TEXAS REGISTER

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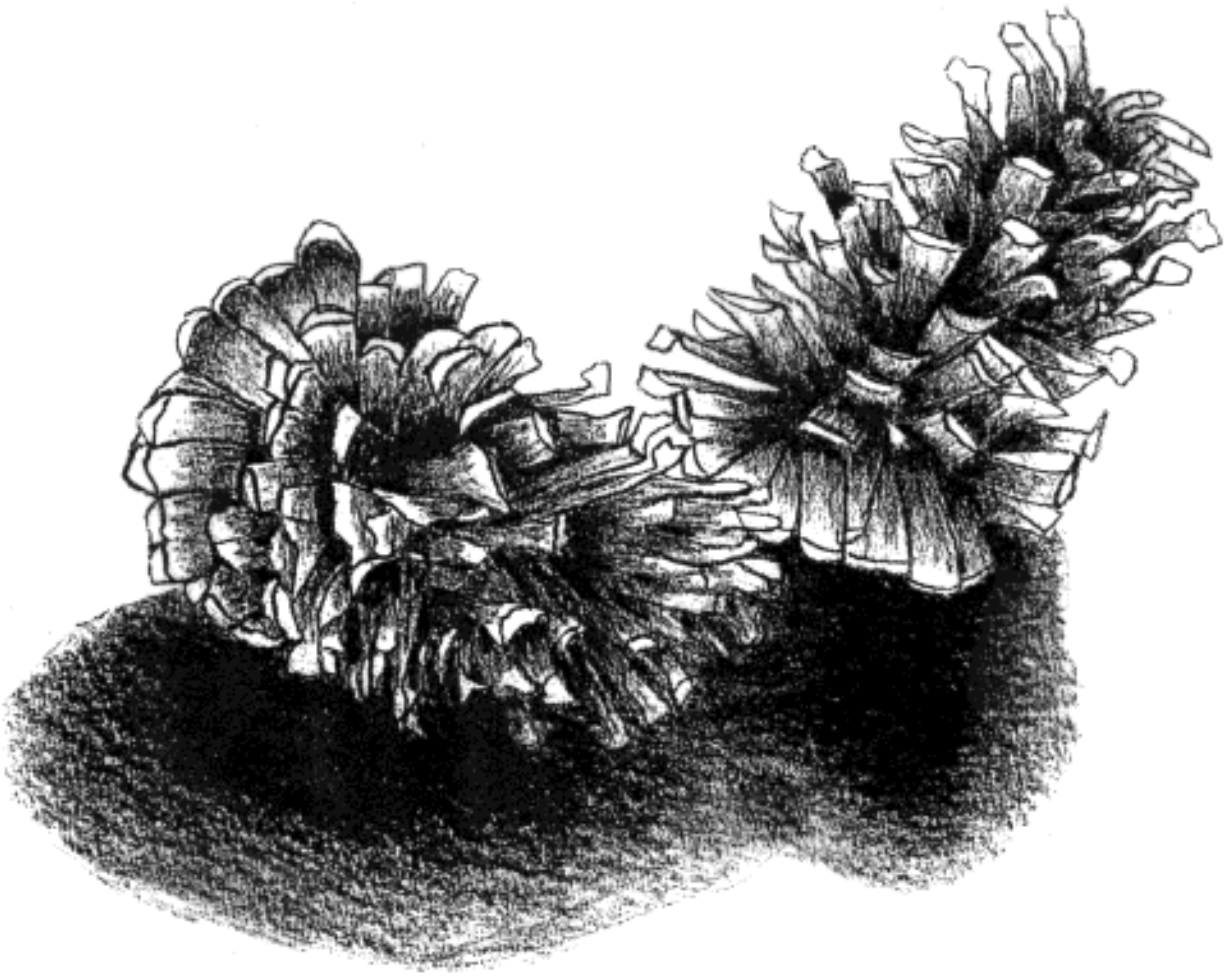

This month's front cover artwork:

Artist: *Joshua Smith*

9th Grade

Killeen Ninth Grade Center

School children's artwork has decorated the blank filler pages of the *Texas Register* since 1987. 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.

We will display artwork on the cover of each *Texas Register.* The artwork featured on the front cover is chosen at random.

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.* The artwork does not add additional pages to each issue and does not increase the cost of the *Texas Register.*

For more information about the student art project, please call (800) 226-7199.

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WITHDRAWN RULES

ADOPTED RULES

RULE REVIEW

TABLES AND GRAPHICS

IN ADDITION

Texas Natural Resource Conservation Commission

North Texas Workforce Development Board

Texas Parks and Wildlife Department

Public Utility Commission of Texas

State Securities Board

Telecommunications Infrastructure Fund Board

Texas Department of Transportation

Texas Water Development Board

TEXAS ETHICS COMMISSION

The Texas Ethics Commission is authorized by the Government Code, §571.091, to issue advisory opinions in regard to the following statues: the Government Code, Chapter 302; the Government Code, Chapter 305; the Government Code, Chapter 572; the Election Code, Title 15; the Penal Code, Chapter 36; and the Penal Code, Chapter 39.

Requests for copies of the full text of opinions or questions on particular submissions should be addressed to the Office of the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, (512) 463-5800.

Advisory Opinion Requests

AOR-451. The Texas Ethics Commission has been asked whether a political party club may accept contributions from corporations for the purpose of funding a scholarship.

AOR-452. The Texas Ethics Commission has been asked whether a judicial candidate subject to the Judicial Campaign Fairness Act may accept a campaign contribution in connection with a primary election after the primary election even if the candidate has no outstanding obligations in connection with the primary election.

TRD-9818380
Tom Harrison
Executive Director
Texas Ethics Commission
Filed: December 16, 1998

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AOR-452. Closed. Withdrawn by requestor.

TRD-9818381
Tom Harrison
Executive Director
Texas Ethics Commission
Filed: December 16, 1998

♦ ♦ ♦

Opinions

EAO-407. (AOR-448). Whether a legislator may use political contributions to rent a tuxedo for the legislative gala on the eve of the first day of a regular legislative session or for a nonprofit charity function.

Summary. A legislator may use political contributions to rent a tuxedo for the legislative gala on the eve of the first day of a regular legislative session. A legislator may use political contributions to rent a tuxedo for attendance at a nonprofit charity event if the legislator attends the event as an activity of a public officeholder.

EAO-408. (AOR-449 and AOR-450). Regarding private employment by members of the legislature.

Summary. A legislator is not subject to a general prohibition on employment by a law firm or by an accounting and investment firm as long as the legislator is performing the work in a capacity other than as a legislator and as long as the legislator's compensation reflects the actual value of the work performed. Specific circumstances could arise, however, in which such employment might not be in keeping with the standards of conduct in Government Code section 572.051.

EAO-409. (AOR-451).. Whether a political party club may accept contributions from corporations for the purpose of funding a scholarship.

Summary. A general-purpose political committee may accept corporate contributions earmarked for a scholarship fund as long as the committee's expenditures in connection with the scholarship fund are not made in connection with a campaign for elective office or on a measure or for officeholder purposes.

TRD-9818382
Tom Harrison
Executive Director
Texas Ethics Commission
Filed: December 16, 1998

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EMERGENCY RULES

An agency may adopt a new or amended section or repeal an existing section on an emergency basis if it determines that such action is necessary for the public health, safety, or welfare of this state. The section may become effective immediately upon filing with the ***Texas Register***, or on a stated date less than 20 days after filing and remaining in effect no more than 120 days. The emergency action is renewