions.

(a) The facility shall not hire or utilize clients to fill staff positions. Former clients are not eligible for employment at the facility until at least two years after documented discharge from active treatment from the facility.

(b) The facility shall not require clients to participate in any fund raising or publicity activities for the facility.

(c) The facility and its personnel shall not enter into a business or personal relationship with a client, give a personal gift to a client, or accept a personal gift of value from a client until at least two years after services to the client cease.

§148.706. Restraint and Seclusion.

(a) The governing body shall adopt a policy to either authorize or prohibit the use of personal restraint, mechanical restraint, and seclusion. All adolescent residential programs and programs accepting emergency detentions shall authorize use of personal restraint. Any facility authorizing use of restraint or seclusion shall have a written procedure that ensures compliance with this section. Outpatient programs shall prohibit the use of restraint or seclusion, except as it relates to court commitment clients.

(b) In programs authorizing use of restraint or seclusion, direct care staff shall be trained as described in §148.603 of this title (relating to Training).

(c) Staff shall not use restraint or seclusion unless a client's behavior endangers the client or others and less restrictive methods have been tried and failed.

(d) Staff shall not use more force than is necessary to prevent imminent harm and shall ensure the safety, well-being, and dignity of clients who are restrained or secluded, including attention for personal needs.

(e) Staff shall obtain authorization from the supervising Qualified Credentialed Counselor (QCC) before starting restraint or seclusion or as soon as possible after implementation.

(1) The facility shall not use standing authorizations for restraint or seclusion.

(2) Authorization for mechanical restraint or seclusion shall be based on a face-to-face evaluation.

(3) Each authorization shall include a specific time limit, not to exceed 12 hours.

(f) When the client has been safely restrained or secluded, staff shall tell the client what behavior and timeframes are required for release and shall release the client as soon as the criteria are met.

(g) Clinical staff shall review and document alternative strategies for dealing with behaviors necessitating the use of restraint or seclusion for an individual client two or more times in any 30-day period.

(h) The chief executive officer of the facility or designee shall review all incident reports involving restraint or seclusion and take action to address unwarranted use of these measures.

(i) A client held in restraint shall be under continuous direct observation. The facility shall ensure adequate circulation during restraint and shall only use devices designed for therapeutic restraint.

(j) Seclusion rooms shall be constructed to prevent clients from harming themselves and shall allow staff to observe clients easily in all parts of the room. When a client is in seclusion, staff shall conduct a visual check every 15 minutes.

(k) Staff shall record the following information in the client record within 24 hours:

(1) the circumstances leading to the use of restraint or seclusion;

(2) the specific behavior necessitating the restraint or seclusion and the behavior required for release;

(3) less restrictive interventions that were tried before restraint or seclusion began;

(4) the signed authorization of the supervising QCC;

(5) the names of the staff members who implemented the restraint or seclusion;

(6) the date and time the procedure began and ended;

(7) the behavior and timeframes required for release;

(8) the client's response;

(9) observations made, including the 15 minute checks; and

(10) attention given for personal needs.

§148.707. Responding to Emergencies.

(a) The facility shall ensure that staff have the training and resources necessary to protect the health and safety of clients and other individuals during medical and psychiatric emergencies.

(b) The facility shall have written procedures for responding to medical and psychiatric emergencies.

(c) Emergency numbers shall be posted by all telephones.

(d) The facility shall have fully stocked first aid supplies that are visible, labeled and easy to access.

§148.708. Searches.

(a) All facilities shall adopt a written policy on client searches. Client searches include personal searches and searches of a client's property or sleeping quarters. If client searches are allowed, the facility shall adopt a written search procedure that ensures the protection of client rights.

(b) Client searches may only be conducted to protect the health, safety, and welfare of clients, staff, or the facility.

(c) Searches shall be conducted in a professional manner that maintains respect and dignity for the client. The facility shall not conduct a directly observed strip search of any client.

(d) A witness shall be present during all client searches.

(e) Staff and witnesses involved in a personal search must be the same gender as the client.

(f) Routine searches of possessions performed when a client returns to a facility may be documented in a central log. All other client searches shall be documented in the client record, including the reason for the search, the result of the search, and the signatures of the individual conducting the search and the witness.

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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SUBCHAPTER H. SCREENING AND ASSESSMENT

40 TAC §§148.801 - 148.805

The new rules are adopted pursuant to the Texas Health and Safety Code, §461.012(a)(15) which provides the Commission authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission program and §461.0141 which provides the Commission authority to adopt rules regarding purchase of services.

The code affected by the adoption of these rules is Chapter 461 of the Health and Safety Code.

§148.801. Screening.

(a) To be eligible for admission to a treatment program, an individual shall meet the DSM criteria for substance abuse or dependence (or substance withdrawal or intoxication in the case of a detoxification program). The facility shall use a screening process appropriate for the target population, individual's age, developmental level, culture and gender which includes the Texas Department of Insurance (TDI) criteria to determine eligibility for admission or referral including an assessment of the client's financial resources and insurance benefits.

(b) The screening process shall collect other information as necessary to determine the type of services that are required to meet the individual's needs. This may necessitate the administration of all or part of validated assessment instruments.

(c) TDI criteria shall guide referral and treatment recommendations as well as placement decisions.

(d) Sufficient documentation shall be maintained in the client record to support the diagnosis and justify the referral/placement decision. Documentation shall include the date of the screening and the signature and credentials of the Qualified Credentialed Counselor (QCC) supervising the screening process.

(e) For admission to a detoxification program, the screening will be conducted by a physician, physician assistant, nurse practitioner, registered nurse, or licensed vocational nurse (LVN). An LVN may conduct a screening under the following conditions:

(1) the LVN has completed detoxification training and demonstrated competency in the detoxification process;

(2) the training and competency verification is documented in the LVN's personnel file;

(3) the LVN shall convey the medical data obtained during the screening process to a physician in person or via telephone. The physician shall determine the appropriateness of the admission and authorize the admission or give instructions for an alternative course of action; and

(4) the physician shall examine the client in person and sign the admission order within 24 hours of authorizing admission.

(f) For admission to all other treatment programs, the screening will be conducted by a counselor or counselor intern.

§148.802. Admission Authorization and Consent to Treatment.

(a) A QCC shall authorize each admission in writing and specify the level of care to be provided. If the screening counselor or intern is not qualified to authorize admission, the QCC shall review the results of the screening with the applicant, directly or indirectly, before authorizing admission. The authorization shall be documented in the client record and shall contain sufficient documentation to support the diagnosis and the placement decision.

(b) The facility shall obtain written authorization from the consenter before providing any treatment or medication. The consent form shall be dated and signed by the client, the consenter, and the staff person providing the information, and shall document that the client and consenter have received and understood the following information:

(1) the specific condition to be treated;

(2) the recommended course of treatment;

(3) the expected benefits of treatment;

(4) the probable health and mental health consequences of not consenting;

(5) the side effects and risks associated with the treatment;

(6) any generally accepted alternatives and whether an alternative might be appropriate;

(7) the qualifications of the staff that will provide the treatment;

(8) the name of the primary counselor;

(9) the client grievance procedure;

(10) the Client Bill of Rights as specified in §148.701 of this title;

(11) the program rules, including rules about visits, telephone calls, mail, and gifts, as applicable;

(12) violations that can lead to disciplinary action or discharge;

(13) any consequences or searches used to enforce program rules;

(14) the estimated daily charges, including an explanation of any services that may be billed separately to a third party or to the client, based on an evaluation of the client's financial resources and insurance benefits;

(15) the facility's services and treatment process; and

(16) opportunities for family to be involved in treatment.

(c) This information shall be explained to the client and consenter in simple, non-technical terms. If an emergency or the client's physical or mental condition prevents the explanation from being given or understood by the client within 24 hours, staff shall document the circumstances in the client record and present the explanation as soon as possible. Documentation of the explanation shall be dated and signed by the client, the consenter, and the staff person providing the explanation.

(d) The client record shall include a copy of the Client Bill of Rights dated and signed by the client and consenter.

(e) If possible, all information shall be provided in the consenter's primary language.

(f) If an individual is not admitted, the program shall refer and assist the applicant to obtain appropriate services.

(g) When an applicant is screened and determined to be eligible for services but denied admission, the facility shall maintain documentation signed by the examining QCC which includes the reason for the denial and all referrals made.

§148.803. Assessment.

(a) A counselor or counselor intern shall conduct and document a comprehensive psychosocial assessment with the client admitted to the facility. The assessment shall document and elicit enough information about the client's past and present status to provide a thorough understanding of the following areas:

(1) presenting problems resulting in admission;

(2) alcohol and other drug use;

(3) psychiatric and chemical dependency treatment;

(4) medical history and current health status, to include an assessment of Tuberculosis (TB), HIV and other sexually transmitted disease (STD) risk behaviors as permitted by law;

(5) relationships with family;

(6) social and leisure activities;

(7) education and vocational training;

(8) employment history;

(9) legal problems;

(10) mental/ emotional functioning; and

(11) strengths and weaknesses.

(b) The assessment shall result in a comprehensive listing of the client's problems, needs, and strengths.

(c) The assessment shall result in a comprehensive diagnostic impression. The diagnostic impression shall include all DSM Axes I, IV, and V at a minimum, and Axes II and III, as allowed by the QCC's license and scope of practice.

(d) If the assessment identifies a potential mental health problem, the facility shall obtain a mental health assessment and seek appropriate mental health services when resources for mental health assessments and/or services are available internally or through referral at no additional cost to the program. These services shall be provided by a facility or person authorized to provide such services or a qualified professional as described in §148.901 of this title (relating to Requirements Applicable to all Treatment Services).

(e) The assessment shall be signed by a QCC and filed in the client record within three individual service days of admission.

(f) The program may accept an evaluation from an outside source if:

(1) it meets the criteria set forth herein;

(2) it was completed during the 30 days preceding admission or is received directly from a facility that is transferring the client; and

(3) a counselor reviews the information with the client and documents an update.

(g) For residential clients, a licensed health professional shall conduct a health assessment of the client's physical health status within 96 hours of admission. The facility may accept a health assessment

from an outside source completed no more than 30 days before admission or received directly from a transferring facility. If the client has any physical complaints or indications of medical problems, the client shall be referred to a physician, physician assistant, or nurse practitioner for a history and physical examination. The examination, if needed, shall be completed within a reasonable time frame and the results filed in the client record.

§148.804. Treatment Planning, Implementation and Review.

(a) The counselor and client shall work together to develop and implement an individualized, written treatment plan that identifies services and support needed to address problems and needs identified in the assessment. When appropriate, family shall also be involved.

(1) When the client needs services not offered by the facility, appropriate referrals shall be made and documented in the client record. When feasible, other QCCs or mental health professionals serving the client from a referral agency should participate in the treatment planning process.

(2) The client record shall contain justification when identified needs are temporarily deferred or not addressed during treatment.

(b) The treatment plan shall include goals, objectives, and strategies.

(1) Goals shall be based on the client's problems/needs, strengths, and preferences.

(2) Objectives shall be individualized, realistic, measurable, time specific, appropriate to the level of treatment, and clearly stated in behavioral terms.

(3) Strategies shall describe the type and frequency of the specific services and interventions needed to help the client achieve the identified goals and shall be appropriate to the level of intensity of the program in which the client is receiving treatment.

(c) The treatment plan shall identify discharge criteria and include initial plans for discharge. The Texas Department of Insurance criteria shall be used as a general guideline for determining when clients are appropriate for transfer or discharge, but individualized criteria shall be specifically developed for each client.

(d) A treatment plan shall include a projected length of stay.

(e) The treatment plan shall identify the client's primary counselor, and shall be dated and signed by the client, and the counselor. When the treatment plan is conducted by an intern or graduate, a QCC shall review and sign the treatment plan.

(f) The treatment plan shall be completed and filed in the client record within five individual service days of admission.

(g) The treatment plan shall be evaluated on a regular basis and revised as needed to reflect the ongoing reassessment of the client's problems, needs, and response to treatment.

(h) The primary counselor shall meet with the client to review and update the treatment plan at appropriate intervals defined in writing by the program. At a minimum, treatment plans shall be reviewed midway through the projected duration of treatment, and no less frequently than monthly in residential programs.

(i) The treatment plan review shall include:

(1) an evaluation of the client's progress toward each goal and objective;

(2) revision of the goals, objectives; and

(3) justifications of continued length of stay.

(j) Treatment plan reviews shall be dated and signed by the client, the counselor and the supervising QCC, if applicable.

(k) When a client's intensity of service is changed, the client record shall contain:

(1) clear documentation of the decision signed by a QCC, including the rationale and the effective date;

(2) a revised treatment plan; and

(3) documentation of coordination activities with receiving treatment provider.

(l) Program staff shall document all treatment services (counseling, chemical dependency education, and life skills training) in the client record within 72 hours, including the date, nature, and duration of the contact, and the signature and credentials of the person providing the service.

(1) Education, life skills training, and group counseling notes shall also include the topic/issue addressed.

(2) Individual counseling notes shall include the goals addressed, clinical observation and new issues or needs identified during the session.

§148.805. Discharge.

(a) The counselor and client/consenter shall develop and implement an individualized discharge plan.

(b) Discharge plans shall be updated as the client progresses through treatment and shall address the continued appropriateness of the current treatment level.

(c) The discharge plan shall address continuity of services to the client.

(1) When a client is referred or transferred to another chemical dependency or mental health service provider for continuing care, the facility shall contact the receiving program before the client is discharged to make arrangements for the transfer.

(2) Coordination activities shall be documented in the client record, including timeframe for client being able to access needed services and any constraints associated with the referral.

(3) With proper client consent, the facility shall provide the receiving program with copies of relevant parts of the client's record.

(d) The program shall involve the client's family or an alternate support system in the discharge planning process when appropriate.

(e) Discharge planning shall be completed before the client's scheduled discharge.

(f) A written discharge plan shall be developed to address ongoing client needs, including:

(1) individual goals or activities to sustain recovery;

(2) referrals; and

(3) recovery maintenance services, if applicable.

(g) The completed discharge plan shall be dated and signed by the counselor, the client, and the consenter (if applicable).

(h) The program shall give the client and consenter a copy of the plan, and file the original signed plan in the client record.

(i) The program shall complete a discharge summary for each client within 30 days of discharge. The discharge summary shall be signed by a QCC and shall include:

(1) dates of admission and discharge;

(2) needs and problems identified at the time of admission, during treatment, and at discharge;

(3) services provided;

(4) assessment of the client's progress towards goals;

(5) reason for discharge; and

(6) referrals and recommendations, including arrangements for recovery maintenance.

(j) The facility shall contact each client no sooner than 60 days and no later than 90 days after discharge from the facility and document the individual's current status or the reason the contact was unsuccessful.

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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SUBCHAPTER I. TREATMENT PROGRAM SERVICES

40 TAC §§148.901 - 148.911

The new rules are adopted pursuant to the Texas Health and Safety Code, §461.012(a)(15) which provides the Commission authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission program and §461.0141 which provides the Commission authority to adopt rules regarding purchase of services.

The code affected by the adoption of these rules is Chapter 461 of the Health and Safety Code.

§148.901. Requirements Applicable to All Treatment Services.

(a) Each client's treatment shall be based on a treatment plan developed from the client's comprehensive assessment.

(b) Group counseling sessions are limited to a maximum of 16 clients. Group education and life skills training sessions are limited to a maximum of 35 clients. This limit does not apply to multi-family educational groups, seminars, outside speakers, or other events designed for a large audience.

(c) Chemical dependency education and life skills training shall follow a written curriculum. All educational sessions shall include client participation and discussion of the material presented.

(d) The program shall provide education about Tuberculosis (TB), HIV, Hepatitis B and C, and sexually transmitted diseases (STDs) based on the Texas Commission on Alcohol and Drug Abuse Workplace and Education Guidelines for HIV and Other Communicable Diseases.

(e) The program shall provide education about the health risks of tobacco products and nicotine addiction.

(f) The program shall provide access to screening for TB and testing for HIV antibody, Hepatitis C, and STDs.

(1) HIV antibody testing shall be carried out by an entity approved by the Texas Department of Health.

(2) If a client tests positive, the program shall refer the client to an appropriate health care provider.

(g) The program shall facilitate access to physical health, mental health, and ancillary services if those services are not available through the program and are necessary to meet treatment goals and shall document these efforts.

(h) Individuals shall not be denied admission or discharged from treatment because they are taking prescribed medication.

(i) The facility shall maintain an adequate number of qualified staff to comply with licensure rules, provide appropriate and individualized treatment, and protect the health, safety, and welfare of clients.

(j) All personnel shall receive the training and supervision necessary to ensure compliance with Commission rules, provision of appropriate and individualized treatment, and protection of client health, safety and welfare.

(k) Direct care staff shall be awake and on site during all hours of program operation.

(l) Residential direct care staff included in staff-to-client ratios shall not have job duties that prevent ongoing and consistent client supervision.

(m) Residential programs shall have at least one counselor on duty at least eight hours a day, six days a week.

(n) Clients in residential programs shall have an opportunity for eight continuous hours of sleep each night. Staff shall conduct and document at least three checks while clients are sleeping.

(o) Individuals responsible for planning, directing, or supervising treatment programs shall be QCCs. The clinical program director must have at least two years of post-licensure experience providing chemical dependency treatment.

(p) Chemical dependency counseling must be provided by a qualified credentialed counselor (QCC), graduate, or counselor intern. Chemical dependency education and life skills training shall be provided by counselors or individuals who have the specialized education and expertise.

(q) All counselor interns shall work under the direct supervision of a QCC as required in 40 TEX. ADMIN. CODE ch. 150 of this title (relating to Counselor Licensure).

§148.902. Requirements Applicable to Detoxification Services.

(a) A facility providing detoxification services shall ensure every individual admitted to a detoxification program meets the DSM criteria for substance intoxication or withdrawal.

(b) All detoxification programs shall ensure continuous access to emergency medical care.

(c) The program shall have a medical director who is a licensed physician. The medical director shall be responsible for admission, diagnosis, medication management, and client care.

(d) The medical director or his/her designee (physician assistant, or nurse practitioner) shall approve all medical policies, procedures, guidelines, tools, and the medical content of all forms, which shall include:

(1) screening instruments and procedures;

(2) protocol or standing orders for each major drug category of abusable drugs (opiates, alcohol and other sedative-hypnotic/anxiolytics, inhalants, stimulants, hallucinogens) that are consistent with guidelines published by nationally recognized organizations (e.g., Substance Abuse and Mental Health Services Administration, American Society of Addiction Medicine, American Academy of Addiction Psychology);

(3) procedures to deal with medical emergencies;

(4) medication and monitoring procedures for pregnant women that address effects of detoxification and medications used on the fetus; and

(5) special consent forms for pregnant women identifying risks inherent to mother and fetus.

(e) The medical director or his/her designee (physician assistant, nurse practitioner) shall authorize all admissions, conduct a face-to-face examination, to include both a history and physical examination of each applicant for services to establish the Axis I diagnosis, assess level of intoxication or withdrawal potential, and determine the need for treatment and the type of treatment to be provided to reach a placement decision.

(1) The examination shall identify potential physical and mental health problems and/or diagnoses that warrant further assessment.

(2) The authorization and examination shall be documented in the client record and shall contain sufficient documentation to support the diagnoses and the placement decision. If the physician determines an admission was not appropriate, the client shall be transferred to an appropriate service provider.

(3) The face-to-face examination (history and physical examination) and signed orders of admission shall occur within 24 hours of admission.

(4) The program may accept an examination completed during the 24 hours preceding admission if it is approved by the program's medical director or designee and includes the elements of paragraphs (1) and (2) of this subsection. The program may not require a client to obtain a history and physical as a condition of admission.

(5) Detoxification programs shall have a licensed vocational nurse or registered nurse on duty for at least eight hours every day and a physician or designee on call 24 hours a day.

(6) Detoxification programs shall ensure that detoxification services are accessible at least 16 hours per day, seven days per week.

(f) Providers shall develop and implement a mechanism to ensure that all direct care staff in detoxification programs have the knowledge, skills, abilities to provide detoxification services, as they relate to the individual's job duties. Providers must be able to demonstrate through documented training, credentials and/or experience that all direct care staff are proficient in areas pertaining to detoxification, including but not limited to areas regarding:

(1) signs of withdrawal;

(2) observation and monitoring procedures;

(3) pregnancy-related complications (if the program admits women);

(4) complications requiring transfer;

(5) appropriate interventions; and

(6) frequently used medications including purpose, precautions, and side effects.

(g) Residential and ambulatory (outpatient) detoxification programs shall provide monitoring to manage the client's physical withdrawal symptoms. Monitoring shall be conducted at a frequency consistent with the degree of severity of the client's withdrawal symptoms, the drug(s) from which the client is withdrawing, and/or the level of intoxication of the client. This information will be documented in the client's record and reflected in the client's orders.

(1) Monitoring shall include:

(A) changes in mental status;

(B) vital signs; and

(C) response of the client's symptoms to the prescribed detoxification medications

(2) Use of instruments such as the Clinical Institute Withdrawal Assessment-Alcohol, revised (CIWA-Ar) for alcohol and sedative hypnotic withdrawal and the "clinician's assessment" in the Behavioral Health Integrated Provider System (BHIPS) is recommended.

(3) More intensive monitoring is required for clients with a history of severe withdrawal symptoms (e.g. a history of hallucinosis, delirium tremors, seizures, uncontrolled vomiting/dehydration, psychosis, inability to tolerate withdrawal symptoms, self harming attempts), or the presence of current severe withdrawal symptoms and/or co-occurring medical and psychiatric disorders.

(4) At a minimum, monitoring should be done every four hours in residential detoxification programs for the first 72 hours and as ordered by the medical director or designee thereafter, dependent on the client's signs and symptoms.

(5) Medication should be available to manage withdrawal/intoxication from all classes of abusable drugs.

(6) Medication "regimens", "protocols" or standing orders can be used, but detoxification should be tailored to each client's need based on vital signs and symptom severity (objective and subjective) and noted in the client's record.

(7) Ambulatory detoxification should have clear documentation by the physician or designee that the client's symptoms are or are expected to be of a severity that necessitates a minimum of once a day monitoring.

(h) In addition to the management of withdrawal and intoxicated states, detoxification programs shall provide services, including counseling, which are designed to:

(1) assess the client's readiness for change;

(2) offer general and individualized information on substance abuse and dependency;

(3) enhance client motivation;

(4) engage the client in treatment; and

(5) include a detoxification plan that contains the goals of successful and safe detoxification as well as transfer to another intensity of treatment. At least one daily individual session by a registered nurse, QCC or counselor intern with the client will be conducted.

(i) Ambulatory detoxification shall not be a stand alone service and services shall be provided in conjunction with outpatient treatment services. When treatment services are not available in conjunction with ambulatory detoxification services, the ambulatory detoxification program shall arrange for them.

(j) Bunk beds shall not be used in residential detoxification programs.

(k) In residential programs, direct care staff shall be on duty where the clients are located 24 hours a day.

(1) During day and evening hours, at least two staff shall be on duty for the first 12 clients, with one more staff on duty for each additional one to 16 clients.

(2) At night, at least one staff member with detoxification training shall be on duty for the first 12 clients with one more staff on duty for each additional one to 16 clients.

(l) Clients who are not in withdrawal but meet the DSM criteria for substance dependence may be admitted to detoxification services for 72 hours for crisis stabilization.

(m) Crisis stabilization is appropriate for clients who have diagnosed conditions that result in current emotional or cognitive impairment in clients such that they would not be able to participate in a structured and rigorous schedule of formal chemical dependency treatment.

(1) The specific client signs and symptoms that meet the DSM or other medical criteria for the disorder must be documented in the client record.

(2) Documentation must also include what symptoms are precluding the client from participating in treatment and the manner in which they are to be resolved.

§148.903. Requirements Applicable to Residential Services.

(a) Residential treatment provides 24-hour per day, 7 days per week multidisciplinary professional clinical support to facilitate recovery from addiction. Clients are housed in a residential site. Comprehensive chemical dependency treatment services offer a structured therapeutic environment.

(b) The facility shall ensure access to the full continuum of treatment services and will ensure sufficient treatment intensity to achieve treatment plan goals. Intensity and content of treatment shall be appropriate to the client's needs and consistent with generally accepted placement guidelines and standards of care.

(c) Each individual admitted to intensive residential services shall be appropriate for this treatment setting, with written justification to support the admission.

(d) Intensive residential shall provide an average of at least 30 hours of services per week for each client, comprised of at least:

(1) ten hours of chemical dependency counseling, (one hour of which shall be individual counseling);

(2) ten hours of additional counseling, chemical dependency education, life skills training, relapse prevention education; and

(3) ten hours of planned, structured activities monitored by staff. Five hours of these services shall occur on weekends and evenings.

(e) In adult intensive residential programs, the direct care staff-to-client ratio shall be at least 1:16 when clients are awake and 1:32 during sleeping hours.

(f) In intensive residential programs counselor caseloads shall not exceed ten clients for each counselor.

(g) Supportive residential shall provide at least six hours of treatment services per week for each client, comprised of at least :

(1) three hours of chemical dependency counseling (one hour per month of which shall be individual counseling); and

(2) three hours of additional counseling, chemical dependency education, life skills training, and relapse prevention education.

(h) In adult supportive residential programs, the direct care staff-to-client ratio shall be at least 1:20 when clients are awake and 1:50 during sleeping hours.

(i) Each supportive residential program shall set limits on caseload size that ensure effective, individualized treatment. The program shall justify the caseload size in writing based on the program design, characteristics and needs of the population served, and any other relevant factors.

§148.904. Requirements for Outpatient Treatment Programs.

(a) Outpatient programs are designed for clients who do not require the more structured environment of residential treatment to maintain sobriety.

(b) Outpatient programs shall ensure access to full continuum of care and ensure sufficiency of treatment intensity to achieve treatment plan goals. Intensity and content of treatment shall be appropriate to the client's needs and consistent with generally accepted placement guidelines and standards of care.

(c) Each individual admitted to an outpatient program shall be appropriate for this treatment setting, with written justification to support the admission.

(d) Treatment includes individualized treatment planning based on a comprehensive assessment, educational and process groups, and individual counseling.

(e) Each client's progress is assessed regularly by clinical staff to help determine the length and intensity of the program for that client.

§148.905. Additional Requirements for Adolescent Programs.

(a) Facilities providing adolescent residential services shall:

(1) maintain separation between adults and adolescents;

(2) have separate sleeping areas, bedrooms, and bathrooms for adults and adolescents, and for males and females;

(3) provide access to education approved by the Texas Education Agency within three school days of admission when treatment is expected to last more than 14 days;

(4) in addition to the service requirements set forth in §148.903(d)(3), provide five hours of planned, structured activities during evenings and weekends. Recreational and leisure activities shall be included in the structured time. The total number of hours of planned, structured activities must be at least 15. Attendance in school may be counted toward this requirement;

(5) ensure the direct care staff-to-client ratio is at least 1:8 during waking hours (including program-sponsored activities away from the facility) and 1:16 during sleeping hours;

(6) ensure clients are under direct supervision at all times. During sleeping hours, staff shall conduct and document hourly bed checks;

(7) facilitate regular communication between an adolescent client and the client's family and shall not arbitrarily restrict any communications without clear individualized clinical justification documented in the client record; and

(8) have written procedures addressing notification of parents or guardians in the event an adolescent leaves a residential program without authorization.

(b) Facilities providing outpatient services shall:

(1) maintain separation between adults and adolescents; and

(2) provide access to education approved by the Texas Education Agency within three school days of admission when treatment is expected to last more than 14 days, if required by law.

(c) Facilities providing day treatment shall provide at least 15 hours of services per week, comprised of at least:

(1) one hour of individual counseling; and

(2) 14 hours of additional counseling, chemical dependency education, life skills training, and relapse prevention education. Attendance in school may not be counted toward this requirement.

(d) All facilities shall:

(1) ensure the program's treatment services, lectures, and written materials are age-appropriate and easily understood by clients;

(2) involve the client's family or an alternate support system in the treatment process or document why this is not possible; and

(3) develop and implement a mechanism to ensure that all direct care staff in adolescent programs have the knowledge, skills, and abilities to provide services to adolescents, as they relate to the individual's job duties. Providers must be able to demonstrate through documented training, credentials and/or experience that all direct care staff are proficient in areas pertaining to adolescent services, including but not limited to areas regarding:

(A) chemical dependency problems specific to adolescent treatment;

(B) appropriate treatment strategies, including family engagement strategies; and

(C) emotional, developmental, and mental health issues for adolescents.

(e) Adolescent programs may serve children 13 to 17 years of age. However, young adults aged 18 to 21 may be admitted to an adolescent program when the screening process indicates the individual's needs, experiences, and behavior are similar to those of adolescent clients.

(f) Adult programs serve individuals 18 years of age or older. However, adolescents aged 17 may be admitted to an adult program when they are referred by the adult criminal justice system or when the screening process indicates the individual's needs, experiences, and behavior are similar to those of adult clients.

(g) Every exception to the general age requirements shall be clinically justified and documented and approved in writing by a QCC.

§148.906. Access to Services for Co-Occurring Psychiatric and Substance Use Disorders (COPSD) Clients.

(a) In determining an individual's initial and ongoing eligibility for any service, an entity may not exclude an individual based on the following factors:

(1) the individual's past or present mental illness;

(2) medications prescribed to the individual in the past or present;

(3) the presumption of the individual's inability to benefit from treatment; or

(4) the individual's level of success in prior treatment episodes.

(b) Providers must ensure that a client's refusal of a particular service does not preclude the client from accessing other needed mental health or substance abuse services.

(c) Providers must establish and implement procedures to ensure the continuity between screening, assessment, treatment and referral services provided to clients.

§148.907. Additional Requirements for COPSD Programs.

(a) The services provided to a client with co-occurring psychiatric and substance use disorders (COPSD) must:

(1) address both psychiatric and substance use disorders;

(2) be provided within established practice guidelines for this population; and

(3) facilitate individuals in accessing available services they need and choose, including self-help groups.

(b) The services provided to a client with COPSD must be provided by staff who are competent in the areas identified in §148.908 of this title (relating to Specialty Competencies of Staff Providing Services to Clients with COPSD).

§148.908. Specialty Competencies of Staff Providing Services to Clients with COPSD.

(a) Providers must ensure that services to clients are age-appropriate and are provided by staff within their scope of practice who have the following minimum knowledge, technical, and interpersonal competencies prior to providing services.

(1) Knowledge competencies:

(A) knowledge of the fact that psychiatric and substance use disorders are potentially recurrent relapsing disorders, and that although abstinence is the goal, relapses can be opportunities for learning and growth;

(B) knowledge of the impact of substance use disorders on developmental, social, and physical growth and development of children and adolescents;

(C) knowledge of interpersonal and family dynamics and their impact on individuals;

(D) knowledge of the current Diagnostic and Statistical Manual of Mental Disorders (DSM) diagnostic criteria for psychiatric disorders and substance use disorders and the relationship between psychiatric disorders and substance use disorders;

(E) knowledge regarding the increased risks of self-harm, suicide, and violence in individuals;

(F) knowledge of the elements of an integrated treatment plan and community support plan for individuals;

(G) basic knowledge of pharmacology as it relates to individuals with a mental disorder;

(H) basic understanding of the neurophysiology of addiction;

(I) knowledge of the phases of recovery for individuals;

(J) knowledge of the relationship between COPSD and DSM Axis III disorders; and

(K) knowledge of self-help in recovery.

(2) Technical competencies:

(A) ability to perform age-appropriate assessments of clients; and

(B) ability to formulate an individualized treatment plan and community support plan for clients.

(3) Interpersonal competencies:

(A) ability to tailor interventions to the process of recovery for clients;

(B) ability to tailor interventions with readiness to change; and

(C) ability to engage and support clients who choose to participate in 12-step recovery programs.

(b) Within 90 days of the effective date of this rule, providers must ensure that staff who provide services to clients with COPSD have demonstrated the competencies described in subsection (a) of this section. These competencies may be evidenced by compliance with current licensure requirements of the governing or supervisory boards for the respective disciplines involved in serving clients with COPSD or by documentation regarding the attainment of the competencies described in subsection (a) of this section.

§148.909. Treatment Planning of Services to Clients with COPSD.

(a) The treatment plan must identify services to be provided and must include measurable outcomes that address COPSD.

(b) The treatment plan must identify the family members' need for education and support services related to the client's mental illness and substance abuse and a method to facilitate the family members' receipt of the needed education and support services.

(c) The client and, if requested, family member, must be given a copy of the treatment plan as permitted by law.

§148.910. Treatment Services for Women and Children.

(a) Clients shall receive gender-specific services in female-only specialized programs.

(b) When appropriate, pre-admission service coordination shall be provided to reduce barriers to treatment, enhance motivation, stabilize life situations, and facilitate engagement in treatment.

(c) Services shall address relationship issues, including past or current experience with sexual, physical, and emotional abuse.

(d) Providers shall develop and implement a mechanism to ensure that all direct care staff in programs that treat women and children have the knowledge, skills, and abilities to provide services to women and children, as they relate to the individual's job duties. Providers must be able to demonstrate through documented training, credentials and/or experience that all direct care staff are proficient in areas pertaining to the needs of and provision of services to women and children.

(e) Individuals responsible for the planning and supervision of the program shall participate in at least 15 clock hours of training annually in understanding children, child development, and/or early childhood education.

(f) Clients shall receive access to appropriate primary medical care, including prenatal care and reproductive health education and services.

(g) Pregnant clients, women with children in custody, and women with dependent children shall receive parenting education and support services.

(h) Women and their dependent children shall be treated as a unit, and both the woman and her children will be admitted into treatment when appropriate.

(i) Children shall receive services to address their needs and support healthy development, including primary pediatric care, early childhood intervention services, substance abuse prevention services, and/or other therapeutic interventions.

(j) Facilities housing children shall comply with the provisions of 40 TEX. ADMIN. CODE ch. 746 (2003)(relating to Minimum Standards for Child-Care Centers) set forth below:

(1) Subchapter B, Administration and Communication §§746.307(a)(b), 746.405(a)(1)(2)(3) and 746.501(6-16)

(2) Subchapter C, Record Keeping, §§746.603(a)(3)-(6), 746.605-627, 746.801(22) and 746.901(3)

(3) Subchapter D, Personnel §§746.1105(2) and 746.1303(2)(3)

(4) Subchapter E, Child/Caregiver Ratios and Group Sizes §§746.1501-2117

(5) Subchapter G, Basic Care Requirements for Children with Special Care Needs §746.2301

(6) Subchapter H, Basic Care Requirements for Infants §§746.2401- 2429

(7) Subchapter I, Basic Care Requirements for Toddlers §§746.2501-2509

(8) Subchapter J, Basic Care Requirements for Pre-Kindergarten Age Children §§746.2601-2607

(9) Subchapter K, Basic Care Requirements for School-age Children §§746.2701-2707

(10) Subchapter L, Discipline and Guidance §§746.2801-2813

(11) Subchapter N, Field Trips §746.3001(1)(8)

(12) Subchapter Q, Nutrition and Food Service §§746.3301, 746.3307 and 746.3311

(13) Subchapter R, Health Practices §§746.3407, 746.3423, 746.3501 and 746.3503

(14) Subchapter S, Safety Practices §§746.3701, 746.3709 and 746.3901-4101

(15) Subchapter T, Physical Facilities §§746.4201, 746.4217, 746.4301, 746.4305-4309, 746.4419-4501, 746.4505 and 746.4509

(16) Subchapter U, Outdoor Safety and Play Equipment §§746.4601-4913

(17) Subchapter V, Swimming Pools and Wading/Splashing Pools §§746.5001-5015

(k) The facility shall adopt program specific rules regarding child care.

(1) These program rules will include provisions addressing:

(A) clients supervising the children of other clients, and

(B) opportunities for indoor and outdoor activities for the children.

(2) The facility shall not allow a client to supervise more than two additional children at any time.

(3) The facility shall provide each client with a copy of these program rules within 24 hours of admission.

(4) Off-site contracted daycare providers shall be licensed by the Texas Department of Protective and Regulatory Services.

(5) If a program has an attendance of more than 30 children at lunch or dinner time, staff shall be provided for meal preparation, serving and cleanup. The staff providing meal services shall not be included in staff to child ratios during this time.

(l) The program shall assist the parent/guardian as necessary to ensure educational opportunities for school age children in accordance with the requirements of the Texas Education Agency.

(m) School age children shall have access and transport to school.

(n) The program shall document any services provided to children, including daycare and community support. The record shall document the child's developmental, physical, emotional, social, and educational needs, and family background and current status.

§148.911. Treatment Services Provided by Electronic Means.

(a) A licensed treatment program may provide outpatient chemical dependency treatment program services by electronic means provided the criteria outlined in this section are addressed.

(1) Services shall be provided to adult clients only; and

(2) Services shall be provided by a QCC.

(b) All treatment sessions shall have two forms of access control as follows:

(1) all on-line contact between a QCC and clients must begin with a verification of the client through a name, password or pin number; and

(2) security as detailed in HIPAA.

(c) All data, including audio, video, text and presentation materials shall be transferred using 128 bit-Encryption.

(d) Programs shall maintain compliance with HIPAA and 42 C.F.R. pt. 2.

(e) Programs shall not use e-mail communications containing client identifying information.

(f) Programs shall use audio and video in real time.

(g) Programs shall ensure timely access to individuals qualified in the technology as backup for systems problems.

(h) Programs shall maintain a toll-free telephone number for technical support.

(i) Programs shall develop a contingency plan for clients when technical problems occur during the provision of services.

(j) Programs shall provide a description of all services offered.

(k) Programs shall provide develop criteria, in addition to DSM, to assess clients for appropriateness of utilizing electronic services.

(l) Programs shall provide appropriate referrals for clients who do not meet the criteria for services.

(m) Programs shall develop a grievance procedure and provide a link to the Commission for filing a complaint when using the Internet or the Commission's toll-free number when counseling by telephone.

(n) Prior to clients engaging in Internet services, programs shall describe and provide in writing the potential risks to clients. The risks shall address at a minimum these areas:

(1) clinical aspects;

(2) security; and

(3) confidentiality.

(o) Programs shall create safeguards to ensure appropriate age and identification of the client.

(p) Programs shall maintain information on statutes and regulations of the governing area in which the client resides or is receiving services by electronic means.

(q) Programs shall provide emergency contact information to the client.

(r) Programs shall maintain resource information for the local area of the client.

(s) Programs shall provide reasonable ADA accommodations for clients upon request.

(t) Programs must reside and perform services in Texas.

(u) The Commission maintains the authority to regulate the program regardless of the location of the client.

(v) The Program shall maintain information on statutes and regulations of the governing area in which the client resides or is receiving the Internet services.

(w) Facility shall provide emergency contact information to the client.

(x) Facility shall maintain resource information for the local area of the client.

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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SUBCHAPTER J. MEDICATION

40 TAC §§148.1001 - 148.1004

The new rules are adopted pursuant to theTexas Health and Safety Code, §461.012(a)(15) which provides the Commission authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission program and §461.0141 which provides the Commission authority to adopt rules regarding purchase of services.

The code affected by the adoption of these rules is Chapter 461 of the Health and Safety Code.

§148.1001. General Provisions for Medication.

(a) All facilities that provide medication shall implement written procedures for medication storage, administration, documentation, inventory, and disposal.

(b) Prescription medication shall be used only for therapeutic and medical purposes and shall be administered as prescribed by an appropriately licensed professional.

(c) Single doses of prescription medication shall be prepared and packaged by a licensed pharmacist or physician.

(d) The facility shall ensure that staff that provide medication are properly credentialed and trained.

(e) The program shall have the phone number of a pharmacy and a comprehensive drug reference manual easily accessible to staff.

§148.1002. Medication Storage.

(a) Prescription and over-the-counter medications, syringes, and needles shall be kept in locked storage and accessible only to staff who are authorized to provide medication.

(b) Clients may keep prescription or over-the-counter medication in their personal possession on site with written authorization from the program director. Staff shall ensure that authorized clients keep medication on their persons or safely stored and inaccessible to other clients.

(c) The program shall store all medications, syringes, and needles in their original containers under appropriate conditions. Medications requiring refrigeration shall not be stored with food and other items.

(d) The facility shall ensure that stock prescription medications are stored in a licensed pharmacy or physician's office and dispensed by a pharmacist or physician as required by TEX. OCC. CODE ANN. ch. 551 (Vernon 2004).

(e) The facility shall ensure that prescription medication is in a container labeled by the pharmacy.

(f) Sample medications provided by physicians must be stored with client specific labeling information, including dosing instructions.

§148.1003. Medication Inventory and Disposal.

(a) The program shall use an effective system to track and account for all prescription medication.

(b) Staff shall inventory and inspect all stored DEA Schedule II, III, and IV prescription medication at least daily using a centralized medication inventory form.

(c) The staff member conducting the inventory shall sign and date the inventory sheet. When a discrepancy exists between the administration record and the inventory count form, a note explaining the reason for the discrepancy or action taken to reconcile/correct the discrepancy shall be signed by the staff member conducting the inventory and kept with the medication inventory forms.

(d) Staff shall separate unused and outdated medication immediately and dispose of it within 30 days.

(e) Methods used for disposal shall prevent medication from being retrieved, salvaged, or used. Two staff members shall witness and document disposal, including amount of medication disposed and method used.

§148.1004. Administration of Medication.

(a) Staff shall provide and discontinue medication exactly as prescribed.

(b) Prescription medication shall be administered only by nurses and other staff who are legally authorized to administer medication.

(c) Clients may self-administer medication under the supervision of staff who are trained as described in §148.603 of this title (relating to Training).

(d) Each dose of prescription and over-the-counter medication taken by the client shall be documented in the client's medication record.

(e) The medication record shall include:

(1) the client's name;

(2) drug allergies (or the absence of known allergies);

(3) the name and dose of each medication;

(4) the frequency and route of each medication;

(5) the date and time of each dose; and

(6) the signature of the staff person who administered or supervised each dose.

(f) The facility shall document the circumstances and reason for any missed doses.

(g) When a client appears to have an adverse reaction to medication, a staff member shall:

(1) notify the prescribing professional or another physician, dentist, podiatrist, physician assistant or nurse practitioner (preferably the prescribing professional);

(2) complete an incident report; and

(3) document the facts in the client record, including the date and time of notification and any other action taken.

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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SUBCHAPTER K. FOOD AND NUTRITION

40 TAC §§148.1101 - 148.1104

The new rules are adopted pursuant to the Texas Health and Safety Code, §461.012(a)(15) which provides the Commission authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission program and §461.0141 which provides the Commission authority to adopt rules regarding purchase of services.

The code affected by the adoption of these rules is Chapter 461 of the Health and Safety Code.

§148.1101. Meals in Outpatient Programs.

(a) Programs shall provide a meal break after five consecutive hours of scheduled activities.

(b) If the facility prepares meals in a centralized kitchen on site, it shall pass an annual kitchen health inspection as required by law.

§148.1102. Meals in Residential Programs.

(a) The residential program shall provide wholesome, well-balanced meals, according to posted weekly approved menus.

(b) The program shall provide modified diets to residents who medically require them as determined by a licensed health professional. Special diets shall be prepared in consultation with a licensed dietitian.

(c) All food shall be selected, stored, prepared, and served in a safe and healthy manner.

(d) The program shall provide at least three meals daily. The program shall provide packaged meals or make other arrangements for clients who are scheduled to be away from the facility during meal time.

(e) A licensed dietitian shall approve menus and written guidelines for substitutions in advance; or

(1) approve a meal planning manual with sample menus and guidelines for substitutions;

(2) approve menus prepared by new staff before they plan meals independently;

(3) review a sample of menus served at least annually; and

(4) provide staff training as needed.

§148.1103. Meals Prepared by Clients.

(a) Staff shall provide training and supervision needed to ensure compliance with the rules in §148.1102 of this title (relating to Meals in Residential Programs).

(b) The program shall define duties in writing and have written instructions posted or easily accessible to clients.

(c) If menu planning and independent meal preparation are part of the clients' treatment program, a licensed dietitian shall:

(1) approve the client training curriculum; and

(2) provide training or approve a training program for staff that instruct and supervise clients in meal preparation.

§148.1104. Meals Provided by a Food Service.

(a) When meals are provided by a food service, a written contract shall require the food service to:

(1) comply with the rules in §148.1102 of this title (relating to Meals in Residential Programs); and

(2) pass an annual kitchen health inspection as required by law.

(b) The facility shall ensure the meals are transported to the facility in temperature controlled containers to ensure the food remains at the temperature at which it was prepared.

(c) The facility shall ensure that at least one staff, at a minimum, maintains a current food handler's permit.

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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SUBCHAPTER L. RESIDENTIAL PHYSICAL PLANT REQUIREMENTS

40 TAC §§148.1201 - 148.1207

The new rules are adopted pursuant to the Texas Health and Safety Code, §461.012(a)(15) which provides the Commission authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission program and §461.0141 which provides the Commission authority to adopt rules regarding purchase of services.

The code affected by the adoption of these rules is Chapter 461 of the Health and Safety Code.

§148.1201. General Physical Plant Provisions.

(a) Physical plant requirements apply only to residential programs.

(b) The water supply shall be of safe, sanitary quality, suitable for use, and adequate in quantity and pressure. The water shall be obtained from a water supply system approved by the Texas Natural Resource Conservation Commission (TNRCC).

(c) Sewage shall be discharged into a State-approved sewage system or septic system; otherwise, the sewage must be collected, treated, and disposed of in a manner which is approved by TNRCC.

(d) Mobile homes, recreational vehicles, and campers shall not be used for client sleeping areas.

§148.1202. Required Inspections.

The residential site shall pass all required inspections and keep a current file of reports and other documentation needed to demonstrate compliance with applicable laws and regulations. The inspections must be signed, dated, and free of any outstanding corrective actions. The following inspections are required:

(1) annual inspection by the local certified fire inspector or the State fire marshal;

(2) annual inspection of the alarm system by the fire marshal or an inspector authorized to install and inspect such systems;

(3) annual kitchen inspection by the local health authority or the Texas Department of Health;

(4) gas pipe pressure test once every three years by the local gas company or a licensed plumber;

(5) annual inspection and maintenance of fire extinguishers by personnel licensed or certified to perform those duties; and

(6) annual inspection of liquefied petroleum gas systems by an inspector certified by the Texas Railroad Commission.

§148.1203. Emergency Evacuation.

Every residential program shall:

(1) have emergency evacuation procedures that include provisions for individuals with disabilities;

(2) hold fire drills on each shift at least quarterly and correct identified problems promptly;

(3) post exit diagrams conspicuously throughout the program site (except in small one-story buildings where all exits are obvious); and

(4) be able to clear the building safely and in a timely manner at all times.

§148.1204. Exits.

(a) Every building shall have at least two well-separated exits on each story.

(b) Every route of exit shall be free of hazards and obstructions, well lit, and marked clearly with illuminated exit signs at all times.

(c) Rooms for 50 or more people shall have exit doors that swing out.

(d) No door may require a key for emergency exit. Locked facilities shall have emergency exit door releases as described in the Life Safety Code and approved by the fire marshal.

§148.1205. Space, Furniture and Supplies.

(a) The facility shall have areas for leisure and dining with adequate space for the number of residents.

(b) Sleeping areas shall have at least:

(1) 80 usable square feet per individual in single-occupancy rooms;

(2) 60 usable square feet per individual in multiple-occupancy rooms (or 50 square feet per individual if bunk beds are used); and

(3) 40 usable square feet for each child 18 months and older and 30 usable square feet per infant under 18 months.

(c) The facility shall provide adequate personal storage space for each client, including space for hanging clothes.

(d) The program shall make at least one phone available to clients.

(e) Each client shall have a separate bed of solid construction with a mattress. Clean bed linen, towels, and soap shall be available at all times and in quantity sufficient to meet the needs of the residents.

(f) All clients shall have access to laundry services or properly maintained laundry facilities equivalent to one washer and dryer per 25 clients.

§148.1206. Fire Systems.

(a) A fire detection, alarm, and communication system required for life safety shall be installed, tested, and maintained in accordance with the facility's occupancy and capacity classifications.

(b) Electrical fire alarm systems shall be installed by agents registered with the State fire marshal's office. The facility shall maintain a copy of the fire alarm installation certificate.

(c) Quarterly fire alarm system tests shall be conducted and documented by facility staff.

(d) Alarms shall be loud enough to be heard above normal noise levels throughout the building.

(e) Fire extinguishers shall be mounted throughout the facility as required by code and approved by the fire marshal.

(1) Each laundry and walk-in mechanical room shall have at least one portable A:B:C extinguisher, and each kitchen shall have at least one B:C fire extinguisher.

(2) Each extinguisher shall have the required maintenance service tag attached.

(f) Staff shall conduct quarterly inspections of fire extinguishers for proper location, obvious physical damage, and a full charge on the gauge.

§148.1207. Other Physical Plant Requirements.

(a) Occupied parts of the building shall be kept between 65 degrees and 85 degrees Fahrenheit, including kitchens and laundry areas. Cooling and heating shall be provided, as necessary, for resident comfort.

(b) Portable electric heaters and open-flame heating devices are prohibited. All fuel-burning devices shall be vented.

(c) The facility shall be well ventilated through the use of windows, mechanical ventilation, or a combination. Windows used regularly for ventilation shall be screened.

(d) Bedrooms and bathrooms with windows shall have appropriate window coverings for privacy.

(e) The facility shall have adequate internal and external lighting to provide a safe environment and meet user needs.

(f) There shall be at least one sink, one tub or shower, and one toilet for every eight residents. All of the fixtures must be in good working order and have the appropriate drain and drain trap to prevent sewage gas escape back into the facility.

(g) The facility shall provide an adequate supply of hot water for the number of residents and the program schedule.

(h) Showers and tubs shall have no-slip surfaces and curtains or other safe enclosures for privacy.

(i) Clean drinking water shall be readily available to all residents.

(j) Food and waste shall be stored, handled, and removed in a way that will not spread disease, cause odors, or provide a breeding place for pests.

(k) The facility shall be kept free of insects, rodents, and vermin.

(l) Poisonous, toxic, and flammable materials shall be labeled, stored, and used safely.

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 February 13, 2004.

TRD-200401040
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2004
Proposal publication date: August 29, 2003
For further information, please call: (512) 349-6668

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SUBCHAPTER M. COURT COMMITMENT SERVICES

40 TAC §148.1301

The new rule is adopted pursuant to the Texas Health and Safety Code, §461.012(a)(15) which provides the Commission authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission program and §461.0141 which provides the Commission authority to adopt rules regarding purchase of services.

The code affected by the adoption of this rule is Chapter 461 of the Health and Safety Code.

§148.1301. Court Commitment Services.

(a) Facilities accepting court commitments shall be licensed to provide the appropriate level of service:

(1) emergency detention: residential detoxification or intensive residential services;

(2) adult inpatient involuntary commitments: intensive residential or residential services for adults;

(3) adult outpatient involuntary commitments: day treatment or outpatient services;

(4) juvenile inpatient commitments: intensive residential services for adolescents; and

(5) juvenile outpatient commitments: day treatment or outpatient services for adolescents.

(b) The facility's court commitment program shall comply with the TEX. HEALTH & SAFETY CODE ANN. ch. 462 (Vernon Supp. 2004).

(c) The facility shall report unauthorized departures to the referring courts. Verbal reports shall be made immediately, with written confirmation within 24 hours.

(d) The program shall provide the judiciary with sufficient written information about its program design, treatment methods, admission processes, lengths of stay and continuum of care to assist the judiciary in committing appropriate clients to the facility.

(e) The program shall accept all chemical dependency clients brought to the facility under an emergency detention warrant, order of protective custody, or civil court order for treatment. A formal screening and assessment is not required before admission.

(f) A program that accepts emergency detentions shall adopt a written policy authorizing use of restraint and/or seclusion and implement procedures that conform with §148.706 of this title (relating to Restraint and Seclusion).

(g) The client record shall contain documentation of the conditions and/or behaviors that caused the client's entry into the civil court commitment process.

(h) The client record shall also contain copies of the legal documents required for civil court commitment as specified by TEX. HEALTH & SAFETY CODE ANN. ch. 462 (Vernon 2001 & Supp. 2004).

(i) The facility shall provide training for at least two designated staff to ensure they understand and comply with court commitment statutes, regulations, and procedures.

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 February 13, 2004.

TRD-200401042
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2004
Proposal publication date: August 29, 2003
For further information, please call: (512) 349-6668

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SUBCHAPTER N. THERAPEUTIC COMMUNITIES

40 TAC §148.1401

The new rule is adopted pursuant to the Texas Health and Safety Code, §461.012(a)(15) which provides the Commission authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission program and §461.0141 which provides the Commission authority to adopt rules regarding purchase of services.

The code affected by the adoption of this rule is Chapter 461 of the Health and Safety Code.

§148.1401. Therapeutic Communities.

(a) Programs that conduct adult residential treatment services using the therapeutic community (TC) methodology are required to comply with this section in addition to all other rules regarding health, safety and physical plant requirements in this chapter. This section of the rules does not apply to those programs serving adolescents. Adolescent programs shall follow the minimum service and staffing requirements in the other sections of this chapter.

(b) A TC methodology to treatment is distinguished from other models of care by the following:

(1) TCs are highly structured residential programs intended to treat criminal and antisocial behaviors occurring with substance abuse or dependence.

(2) This model views recovery from these disorders as a developmental learning process in which the social and psychological characteristics of the client must be changed to one of "right living" and the client must adopt appropriate morals and values promoted by the program as opposed to solely recovering from an illness.

(3) The model utilizes the community itself and TC specific group-type meetings as the primary modality of change. Confrontation amongst clients regarding their behaviors, a carefully orchestrated consequence-reward system and hierarchical privilege system are the primary approaches utilized instead of the counseling and therapy utilized in other models of treatment.

(4) Counselors act primarily as role models and rational authorities rather than as counselors or therapists.

(5) The model expects the client length of stay to be a minimum of 90 days in order to achieve positive outcomes.

(6) The program is divided into 3 phases: The Orientation Phase (Information Dissemination), Primary Treatment Phase (Personal Application), and Re-Entry/Relapse Prevention Phase (Social Application).

(c) Treatment programs using the TC methodology are required to comply with Subchapter H. of this title (relating to Screening and Assessment).

(d) If the comprehensive psychosocial assessment identifies a potential mental health problem, the program shall arrange for the client to obtain a mental health evaluation by a Qualified Mental Health Professional.

(1) If the mental health evaluation reflects the client currently has a diagnosis, or has been diagnosed during the last year with an Axis I diagnosis or post traumatic stress disorder, and/or moderate to severe mental retardation, the program shall obtain written authorization from a licensed psychiatrist or licensed physician experienced in treating chemical dependency, for the client to receive TC treatment services prior to providing TC program services.

(2) A QCC, with at least one year documented experience in treating individuals with mental illness, shall act as the primary counselor and confer at least monthly with the authorizing psychiatrist or physician.

(e) The admission authorization process shall follow the rules as outlined in §148.802 of this title (relating to Admission Authority and Consent to Treatment). In addition to the elements outlined in §148.802(b)(1)-(16), the consent to treatment form shall contain the information in (b)(1)-(6), above. The client shall voluntarily agree to participate in the TC program.

(1) If the client is pregnant at the time of admission, the program shall obtain written authorization from a licensed physician for the client to receive TC treatment services prior to providing TC program services. If the pregnancy is determined after admission, the program shall obtain written authorization from a licensed physician for the client to receive TC treatment services.

(2) A physician or physician assistant shall monitor the client's response to treatment at least monthly or more often as needed.

(f) The TC Program shall ensure that all staff receive training in the TC methodology. All staff members shall receive 16 hours of training in TC theory, TC methods, and TC intervention techniques. This training is in addition to the applicable training requirements outlined in §148.603 of this title (relating to Training), and must take place within the first ninety days of employment.

(g) Intensive residential TC programs shall provide a minimum of 20 hours of services per week, which shall include:

(1) Six hours of counseling (which shall include two hours of individual counseling per month);

(2) Six hours of additional counseling, CD education, and life skills training; and

(3) Eight hours of TC groups, such as cognitive restructuring, AM/PM development, and encounter-confrontation groups. A counselor shall be present to supervise or monitor the activity and maintain structure in the TC groups.

(h) In addition to the 20 hours outlined above, the program shall provide ten additional hours of peer driven activities, such as community meetings, house meetings, peer support, recreation, seminars, and self help groups.

(i) Attendance shall be documented for peer driven activities. Documentation shall contain date, duration and type of activity. There is no size limitation or staffing requirement for peer driven activities.

(j) Ten hours of the above services shall be in provided in the evenings and on weekends.

(k) Adult Supportive TC Residential Programs shall provide at least six hours of treatment services per week for each client, comprised of at least:

(1) two hours of chemical dependency counseling (one hour per month of which shall be individual counseling);

(2) two hours of additional counseling, chemical dependency education, and life skills training; and

(3) two hours of TC groups such as cognitive restructuring, AM/PM development, and encounter- confrontation groups. A counselor shall be present to supervise or monitor the activity and maintain structure in the TC groups.

(l) Group counseling size is limited to 16 clients. Chemical dependency education and life skills classes are limited to 35 clients.

(m) The TC program shall set limits on counselor caseload size that ensures effective, individualized treatment. The TC program shall justify the caseload size in writing based on the program design, characteristics and needs of the population served, and the minimum client service hours as indicated in this section.

(n) In intensive residential TC programs the direct care staff to client ratio shall be 1:16 while awake and 1:32 during sleeping hours.

(o) In supportive residential TC programs the direct care staff to client ratio shall be 1:20 while awake and 1:50 during sleeping hours.

(p) In addition to the other requirements of this subchapter, the TC program's policy and procedure manual shall contain the following:

(1) written program description explaining how the therapeutic community functions;

(2) program structure, including rules, methods, and service schedule;

(3) overview of the TC treatment process;

(4) a description of consequences and rewards system; and

(5) policy stating that interventions are not used as punishment and that access to medical and psychiatric care will not be denied.

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 February 13, 2004.

TRD-200401041
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2004
Proposal publication date: August 29, 2003
For further information, please call: (512) 349-6668

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SUBCHAPTER O. FAITH BASED CHEMICAL DEPENDENCY PROGRAMS

40 TAC §§148.1501 - 148.1506

The new rules are adopted pursuant to the Texas Health and Safety Code, §461.012(a)(15) which provides the Commission authority to adopt rules governing its functions, including rules that prescribe the policies and procedures it follows in administering any Commission program and §461.0141 which provides the Commission authority to adopt rules regarding purchase of services.

The code affected by the adoption of these rules is Chapter 461 of the Health and Safety Code.

§148.1501. Definitions.

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

(1) Medical Care--Diagnosis or treatment of a physical or mental disorder.

(2) Medical Detoxification Services--Chemical dependency treatment designed to systematically reduce the amount of alcohol and other toxic chemicals in a client's body, manage withdrawal symptoms, and encourage the client to seek ongoing treatment for chemical dependency.

(3) Medical Withdrawal Service--See Medical Detoxification Services.

(4) Program--For the purposes of this subchapter, program means a system of care delivered to chemically dependent individuals.

(5) Religious Organization--A church, synagogue, mosque, or other religious institution:

(A) the purpose of which is the propagation of religious beliefs; and

(B) that is exempt from Federal income tax under Section 501(a) of the Internal Revenue Code of 1986, 26 U.S.C. §501(a), by being listed as an exempt organization under §501(c) of that code, 26 U.S.C. §501(c).

§148.1502. Exemption for Faith-Based Programs.

(a) A chemical dependency treatment program is exempt from licensure under TEX. HEALTH & SAFETY CODE ANN. §§464.051-.061 (Vernon 2001 & Supp. 2004) if it:

(1) is conducted by a religious organization;

(2) is exclusively religious, spiritual, or ecclesiastical in nature;

(3) does not treat minors; and

(4) is registered under this chapter.

(b) An exempt program registered under this section may not provide medical care, medical detoxification, or medical withdrawal services.

§148.1503. Registration for Exempt Faith-Based Programs.

(a) To register its exemption, the religious organization shall complete and submit these documents to the Commission:

(1) a registration application;

(2) a copy of the determination letter from the Internal Revenue Service documenting the organization's tax exempt status under the Internal Revenue Code (26 U.S.C. §501(c)(3); and

(3) a copy of the organization's articles of incorporation documenting that the primary purpose of the organization is the propagation of religious beliefs or a letter from the State of Texas Comptroller's Office documenting the organization's religious tax exemption status.

(b) The Commission shall issue a letter documenting the organization's registered exemption if the application packet satisfies the requirements in this section.

(c) An exempt organization registered under this section shall notify the Commission in writing within ten working days of any change affecting the program's exemption.

(d) Incomplete applications shall be returned to the applicant.

§148.1504. Admission to Faith-Based Programs.

(a) An exempt program registered under this section may not admit an individual unless the individual signs the admission statement at the time of admission.

(b) The program shall keep the original signed admission statement and give a copy of it to the individual admitted.

§148.1505. Advertisement.

(a) An exempt program registered under this section must include a notice in any advertisements or literature that promotes or describes the program or its chemical dependency treatment services.

(b) This statement shall reflect the following: The treatment and recovery services at (name of program) are exclusively religious in nature and are not subject to licensure or regulation by the Texas Commission on Alcohol and Drug Abuse. This program offers only non-medical treatment and recovery methods, such as prayer, moral guidance, spiritual counseling, and scriptural study.

§148.1506. Revocation of Exemption.

(a) The Commission may revoke the exemption after notice and hearing if:

(1) the organization conducting the program fails to inform the Commission of any material changes in the program's registration information in a timely manner;

(2) any program advertisement or literature fails to include the statements required under this section; or

(3) the organization violates TEX. HEALTH & SAFETY CODE ANN. §§464.051-.061 (Vernon 2001 & Supp. 2004) or any Commission rule adopted under the subchapter.

(b) The Commission shall notify the organization in writing of its intent to revoke the exemption and offer the organization the opportunity for an informal hearing.

(c) The organization shall have 15 calendar days from the postmark date of the notice to submit a written request for an informal hearing.

(d) If the organization does not request an informal hearing, the revocation shall go into effect 30 calendar days from the postmark date of the notice of intent.

(e) If the organization requests an informal hearing, the Commission shall schedule the informal hearing within 15 calendar days of the postmark date of the request.

(f) At the hearing, the organization shall have opportunity to show compliance.

(g) If the organization does not show compliance, the Commission's governing board shall consider the information received at

the hearing and determine whether or not to revoke the organization's exemption.

(h) The Commission shall send the organization written notification of its decision within 30 calendar days of the date of the hearing.

(i) The revocation shall take effect 30 calendar days from the postmark date of the written notice of decision.

(j) An organization whose exemption has been revoked may apply to reinstate the exemption one year after the effective date of the revocation.

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 February 13, 2004.

TRD-200401043
Thomas F. Best
General Counsel
Texas Commission on Alcohol and Drug Abuse
Effective date: September 1, 2004
Proposal publication date: August 29, 2003
For further information, please call: (512) 349-6668

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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

Credit Union Department

Title 7, Part 6

The Texas Credit Union Commission will review and consider Chapter 91, §§91.101 (Definitions), 91.201 (Incorporation Procedures), 91.301 (Field of Membership), and 91.302 (Election Ballots) of Title 7, Part 6 of the Texas Administrative Code in preparation for the Credit Union Commission's Rule Review as required by Section 2001.39, Government Code.

Comments or questions regarding these rules may be submitted in writing to Kerri T. Galvin, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699, or electronically to Kerri.Galvin@tcud.state.tx.us.

TRD-200401081
Harold E. Feeney
Commissioner
Credit Union Department
Filed: February 17, 2004

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The Texas Credit Union Commission will review and consider Chapter 97, §97.205 (Historically Underutilized Businesses) of Title 7, Part 6 of the Texas Administrative Code in preparation for the Credit Union Commission's Rule Review as required by Section 2001.39, Government Code.

Comments or questions regarding these rules may be submitted in writing to Kerri T. Galvin, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699, or electronically to Kerri.Galvin@tcud.state.tx.us.

TRD-200401082
Harold E. Feeney
Commissioner
Credit Union Department
Filed: February 17, 2004

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Department of Information Resources

Title 1, Part 10

The Department of Information Resources (DIR) files this notice of intention to review and consider for readoption, revision or repeal Title 1, Texas Administrative Code, Chapter 201, § 201.11, "Procedure for Adoption of Information Resources Standards and Policies." The review and consideration of the rule are conducted in accordance with Texas Government Code §2001.039. The review will include, at a minimum, an assessment by DIR of whether the reasons the rule was initially adopted continue to exist and whether the rule should be readopted.

Any questions or written comments pertaining to this rule review may be submitted to Renee Mauzy, General Counsel, via mail at P. O. Box 13564, Austin, Texas 78711, via facsimile transmission at (512) 475-4759 or via electronic mail at renee.mauzy@dir.state.tx.us. The deadline for comments is thirty (30) days after publication of this notice in the *Texas Register*. Any proposed changes to these rules as a result of the rule review will be published in the Proposed Rule section of the Texas Register. The proposed rule changes will be open for public comment prior to final adoption or repeal of the rule by DIR in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

TRD-200401080
Renee Mauzy
General Counsel
Department of Information Resources
Filed: February 17, 2004

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Texas State Board of Medical Examiners

Title 22, Part 9

The Texas State Board of Medical Examiners proposes to review Chapter 163, (§§163.1-163.13), concerning Licensure, pursuant to the Texas Government Code, §2001.039.

The Texas State Board of Medical Examiners is contemporaneously proposing amendments to §§163.1-163.7, 163.11 and 163.12, elsewhere in this issue of the *Texas Register*.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Comments on the proposed review may be submitted to Pat Wood, P.O. Box 2018, MC-901, Austin, Texas, 78768-2018.

TRD-200401007
Donald W. Patrick, MD, JD
Executive Director
Texas State Board of Medical Examiners
Filed: February 13, 2004

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Texas Water Development Board

Title 31, Part 10

The Texas Water Development Board (board) files this notice of intent to review 31 TAC, Part 10, Chapter 370, Colonia Plumbing Loan Program, in accordance with the Texas Government Code, §2001.039. The board finds that the reason for adopting the chapter continues to exist. The board concurrently proposes an amendment to §370.26(a) to include the phrase "and is enforcing" after "adopted" in order to insure that applicants are informed that the requirement to adopt the model subdivision rules includes the requirement to enforce the model subdivision rules. The board also proposes amendments to §370.26(b) and §370.41(11) to refer to the Texas Commission on Environmental Quality rather than the Texas Natural Resource Conservation Commission because it has changed its name.

As required by §2001.039 of the Texas Government Code, the board will accept comments and make a final assessment regarding whether the reason for adopting each of the rules in 31 TAC Chapter 370 continues to exist. The comment period will last 30 days beginning with the publication of this notice of intention to review.

Comments or questions regarding this rule review may be submitted to Jonathan Steinberg, Deputy Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, by e-mail to jonathan.steinberg@twdb.state.tx.us or by fax @ 512/463-5580.

TRD-200401119
Jonathan Steinberg
Deputy Counsel
Texas Water Development Board
Filed: February 18, 2004

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Adopted Rule Reviews

Texas Commission on Environmental Quality

Title 30, Part 1

The Texas Commission on Environmental Quality (commission) adopts the rules review and readopts Chapter 14, Grants, without changes, 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. Any updates, consistency issues, or other changes, if needed, will be addressed in a separate rulemaking. The notice of intention to review was published in the December 5, 2003 issue of the *Texas Register* (28 TexReg 10978).

CHAPTER SUMMARY

Chapter 14 provides information and requirements related to grants. Chapter 14 includes: definitions specific to this chapter; the authority for the agency to award grants; the applicability or purpose that a grant may or may not be awarded; the types of funding that the agency may use for awarding grants; the means for determining recipient eligibility requirements and recipient selection criteria; guidelines for solicitations using requests for proposals; circumstances when a grant may be made by direct award; notice requirements; payment procedures; the means for determining eligible activities and delegating authority; and the effect of the chapter on prior grants.

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 14 continue to exist. The rules are needed to implement Texas Water Code, §5.124, which authorizes the agency to award grants for any purpose regarding resource conservation or environmental protection.

PUBLIC COMMENT

The comment period closed January 5, 2004. No comments were received.

TRD-200401087
Kevin McCalla
Director, General Law Division
Texas Commission on Environmental Quality
Filed: February 17, 2004

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The Texas Commission on Environmental Quality (commission) adopts the rules review and readopts Chapter 295, Water Rights, Procedural, without changes, 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. Any updates, consistency issues, or other changes, if needed, will be addressed in a separate rulemaking. The notice of intention to review was published in the September 26, 2003 issue of the *Texas Register* (28 TexReg 8387).

CHAPTER SUMMARY

Chapter 295, Subchapter A, Requirements of Water Rights Applications General Provisions, contains general requirements on the contents of an application. In addition, the subchapter contains requirements for applications regarding: the storage of appropriated surface water in aquifers; agriculture use authorizations; dams and reservoirs; permits under Texas Water Code, §11.143; temporary permits; amendments to water use permits and extensions of time; diversion for domestic or livestock use from unsponsored and storage-limited projects; and an emergency water use permit. Also included are requirements for filing water supply contracts and amendments; requirements for applications to use bed and banks; and specifications for maps, plats, and drawings accompanying an application for a water use permit. Subchapter B, Water Use Permit Fees, contains the requirements for water use permit fees. Subchapter C, Notice Requirements for Water Right Applications, contains notice requirements for water use permit applications. Subchapter D, Public Hearing, contains the requirements for a public hearing. Subchapter E, Special Actions of the Commission, contains requirements on special actions of the commission, and Subchapter F, Miscellaneous, contains requirements on filing of instruments and reports.

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 295 continue to exist. The rules are necessary to provide details of the procedural requirements, including filing and fee requirements, to implement Texas Water Code, Chapter 11. The rules also include descriptions of the public notices required for each application, information related to public hearings, and a definition of special actions that may be taken by the commission related to specific types of water rights. The rules are necessary for the regulation of state waters by the commission. Chapter 295 was adopted in accordance with Texas Water Code, Chapter 11, Water Rights.

PUBLIC COMMENT

The public comment period closed on October 27, 2003. No comments were received.

TRD-200401088

Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: February 17, 2004

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Texas State Board of Pharmacy

Title 22, Part 15

The Texas State Board of Pharmacy adopts the review of Chapter 291, Subchapter B, §§291.31 - 291.34 and §291.36, concerning Community Pharmacy (Class A), pursuant to the Texas Government Code §2001.039, regarding Agency Review of Existing Rules. The proposed review was published in the December 26, 2003, issue of the *Texas Register* (28 TexReg 11630).

In conjunction with this review, the agency adopts amendments to Chapter 291, Subchapter B, §§291.31 - 291.34 and §291.36, published elsewhere in this issue of the *Texas Register*. The agency finds the reason for adopting the rules continue to exist.

TRD-200401068
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: February 13, 2004

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Texas Water Development Board

Title 31, Part 10

Pursuant to the notice of intent to review published in the November 28, 2003 issue of the *Texas Register*, (28 TexReg 10782), the Texas Water Development Board (the board) has reviewed and considered for readoption 31 TAC, Part 10, Chapter 367, Agricultural Water Conservation Program, in accordance with the Texas Government Code, §2001.039.

The board considered, among other things, whether the reasons for adoption of these rules continue to exist. No comments were received on the proposed rule review.

As a result of the board's review, the board determined that the rules are still necessary and readopts the rules because they govern the board's program of financial assistance for agricultural water conservation as established by Texas Water Code, Chapters 15 and 17. As a result of the rule review, the board adopts the repeal of 31 TAC Chapter 367, Subchapter A, Grants for Equipment Purchases, §§367.1 - 367.3 and §§367.21 - 367.30, Subchapter B, Agricultural Water Conservation Loan Program, §§367.40 - 367.51, Subchapter C, Grants to State Agencies, §§367.71 - 367.77, and adopts new §§367.1 - 367.14, concerning Agricultural Water Conservation Program. This completes the board's review of 31 TAC Chapter 367.

TRD-200401116
Jonathan Steinberg
Deputy Counsel
Texas Water Development Board
Filed: February 18, 2004

♦ ♦ ♦

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.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 10 TAC §80.181(1)

Consumer Disclosure Statement

Esta forma está disponible en Español a petición del vendedor o al llamar al 1-800-500-7074

"When buying a manufactured home, there are a number of important considerations, including price, quality of construction, features, floor plan, and financing alternatives. The United States Department of Housing and Urban Development (HUD) helps protect consumers through regulation and enforcement of HUD design and construction standards for manufactured homes. Manufactured homes that meet HUD standards are known as 'HUD-code manufactured homes.'

The Texas Department of Housing and Community Affairs, regulates Texas manufacturers, retailers, brokers, salespersons, installers, and rebuilders of manufactured homes.

If you plan to place a manufactured home on land that you own or will buy, you should consider items such as:

"ZONING AND RESTRICTIVE COVENANTS" Municipalities or subdivisions may restrict placement of manufactured homes on certain lots, may prohibit the placement of homes within a certain distance from property lines, may require that homes be a certain size, and may impose certain construction requirements. You may need to obtain building permits and homeowner association approval before you place a manufactured home on a certain lot. Contact the local municipality, county, and subdivision manager to find out if you can place the manufactured home of your choice on a certain lot.

"WATER" Be sure that your lot has access to water. If you must drill a well contact several driller's for bids. If water is available through a municipality, utility district, water district, or cooperative, you should inquire about the rates you will have to pay and the costs necessary to join the water system.

"SEWER" If your lot is not serviced by a municipal sewer system or utility district, you will have to install an on-site sewer facility (commonly known as a septic system). There are a number of concerns or restrictions that will determine if your lot is adequate to support an on-site sewer facility. Check with the local county or a licensed private installer to determine the requirements that apply to your lot and the cost to install such a system.

"HOMEOWNER ASSOCIATION FEES" Many subdivisions have mandatory assessments and fees that lot owners must pay. Check with the manager of the subdivision in which your lot is located to determine if any fees apply to your lot.

"TAXES" Your home will be appraised and subject to *ad valorem taxes* as are other single-family residential structures. These taxes MUST be escrowed with your monthly payment, except that your lender is not obligated to impose an escrow requirement in a real property transaction involving a manufactured home if the lender is a federally insured financial institution and does not otherwise require the escrow of taxes, insurance premiums, fees, or other charges in

connection with loans secured by residential real property. On closing, you will be notified of all provisions pertaining to federal truth in lending disclosures.

"INSURANCE" Your lender may require you to obtain insurance that meets lender requirements and protects your investment. You should request quotes from the agent of your choice to obtain the insurance.

"TYPES OF MORTGAGES AVAILABLE" The acquisition of a manufactured home may be financed by a real estate mortgage or a chattel mortgage. A real estate mortgage may have a lower interest rate than a chattel mortgage.

"RIGHT OF RESCISSION" If you acquire a manufactured home, by purchase, exchange, or lease-purchase, you may, not later than the THIRD DAY after the date the applicable contract is signed, rescind the contract WITHOUT PENALTY OR CHARGE.

This **Disclosure** was provided by the retailer and/or lender shown below on this date and it was provided to me or us before I or we completed a credit application or before signing a contract to purchase a manufactured home.

Retailer Name / License # or Lender Date	Consumer Date
Street Address	Consumer Date
City County State Zip	Street Address
	City County State Zip

The disclosure must be given in writing in at least 12 point type. It may not be attached to any other disclosure or document or included in any other disclosure or document. The consumer must sign and date a copy of the disclosure to acknowledge that it was provided.

Figure: 10 TAC §80.181(2)

Declaración de Divulgaciones para el Consumidor

Al comprar una vivienda prefabricada, hay varias consideraciones importantes, incluyendo el precio, la calidad de construcción, las características, el plano de piso, y las alternativas para financiamiento. El Departamento de Vivienda y Desarrollo Urbano de EE.UU. (HUD) ayuda a proteger los consumidores a través de la regulación y ejecución de normas de HUD para el diseño y la construcción de viviendas prefabricadas. Las viviendas prefabricadas construidas de acuerdo con las normas de HUD se conocen como "HUD-code manufactured homes".

El Departamento de Viviendas y Asuntos Comunitarios reglamenta los fabricantes, minoristas, agentes, vendedores, instaladores, y reconstructores de viviendas prefabricadas en Texas.

Si usted desea colocar una vivienda prefabricada en terreno que le pertenece o que comprará, usted debe considerar detalles como los siguientes:

"RESTRICCIONES Y CONVENIOS RESTRICTIVOS" Municipalidades o subdivisiones pueden restringir la colocación de viviendas prefabricadas en ciertos lotes, restringir su colocación a cierta distancia de linderos de propiedad, requerir que sean de cierto tamaño, y establecer ciertos requisitos para su tamaño y construcción. Puede que usted tenga que obtener permisos de construcción y aprobación de una asociación de propietarios antes de colocar una vivienda prefabricada en un lote en particular. Comuníquese con el gerente de la municipalidad, el condado, y la subdivisión local para determinar si la vivienda prefabricada que usted prefiere se puede colocar en un lote en particular.

"AGUA" Asegurase de que su lote tiene acceso al agua. Si tiene que perforar un pozo, comuníquese con varios perforadores para ofertas. Si agua está disponible a través de una municipalidad, un distrito de servicio público, un distrito de agua, o una cooperativa, usted debe preguntar sobre las tarifas que tendrá que pagar y los costos de ingresar con el sistema de agua.

"ALCANTARILLA" Si su lote no es servido por un sistema alcantarilla municipal o un distrito de servicio público, usted tendrá que instalar un sistema para aguas cloacales (conocido como una fosa séptica). Hay varias consideraciones o restricciones que determinarán si su lote es adecuado para soportar una fosa séptica. Para determinar los requisitos que se aplican a su lote y el costo de instalar tal sistema, comuníquese con el condado o un instalador privado que tiene licencia.

"HONORARIOS PARA UNA ASOSIACION DE DUENOS" Muchas subdivisiones tienen tasas y cuotas obligatorias que los propietarios de lotes tienen que pagar. Comuníquese con el gerente de la subdivisión donde está localizado su lote para determinar si hay honorarios asociados con su lote.

"IMPUESTOS" Su vivienda será evaluada y sujeto a impuestos "*al valórem*" igual que otras estructuras residenciales para una sola familia. Estos impuestos se tienen que poner en plica con su pago mensual las primas para aseguranza, honorarios, u otros cobros en conexión con los préstamos asegurados por los bienes raíces residenciales, excepto que su prestamista no está obligado a imponer un requisito de plica en una transacción de bienes raíces que incluyen una

vivienda prefabricada si el prestamista es una institución financiera asegurada por el gobierno federal y de otros modos no requiere la plica de los impuestos. En el cierre, le notificarán de todas las divulgaciones requeridas por el gobierno federal para préstamos honestos.

"ASEGURANZA" Su prestamista puede requerir que usted obtenga aseguranza que satisface los requisitos del prestamista y que protege su inversión. Usted debe de pedir cotización del agente que usted prefiere para obtener aseguranza.

"TIPOS DE HIPOTECAS DISPONIBLES" La compra de una vivienda prefabricada se puede financiar con una hipoteca para bienes raíces o con una hipoteca prendaria. Una hipoteca para bienes raíces puede tener una taza de interés mas baja que una hipoteca prendaria.

"DERECHO A RESCINDIR" Si usted adquiere una vivienda prefabricada, por medio de una compra, un intercambio, o un contrato para la compra tras arrendamiento, usted puede, hasta el TERCER DIA después de la fecha en que se firma el contrato pertinente, rescindir el contrato SIN PENA NI COBRO.

Esta **Divulgación** fue proveída por el minorista y/o el prestamista indicado abajo en esta fecha y me(nos) fue proveído antes de que completara(mos) una aplicación para crédito o antes de firmar un contrato para la compra de una vivienda prefabricada.

Nombre y # de licencia del minorista o prestamista **Fecha**

Dirección

Ciudad **Condado** **Estado** **Código Postal**

Consumidor **Fecha**

Consumidor **Fecha**

Dirección

Ciudad **Condado** **Estado** **Código Postal**

Antes de completar una aplicación para crédito, el minorista o su agente tiene que dar al consumidor esta declaración en texto tipográfico de por lo menos tamaño 12, y no puede estar adjunto con, ni incluido en, ninguna otra divulgación u otro documento.

Figure: 10 TAC §80.182(a)(1)

CHOOSING A LOAN TO BUY A MANUFACTURED HOME

Esta forma está disponible en Español a petición del vendedor o al llamar al 1-800-500-7074

CONSUMER – Before you agree to any loan to buy a manufactured home, you must be given these – and other – disclosures. They are intended to help you make the best possible choice on this major purchase. You will also be required to sign papers to confirm that you actually received these disclosures. **THESE ARE IMPORTANT. The costs and obligations of home ownership are more than just monthly payments.**

If you want to obtain a loan to buy your manufactured home, you will need to apply for the loan and "qualify" or be approved. There are two basic types of loans to buy manufactured homes: mortgage loans and consumer loans. Mortgage loans, typically used for "site built" homes, use both the land and the home as security for the loan. Consumer loans are usually secured only by what is being purchased, in this case the home, and they do not have real estate as security. If you fail to make your required loan payments, you may lose your collateral.

How do you compare mortgage loans and consumer loans?

The main factors that will affect the amount of each monthly payment and the total of the payments that you will make over the life of the loan are the interest rate, the "term" (how long you are given to repay), and the amount that you borrow. In the past, mortgage loans have had lower interest rates than consumer loans, but you should ask about the interest rates for which YOU will qualify on different types of loans. There are things that lenders can do with the loan term to change the monthly payments. For example, they may calculate the payments based on a very long term but actually have a shorter term, meaning that when the last payment falls due it will be a large payment (a balloon payment). When you look at the options available, you should consider that the longer the term, the longer it will take to pay off the loan; but longer terms will also result in lower monthly payments. It is a trade-off between managing your monthly payments and owning your home debt-free sooner.

Most loans have other costs, and they may affect the amount you will need to come up with "out of pocket" or the amount that you will need to borrow. Some of these costs are "lender" costs that are incurred on almost all loans, such as underwriting and processing fees and filing fees. Some of these costs involve third party services that are obtained, such as surveys, appraisals, and title insurance policies. Typically these third party costs are associated with mortgage loans. ASK WHAT COSTS ARE – OR MAY BE – FINANCED AS PART OF THE LOAN AMOUNT.

Regardless of which type of loan you decide on, you will need to complete an application. Typically a loan application provides the lender with information about your employment and income and your financial condition (the things you own and the obligations you owe). Mortgage loans usually take longer to review and approve because these things must be verified and documented in greater detail than on a consumer loan. Also, obtaining third party services, such as title insurance, surveys, and appraisals, may take additional time.

What if I can't make my loan payments?

Regardless of whether you have a mortgage loan or a consumer loan, you will be asked to give your lender the right to protect itself by making the entire loan balance due and by taking control of the security so that they can sell it and apply the money from the sale to the unpaid loan balance. On a consumer loan, a private foreclosure is usually done. The lender finds a buyer for the home and sells it to them. The lender can usually repossess the home as long as they do not cause a breach of the peace. The lender may sell the home for whatever it is worth at the time and apply the proceeds of the sale first to the costs of repossession, and any remaining amounts are applied to your unpaid loan balance. If the proceeds of the sale are not enough to pay off what is owed on the home, the finance company may sue you to collect the "deficiency" which is the unpaid balance owed on your loan, including any unpaid interest and late charges.

On a mortgage loan, there is a process for posting notice and holding a public auction of the home. A lender on a mortgage loan cannot evict you. The lender will sell your home and the property at a foreclosure sale, and the new owners will have to go to court to have you evicted. You can lose the manufactured home and the property it is sitting on if you cannot make the payments on a mortgage loan. Any problems with your loan, including late payments and any foreclosures, can be reported and go on your credit record.

ASK QUESTIONS BEFORE YOU DECIDE ON A PARTICULAR TYPE OF LOAN. Understand the loan product you choose.

If you apply for a mortgage loan, the Real Estate Settlement Procedures Act requires you to be given a Good Faith Estimate that will describe your estimated closing costs. If you apply for a consumer loan, the section below must be completed to describe your estimated closing costs on a consumer loan:

Description of cost	*Estimated amount*	*Indicate if the cost will be included in the amount of the loan or if it must be paid "up front" or at closing*

If you apply for a consumer loan, your estimated MONTHLY payments would be as follows:

Principal and interest on an initial loan amount of $_____	**$_____**
1/12 of estimated annual premium for required insurance	**$_____**
1/12 of estimated property taxes on the manufactured home	**$_____**

This estimate is based on the following:

[ ] Installation in _____ County at the following specified location and information obtained from that county's tax assessor as to the current rates applicable at that location.

Location:

[ ] You have told us that the home will be installed in _____County, but you have not yet determined where in the county it will be installed. Therefore, this disclosure is based on the actual information obtained from that county's tax assessor as to current rates that are applicable throughout the county. If the home is ultimately located on a site subject to one or more additional tax entities that do not extend throughout the county, your actual taxes may be higher.

[ ] You have told us that you do not know in which county the home will be installed. Therefore, this disclosure is based on the actual information obtained from the county tax assessor for _____ County, being the county where this dealership is located, as to current rates that are applicable throughout this county. If the home is ultimately located in a different county and or in this county but on a site subject to one or more additional tax entities that do not extend throughout the county, your actual taxes may be higher.

NOTE: YOUR ACTUAL PROPERTY TAXES MAY DIFFER. CONTACT THE TAX ASSESSOR IN THE COUNTY WHERE YOUR HOME WILL BE LOCATED TO OBTAIN ADDITIONAL INFORMATION.

CONSUMER:

IF YOUR LENDER DOES NOT ESCROW, YOU WILL STILL BE RESPONSIBLE FOR PROPERTY TAXES.

Other estimated costs (describe)

$____

$____

TOTAL ESTIMATED MONTHLY COSTS	**$_____**

HOME OWNERSHIP WILL INVOLVE OTHER COSTS, SUCH AS REPAIRS, MAINTENANCE, AND UTILITIES. ALSO, THERE MAY BE THINGS YOU WILL WANT THAT MAY NOT BE INCLUDED IN THE PRICE OF THE HOME.

[ ] IF THIS BOX IS CHECKED, the person who is selling you the manufactured home or someone affiliated with them will also be involved in making or placing the loan to buy the home and will be receiving compensation, such as a fee, commission, or premium, for providing this service. If all they are doing is originating the loan and selling it at no profit and they are not receiving any additional compensation, this box does not need to be checked. If it is checked, here is an ESTIMATE of their compensation:

Nature of compensation	**Estimated amount or range of compensation**
	$_____

At this time the following ADDITIONAL DISCLOSURES are being provided and are attached (list):

Each of us, by signing below, agree that we were given this disclosure on the date shown and it had been fully completed at the time it was given to us.

Name:_____ **Name:_____**

Signature:_____ **Signature:_____**

Date:_____ **Date:_____**

By signing below, I confirm that I am the person licensed under the Texas Manufactured Housing Standards Act who provided this disclosure (including any attachments) to the consumers named above.

Name:_____

Signature:_____

Date:_____

License number:_____

Figure: 10 TAC §80.182(a)(2)

ESCOGIENDO UN PRESTAMO PARA LA COMPRA DE UNA VIVIENDA PREFABRICADA

CONSUMIDOR – Antes de aceptar un préstamo para una vivienda prefabricada, se requiere que sea presentado con estas - y otras - advertencias. Sirven para ayudarle hacer la mejor decisión posible en esta compra importante. También se requiere que usted firme documentos confirmando que recibió estas advertencias. **ESTAS ADVERTENCIAS SON IMPORTANTES. Los costos y las obligaciones de ser dueño de un hogar son más que simplemente hacer los pagos mensuales.**

Si quiere obtener un préstamo para su vivienda prefabricada, usted tendrá que hacer aplicación para el préstamo y "calificar" o ser aprobado. Hay dos tipos básicos de préstamos para una vivienda prefabricada: los préstamos hipotecarios y los préstamos de consumidor. Los préstamos hipotecarios, típicamente usados para viviendas construidas en un terreno, usan el terreno y la vivienda como seguridad para el préstamo. Usualmente, los préstamos de consumidor se aseguran sólo con lo que se está comprando, en este caso la vivienda prefabricada, y no mantienen el terreno como seguridad.

Si usted no logra hacer los pagos, puede perder su vivienda.

¿Cómo se comparan los préstamos hipotecarios a los préstamos de consumidor?

Los factores principales que afectarán la cantidad de cada pago mensual y el total de los pagos que hará durante la duración del préstamo son la tasa de interés, el plazo (cuanto tiempo se le dará para pagar), y la cantidad que tomará prestado. En el pasado, los préstamos hipotecarios han llevado tasas de interés más bajos que los préstamos de consumidor. Usted debe preguntar sobre las tasas de interés de los diferentes tipos de préstamos por las que USTED puede calificar. Hay varias maneras en que los prestamistas, utilizando el plazo del préstamo, pueden cambiar los pagos mensuales. Por ejemplo, pueden calcular los pagos de manera que se basan en un plazo muy largo pero en realidad tiene un plazo más corto. Entonces cuando cumpla el último pago será una cantidad grande (un "balloon payment" o "pago aumentado"). Al considerar las alternativas disponibles, debe tomar en cuenta que mientras más largo sea el plazo, más tiempo le tomará pagar el préstamo; pero plazos más largos también resultarán en pagos mensuales más bajos. Es un intercambio entre administrar sus pagos mensuales y ser dueño de su hogar sin deuda más pronto.

La mayoría de los préstamos tienen otros costos. Estos pueden afectar la cantidad que tendrá que pagar de su bolsillo o la cantidad que tendrá que tomar prestado. Algunos de estos costos son costos del prestamista que se incurren en casi todos los préstamos, como cobros para endorsamiento, procesamiento, y registramiento. Algunos de estos costos son para servicios que se obtienen de otros individuos, como levantamiento topográfico, tasación, y póliza de seguros de título. Típicamente, estos costos están asociados con los préstamos hipotecarios. PREGUNTE CUALES COSTOS SON - O PUEDEN SER - FINANCIADOS COMO PARTE DE LA CANTIDAD DEL PRESTAMO.

Sin importar que tipo de préstamo elija, usted tendrá que llenar una aplicación. Típicamente, la aplicación para un préstamo le provee al prestamista información sobre su empleo e ingresos y su condición financiera (sus propiedades y las deudas que tiene). Usualmente, los préstamos hipotecarios toman más tiempo para revisar y aprobar porque estos datos se tienen que verificar y documentar en mayor detalle que para un préstamo de consumidor. También el obtener servicios de otros individuos, como la póliza de seguros de título, levantamiento topográfico, y tasación, pueden tomar tiempo adicional.

¿Qué sucede si no puedo hacer los pagos?

Sin considerar si tienes un préstamo hipotecario o un préstamo de consumidor, se le pedirá dar a su prestamista el derecho a protegerse haciendo que la cantidad total aún sin pagar sea vencida y tomando control de la seguridad para que pueda vender la propiedad y asignar el dinero de la venta al saldo del préstamo. Usualmente, para un préstamo de consumidor se realiza una ejecución hipotecaria privada. El prestamista consigue un comprador para la vivienda y la vende. Usualmente, el prestamista puede recobrar posesión de la vivienda mientras no cause una violación de la paz. El prestamista puede vender la vivienda por el valor actual y asignar las ganancias de la venta primero a los costos de recobrar posesión, y el resto se asigna al saldo del préstamo. Si las ganancias no son suficientes para pagar la deuda entera, la compañía financiera puede entablar acción judicial para colectar la "deficiencia" que es el saldo del préstamo, incluyendo intereses e intereses moratorios que quedan sin pagar.

Para un préstamo hipotecario, hay un proceso para hacer noticia pública y tener una subasta pública para la vivienda. El prestamista de un préstamo hipotecario no lo puede desalojar. El prestamista venderá la propiedad, y los nuevos dueños tendrán que ir al corte para desalojarlo. Usted puede perder la vivienda prefabricada y el terreno en que está colocada si no puede hacer los pagos de su préstamo hipotecario. Cualquier problema con su préstamo, incluyendo pagos atrasados y ejecución hipotecaria, puede ser reportado y añadido a su reporte de crédito.

HAGA PREGUNTAS ANTES DE ESCOGER UN TIPO DE PRESTAMO EN PARTICULAR. Entienda el préstamo que usted escoge.

Si usted aplica para un préstamo hipotecario, el "Real Estate Settlement Procedures Act" (la ley de Procedimientos en el Cierre de Operaciones de Bienes Raíces) requiere que se le de una copia de una Estimación de Buena Fe que describe la cantidad estimada de los costos de cierre. Si usted aplica para un préstamo de consumidor, la sección abajo se tiene que llenar para describir sus costos de cierre estimados:

Descripción del costo	*Cantidad estimada*	*Indique si el costo será incluido en la cantidad del préstamo o si será un costo inicial o un costo de cierre.*

Si usted aplica para un préstamo de consumidor, la cantidad estimada de su pago mensual sería lo siguiente:

Capital e interés en una cantidad inicial de un préstamo de $_____** **$____

1/12 de la prima anual estimada para aseguranza **$____**

1/12 de los impuestos de propiedad estimados para la vivienda prefabricada **$____**

Este estimado se basa en lo siguiente:

[ ] Instalación en el condado de _____ en la siguiente localización especificada e información obtenida del asesor de impuestos del condado sobre la tasa de interés actual aplicable en esa localización.

Localización:

[ ] Ha dicho que la vivienda se instalará en el condado de _____, pero no ha determinado donde se instalará en el condado. Por lo tanto, esta divulgación se basa en la información actual obtenida del asesor de impuestos del condado en cuanto a las tasas de interés actuales aplicadas por todo el condado. Si finalmente la vivienda está localizada en un sitio sujeto a uno o más entidades de impuestos adicionales que no son extendidos por todo el condado, sus impuestos en realidad pueden costarle más.

[ ] Ha dicho que no sabe en cual condado se instalará la vivienda. Por lo tanto, esta divulgación se basa en la información actual obtenida del asesor de impuestos del condado de _____, siendo el condado donde el negocio está localizado, en cuanto a las tasas actuales aplicadas por todo el condado. Si finalmente la vivienda está localizada en otro condado o un sitio sujeto a uno o más entidades de impuestos adicionales que no son extendidos por todo el condado, sus impuestos en realidad pueden costarle más.

NOTA: SUS IMPUESTOS DE PROPIEDAD ACTUALES PUEDEN DIFERIR. COMUNIQUESE CON EL ASESOR DE IMPUESTOS DEL CONDADO DONDE LA VIVIENDA SERA LOCALIZADA PARA OBTENER MAS INFORMACION.

CONSUMIDOR:

AUNQUE SU PRESTAMISTA NO PONGA EN PLICA LOS IMPUESTOS, USTED TODAVIA SERA RESPONSABLE POR ELLOS.

Otros costos estimados (describa)

$____

$____

TOTAL ESTIMADO DE LOS COSTOS MENSUALES	**$_____**

SER PROPIETARIO DE UNA VIVIENDA TIENE OTROS COSTOS, TALES COMO REPARACIONES, MANTENIMIENTO, Y UTILIDADES. TAMBIEN, PUEDE HABER OTRAS COSAS QUE USTED DESEA QUE NO PUEDEN SER INCUIDAS EN EL PRECIO DE SU VIVIENDA.

[ ] Si esta caja está marcada, la persona que le está vendiendo la vivienda prefabricada o alguien afiliado con ellos también tomará parte en hacer o someter el préstamo para comprar la vivienda y recibirá compensación, como un honorario, una comisión, o una prima, por este servicio. Si solamente están originando el préstamo y vendiéndolo sin ganancia y no están recibiendo compensación adicional, esta caja no necesita ser marcada. Si está marcada, aquí está una ESTIMACION de su compensación:

Clase de compensación	**Cantidad estimada o gama de compensación**
	$_____

Adjunto también encuentre las siguientes DIVULGACIONES ADICIONALES (enumerar):

Por medio de nuestra firma, cada uno de nosotros confirmamos que esta divulgación fue proveída en la fecha indicada y que estaba completo en ese momento.

Nombre:_____	**Nombre:**_____
Firma:_____	**Firma:**_____
Fecha:_____	**Fecha:**_____

Al firmar abajo, confirmo que soy la persona licenciada de acuerdo con el Texas Manufactured Housing Standards Act (el Acto de Normas Para Viviendas Prefabricadas de Texas) quien proporcionó esta divulgación (incluyendo cualquier documento adjunto) a los consumidores antedichos.

Nombre:_____

Firma:_____

Fecha:_____

Número de licencia:_____

Figure: 10 TAC §80.209(a)

Texas Department of Housing and Community Affairs

MANUFACTURED HOUSING DIVISION

P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109

Pursuant to the Texas Manufactured Housing Standards Act, Chapter 1201 of the Occupations Code
Internet Address: www.tdhca.state.tx.us/mh/index.htm

APPLICATION FOR STATEMENT OF OWNERSHIP AND LOCATION

BLOCK 1: Transaction Identification

This application is for:

- ☐ First time issuance of an SOL for a new home (first retail sale)
- ☐ Revised SOL to reflect changes in (check **all** that apply and complete the applicable blocks):
  - ☐ Location (Blocks 2, 3, 4b, 6, and 10)
  - ☐ Ownership (Blocks 2, 3, 4a, 4b, 5, 6, 7, 8, 9, 10a, and 10b)
  - ☐ Personal/real property election (Blocks 2, 3, 4b, 6, 7, and 10b)
  - ☐ Residential/non-residential use (Blocks 2, 3, 4b, and 10b)
  - ☐ Lien information (Blocks 2, 3, 4b, 10b, and if **adding** a lien, Block 8)
- ☐ Certified copy of SOL with **no** changes (complete Blocks 2 and 8 only)
- ☐ Quick Processing (requires additional fee **and** must be delivered in person or by overnight mail)

For Department Use Only
Codes:

Form T: Y / N
County Code:
Right of Surv.: Y / N
Wind Zone: I / II
Retailer #:
Manufacturer #:

BLOCK 2: Home Information

Manufacturer Name:		Model:	
Address:		Date of Manufacture:	
City, State, Zip:		Total Square Feet:	
License Number:		Wind Zone:	

	Label/Seal Number	*Serial Number*	*Weight*	*Size**
Section 1:				X
Section 2:				X
Section 3:				X
Section 4:				X

**NOTE: Size must be reported as the outside dimensions (length and width) of the home as measured to the nearest ½ foot at the base of the home, exclusive of the tongue or other towing device.*

BLOCK 3: Home Location

Was Home Moved? ☐ Yes ☐ No If yes, attach Form T – Notice of Installation and copy of moving permit

Physical Location:

Address *City* *State* *ZIP* *County*

BLOCK 4: Ownership Information **IF ownership changed, date of transfer:**

(4a) Seller(s) or Transferor(s)		(4b) Purchaser(s), Transferee(s), or Owner(s)	
Name	License # if Retailer:	Name	License # if Retailer:
Name		Name	
Mailing Address		Mailing Address	
City/State/Zip.		City/State/Zip	
Daytime Phone Number ( )		Daytime Phone Number ( )	

BLOCK 5: Right of Survivorship (if no box is checked, joint owners will NOT have right of survivorship)

If joint owners desire right of survivorship, check the applicable box below:

- ☐ Husband and wife will be the only owners and agree that the ownership of the above described manufactured home shall, from this day forward, be held jointly and in the event of death, shall pass to the surviving owner.
- ☐ Joint owners are other than husband and wife, desire right of survivorship, **and** have attached a completed Affidavit of Fact for Right of Survivorship.

BLOCK 6: Personal/Real Property Election - to be elected by purchaser(s), transferee(s), or owner(s)

☐ Personal Property - Applicant elects to treat this home as personal property. All documents affecting title to the home will be filed in the records of the department.

☐ Real Property – I (we) elect to treat this home as real property and certify that I am (we are) entitled to make this election in accordance with Section 1201.2055 of the Occupations Code because (**one** box **must** be checked):

- ☐ I (we) own the real property that the home is attached to.
- ☐ I (we) have a qualifying long-term lease for the land that the home is attached to.

I (We) understand that the home will not be considered to be real property until a certified copy of the SOL has been filed in the real property records of the county in which the home is located.

Legal description must be provided for real property: _____

_____

_____

BLOCK 7: Designated Use - to be designated by purchaser(s), transferee(s), or owner(s)

☐ Residential Use (as a dwelling)

☐ Non-Residential - Check **one** of the following:

- ☐ Business Use
- ☐ Salvage

BLOCK 8. Personal Property Liens - Specify any liens, charges, or other encumbrances to be recorded on the SOL

Date of First Lien:		Date of Second Lien:	
Name of First Lienholder:		Name of Second Lienholder:	
Mailing Address:		Mailing Address:	
City/State/ZIP:		City/State/ZIP:	
Daytime Phone Number:	( ) -	Daytime Phone Number:	( ) -

BLOCK 9. Third Party Special Mailing Instructions - for copies requested by persons other than owner or lienholder of record

IF a certified copy of an SOL is to be mailed to anyone other than the owner or lienholder of record (such as a closing agent), please provide that mailing address here.

Name:	
Company:	
Street Address:	
City, State, Zip:	

BLOCK 10. Certification and Notarization - The statements set forth herein are made under oath and are true and correct.

(10a) Each seller/transferor must sign, and notary signature and seal are required.	**(10b) Each purchaser/transferee or owner must sign, and notary signature and seal are required.**
_____ *Signature of seller/transferor* *Sworn and subscribed before me this ____ day of _____, 20___* _____ *Signature of Notary* *SEAL*	_____ *Signature of purchaser/transferee or owner* *Sworn and subscribed before me this ____ day of _____, 20___* _____ *Signature of Notary* *SEAL*
_____ *Signature of seller/transferor* *Sworn and subscribed before me this ____ day of _____, 20___* _____ *Signature of Notary* *SEAL*	_____ *Signature of purchaser/transferee or owner* *Sworn and subscribed before me this ____ day of _____, 20___* _____ *Signature of Notary* *SEAL*

Figure: 10 TAC §80.209(b)

Texas Department of Housing and Community Affairs

MANUFACTURED HOUSING DIVISION

P. O. BOX 12489 Austin, Texas 78711-2489
(800) 500-7074, (512) 475-2200 FAX (512) 475-1109

Pursuant to the Texas Manufactured Housing Standards Act, Chapter 1201 of the Occupations Code
Internet Address: www.tdhca.state.tx.us/mh/index.htm

RELEASE OF LIEN, FORECLOSURE OF LIEN OR LIEN ASSIGNMENTS

(Please type or print clearly.)

FORM B

BLOCK 1: Home Information (Must be completed)

Manufacturer Name:		License #:	
Manufacturer Address:			
Model :	Total Sq. Ft.:	Date of Manufacture:	

Label/Seal Number	Complete Serial Number	Weight	Size
Section One:			
Section Two:			
Section Three:			

BLOCK 2: For Release of Liens

(Name of Lienholder)	*(Address)*	*(City)*	*(State)*	*(Zip)*	*(Phone)*
(Name of Consumer)	*(Address)*	*(City)*	*(State)*	*(Zip)*	*(Phone)*

Release of Lien Effective Date:

BLOCK 3: For Foreclosure of Lien

Date of Repossession: _____ Release of Lien Effective Date: _____

Method of Repossession (MUST CHECK ONE):

( ) Terms of Security (Lien) Agreement

( ) Judicial Order (Sequestration, Possessory Lien, etc.) If by judicial order, attach a copy of the Sheriff's Bill of Sale. If the lien was not recorded on the document of title, a COPY of the Security Agreement or Judicial Order must be attached.

Lienholder certifies that the home will be sold only to or through a licensed retailer. If a sale is being recorded in conjunction with the repossession, the name and license number of the retailer must be provided: _____

BLOCK 4: For Lien Assignments From Lienholder to Lienholder

Name of former lender: _____

New Lender: _____

(Name of Lienholder) (Address) (City) (State) (Zip) (Phone)

BLOCK 5: Notarized Signature Required

I (We) certify that the statements set forth hereinabove and the information attached hereto are true and correct.

In the case of foreclosure, I (we) further certify that either the home will be sold from a licensed retailer's location or I am (we are) not required to be licensed under Subchapter C of the Standards Act.

Seal

_____
(Signature of Person Authorized to Sign for Lienholder)

(Title of Person Signing) *(Phone)*

Sworn and subscribed before me this _____ day of _____, 20_____
(month) *(year)*

_____
(Signature of Notary)

(Typed Name of Notary) *(Date Commission Expires)*

Figure: 16 TAC §26.32(j)(2)

****

Charges on Your Telephone Bill

Your Rights as a Customer

Placing charges on your phone bill for products or services without your authorization is known as "cramming" and is prohibited by law. Your telephone company may be providing billing services for other companies, so other companies' charges may appear on your telephone bill.

If you believe you were "crammed," you should contact the telephone company that bills you for your telephone service, (insert name of company), at (insert company's toll-free telephone number) and request that it take corrective action. The Public Utility Commission of Texas requires the billing telephone company to do the following within 45 calendar days of when it learns of the unauthorized charge:

- Notify the service provider to cease charging you for the unauthorized product or service;
- remove any unauthorized charge from your bill;
- refund or credit all money to you that you have paid for an unauthorized charge; and

- on your request, provide you with all billing records related to any unauthorized charge within 15 business days after the charge is removed from your telephone bill.

If the company fails to resolve your request, or if you would like to file a complaint, please write or call the Public Utility Commission of Texas, PO Box 13326, Austin, Texas 78711-3326, (512) 936-7120 or toll-free in Texas at (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

Your phone service cannot be disconnected for disputing or refusing to pay unauthorized charges.

You may have additional rights under state and federal law. Please contact the Federal Communications Commission, the Attorney General of Texas, or the Public Utility Commission of Texas if you would like further information about possible additional rights.

****

Figure: 19 TAC §230.192

Approved Academic Specializations and Delivery Systems
for Elementary Certificates

Academic Specialization or Delivery System	OPTION I Two 12 Semester Hour Specializations as Described in §230.191(d)(A)(i)	OPTION II 18 Semester Hour Specialization as Described in §230.191(d)(A)(ii)	OPTION III 24 Semester Hour Specialization As Described in §230.191(d)(A)(iii)	OPTION IV 24 Semester Hour Specialization As Described in §230.191(d)(A)(iv)	Specific Requirements or Exceptions
Generic Special Education (Delivery System)	. . . .	. . . .	X	. . . .	Must emphasize but need not be limited to: . infant/child development; . task analysis; . motor development/adaptive physical education; . parent training; . oral language development; . behavior management; . classroom organization; and . survey of special education. NOTE: The teacher certificate-elementary with generic special education shall be valid from pre-kindergarten through grade 12 in school settings having students with identified special needs. Assignment to certain specialized programs may require completion of additional courses or certification as described in §230.199 of this subchapter (relating to Endorsements) or §230.484 of this chapter (relating to Eligibility Requirements for Specialized Assignments or Programs).

Figure: 19 TAC §230.193(b)

Teaching Fields and Delivery Systems for Secondary Certification

Teaching Field or Delivery System	OPTION I 36 Semester Hours as Described in §230.191(d)(B)(i)	OPTION II 24 Semester Hours as Described in §230.191(d)(B)(ii)	OPTION III 48 Semester Hours as Described in §230.191(d)(B)(iii)	OPTION IV 48 Semester Hours as Described in §230.191(d)(B)(iv)	Specific Requirements or Exceptions
Art	X	X	X	....	....
Business Administration	X	X	....	....	courses in business, not including typing and shorthand
Business-Basic	....	....	X	....	courses in business that include typing but not shorthand
Business-Composite	....	....	X	....	courses in all aspects of business that include typing and shorthand
Business Secretarial	X	X	....	....	courses in business that include typing and shorthand
Dance	X	X	....	....	....

Generic Special Education (Delivery System)	....	X	....	....	Must emphasize, but need not be limited to: . infant/child development; . task analysis; . motor development and adaptive physical education; . parent training; . oral language development; . behavior management; . classroom organization; and . survey of special education. NOTE: Assignment to school settings having students with identified special needs shall be limited to grades 6-12. Assignment to certain specialized programs may require completion of additional courses or certification as described in §230.199 of this subchapter (relating to Endorsements) or §230.484 of this chapter (relating to Eligibility Requirements for Specialized Assignments or Programs).
Health Education	X	X	....	....	....
Industrial Arts	X	....	X	....	Must include, but need not be limited to, courses in visual technology, power/energy technology, and production technology.
Journalism	X	X	....	....	....
Music	X	X	X	....	....

Other Languages	X	X	....	....	Programs may be offered in: . French; . German; . Latin; . Spanish; and . Other languages as approved by the State Board for Educator Certification (SBEC). Each institution which recommends individuals for language certification must assess their oral proficiency in accordance with procedures, criteria, and passing scores specified by the SBEC.
Physical Education	X	X	....	....	....
Speech Communications	X	X	....	....	....
Theatre Arts	X	X	....	....	....

Figure: 40 TAC §148.603(d)(1)

MEMORANDUM OF UNDERSTANDING

The purpose of this MOU is to implement certain requirements enacted by Acts 1993, 73rd Legislature, Regular Session, Chapter 573 (Senate Bill 210), which amends Chapter 161 of the Health and Safety Code by adding Subchapter K, relating to, "abuse, neglect, and unprofessional or unethical conduct in health care facilities." Section 161.133 requires the Texas Board of Mental Health and Mental Retardation (TXMHMR), the Texas Board of Health (TDH) and the Texas Commission on Alcohol and Drug Abuse (TCADA) to adopt by rule a joint MOU, as set out below, detailing the health facility inservice training requirement for identifying patient abuse or neglect and illegal, unprofessional, or unethical conduct by or in the health care facility.

In accordance with the above-referenced legislation, each health care facility is required to annually provide, as a condition of continued licensure, a minimum of eight hours of inservice training designed to assist employees and health care professionals associated with the facility in identifying patient abuse or neglect and illegal, unprofessional, or unethical conduct by or in the facility, as such terms are defined in Chapter 161, Health and Safety Code, Subchapter K.

Accordingly, TXMHMR, TDH, and TCADA agree as follows:

Section I
APPLICATION

If a health care facility provides inpatient mental health, chemical dependency, or comprehensive medical rehabilitation services in a separate and distinct unit of the hospital, the requirements of this MOU shall apply to all employees and associated health care professionals who are assigned to, or who provide services on such units.

Section II
DEFINITIONS

Health care facility — An inpatient mental health facility, inpatient treatment facility, or hospital that provides comprehensive medical rehabilitation services.

Hospital that provides comprehensive medical rehabilitation services — Includes a general hospital and a special hospital.

Illegal conduct — Conduct prohibited by law.

Inpatient mental health facility — As defined in §571.003 of the Texas Health and Safety Code, a mental health facility that can provide 24-hour residential and psychiatric services and that is:

(A) a facility operated by the TXMHMR;
(B) a private mental hospital licensed by the TDH;
(C) a community center;

(D) a facility operated by a community center or other entity designated by the TXMHMR to provide mental health services;

(E) an identifiable part of a general hospital in which diagnosis, treatment, and care for persons with mental illness is provided and that is licensed by the TDH; or

(F) a hospital operated by a federal agency.

Inpatient treatment facility — A treatment facility that can provide 24-hour residential and chemical dependency services and that is:

(A) a public or private hospital;

(B) a detoxification facility;

(C) a primary care facility;

(D) an intensive care facility;

(E) a long-term care facility;

(F) a community mental health center;

(G) a recovery center;

(H) a halfway house;

(I) an ambulatory care facility; or

(J) any other facility that offers or purports to offer chemical dependency treatment.

Unethical conduct — Conduct prohibited by the ethical standards adopted by state or national professional organizations for their respective professions or by rules established by the state licensing agency for the respective profession.

Unprofessional conduct — Conduct prohibited under rules adopted by the state licensing agency for the respective profession.

Section III
MINIMUM STANDARDS OF TRAINING PROGRAM

A. The inservice training program shall address, at a minimum, the following elements:

1. Applicable laws and regulations governing patient abuse and neglect, as well as policies and procedures adopted by the governing board of the facility with regard to patient abuse and neglect.

2. Applicable laws and regulations governing illegal, unprofessional, and unethical conduct, as well as policies and procedures adopted by the governing board of the facility with regard to illegal, unprofessional, and unethical conduct.

3. Applicable laws and regulations governing patient rights, as well as policies and procedures adopted by the governing board of the facility with respect to patient rights.

4. Specific types of patient abuse and neglect and how to identify when abuse or neglect is occurring or has occurred.

5. Specific types of illegal, unprofessional, and unethical conduct and how to identify when illegal, unprofessional, or unethical conduct is occurring or has occurred.

6. Requirements and procedures for reporting an incident of patient abuse and neglect, together with the applicable penalties for non-reporting.

6. Requirements and procedures for reporting an incident of patient abuse and neglect, together with the applicable penalties for non-reporting.

7. Requirements and procedures for reporting illegal, unprofessional, and unethical conduct, together with the applicable penalties for non-reporting.

8. The legal protection afforded to employees and associated health care professionals who report patient abuse and neglect and illegal, unprofessional, and unethical conduct.

B. In addition, the training program may include training designed to improve patient care or to prevent abuse or neglect and illegal, unprofessional, or unethical conduct from occurring. This additional training may be customized according to the type of tasks performed by the various employees and health care professionals, their amount of direct patient contact, and the likelihood of their being exposed to patient abuse or neglect and illegal, unprofessional, or unethical conduct. Courses related to improving patient care may include things such as the "Prevention and Management of Aggressive Behavior" (PMAB) or other programs designed to deal with aggressive behavior and crisis intervention, some aspects of existing employee orientation courses, and continuing education courses (CME, CNE, CEU) related to improving patient care.

C. Each full-time employee or associated health care professional shall receive a minimum of eight hours inservice training on identifying patient abuse or neglect and illegal, unprofessional, or unethical conduct. The inservice training program shall include the topics outlined in paragraph (A) of this section; in addition, the training may include other topics as outlined in paragraph (B) of this section.

D. Although each part-time employee or associated health care professional must receive training as outlined in paragraphs (A) and (B) above, the amount and type of training provided to each part-time employee or associated health care professional may be determined based on a number of factors, including, but not limited to:

(1) the amount of direct contact the employee or associated health care professional has with patients;

(2) the amount of time the employee or associated health care professional spends at the health care facility (e.g., a consultant who is at the hospital 20 hours a week versus a consultant who works at the health care facility once a month).

E. An interim training program that does not meet the minimum requirements set forth in Section I, Paragraph A, above, is acceptable until June 1, 1994, to allow for development of a training program that meets the minimum standards of this MOU.

Section IV
MEANS OF REPORTING COMPLIANCE WITH REQUIREMENTS

A. Each facility subject to the inservice training requirement shall keep a record of the exact content of training provided.

B. Each facility subject to the inservice training requirement shall furnish documentation to show that each employee has completed the required training.

Documentation shall include:

1. course title
2. instructor's name
3. date(s) of course(s)
4. employee or associate health professional's social security number
5. signature block for employee or associated health care professional to verify that training was received and that he/she is aware of the training objectives
6. length of program presented

C. The health care facility shall keep the records required in Paragraphs A and B above for five (5) years.

D. A health care facility that utilized an independent contracting agency that supplies health care professionals and/or contract personnel to serve on a full or part time basis in a health care facility may rely on written representations by the independent contracting agency that such health care professionals and/or contract personnel have received inservice training on identifying patient abuse or neglect and illegal, unprofessional or unethical conduct. An independent contracting agency shall meet all other requirements of this MOU and shall supply evidence documenting each healthcare professional's and/or contract personnel's compliance with such requirements.

E. Employees and associated health care professionals may fulfill all or some of the training requirement by attending a continuing education program on patient abuse or neglect or illegal, unprofessional, or unethical conduct, provided such program meets the minimum requirements set forth in Section I, Paragraph A, above. In addition, briefings regarding the Code of Ethics for the appropriate discipline provided by the discipline head or other individual may be used to fulfill a portion of the requirement.

F. Each health care facility shall be in compliance with the annual requirement if it can demonstrate that each employee or associated health care professional received the required training over a twelve month period, and that the health care facility provided the required eight hours of inservice training over the twelve month period.

Section V
MISCELLANEOUS PROVISIONS

A. This memorandum of understanding shall be jointly adopted as a rule by the Texas Board of Mental Health and Mental Retardation, the Texas Board of Health, and the Texas Commission on Alcohol and Drug Abuse and shall be effective upon final joint adoption of the rules by the signatory agencies.

B. This memorandum may be amended at any time upon the mutual agreement of the agencies and such amendments shall also be made to the jointly adopted rules.

C. Each agency shall review and modify the memorandum as necessary not later than the last month of each state fiscal year.

EXECUTION OF MEMORANDUM OF UNDERSTANDING

For faithful performance of the terms of this Memorandum of Understanding (MOU) concerning training to identify client abuse or neglect and illegal, unprofessional, and unethical conduct, it is hereby executed by the undersigned persons in their capacities as stated below.

David R. Smith, M.D., Commissioner
Texas Department of Health

J. Ben Bynum, Executive Director
Texas Commission on Alcohol
and Drug Abuse

Dennis Jones, Commissioner
Texas Department of Mental Health
and Mental Retardation

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

The Texas Department of Agriculture (the department) will hold a public hearing to take public comment on proposed amendments to the Texas Capital Fund Program rules, Title 10, Part 1, §255.7, which have been proposed by the Office of Rural Community Affairs (ORCA). The proposal was published in the Friday, December 26, 2003, issue of the *Texas Register* (28 TexReg 11451). ORCA has extended the comment period to March 15, 2004. The Texas Capital Fund Program is administered by the department.

The hearing will be held on March 4, 2004, beginning at 9:00 a.m. in Room 1003A of the Stephen F. Austin Building, 1700 N. Congress, Austin, Texas.

For more information please contact Karl Young, Texas Department of Agriculture, P. O. Box 12847, Austin, Texas 78711, 512-463-7577.

TRD-200401098
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Filed: February 17, 2004

♦ ♦ ♦

Office of the Attorney General

Contract Award

This publication is filed pursuant to Texas Government Code, Section 2254.030. The Request for Proposal was published in the December 19, 2003 issue of the *Texas Register* (28 Texreg 11381).

DESCRIPTION OF ACTIVITIES OF PRIVATE CONSULTANT:

The Office of the Attorney General of Texas (the "OAG") has entered into a major consulting services contract for the following services:

The OAG administers millions of dollars of federal funds for the Child Support (Title IV-D) and Medicaid (Title XIX) programs. The OAG recoups its indirect costs from these federal programs based on rates approved by the United States Department of Health and Human Services ("HHS"). Contractor will review the indirect cost methodologies of the OAG to determine areas of cost recovery which will maximize revenue from the recovery of indirect costs and will develop indirect cost rates throughout the OAG, as appropriate. Contractor will prepare Indirect Cost Allocation Plans for FY03 (based on actual expenditures) and for FY05 (based on budgeted expenditures) in accordance with OMB Circular A-87, for submission to HHS for federal approval and will negotiate approval of those plans with HHS. Contractor will also analyze existing legal billing rates of the OAG for purposes of reconciling those existing rates with actual costs of the OAG in providing the legal services and will provide to the OAG a report of that reconciliation. Contractor will develop the FY05 billing rates for legal services. Contractor will negotiate with HHS for approval of the FY05 billing rates. Finally, Contractor will provide guidance to the OAG in the implementation of these plans and billing rates.

NAME AND BUSINESS ADDRESS OF PRIVATE CONSULTANT:

The private consultant engaged by the OAG for these activities is Maximus, Inc., whose business address is 13601 Preston Road, Suite 400W, Dallas, TX 75240.

TOTAL VALUE AND TERM OF THE CONTRACT:

The total value of the contract is $49,000. The term of the contract began on February 9, 2004, and will terminate on August 31, 2004, unless federal approval is still pending for the plans. In such case, the contract will continue until August 31, 2005 for the sole purpose of obtaining the necessary federal approval.

DATES ON WHICH REPORTS ARE DUE:

The Indirect Cost Allocation Plans must be submitted to HHS no later than April 30, 2004. The final report regarding the FY05 billing rates for legal services must be submitted to the OAG no later than July 30, 2004.

For information regarding this publication you may contact A.G. Younger, Agency Liaison at 512-463-2110.

TRD-200400971
Nancy S. Fuller
Assistant Attorney General
Office of the Attorney General
Filed: February 12, 2004

♦ ♦ ♦

Automobile Theft Prevention Authority

Request for Applications under the Automobile Theft Prevention Authority Fund

Notice of Invitation for Applications:

The Automobile Theft Prevention Authority is soliciting applications for grants to be awarded for projects under the Automobile Theft Prevention Authority (ATPA) Fund.

This grant cycle will be one year in duration, and will begin on September 1, 2004. One or more of the following types of projects may be awarded, depending on the availability of funds:

Law Enforcement/Detection/Apprehension Projects, to establish motor vehicle theft enforcement teams and other detection/apprehension programs. Priority funding may be provided to state, county, precinct commissioner, general or home rule cities for enforcement programs in particular areas of the state where the problem is assessed as significant. Enforcement efforts covering multiple jurisdictional boundaries may receive priority for funding.

Prosecution/Adjudication/Conviction Projects, to provide for prosecutorial and judicial programs designed to assist with the prosecution of persons charged with motor vehicle theft offenses.

Prevention, Anti-Theft Devices and Automobile Registration Projects, to test experimental equipment which is considered to be

designed for auto theft deterrence and registration of vehicles in the Texas Help End Auto Theft (H.E.A.T.) Program.

Reduction of the Sale of Stolen Vehicles or Parts Projects, to provide vehicle identification number labeling, including component part labeling and etching methods designed to deter the sale of stolen vehicles or parts.

Public Awareness and Crime Prevention/Education/Information Projects, to provide education and specialized training to law enforcement officers in auto theft prevention procedures, provide information linkages between state law enforcement agencies on auto theft crimes, and develop a public information and education program on theft prevention measures.

Eligible Applicants:

State agencies, local general-purpose units of government, independent school districts, nonprofit, and for profit organizations are eligible to apply for grants for automobile theft prevention assistance projects. Nonprofit and profit organizations shall be required to provide with their grant applications sufficient documentation to evaluate the credibility and the community support of the organization and the viability of the organization's existing activities in the context of providing automobile theft prevention assistance.

Contact Person:

Detailed specifications, including selection process and schedule for workshops for applicants will be made available through ATPA. Copies of the Administrative Guide and the application can be found at www.txwatchyourcar.com. Contact Susan Sampson, Director, Texas Automobile Theft Prevention Authority, 4000 Jackson Avenue, Austin, Texas 78731, (512) 374-5101.

Application Workshops:

April 7th, Wednesday, Houston, Texas, 2:30 p.m. - 3:30 p.m., Hilton Houston Southwest, 6780 Southwest Freeway, Houston, Texas, (713) 977-7911.

Closing Date for Receipt of Applications:

The **original** and **four** copies of the proposal must be received by the Texas Automobile Theft Prevention Authority by 5 p.m., May 7, 2004 or postmarked by May 7, 2004. If mailed, applications must be marked "Personal and Confidential" and addressed to the contact person listed above. If delivered, please leave application with the contact person (or designee) at the address listed.

Selection Process:

Applications will be selected according to §§57.2, 57.4, 57.7, and 57.14, as published in Title 43, Chapter 57, Texas Administrative Code. Grant award decisions by ATPA are final and not subject to judicial review. Grants will be awarded on or before September 1, 2004.

TRD-200400967
Susan Sampson
Director
Automobile Theft Prevention Authority
Filed: February 12, 2004

♦ ♦ ♦

Coastal Bend Workforce Development Board

Public Notice to Comment on Draft Workforce Development Integrated Plan Modification

The Coastal Bend Workforce Development Board (d.b.a. Work-Force 1) will publish its draft Integrated Plan Modification for the twelve county region of Aransas, Bee, Brooks, Duval, Jim Wells, Kenedy, Kleberg, Live Oak, McMullen, Nueces, Refugio, and San Patricio counties. The Plan Modification includes the following information: (1) description of service delivery system for the region (2) strategic and operational goals and objectives, (3) activities and services to be provided to area employers, workers, job seekers, and youth (4) the integration of services at the Coastal Bend Workforce Centers, (5) and the Targeted Occupations List. The general public, local entities, and interested parties are invited to comment on the Plan Modification. To facilitate your comments, The Draft Plan Modification will be available for a thirty-day period on the Work-Force 1 web site, www.workforce1.com, beginning March 1, 2004.

We encourage you to submit your comments. You may send your written comments to the following address/fax/email:

Work-Force 1

ATTN: Jenney Friesenhan

4444 Corona, Suite 215

Corpus Christi, Texas 78411

Phone (361) 225-1098 x 111

FAX (361) 814-3450

jenney.friesenhan@work-force1.com

Work-Force 1 is an equal opportunity employer/program. Auxiliary aids and services are available upon request. You may access Relay Texas by dialing 711.

TRD-200401102
Oscar Martinez
President/CEO
Coastal Bend Workforce Development Board
Filed: February 18, 2004

♦ ♦ ♦

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 project(s) during the period of February 6, 2004, through February 13, 2004. The public comment period for these projects will close at 5:00 p.m. on March 19, 2004.

FEDERAL AGENCY ACTIONS:

Applicant: GulfTerra Energy Partners/GulfTerra South Texas Location: The project is located at Tule Lake Channel and Nueces Bay, Nueces and San Patricio counties, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: CORPUS CHRISTI, Texas. Approximate NAD27 UTM Coordinates: Zone 14; Easting 653,532,

Northing 3,083,719 to Easting 652,310, Northing 3,077,569. Project Description: GulfTerra proposes to install a new 8-inch butane shuttle pipeline under Tule Lake Channel and Nueces Bay, Nueces and San Patricio counties, Texas. The project involves four directional drills. The first drill begins in Origin Station northeast of the intersection of Navigation Boulevard and Up River Road and ends on the north side of the railroad tracks, south of Tule Lake Channel. The second spans Tule Lake Channel west of Navigation Boulevard. The third and fourth drills will extend into Nueces Bay from the north and south shorelines. The drills have been extended to avoid live oyster reefs and seagrasses identified within the project area. The remaining pipeline distance of approximately 11,000 feet between the north and south bore exit points along the bay bottom will be jetted in to a depth of 4 feet below the bay bottom. It is anticipated that this will displace approximately 6,520 cubic yards of sediment along a 150-foot -wide work corridor. No impacts to waters of the U.S. for the Tule Lake Channel are expected. CCC Project No.: 04-0027-F1 Type of Application: U.S.A.C.E. permit application #23144 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Applicant: Copano Field Services Location: The project is a combination of four linear pipelines, approximately 54,735 feet in length, in Aransas Bay, southeast of Rockport, Aransas County, Texas. The pipelines can be located on the U.S.G.S. quadrangle map entitled Rockport, TX. The NAD 83 UTM coordinates for each segment are in UTM Zone 14.

The first proposed pipeline is in State Tracts (ST's) 167 and 175 for a total distance of ~2,640 feet in water depths ranging from -11.0 to -12.5 feet Mean Low Water (MLW). It begins at approximately: Easting 694756; Northing 3101500; and ends at approximately: Easting 694775; Northing 3100696.

The second proposed pipeline is in ST's 186, 199, 200, and 201 for a total distance of ~6,515 feet in water depths ranging from -12.5 to -13.5 feet MLW. It begins at approximately: Easting 695516; Northing 3097895; and ends at approximately: Easting 693824; Northing 3096856.

The third proposed pipeline originates in Aransas Bay, goes through Blind Pass, runs parallel to shore and ends at San Jose Island. It is in ST's 199, 200, 210, 211, 212, 233, 234, 236, and 237 for a total distance of ~22,910 feet in water depths ranging from -13.0 feet MLW to where it connects with an on-shore well on San Jose Island. It begins at approximately: Easting 693824; Northing 3096856 and continues straight to approximately: Easting 697418; Northing 3093213, which is where it turns approximately 75 degrees and continues in a channel with several minor directional changes to avoid seagrasses. Finally, it ends at approximately: Easting 696653; Northing 3091595.

The fourth proposed pipeline originates in Aransas Bay, goes through Blind Pass, runs parallel to shore and ends at San Jose Island. It is in ST's 186, 201, 202, 209, 210, 234, 236 and 237 for a total distance of ~22,670 feet in water depths ranging from -13.0 feet MLW to where it connects with an on-shore well on San Jose Island. It begins at approximately: Easting 695516; Northing 3097895 and continues straight to approximately: Easting 697418; Northing 3093213, which is where it turns approximately 45 degrees and continues in a channel with several minor directional changes to avoid seagrasses. Finally, it ends at approximately: Easting 696653; Northing 3091595. Project Description: The applicant proposes to install, operate, and maintain pipelines necessary for natural gas transportation activities. The applicant proposes to install four 8-inch diameter natural gas pipelines in Aransas Bay. The total length of pipelines that would be installed is approximately 54,735 linear feet. All of the pipelines would be located in waters of the U.S. and on state-owned submerged land. The pipes would be laid by jetting them into place. Immediately following "jetting" there would be a small depression in the bay bottom which would eventually achieve pre-construction contour. A small portion of the trenching would be done mechanically. Where work is done mechanically, the bay bottom would be restored to pre-installation conditions once work is complete.

The majority of the 54,735-foot-long project area lies in deep water where no seagrasses or oyster beds are known to exist. The exception is an approximately 6,500-foot-long stretch located between Mud Island and San Jose Island, the northernmost portion of which is in the channel known as Blind Pass. The proposed alignment of the approximate 6,500-foot stretch is within a 200-foot-wide existing small-craft channel. The last segment of the proposed alignment exits the channel perpendicular to it and connects with an on-shore well. That segment is 176-feet-long, approximately 90-feet of which would traverse seagrasses.

The applicant's agent conducted a Pre-Construction Habitat Survey that documents the presence or absence of sensitive habitats within 500 feet of either side of the proposed pipeline route. The survey was used to align the proposed pipeline route to avoid or minimize impacts to aquatic resources by aligning the pipeline equidistant from seagrasses on either side of it. Where the pipeline exits the channel and connects with the on-shore well, the applicant estimates that approximately 1,350 square feet (0.03 acres) of seagrass consisting of shoalgrass and turtlegrass may be temporarily affected by the construction activity.

The proposed pipeline installation method is to jet the trench in water depths greater than -3.5 MLW using a shallow-draft barge as a work platform. To minimize potential impacts, the applicant proposes to install and maintain turbidity curtains along the 60-foot-wide work corridor to confine the movement of suspended particles within the water column. In water depths less than -3.5 MLW, the proposed installation method is mechanical trenching. The proposed pipeline would be laid in a 3.5-footdeep trench with an approximate 15-foot top width and an approximate 4- to 6-foot bottom width. The mechanical trenching activity involves the use of a shallow-draft-barge mounted backhoe that would remain in the existing channel and dig from the channel to halfway to the San Jose shoreline. The excavated material would be placed on the barge while the pipeline is laid and used to cover the line once it is placed within the channel. The remainder of the shoreline would be dug using a land-based backhoe which will temporarily place the excavated material in uplands on San Jose Island.

To mitigate for the possible temporary impacts within the proposed alignment between the small-boat channel parallel with the San Jose Island shoreline and San Jose Island, the applicant has proposed to relocate the scattered clumps of oysters. Additionally, the applicant has proposed to transplant the smooth cordgrass vegetation to just south of the project area along the shoreline. The applicant would revisit the project site one year after completion to monitor the re-colonization. If the seagrass has not recolonized to at least 50 percent of its original aerial coverage, the applicant proposes to sprig the area with seagrass to achieve at least 50 percent coverage. CCC Project No.: 04-0028-F1 Type of Application: U.S.A.C.E. permit application #23256 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 §1251-1387). Note: The consistency review for this project may be conducted by the Texas Railroad Commission under §401 of the Clean Water Act.

Applicant: City of Aransas Pass Location: The project is located in what is presently known as Conn Brown Harbor adjacent to SH 361 in Aransas Pass, San Patricio County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Aransas Pass, TX. Approximate (NAD 83) UTM Coordinates: Zone 14; Easting: 683293; Northing: 3087537. Project Description: The applicant proposes to develop the existing Conn Brown Harbor. The applicant's proposal

includes bulkhead repair at shrimping/fishing industry waterfront businesses, new bulkhead construction, floating docks that would create new recreational boat slips, over-water deck structures, retail development, marine support services, infrastructure improvement, public boat ramp and waterfront access improvements, and harbor cleanup. New bulkhead construction would be above Mean High Water and would not involve fill in waters of the United States. CCC Project No.: 04-0029-F1 Type of Application: U.S.A.C.E. permit application #23284 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 §1251-1387).

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-200401108
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: February 18, 2004

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Comptroller of Public Accounts

Correction of Error

The Comptroller of Public Accounts proposed an amendment to 34 TAC §1.5 in the February 13, 2004, issue of the *Texas Register* (29 TexReg 1301). The text "This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt." was submitted by the agency and inadvertently included at the end of subsection (e) on page 1302. Subsection (e) should read as follows:

(e) An oral hearing under the Tax Code, §154.1142 or §155.0592, will be set if requested by the permit holder within 15 calendar days of the receipt of the notice of violation(s).

TRD-200401148

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Concho Valley Council of Governments

Request for Qualifications

Notice of Availability of Request for Qualifications to Consulting Firms for Hazard Mitigation Action Plan

This notice by the Concho Valley Council of Governments (CVCOG) for consultant services is filed under the provisions of Government Code, Chapter 2254.

The Concho Valley Council of Governments (CVCOG) is providing notice of the availability of a Request for Qualifications (RFQ). This Request for Qualifications (RFQ) is being made available by the Concho Valley Council of Governments (CVCOG) to professional consulting firms who may have an interest in assisting CVCOG, its participating member local governments, and other partners to prepare a multi-jurisdictional Concho Valley Mitigation Action Plan that can be used in response to a nationally identified need to reduce our vulnerability to disasters.

The 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

The complete Request for Qualifications is available at the following website: www.cvcog.org or by contacting CVCOG staff at (325) 944-9666.

EVALUATION OF QUALIFICATIONS

To assist interested consultants, an Offeror's Conference will be held:

On: Thursday, February 26, 2004

At: 2:00 p.m.

At: TxDOT Regional Offices, Building 1A, 4502 Knickerbocker Rd., San Angelo TX

CVCOG will discuss the proposed project and respond to questions concerning the Request for Qualifications. A contract will be awarded to the most responsible Offeror. CVCOG reserves the right to accept or reject any item or group of items in a proposal. With authority granted by the CVCOG Executive Committee, a written contract shall be offered by the CVCOG to the successful Offeror, and subject to acceptance by the successful Offeror within thirty (30) days after issuance by CVCOG. Should a contract not be accepted within thirty (30) days, CVCOG reserves the right to cancel the contract, and award a contract to the next Offeror in order of rank as listed in the CVCOG Executive Committee Minutes.

CONSULTANT RESPONSE

Consultants will submit a copy of a written response to the available Request for Qualifications to Marcos Mata, CVCOG Regional Services Coordinator, to be received by 12:00 noon, Friday March 26, 2004 at the CVCOG offices. This written response should be concise, and specific to this RFQ.

CVCOG CONTACT

The project will be coordinated by CVCOG's Regional Services Coordinator, Marcos Mata. For further information, contact him at (325) 944-9666 or by email at marcos@cvcog.org.

TRD-200401094
Jeffrey K. Sutton
Executive Director
Concho Valley Council of Governments
Filed: February 17, 2004

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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, 303.009, and 304.003, Tex. Fin. Code.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 02/23/04 - 02/29/04 is 18% for Consumer [1]/Agricultural/Commercial [2]/credit thru $250,000.

The weekly ceiling as prescribed by Sec. 303.003 and Sec. 303.009 for the period of 02/23/04 - 02/29/04 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 03/01/04 - 03/31/04 is 5% for Consumer/Agricultural/Commercial/credit thru $250,000.

The judgment ceiling as prescribed by Sec. 304.003 for the period of 03/01/04 - 03/31/04 is 5% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

TRD-200401104
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: February 18, 2004

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Credit Union Department

Applications to Expand Field of Membership

Notice is given that the following applications have been filed with the Credit Union Department and are under consideration:

An application was received from Permian Basin Credit Union, Odessa, Texas to expand its field of membership. The proposal would permit persons that live, work, or worship in Odessa, Texas, to be eligible for membership in the credit union.

An application was received from Velocity Credit Union, Austin, Texas to expand its field of membership. The proposal would permit persons who live, work, worship, attend school in, and businesses and other legal entities located in Bastrop, Caldwell, Hays, or Travis Counties, Texas, to be eligible for membership in the credit union.

An application was received from Vought Heritage Community Credit Union, Grand Prairie, Texas (#1) to expand its field of membership. The proposal would permit the Friends of the Texas Credit Union Foundation, its employees, members, and their family members, who live, work, worship, or attend school, in Dallas or Tarrant Counties, Texas, to be eligible for membership in the credit union.

An application was received from Vought Heritage Community Credit Union, Grand Prairie, Texas (#2) to expand its field of membership. The proposal would permit all business entities and individuals, and their family members, who live, work, worship, or attend school, in Dallas County, Texas, to be eligible for membership in the credit union.

An application was received from Vought Heritage Community Credit Union, Grand Prairie, Texas (#3) to expand its field of membership. The proposal would permit all business entities and individuals, and their family members, who live, work, worship, or attend school, in Tarrant County, Texas, to be eligible for membership in the credit union.

An application was received from Star One Credit Union, Sunnyvale, California to expand the field of membership of its branch office located in Austin, Texas. The proposal would permit the employees of Collins Financial Services who work at, or are paid from, or supervised from, or headquartered from their location at 2101 W. Ben White Blvd. in Austin, Texas, to be eligible for membership in the credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Credit unions that wish to comment on any application must also complete a Notice of Protest form. The form may be obtained by contacting the Department at (512) 837-9236 or downloading the form at http://www.tcud.state.tx.us/applications.html. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200401111
Harold E. Feeney
Commissioner
Credit Union Department
Filed: February 18, 2004

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Notice of Final Action Taken

In accordance with the provisions of 7 TAC Section 91.103, the Credit Union Department provides notice of the final action taken on the following application(s):

Application(s) to Expand Field of Membership - Approved

Galleria Credit Union, Dallas, Texas - See *Texas Register* issue dated October 31, 2003.

Texas DPS Credit Union, Austin, Texas - See *Texas Register* issue dated November 28, 2003.

Harlingen Area Teachers Credit Union, Harlingen, Texas - See *Texas Register* issue dated November 28, 2003.

Reed Credit Union, Houston, Texas - See *Texas Register* issue dated November 28, 2003.

OmniAmerican Credit Union, Fort Worth, Texas - See *Texas Register* issue dated November 28, 2003.

Texas Dow Employees Credit Union, Lake Jackson, Texas (Amended) - Members and employees of the Friends of the Texas Credit Union Foundation who reside, work, or attend school in Brazoria County, Texas; Galveston County, Texas; and the portion of Harris County, Texas within these geographical confines: Beginning at the intersection of Loop 610 and Highway 288; south to Highway 6; west to Highway 59; south to Highway 99; northwest to IH-10; east to Highway 6; north to Highway 290; southwest to Loop 610 then back to the intersection of the beginning point at Highway 288 South.

TruWest Credit Union, Scottsdale Arizona (Amended) - Persons who live, work, or attend school within a ten-mile radius of the credit union's proprietary offices located at 7700 Parmer Lane, Austin, Texas 78729 (Permit No. OSB 18) and 13609 IH-35 North, Austin, Texas 78753 (Permit No. OSB 30).

Application(s) to Amend Articles of Incorporation - Approved

Associated Credit Union, Deer Park, Texas - See *Texas Register* issue dated December 26, 2003.

Application(s) for a Merger or Consolidation - Approved

Catholic Credit Union (Del Rio) and St. Joseph's Credit Union (San Antonio) - See *Texas Register* issue dated October 31, 2003.

Trabusa Federal Credit Union (Mesquite) and Dallas Treasury Credit Union (Dallas) - See *Texas Register* issue dated October 31, 2003.

TRD-200401110

Harold E. Feeney
Commissioner
Credit Union Department
Filed: February 18, 2004

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Deep East Texas Local Workforce Development Board

Release for Public Comment

The Deep East Texas Local Workforce Development Board, Inc. issues this public notice of its annual strategic and operational Plan Modification.

The Deep East Texas Local Workforce Development Board is responsible for the implementation of workforce development programs throughout its Board area, which includes the following 12 counties: Angelina, Houston, Jasper, Nacogdoches, Newton, Polk, Sabine, San Augustine, San Jacinto, Shelby, Trinity, and Tyler. The Board's Integrated Plan Modification for program year 2004 and fiscal year 2005 will be submitted to the Texas Workforce Commission no later than April 2, 2004. At a minimum, the Integrated Plan Modification will include changes to strategic goals and objectives and service delivery strategies for businesses, adults, dislocated workers, and youth. Workforce programs and services covered in this strategic and operational Plan Modification include: Workforce Investment Act, Food Stamp Employment & Training, Choices, Reintegration of Offenders, Child Care, TAA, and more.

The Board will make available to the public a draft of its strategic and operational Plan Modification for the plan year of July 1, 2004 through June 30 2005. The draft strategic and operational Plan Modification is available on the Internet site http://www.detwork.org; or may be requested by telephone (936) 639-8898 or in person at 1318-C South John Redditt, Lufkin, Texas 75904.

The public comment period will begin on March 1, 2004 and the deadline for receipt of comments is 5:00 p.m. on March 31, 2004. Public comments must be submitted in writing to the following postal address: 1318-C South John Redditt, Lufkin, Texas 75904, faxed to the following number: (936) 633-7491, or e-mailed to the following individual: Marilyn Hartsook at the following Internet e-mail address: marilyn.hartsook@twc.state.tx.us. All comments will be submitted to the Texas Workforce Commission and incorporated as part of the Board's Plan Modification. For more information, call Marilyn Hartsook at (936) 639-8898.

The Deep East Texas Local Workforce Development Board is an equal opportunity organization. Auxiliary aids or services are available upon request to those individuals with disabilities. For extra assistance, please contact us at (936) 639-8898.

TRD-200401079
Marilyn Hartsook
Planner
Deep East Texas Local Workforce Development Board
Filed: February 17, 2004

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Texas Commission on Environmental Quality

Notice of Bulk Fuel Terminal and Site-Wide General Operating Permit Issuance

Notice is hereby given that the Texas Commission on Environmental Quality (TCEQ) Executive Director issued the Bulk Fuel Terminal and Site-Wide General Operating Permit (GOP) Numbers 515 and 516 under the requirements of Title 30, Texas Administrative Code, Chapter 122, Subchapter F (relating to General Operating Permits) on February 27, 2004.

Beginning on February 27, 2004, the Bulk Fuel Terminal and Site-Wide GOPs are subject to public petition for 60 days as specified under 30 TAC §122.360. Any person affected by the decision of the executive director to issue the Bulk Fuel Terminal and Site-Wide GOPs may petition the U.S. Environmental Protection Agency (EPA) to make an objection. Petitions shall be based only on objections to the Bulk Fuel Terminal and Site-Wide GOPs that were raised with reasonable specificity during the public comment period, unless the petitioner demonstrates in the petition to the EPA that it was not possible to raise the objections within the public comment period. The petition shall identify all objections. A copy of the petition shall be provided to the executive director by the petitioner. The executive director shall have 90 days from the receipt of an EPA objection to resolve any objection and, if necessary, terminate or revise the Bulk Fuel Terminal and Site-Wide GOPs.

Copies of the Bulk Fuel Terminal and Site-Wide GOPs and final statement of basis, which includes the executive director's response to comments, may be obtained from the TCEQ Web site at *http://www.tnrcc.state.tx.us/permitting/airperm/opd/permtabl.htm* or by contacting the TCEQ Air Permits Division, Office of Permitting, Remediation & Registration, (512) 239-1250. For further information or questions concerning the Bulk Fuel Terminal and Site-Wide GOPs, contact Ms. Beryl Thatcher, Office of Permitting, Remediation & Registration, Air Permits Division, (512) 239-5946.

TRD-200401089
Stephanie Bergeron
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: February 17, 2004

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Notice of Meeting on March 30, 2004 in San Antonio, Texas Concerning the Proposed Remedy for the J. C. Pennco Waste Oil Service State Superfund Site

The executive director of the Texas Commission on Environmental Quality (TCEQ or commission) is issuing this public notice of a proposed selection of remedy for the J. C. Pennco Waste Oil Service proposed state Superfund site (the Site). In accordance with 30 TAC §335.349(a) concerning General Requirements for Remedial Activities, and Texas Health and Safety Code (THSC), §361.187, Proposed Remedial Action, a public meeting regarding the commission's selection of a proposed remedy for the Site shall be held. The statute requires that the commission shall publish notice of the meeting in the *Texas Register* and in a newspaper of general circulation in the county in which the facility is located at least 30 days before the date of the public meeting. This notice was also published in the *San Antonio Express News* on February 27, 2004.

The public meeting is scheduled for March 30, 2004 at 7:00 P.M. at Salado Intermediate School Cafetorium, 3602 South W. W. White Road, San Antonio, Bexar County, Texas. The public meeting will be legislative in nature and is not a contested case hearing under Texas Government Code, Chapter 2001.

The Site, was proposed for listing on the state superfund registry in the August 26, 1997 issue of the *Texas Register* (22 TexReg 8570). The Site is located at 4927 Higdon Road, southeast of San Antonio, outside the city limits, in Bexar County, Texas. The Site consists of a rectangular piece of land occupying approximately five acres. The Site is bordered

by Higdon Road to the south, farm land to the north, and residential property and light industry to the east and west.

The Site was in operation from 1984 until April 1992. During this time, the Site received an unknown quantity of drums with used chemicals including motor oil, antifreeze, and solvents. Reportedly, most of the oil and other chemicals were sold for recycling. The drums were sold for use as livestock feeders, trash receptacles, and barbeque pits. Contamination resulted from spills and discharges from the oil storage tanks and barrel cleaning activities. A TCEQ investigation in 1991 discovered similar solvents in a nearby residential well. In May 1992, the owner of the Site filed for bankruptcy protection and the Site was abandoned. The commission installed a fence at the Site in 1994. In 1995 and 1996, the EPA removed approximately 4,000 drums, 120 cubic yards of soil and debris, 31,500 gallons of liquid wastes, and 23 tanks from the Site. In November 1996, the EPA referred the Site to the state for further remedial action.

The remedial investigation at the Site was completed in October 2003. A pre-feasibility study technical memorandum for soil was completed in August 2003, and concluded that no additional remedial actions related to the soil were required at the Site. The presumptive remedy document for groundwater, completed in January 2004, presented a summary of the specific risks identified in the groundwater at the Site and evaluation of potential remedial alternatives.

All persons desiring to make comments may do so prior to or at the public meeting. All comments submitted **prior** to the public meeting must be received by 5:00 p.m. March 29, 2004 and should be sent in writing to Carol Boucher, Project Manager, Texas Commission on Environmental Quality, Remediation Division, MC 143, P. O. Box 13087, Austin, Texas 78711-3087, or by facsimile at (512) 239-2450. The public comment period for this action will end at the close of the public meeting on March 30, 2004.

A portion of the record for this Site, including documents pertinent to the proposed remedy, is available for review during regular business hours at the San Antonio Public Library, McCreless Branch, 1023 Ada Street. Copies of the complete public record file may be obtained during regular business hours at the commission's Records Management Center, Records Customer Service, Building E, First Floor, MC 199, 12100 Park 35 Circle, Austin, Texas 78753, (800) 633-9363 or (512) 239- 2920. Photocopying of file information is subject to payment of a fee. Parking for persons with disabilities is available on the east side of Building D, convenient to access ramps that are between Buildings D and E.

Information is also available regarding the state Superfund program at *http://www.tnrcc.state.tx.us./permitting/remed/superfund.*

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the meeting should contact the agency at (800) 633-9363 or (512) 239-2463. Requests should be made as far in advance as possible.

For further information about this site or the public meeting, please call John Flores, TCEQ Community Relations, at (800) 633-9363, extension 5674.

TRD-200401086
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 17, 2004

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Proposed Enforcement Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075, which requires that the commission may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **March 29, 2004**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and Safety Code (THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on March 29, 2004**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the commission in **writing**.

(1) COMPANY: Amy Food Inc.; DOCKET NUMBER: 2003-0580-AIR-E; IDENTIFIER: Air Account Number HX-3206-D; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: food preparation; RULE VIOLATED: 30 TAC §101.4 and THSC, §382.085(a) and (b), by failing to control odor from the food processing operation;; PENALTY: $2,300; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: AquaSource Utility, Inc. Creekside Estates Plant; DOCKET NUMBER: 2003- 1306-MWD-E; IDENTIFIER: Texas Pollutant Discharge Elimination System (TPDES) Permit Number 11375-001; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 11375-001, and the Code, §26.121(a), by failing to meet the permitted effluent limits at Outfall 001; PENALTY: $6,720; ENFORCEMENT COORDINATOR: Christina McLaughlin, (512) 239-6589; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: BP Amoco Chemical Company; DOCKET NUMBER: 2003-1426-AIR-E; IDENTIFIER: Air Account Number GB-0001-R; LOCATION: Texas City, Galveston County, Texas; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §§101.20(2), 115.355(1), 116.115(c) and Air Permit Number 1176, by failing to perform fugitive monitoring; PENALTY: $1,300; ENFORCEMENT COORDINATOR: Sandy VanCleave, (512) 239-0667; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(4) COMPANY: Bahram Solhjou; DOCKET NUMBER: 2003-1288-MWD-E; IDENTIFIER: TPDES Permit Number 12882-001, RN102079043; LOCATION: near Houston, Harris County, Texas; TYPE OF FACILITY: wastewater treatment;

RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 12882-001, and the Code, §26.121(a), by failing to comply with permitted limits for ammonia nitrogen and total suspended solids (TSS); PENALTY: $1,271; ENFORCEMENT COORDINATOR: Merrilee Gerberding, (512) 239-4490; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(5) COMPANY: Best Deal Enterprises Inc.; DOCKET NUMBER: 2003-0820-PST-E; IDENTIFIER: Petroleum Storage Tank (PST) Facility Identification Number 72991, RN101435154; LOCATION: Dickinson, Galveston County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; and 30 TAC §115.245(2), by failing to conduct the annual pressure decay test on the Stage II vapor recovery system within the 12 months prior to the investigation; PENALTY: $2,700; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(6) COMPANY: Don Calvert dba Big Jacks Grocery; DOCKET NUMBER: 2003-0864-PST-E; IDENTIFIER: PST Facility Identification Number 8171; LOCATION: Lewisville, Denton County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $3,800; ENFORCEMENT COORDINATOR: Joseph Daley, (512) 239-3308; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(7) COMPANY: Boening Brothers Dairy, Inc.; DOCKET NUMBER: 2003-1046-PST-E; IDENTIFIER: PST Facility Identification Number 0011987; LOCATION: Floresville, Wilson County, Texas; TYPE OF FACILITY: dairy; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $2,100; ENFORCEMENT COORDINATOR: Brad Brock, (512) 239-1165; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(8) COMPANY: Town of Buckholts; DOCKET NUMBER: 2003-0013-MWD-E; IDENTIFIER: TPDES Permit Number 11875-001; LOCATION: near Buckholts, Milam County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 11875-001 and the Code, §26.121(a), by failing to comply with permitted limits at Outfall 001 for biochemical oxygen demand, TSS and dissolved oxygen, and total residual chlorine, failing to notify the TCEQ that alterations to the permitted design of the facility were made prior to February 14, 2002, failing to report effluent violations greater than 40% of the permitted limit, in writing, within five working days of becoming aware of the noncompliance, failing to submit the annual sludge report for the year 2001, and failing to prevent a discharge of visible foam into the creek adjacent to the plant.; PENALTY: $8,280; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(9) COMPANY: John Michael Corder; DOCKET NUMBER: 2003-1057-PST-E; IDENTIFIER: PST Facility Identification Number 29311, RN101775104; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $1,050; ENFORCEMENT COORDINATOR: Ronnie Kramer, (806) 353-9251; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(10) COMPANY: Custom Food Group, L.P. dba Custom Food Group; DOCKET NUMBER: 2003-1199-PWS-E; IDENTIFIER: Public Water Supply (PWS) Identification Number 0200504; LOCATION: Alvin, Brazoria County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c) and THSC, §341.033(d), by failing to submit routine water samples for bacteriological analysis; and 30 TAC §290.109(g)(4), by failing to provide public notification for sampling deficiencies; PENALTY: $1,563; ENFORCEMENT COORDINATOR: Craig Carson, (512) 239-5612; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(11) COMPANY: Degussa Engineered Carbons, L.P.; DOCKET NUMBER: 2003-1200-AIR-E; IDENTIFIER: Air Account Number OC-0020-R; LOCATION: Orange, Orange County, Texas; TYPE OF FACILITY: carbon black plant; RULE VIOLATED: 30 TAC §116.115(c), §101.20(3), Permit Numbers 9403B and PSD-TX-P627M2, and THSC, §382.085(b), by failing to maintain an emission rate below the maximum allowable emission rate table; 30 TAC §205.6, by failing to pay fiscal year 2003 general permit stormwater fees and late fees; and 30 TAC §335.323, by failing to pay nonhazardous waste generation late fees; PENALTY: $10,000; ENFORCEMENT COORDINATOR: Stacey Young, (512) 239-1899; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(12) COMPANY: Gustavo Garcia and Ulysia Garcia dba Diamond G; DOCKET NUMBER: 2003-1164-PST-E; IDENTIFIER: PST Facility Identification Number 10378; LOCATION: Premont, Jim Wells County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor underground storage tanks (USTs) for releases; and 30 TAC §334.48(c), by failing to conduct inventory control procedures at a retail fueling facility; PENALTY: $4,750; ENFORCEMENT COORDINATOR: Audra Baumgartner, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503.

(13) COMPANY: Dutch Boy Cleaners, Inc.; DOCKET NUMBER: 2003-0533-EAQ-E; IDENTIFIER: Edwards Aquifer Site Registration Number 13-02110501, Edwards Aquifer protection program project number 1982.00; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: dry cleaning; RULE VIOLATED: 30 TAC §213.4(a)(1), by failing to obtain commission approval by submitting a water pollution abatement plan prior to constructing a dry cleaning facility on the Edwards Aquifer Recharge Zone; PENALTY: $3,200; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(14) COMPANY: E. D. Baker Company; DOCKET NUMBER: 2003-1366-AIR-E; IDENTIFIER: Air New Source Review (NSR) Permit Number 54240, RN103002473; LOCATION: near Borger, Hutchinson County, Texas; TYPE OF FACILITY: rock crusher; RULE VIOLATED: 30 TAC §116.110(a)(1) and THSC, §382.0518(a) and §382.085(b), by failing to obtain a permit to construct and operate a rock crusher before operation began; PENALTY: $10,000; ENFORCEMENT COORDINATOR: Ronnie Kramer, (806) 353-9251; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(15) COMPANY: Flex-O-Lite, Inc.; DOCKET NUMBER: 2002-1011-AIR-E; IDENTIFIER: Air Account Number LA-0012-U, RN101051571; LOCATION: Paris, Lamar County, Texas; TYPE OF FACILITY: reflective glass bead manufacturing; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.085(b) and §382.0518(a), by failing to obtain NSR permit authorization prior to modifying

glass melting tanks, and to obtain NSR permit authorization prior to diverting emissions; 30 TAC §116.115(c) and NSR Permit Number 35322, by failing to comply with the coating usage record keeping provisions; and 30 TAC §116.116(a)(1), by failing to comply with the representations made in the June 11, 1999 application for amendment to NSR Permit Number 35322; PENALTY: $41,275; ENFORCEMENT COORDINATOR: Carolyn Lind, (903) 535-5100; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(16) COMPANY: Franklin Building Materials, Inc.; DOCKET NUMBER: 2003-1323-AIR-E; IDENTIFIER: Air Account Number EE-0862-E, RN100815554; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: cultured marble manufacturing; RULE VIOLATED: 30 TAC §116.110(a)(1) and THSC, §382.085(b) and §382.0518(a), by failing to obtain a permit to operate a thermoset resin operation; PENALTY: $2,160; ENFORCEMENT COORDINATOR: Jill Reed, (915) 570-1359; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(17) COMPANY: Jack Ray & Sons Oil Co., Inc. ; DOCKET NUMBER: 2003-1505-PST-E; IDENTIFIER: RN101563039; LOCATION: Fort Worth, Dallas County, Texas; TYPE OF FACILITY: fuel distributor; RULE VIOLATED: 30 TAC §335.4(b)(1)(A), by failing to observe a valid, current delivery certificate prior to the deposit of a regulated substance into the UST; PENALTY: $5,760; ENFORCEMENT COORDINATOR: Erika Fair, (512) 239-6673; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(18) COMPANY: Lake Brownwood Christian Retreat; DOCKET NUMBER: 2003-0030-PWS- E; IDENTIFIER: RN101563039; LOCATION: Brownwood, Brown County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c) and (2)(F) and THSC, §341.033(d), by failing to collect and submit the required number of additional routine monthly water and bacteriological samples; PENALTY: $1,613; ENFORCEMENT COORDINATOR: Ronnie Kramer, (806) 353-9251; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(19) COMPANY: Mack Massey Motors, LP; DOCKET NUMBER: 2003 1282-PST-E; IDENTIFIER: PST Facility Identification Number 18758; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: motor vehicle dealership; RULE VIOLATED: 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available a valid, current fuel delivery certificate to a common carrier prior to receiving fuel deliveries on February 26, 2003, March 26, 2002, May 17, 2002, May 31, 2002, June 26, 2002, July 24, 2002, August 14, 2002, September 16, 2002, October 1, 2002, October 22, 2002, November 16, 2002, and January 13, 2003. PENALTY: $1,632 ; ENFORCEMENT COORDINATOR: Mauricio Olaya; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(20) COMPANY: Jose G. Nieto and Luis A. Nieto dba Nietos Service Station 2; DOCKET NUMBER: 2003 0782-PST-E; IDENTIFIER: PST Facility Identification Number 0035981; LOCATION: Elsa, Hidalgo County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $4,200; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(21) COMPANY: City of Palmer Domestic Wastewater System; DOCKET NUMBER: 2003 1319-MWD-E; IDENTIFIER: TPDES Permit Number 0013620-001, RN102092962; LOCATION: Palmer, Ellis County, Texas; TYPE OF FACILITY: domestic wastewater system; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 0013620-001, and the Code, §26.121(a), by failing to meet the effluent limitations and monitoring requirements; PENALTY: $18,160; ENFORCEMENT COORDINATOR: Cari Bing, (512) 239-1445; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(22) COMPANY: Polk County; DOCKET NUMBER: 2003 0512-MSW-E; IDENTIFIER: Municipal Solid Waste Permit Number 1384; LOCATION: Leggett, Polk County, Texas; TYPE OF FACILITY: municipal solid waste landfill; RULE VIOLATED: 30 TAC §37.111 and §37.271(5), by failing to submit an annual update of the local government financial test for Fiscal Year 2001; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(23) COMPANY: Pure Utilities LC dba Lakeside Village Sewer Plant; DOCKET NUMBER: 2003 1229-MWD-E; IDENTIFIER: TPDES Permit Number 14014-001; LOCATION: Livingston, Polk County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and (5), TPDES Permit Number 14014-001, and the Code, §26.121(a), by failing to operate and maintain all systems of collection, treatment, and disposal; 30 TAC §319.11(b) and 40 Code of Federal Regulations §136.3(e), by failing to analyze samples within the permitted time; PENALTY: $2,576; ENFORCEMENT COORDINATOR: Tel Croston, (513) 239-5717; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(24) COMPANY: Janie G. Carrales dba Roberts Get-N-Go; DOCKET NUMBER: 2003 1083- PST-E; IDENTIFIER: PST Facility Identification Number 0023552; LOCATION: Premont, Jim Wells County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance; PENALTY: $3,150; ENFORCEMENT COORDINATOR: Chris Friesenhahn, (210) 490-3096; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas (361) 825-3100.

(25) COMPANY: City of Round Rock; DOCKET NUMBER: 2003 1364-PWS-E; IDENTIFIER: PWS Identification Number 2460003; LOCATION: Round Rock, Williamson County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(5), by failing to comply with the maximum contaminate level during the fourth quarter of 2002; PENALTY: $555; ENFORCEMENT COORDINATOR: Walter Lassen, (5412) 239-0513; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339- 2929.

(26) COMPANY: Siber Enterprise, Inc. Dba Star Food and Grocery; DOCKET NUMBER: 2003 0135-PST-E; IDENTIFIER: PST Facility Identification Number 0039774; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test line leak detectors for two USTs at least once per year for performance and operational reliability; 30 TAC §334.50(d)(9)(A)(v), by failing to report a suspected release from two USTs within 72 hours; and 30 TAC §334.74, by failing to investigate suspected released from two USTs; PENALTY: $6,800; ENFORCEMENT COORDINATOR: Trina Grieco, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(27) COMPANY: Texas Department of Transportation; DOCKET NUMBER: 2002 0492-PST- E; IDENTIFIER: PST Facility Identification Number 0008723; LOCATION: Alvin, Brazoria County, Texas; TYPE OF FACILITY: regulatory transportation; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor the USTs for releases of a frequency of at least once per month; 30 TAC §334.50(d)(4)(ii)(II), by failing to put the automatic tank gauging (ATG) system into test mode at least once per month; 30 TAC §334.50(a)(1)(C)(ii)(I), by failing to conduct inventory control in conjunction with ATG; 30 TAC §334.8(c)(4)(B) and the Code, §26.346(a), by failing to submit a UST registration and self certification form; and 30 TAC §334.8(c)(5)(A)(i), by failing to make available to a common carrier a valid, current delivery certificate before delivery of a regulated substance into the UST system; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Trina Grieco, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(28) COMPANY: University of Texas Southwestern Medical Center; DOCKET NUMBER: 2003 1216-AIR-E; IDENTIFIER: Air Account Number DB-2459-D; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: medical center; RULE VIOLATED: 30 TAC §122.146(1) and (2) and THSC, §382.085(b), by failing to submit annual certification of compliance for the reporting period of April 4, 2002 - April 3, 2003; PENALTY: $2,040; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; ; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(29) COMPANY: Xexes, Inc.; DOCKET NUMBER: 2003 1334-AIR-E; IDENTIFIER: RN102995099; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: used car dealership; RULE VIOLATED: 30 TAC §114.20(b)(2)(A) and (c), by failing to observe that a 2000 Pontiac offered for sale had the air injection reaction system, rear oxygen sensors, exhaust gas recirculation valve, and catalytic converter either removed or tampered with.; PENALTY: $360; ENFORCEMENT COORDINATOR: Stacey Young, (512) 239-1899; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-200401076
Paul C. Sarahan
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 17, 2004

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Texas Department of Health

Licensing Actions for Radioactive Materials

The Texas Department of Health has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Conroe	River Pointe Heart & Vascular Center	L05728	Conroe	00	01/30/04

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Amarillo	Amarillo Medical Specialists LLP	L05525	Amarillo	03	02/04/04
Arlington	Physician Reliance Network Inc.	L05116	Arlington	07	02/05/04
Austin	Texas Cardiovascular Consultants PA	L05246	Austin	11	02/02/04
Austin	Seton Medical Center	L02896	Austin	74	02/02/04
Austin	Seton Medical Center	L02896	Austin	75	02/05/04
Austin	Cardinal Health	L02117	Austin	77	02/09/04
Austin	Daughters of Charity Health Serv of Austin	L00268	Austin	82	02/11/04
Bedford	Texas Oncology PA	L05550	Bedford	03	02/06/04
Borger	Agrium US Inc	L02772	Borger	17	02/13/04
Cleburne	Walls Regional Hospital	L02039	Cleburne	25	02/06/04
Conroe	River Pointe Heart and Vascular Center	L05728	Conroe	01	02/13/04
Corpus Christi	Cardinal Health	L04043	Corpus Christi	33	02/11/04
Dallas	Texas Oncology PA	L04878	Dallas	26	01/30/04
Dallas	Doctors Hospital	L01366	Dallas	43	02/06/04
Dallas	Baylor University Medical Center	L01290	Dallas	60	02/05/04
Dallas	Physician Reliance Network	L05534	Dallas	03	02/13/04
Deer Park	GK Techstar LLC	L05562	Deer Park	02	01/30/04
Denison	Texoma Heart Group	L05208	Denison	07	02/03/04
Denton	Paramount Cardiovascular Associates PA	L05596	Denton	01	02/04/04
Denton	Neorx Manufacturing Group Inc	L05433	Denton	09	02/03/04
El Paso	EP Premier Medical Group PA	L05198	El Paso	04	02/05/04
El Paso	Physicians Specialty Hosp. of El Paso East LP	L05676	El Paso	01	02/09/04
El Paso	El Paso Healthcare System LTD	L02551	El Paso	43	02/09/04
Fort Worth	Baylor All Saints Medical Center	L02212	Fort Worth	65	02/03/04
Fort Worth	CMJ Engineering Inc	L05564	Fort Worth	01	02/06/04
Galveston	The University of Texas Medical Branch	L01299	Galveston	61	01/30/04
Henderson	Henderson Memorial Hospital	L03466	Henderson	16	02/02/04
Henrietta	Clay County Memorial Hospital	L03228	Henrietta	17	02/03/04
Houston	River Oaks Imaging And Diagnostic LP	L05493	Houston	03	02/03/04
Houston	H & G Inspection Company Inc.	L02181	Houston	177	02/06/04
Houston	Mallinckrodt Medical Inc.	L03008	Houston	65	02/06/04
Houston	The Methodist Hospital	L00457	Houston	119	02/11/04
Houston	Texas Childrens Hospital	L04612	Houston	32	02/13/04
Lufkin	Abitibi Consolidated Corp	L03870	Lufkin	15	02/11/04

CONTINUED AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
McAllen	McAllen Hospitals LP	L01713	McAllen	67	01/30/04
McAllen	McAllen Hospitals LP	L04902	McAllen	09	02/13/04
Paris	Advanced Heart Care PA	L05290	Paris	06	02/10/04
Pasadena	Celanese LTD Clear Lake Plant	L01130	Pasadena	58	01/30/04
Pittsburg	East Texas Medical Center Pittsburg	L03106	Pittsburg	18	02/03/04
San Angelo	Shannon Medical Center	L02174	San Angelo	49	02/05/04
San Angelo	Hirschfeld Steel Company	L04361	San Angelo	13	02/10/04
San Antonio	Christus Santa Rosa Health Care	L02237	San Antonio	76	02/02/04
San Antonio	Radiology Associates of San Antonio PA	L04305	San Antonio	32	02/05/04
San Antonio	Radiology Associates of San Antonio PA	L04927	San Antonio	20	02/05/04
San Antonio	Radiology Associates of San Antonio	L05358	San Antonio	15	02/06/04
San Antonio	Health South Surgery Center at Pasteur Plaza	L05659	San Antonio	02	02/13/04
San Antonio	M M Ontiveros M.D. P.A.	L05675	San Antonio	02	02/11/04
Stephenville	Harris Methodist Erath County	L03097	Stephenville	23	02/09/04
Temple	Scott & White Memorial Hosp & Scott Sherwood & Brindley Foundation	L00331	Temple	70	02/03/04
Throughout Tx	Expro Americas	L05611	Alice	03	02/11/04
Throughout Tx	Grant Works Inc	L05380	Austin	02	02/04/04
Throughout Tx	Texas Department of Transportation	L00197	Austin	99	02/11/04
Throughout Tx	Beavers Construction Company LLC	L05003	Bowie	06	02/02/04
Throughout Tx	Allance Imaging Inc.	L05336	Dallas	07	02/13/04
Throughout Tx	Cooperheat-MQS Inc.	L00087	Houston	115	02/03/04
Throughout Tx	Metco	L03018	Houston	142	02/02/04
Throughout Tx	H & G Inspection Company Inc.	L02181	Houston	176	02/04/04
Throughout Tx	Varco LP	L00287	Houston	114	02/11/04
Throughout Tx	Tracer-Tech Services	L05375	Midland	04	01/29/04
Throughout Tx	X-R-I Non-Destructive Testing	L05275	Pearland	32	02/04/04
Throughout Tx	Raba-Kistner Consultants Inc.	L01571	San Antonio	52	02/12/04
Tomball	Tomball Hospital Authority	L02514	Tomball	29	02/10/04
Tyler	East Texas Medical Center Healthcare Assoc.	L05702	Tyler	01	02/05/04
Victoria	Citizens Medical Center	L00283	Victoria	68	02/13/04
Waco	Hillcrest Baptist Medical Center	L00845	Waco	73	01/30/04
Wichita Falls	Howmet Corporation	L05106	Wichita Falls	08	02/12/04
Winnsboro	Presbyterian Hospital of Winnsboro	L03336	Winnsboro	17	01/30/04

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Throughout Tx	Durwood Greene Construction LP	L04753	Stafford	05	02/04/04

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Midland	B & R Inspection & Equipment Co.	L02564	Midland	18	02/06/04
Sherman	Johnson and Johnson Wound Management Worldwide Division of Ethicon Inc.	L01870	Sherman	22	02/10/04

In issuing new licenses, amending and renewing existing licenses, or approving exemptions to Title 25 Texas Administrative Code (TAC), Chapter 289, the Texas Department of Health (department), Bureau of Radiation Control, has determined that the applicants are qualified by reason of training and experience to use the material in question for the purposes requested in accordance with 25 TAC, Chapter 289 in such a manner as to minimize danger to public health and safety or property and the environment; the applicants' proposed equipment, facilities and procedures are adequate to minimize danger to public health and safety or property and the environment; the issuance of the new, amended, or renewed license (s) or the issuance of the exemption (s) will not be inimical to the health and safety of the public or the environment; and the applicants satisfy any applicable requirements of 25 TAC, Chapter 289. In granting termination of licenses, the department has determined that the licensee has properly decommissioned its facilities according to the applicable requirements of 25 TAC, Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC, Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189. For information call (512) 834-6688.

TRD-200401105
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: February 18, 2004

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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: David P. Shore, II, D.D.S., Lott, R04384; Harold G. Bissonnet, Jr., D.D.S., Houston, R10066; Michael C. Dyck, D.D.S., Dallas, R19703; Dallas Outpatient Cardiovascular Center, Dallas, R20359; Ronald W. Daniel, D.D.S., Duncanville, R21183; Victor I. Lugo-Miro, M.D., P.A., Kingwood, R21830; Brian K. Ross, D.D.S., Bedford, R21868; Cordova Health Management Inc., San Antonio, R23331; Dave E. Nichols, D.D.S., Houston, R23985; Crowne Chiropractic Clinic of Pleasant Grove, LLC, Dallas, R25501; Arthur W. Coleman, D.D.S., Houston, R26758; Larry G. Schneider, M.D., P.A., Porter, R26876; Medical City Dallas Hospital, Dallas, Z00253; Surgicare of Travis Centre Inc., Houston, Z00618.

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-200401100
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: February 18, 2004

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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: Baylor Sports Science Center, Dallas, G02086; MDI Holdings Inc., Dallas, L05501.

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-200401099
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: February 18, 2004

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation on Anthony Mata, Jr.

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 to Anthony Mata, Jr. (Texas Radiographer Identification Number 009694) of Houston. A total penalty of $4,000 is proposed to be assessed the radiographer for alleged violations of 25 Texas Administrative Code, Chapter 289.

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-200401078
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: February 17, 2004

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Notice of Revocation of Certificates of Registration

The Texas Department of Health, having duly filed complaints pursuant to 25 Texas Administrative Code, §289.205, has revoked the following certificates of registration: Jack K. Callan, D.V.M., Abilene, R01061, January 30, 2004; MacGregor Medical Association, Houston, R06531, January 30, 2004; Diagnox Services, Inc., Houston, R11771, January 30, 2004; Linda A. Miller, Bullard, R16499, January 30, 2004; Plano-Action Chiropractic, Plano, R19388, January 30, 2004; Tower Medical Center of Beaumont, P.A., Port Neches, R22854, January 30, 2004; Accent Dental PC, Irving, R23140, January 30, 2004; M. K. Tholen, D.D.S., PC, Houston, R24561, January 30, 2004; Elizabeth Nava, D.D.S., Dallas, R25263, January 30, 2004; Allcare Family Medicine, P.A., Fort Worth, R25881, January 30, 2004; Gulf Coast Family Practice Associates, Pittsburg, R26693, January 30, 2004; God is Good LLC, Sugar Land, R26707, January 30, 2004; Westport Technology Center International, Houston, Z01148, January 30, 2004.

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-200401077
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: February 17, 2004

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Notice of Revocation of Radioactive Material Licenses

The Texas Department of Health, having duly filed complaints pursuant to 25 Texas Administrative Code, §289.205, has revoked the following radioactive material licenses: Qualitech Steel Corporation, Corpus Christi, L05157, February 9, 2004; Cyvon Imaging Inc., Dallas, L05320, February 9, 2004; Paragon Wireline Inc., Bryan, L05367, February 9, 2004; Houston Diagnostic and Treatment Center, Houston, L05423, February 9, 2004.

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-200401101
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: February 18, 2004

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Texas Department of Housing and Community Affairs

Request for Qualifications to Provide Market Analysis

I. PURPOSE OF THE REQUEST

The Texas Department of Housing and Community Affairs (the Department or TDHCA) is requesting submission of qualifications to provide market analysis relating to various real estate transactions in Texas, which are subject to underwriting by TDHCA. The Department's Market Analysis Rules and Guidelines provide more information on the market study guidelines and required qualifications. This policy may be accessed through the TDHCA web site at

http://www.tdhca.state.tx.us/underwrite.html

The Department reserves the right to compile a list of approved firms, based on submitted qualifications, for use by Applicants of various housing programs administered through TDHCA. Firms may be added to the list upon submission review and acceptance of qualifications.

II. RESPONSE TIME FRAME AND OTHER INFORMATION

Response Due: Open

It is the express policy of the Department that parties receiving this request refrain from initiating any contact or communication with members of the TDHCA Board of Directors with regard to selection of firms relative to this Request for Qualifications while the selection process is occurring. Any violation of this policy will be considered a basis for disqualification.

Also, by releasing this Request for Qualifications, TDHCA shall not be obligated to proceed with any action on the Request for Qualifications and may decide it is in the Department's best interest to refrain from pursuing any selection process.

Two copies of the qualifications and one copy of a sample market study should be delivered to the following address:

Texas Department of Housing and Community Affairs

Attention: Lisa Vecchietti, Real Estate Analysis

507 Sabine Street, Suite 400

P.O. Box 13941

Austin, Texas 78711-3941

III. RESPONSE FORMAT

A. Each item in Section IV of this Request for Qualifications should be specifically addressed, or an explanation should be provided as to why no response is given.

B. Identify the item to be addressed in the introduction to each response.

C. Please limit your response to relevant material and your qualifications to 10 pages in length; additional information may be submitted in the form of an attachment or appendix.

PROPOSAL CONTENT

A. General Information

Provide information regarding the organization and structure of the firm including, but not limited to:

1. Number of offices located in Texas

2. Location of office(s) and brief description of support staff

3. Number of registered representatives located in Texas

4. List of housing clients currently served by or proposed to be served by the firm

5. Areas of Texas the firm is willing to serve

B. Firm

Provide information regarding the experience of the firm including, but not limited to:

1. Number of market studies for multifamily and single family residential properties; attach a descriptive list of assignments performed since 1998

2. Description of familiarity with transactions involving federal and/or state housing programs

3. Any other unique qualifications

C. Personnel

Provide information about the professionals employed by the firm including, but not limited to:

1. Names, office location and brief resumes, including licensing and certification

2. List of housing clients served by or proposed to be served by the personnel assigned to this account

D. Services Provided

Provide certification that the services to be provided will conform to the Department's Market Analysis Rules and Guidelines.

E. Documentation of Standing

Provide documentation of organization and/or certificate of good standing in the State of Texas.

V. SAMPLE MARKET STUDY

Provide a sample market study. The sample must conform to the requirements of the Department's Market Analysis Rules and Guidelines. The subject development may be fictitious, but the body of the market study must accurately reflect the most current information available for the chosen market area, including relevant demographics. (This item should be included as an attachment or appendix and will not be considered part of the page limitation of proposals.)

VI. FINANCIAL CONDITION

Provide a copy of the firm's most recent audited financial statement, if available. (This item should be included as an attachment or appendix and will not be considered part of the page limitation of proposals.)

VII. DEPARTMENTAL INFORMATION

Additional information regarding TDHCA may be obtained from Lisa Vecchietti. All requests must be in writing and sent to (512) 475-4420 (fax) or lisa.vecchietti@tdhca.state.tx.us (email). All questions and responses will be made available to all applicants and will be subject to disclosure under the Open Records Act.

VIII. OPEN RECORDS

Information submitted to TDHCA is public information and is available upon request in accordance with the Texas Public Information Act, Chapter 552 of the Government Code (the "Act"). A firm submitting any information it considers confidential as to trade secrets or commercial or financial information, which it desires not to be disclosed, must clearly identify all such information in its proposal. If information so identified by a firm is requested from TDHCA, the firm will be notified and given an opportunity to present its position to the Texas Attorney General, who shall make the final determination as to whether such information is excepted from disclosure under the Act. Information not clearly identified as confidential will be deemed to be non-confidential and will be made available by TDHCA upon request.

IX. COSTS INCURRED IN RESPONDING

All costs directly or indirectly related to the preparation of a response to this RFQ shall be the sole responsibility of and shall be borne by the firm.

TRD-200400969
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: February 12, 2004

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2004 Housing Tax Credit Program

Notice Of Meetings Schedule for Clarification of 2004 Cycle Applications

The Texas Department of Housing and Community Affairs (the "Department") is committed to making the 2004 Housing Tax Credit Program allocation a better, more transparent process. Therefore, the Department will be hosting a series of meetings for 2004 cycle applicants.

The focus of these meetings is to provide clarification from TDHCA Directors to any specific requests for additional information that have been made by the Department concerning specific applications. These meetings are open to the public and will allow for public discussion with key members of the Department staff without violating the Ex Parte Communications prohibition, Texas Government Code, § 2306.1113. The schedule of these meetings is provided below:

Friday, March 12, 2004 at 10:00 a.m., 4th Floor Board Room, 507 Sabine, Austin

Friday, March 26, 2004 at 10:00 a.m., 4th Floor Board Room, 507 Sabine, Austin

Friday, April 09, 2004 at 10:00 a.m., 4th Floor Board Room, 507 Sabine, Austin

Friday, April 23, 2004 at 10:00 a.m., 4th Floor Board Room, 507 Sabine, Austin

Friday, May 7, 2004 at 10:00 a.m., 4th Floor Board Room, 507 Sabine, Austin

Friday, May 21, 2004 at 10:00 a.m., 4th Floor Board Room, 507 Sabine, Austin

Friday, June 04, 2004 at 10:00 a.m., 4th Floor Board Room, 507 Sabine, Austin

Friday, June 18, 2004 at 10:00 a.m., 4th Floor Board Room, 507 Sabine, Austin

Friday, July 02, 2004 at 10:00 a.m., 4th Floor Board Room, 507 Sabine, Austin

Friday, July 16, 2004 at 10:00 a.m., 4th Floor Board Room, 507 Sabine, Austin

Individuals who require auxiliary aids or services for the public hearings should contact Gina Esteves ADA Responsible Employee, at (512) 475-3943 or Relay Texas at 1 (800) 735-2989 at least two days before the meeting so that appropriate arrangements can be made.

If you have any questions regarding these meetings, please contact Jennifer Joyce, Program Analyst for the HTC Program at (512) 475-3995 or visit our web site at: www.tdhca.state.tx.us.

TRD-200401144
Edwina P. Carrington
Executive Director
Texas Department of Housing and Community Affairs
Filed: February 18, 2004

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Texas Department of Insurance

Insurer Services

Application for admission to the State of Texas by CALIFORNIA INSURANCE COMPANY, a foreign fire and casualty company. The home office is in San Francisco, California.

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-200401146
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: February 18, 2004

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Notice of Public Hearing

The Commissioner of Insurance will hold a public hearing under Docket No. 2590, on March 10, 2004 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 appointment to the Board of Directors of the Texas Windstorm Insurance Association (TWIA). Mr. James E. Wade of Port Neches, 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. James P. Elbert, of the Elbert Insurance Agency in Lake Jackson, 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, §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, including but not limited to, maximum rates, competitive rates, and policy forms. Any person may appear and testify for or against the proposed appointments.

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) 322-2265, MC 104-PC, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

TRD-200401048
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: February 13, 2004

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Texas Lottery Commission

Instant Game No. 429 "Doubling Red 7's"

1.0 Name and Style of Game.

A. The name of Instant Game No. 429 is "DOUBLING RED 7s". The play style is "key number match with doubler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 429 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 429.

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- The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: $1.00, $2.00, $4.00, $5.00, $8.00, $10.00, $20.00, $50.00, $100, $200, $2,000, $24,000, 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, and 15. The possible red play symbols are: $1.00, $2.00, $4.00, $5.00, $8.00, $10.00, $20.00, $50.00, $100, $200, $2,000, $24,000, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15.

D. Play Symbol Caption- the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and 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. 429 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7 (red)	DBL
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$8.00	EIGHT$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$200	TWO HUND
$2,000	TWO THOU
$24,000	24 THOU

E. Retailer Validation Code - Three (3) 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. 429 - 1.2E

CODE	PRIZE
TWO	$2.00
FOR	$4.00
EGT	$8.00
TEN	$10.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2:16. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2:16 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 boxed four (4) digit Security Number 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 $2.00, $4.00, $8.00, $10.00, or $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100 or $200.

I. High-Tier Prize- A prize of $2,000 or $24,000.

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 (429), 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: 429-0000001-000.

L. Pack - A pack of "DOUBLING RED 7s" Instant Game tickets contains 250 tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). Tickets 000 and 001 will be shown on the front of the pack; the backs of tickets 248 and 249 will show. Every other book will be opposite. 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 "DOUBLING RED 7s" Instant Game No. 429 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 "DOUBLING RED 7s" Instant Game is determined once the latex on the ticket is scratched off to expose 22 (twenty-two) Play Symbols. If the player reveals a YOUR NUMBERS play symbol that matches either LUCKY NUMBERS play symbol, the player will win the prize indicated. If the player reveals a RED "7" play symbol, the player will automatically win double the prize amount shown below the RED "7" symbol. 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 twenty-two (22) 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, unless specified, 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 except for dual image games;

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 22 (twenty-two) 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 22 (twenty-two) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 22 (twenty-two) 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 within a book will not have identical patterns.

B. There will be no duplicate LUCKY NUMBERS on a ticket.

C. On winning and non-winning tickets, the "7" symbol will never appear as either of the LUCKY NUMBERS.

D. The LUCKY NUMBERS will never appear in red.

E. No duplicate non-winning YOUR NUMBER play symbols on a ticket.

F. No prize symbol will appear more than 2 times on a non-winning ticket

G. On winning and non-winning tickets, the prize symbol corresponding to a red play symbol will also be in red. The prize symbol corresponding to a black play symbol will be in black.

H. Tickets containing red YOUR NUMBERS will contain a maximum of 4 red YOUR NUMBERS.

I. Winning tickets will only win by matching a black YOUR NUMBER to a black LUCKY NUMBER (not including tickets that win with the red '7' play symbol).

2.3 Procedure for Claiming Prizes.

A. To claim a "DOUBLING RED 7s" Instant Game prize of $2.00, $4.00, $8.00, $10.00, $20.00, $50.00, $100 or $200, a claimant shall sign the back of the ticket in the space designated 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 $200 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 Section 2.3.C of these Game Procedures.

B. To claim a "DOUBLING RED 7s" Instant Game prize of $2,000 or $24,000, 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 "DOUBLING RED 7s" 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 "DOUBLING RED 7s" 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 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. 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.

2.7 Disclaimer. The number of actual prizes in a game may vary based on sales, distribution, testing, and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back of an Instant Game ticket in the space designated, 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, 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. 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 10,080,000 tickets in the Instant Game No. 429. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 429 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 In**
$2	1,048,320	9.62
$4	604,800	16.67
$8	322,560	31.25
$10	100,800	100.00
$20	50,400	200.00
$50	26,040	387.10
$100	14,868	677.97
$200	5,040	2,000.00
$2,000	100	100,800.00
$24,000	8	1,260,000.00

*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 4.64. 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. 429 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. 429, 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-200400970
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 12, 2004

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Withdraw Instant Game No. 427, "$50's Fever"

The Texas Lottery Commission hereby withdraws the game procedure and tables for $50's Fever, Instant Game No. 427, published in the February 13, 2004, *Texas Register*.

TRD-200401096
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 17, 2004

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Public Utility Commission of Texas

Notice of Application for a Certificate of Convenience and Necessity in Jack and Wise Counties, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on February 13, 2004, for a certificate of convenience and necessity in Jack and Wise Counties, Texas.

Docket Style and Number: Application of Brazos Electric Power Cooperative, Incorporated (BEPC) for a Certificate of Convenience and Necessity for a Single Circuit 138-kV Transmission Line in Jack and Wise Counties, Texas. Docket Number 29186.

The Application: BEPC is rebuilding its existing 69-kV Cottondale Switch to Joplin Substation transmission line to convert it to 138 kV. The proposed new 138-kV Cottondale Switch to Jack County Generating Plant transmission line addressed in this application will be constructed roughly adjacent to the rebuilt line. The line from the plant to Cottondale Switch would be approximately 5.2 miles long. The project is designated the Jack County Generation Plant to Cottondale Switch. The right-of-way width for this project will be approximately 110 feet. The estimated cost for the project is $1,981,450.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by March 29, 2004, 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 29186.

TRD-200401097
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 17, 2004

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On February 12, 2004, TVS Communications 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 60239. Applicant intends to (1) reflect a change in ownership/control to IBEX Telecom, LLC, and (2) reflect a name change to Cedar Valley Communications, Incorporated.

The Application: Application of TVS Communications for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 29325.

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 3, 2004. 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 29325.

TRD-200401084
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 17, 2004

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On February 10, 2004, Suretel, Incorporated 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 reflect a change in ownership/control.

The Application: Application of Suretel, Incorporated for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 29316.

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 3, 2004. 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 29316.

TRD-200401147
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 18, 2004

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on February 9, 2004, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of France Telecom Corporate Solutions L.L.C. for a Service Provider Certificate of Operating Authority, Docket Number 29311 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ISDN, T1-Private Line, Frame Relay, Fractional T1, long distance, wireless, and VPN, local dedicated services.

Applicant's requested SPCOA geographic area includes the entire State of Texas.

Persons who wish 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 3, 2004. 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 29311.

TRD-200400994
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 12, 2004

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on February 9, 2004, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Global Connection Inc. of America, d/b/a GCIA Corp. for a Service Provider Certificate of Operating Authority, Docket Number 29312 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, ISDN, HDSL, SDSL, RADSL, VDSL, Optical Services, T1-Private Line, Switch 56 KBPS, Frame Relay, Fractional T1, long distance and wireless services.

Applicant's requested SPCOA geographic area includes the areas of Texas currently served by SBC Texas, Verizon, United Telephone, and Central Telephone Company of Texas, d/b/a Sprint.

Persons who wish 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 3, 2004. 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 29312.

TRD-200400995
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 12, 2004

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Notice of Entering into Major Consulting Services Contract

The Public Utility Commission of Texas (PUCT) announces that it has entered into a major consulting contract with Potomac Economics, Ltd., 4029 Ridge Top Road, Suite 350, Fairfax, VA 22030. This notice is being published pursuant to the provisions of Texas Government Code §2254.030. The consultant will, among other things, provide services related to the continued refinement of existing quantitative tools

and the development of new quantitative tools for use by the PUCT in monitoring the electric market in Texas and provide technical expertise to evaluate complex anti-competitive behaviors and market abuses. The amount of the contract is for an amount not to exceed $1,000,000. The contract term is from January 30, 2004 to August 31, 2004. The consultant will provide various reports throughout the course of this contract, including an annual report regarding the competitiveness of the wholesale electricity market to the PUCT on or before May 1, 2004. The due dates for other contract deliverables vary and are set out in the scope of work contained in the contract. Any questions regarding this posting should be directed to:

Ms. Beverly Luna

Director of General Law

Public Utility Commission of Texas

1701 North Congress Avenue

Austin, TX 78711

(512) 936-9146

beverly.luna@puc.state.tx.us

TRD-200401103
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 18, 2004

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Notice of Petition for Expanded Local Calling Service

Notice is given to the public of the filing with the Public Utility Commission of Texas of a petition on January 2, 2004, for expanded local calling service (ELCS), pursuant to Chapter 55, Subchapter C of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Project Title and Number: Petition of the Coldspring Exchange for Expanded Local Calling Service, Project Number 29125.

The petitioners in the Coldspring exchange request ELCS to the exchanges of Huntsville, Waterwood, and New Waverly.

Persons who wish 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 8, 2004. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2789. All comments should reference Project Number 29125.

TRD-200400996
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 12, 2004

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Public Notice of Amendment to Interconnection Agreement

On February 10, 2004, Southwestern Bell Telephone, LP d/b/a SBC Texas and Signatel Telephone Corp., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under Section 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 & Supp. 2004) (PURA). The joint application has been designated Docket Number 29319. 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 3 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 29319. 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 March 15, 2004, 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 29319.

TRD-200400998
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 12, 2004

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Public Notice of Amendment to Interconnection Agreement

On February 10, 2004, Southwestern Bell Telephone, LP d/b/a SBC Texas and Looking Glass Networks, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under Section 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 & Supp. 2004) (PURA). The joint application has been designated Docket Number 29320. 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 3 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 29320. 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 March 15, 2004, 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 29320.

TRD-200400999
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 12, 2004

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Public Notice of Amendment to Interconnection Agreement

On February 10, 2004, Southwestern Bell Telephone, LP d/b/a SBC Texas and Vartec Telecom, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under Section 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 & Supp. 2004) (PURA). The joint application has been designated Docket Number 29321. 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 3 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 29321. 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 March 15, 2004, 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 29321.

TRD-200401000
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 12, 2004

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Public Notice of Amendment to Interconnection Agreement

On February 12, 2004, Southwestern Bell Telephone, LP, doing business as SBC Texas, and PNG Telecommunications, Incorporated, 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 2004) (PURA). The joint application has been designated Docket Number 29329. 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 29329. 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 March 16, 2004, 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 29329.

TRD-200401091
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 17, 2004

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Public Notice of Amendment to Interconnection Agreement

On February 12, 2004, Southwestern Bell Telephone, LP, doing business as SBC Texas, and VoIP Services, 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 2004) (PURA). The joint application has been designated Docket Number 29330. 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 29330. 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 March 16, 2004, 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 29330.

TRD-200401092
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 17, 2004

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Public Notice of Amendment to Interconnection Agreement

On February 12, 2004, Southwestern Bell Telephone, LP, doing business as SBC Texas, and DSLnet Communications, 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 2004) (PURA). The joint application has been designated Docket Number 29332. 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 29332. 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 March 16, 2004, 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 29332.

TRD-200401093

Adriana Gonzales

Rules Coordinator

Public Utility Commission of Texas

Filed: February 17, 2004

♦ ♦ ♦

Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule §26.215

Notice is given to the public of the filing, on February 10, 2004, with the Public Utility Commission of Texas, a notice of intent to file a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.215. The Applicant will file the LRIC study on February 20, 2004.

Docket Title and Number. Southwestern Bell Telephone, LP d/b/a SBC Texas's Application for Approval of LRIC Study for FibreMAN Service Repeater Introduction Pursuant to P.U.C. Substantive Rule §26.215, Docket Number 29318.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 29318. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Customer Protection Division at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200400993

Adriana Gonzales

Rules Coordinator

Public Utility Commission of Texas

Filed: February 12, 2004

♦ ♦ ♦

Public Notice of Interconnection Agreement

On February 11, 2004, Southwestern Bell Telephone, LP d/b/a SBC Texas and Connect Paging, Inc. d/b/a Get a Phone, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under Section 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 & Supp. 2004) (PURA). The joint application has been designated Docket Number 29323. 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 interconnection agreement. Any interested person may file written comments on the joint application by filing 3 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 29323. 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 March 15, 2004, 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 29323.

TRD-200400997
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 12, 2004

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Public Notice of Interconnection Agreement

On February 12, 2004, Universal Telephone Exchange, Incorporated and GTE Southwest, Incorporated, doing business as 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 2004) (PURA). The joint application has been designated Docket Number 29328. 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 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 29328. 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 March 16, 2004, 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 29328.

TRD-200401090
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 17, 2004

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Public Notice of Workshop on the Application of P.U.C. Substantive Rule §25.503 Relating to the Oversight of Wholesale Market Participants

The Public Utility Commission of Texas (commission) will hold a public workshop to discuss newly adopted P.U.C. Substantive Rule §25.503 that establishes the standards the commission will apply when reviewing the activities of entities participating in the wholesale electricity markets, including the Electric Reliability Council of Texas (ERCOT) administered markets.

The workshop will be held on Friday, March 12, 2004, at the Public Utility Commission of Texas, Travis Building, 1701 North Congress Avenue, Austin, Texas, in the Commissioners' Hearing Room located on the 7th floor of the building. The workshop will start at 9:30 a.m. and last until 1:30 p.m. All interested persons are invited to participate in the workshop.

The text of P.U.C. Substantive Rule §25.503 can be downloaded from the commission's website at www.puc.state.tx.us. The commission is requesting that interested persons file questions regarding the application of P.U.C. Substantive Rule §25.503 as well as fact scenarios that they would like to discuss in light of the rules provisions. The questions and fact scenarios may be submitted (in writing, with 16 copies)

to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711- 3326, by 3:00 p.m. on March 4, 2004, and should specifically reference Project Number 26201. Staff will use the questions and fact scenarios to develop the topics for discussion at the workshop. Additionally, the Staff will describe the informal and formal investigative processes that will be followed in reviewing market activities and will answer questions regarding enforcement procedures.

Questions concerning the workshop or this notice should be referred to Danielle Jaussaud, Market Oversight Division, 512-936-7396. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200401083
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 17, 2004

♦ ♦ ♦

Texas Department of Transportation

Request for Proposal for Aviation Engineering Services - Addendum 01

The Texas Department of Transportation published a request for proposal regarding the Albany Municipal Airport in the *Texas Register* dated February 13, 2004 (29 TexReg 1472).

The project scope has changed as follows:

FROM: Provide engineering/design services to: extend, widen, overlay and mark Runway 17-35; construct and mark partial parallel taxiway; reconstruct and enlarge turnaround Runway 35 end; overlay and mark stub taxiway; reconstruct apron; rehabilitate hangar access taxiways; replace low intensity runway light with medium intensity runway lights Runway 17-35; replace rotating beacon and tower; grade embankment Runway 17-35; install precision approach path indicator-2 Runway 17-35; replace windcone and segmented circle; relocate road; install fencing; install erosion/sedimentation controls; and prepare an Airport Layout Plan.

TO: Provide engineering/design services to: extend, widen, overlay and mark Runway 17-35; construct and mark new parallel taxiway; reconstruct turnarounds Runway 17-35; overlay and mark stub taxiway; reconstruct apron; rehabilitate hangar access taxiways; replace low intensity runway light with medium intensity runway lights Runway 17-35; replace rotating beacon and tower; grade embankment Runway 17-35; install precision approach path indicator-2 Runway 17-35; replace windcone and segmented circle; relocate road; install fencing; install erosion/sedimentation controls; and prepare an Airport Layout Plan.

NOTE: New Criteria for Evaluating Engineering Proposals will be used by selection committee to evaluate engineering proposals for this project.

TRD-200401085
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: February 17, 2004

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Request for Qualifications

Pursuant to the authority granted under Subchapter I, Chapter 361, Texas Transportation Code (the "Enabling Legislation"), the Texas Department of Transportation ("TxDOT") may enter into comprehensive development agreements for the financing, design, construction, maintenance, or operation of turnpike projects. The Enabling Legislation authorizes private involvement in turnpike projects and provides a process for soliciting, accepting, and processing qualifications submittals and proposals for such projects. Section 361.3022, Texas Transportation Code, prescribes requirements for qualifications submittals and proposals and requires TxDOT, if a decision is made to issue a request for qualifications for a proposed project, to publish a request for qualifications in the *Texas Register* that includes the criteria that will be used to evaluate qualifications submittals, the relative weight given to the criteria, and a deadline by which the qualifications submittals must be received. The Texas Transportation Commission has promulgated rules located at Title 43, Texas Administrative Code, §§27.1-27.5 (the "Rules"), governing the submission and processing of qualifications submittals and proposals and providing for publication of notice that TxDOT is requesting qualifications submittals or proposals for development of a turnpike project with private involvement.

This notice represents the first step in the process of procuring the design, fabrication, and delivery of ramp plaza and mainlane plaza toll booths required for turnpike projects currently under construction near Austin, Texas. Additional toll booths for future candidate turnpike projects in Texas may be required as requested by TxDOT in accordance with the terms of the comprehensive development agreement. As defined by Section 361.001, Texas Transportation Code, the design, fabrication, and delivery of toll booths is considered part of a turnpike project.

Through this notice, TxDOT is seeking qualifications submittals ("QS") in response to a request for qualifications ("RFQ"). TxDOT will accept for consideration any QS received in accordance with the Rules within fourteen (14) days of the publication of this notice. TxDOT anticipates issuing the RFQ, receiving and analyzing the QSs, developing a shortlist of proposing firms or consortia and issuing a request for detailed proposals ("RFP") to that shortlisted group. After review and a best value evaluation of the RFP responses, TxDOT may negotiate and enter into a comprehensive development agreement for the project.

RFQ Evaluation Criteria. QSs shall be evaluated by TxDOT for shortlisting purposes using the following general criteria: experience with toll booth design and fabrication; ability to deliver on schedule based on production capacity; relative quality/safety record of the respondents; relative strength of references; and relative financial strength of the respondents. The specific criteria under the foregoing subcategories will be identified in the RFQ, as will the relative weighting of the criteria.

Release of RFQ and Due Date. TxDOT currently anticipates that the RFQ will be available on February 27, 2004. Copies of the RFQ will be available at TxDOT's offices: Texas Department of Transportation, 1421 Wells Branch Parkway, Suite 107, Pflugerville, Texas 78660. QSs will be due on March 12, 2004.

TRD-200401145
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: February 18, 2004

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The University of Texas System

Notice of Request for Application

Texas Regional Collaboratives for Excellence in Science Teaching

Title II Part B- Mathematics and Science Partnerships

The University of Texas at Austin, Center for Science and Mathematics Education, Texas Regional Collaboratives for Excellence in Science Teaching, announces a competitive Request for Applications. This submission is required by the Texas Education Agency.

Purpose: Applicant programs are to improve the academic achievement of students in science through forming partnerships among institutions of higher education, local education agencies, elementary schools, and secondary schools. These partnerships will provide high quality, sustained, and high intensity professional development focused on the education of science teachers as a career-long process. Such process should continuously stimulate teachers' intellectual growth and upgrade teachers' knowledge and skills through activities that are founded on scientifically-based research and aligned with the Texas Essential Knowledge and Skills for Science.

Estimated Range of Awards: $15,000 - $25,000

Program Period: March 1, 2004- July 31, 2004

Application for Transmittal Deadline: February 20, 2004 at 4:30 p.m. Central Time

Parties interested in a copy of the Request for Application should contact:

Kamil A. Jbeily, Ph.D.

Director, Texas Regional Collaboratives

The University of Texas at Austin

Center for Science and Mathematics Education

1 University Station D5500

Austin, Texas 78713-0377

Voice: 512.471.9460

Email: kjbeily@mail.utexas.edu

TRD-200400964
Francie A. Frederick
Counsel and Secretary to the Board
The University of Texas System
Filed: February 11, 2004

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.

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 29 (2004) is cited as follows: 29 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 "29 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 29 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
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
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 16, April 9, July 9, and October 8, 2004). 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

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).

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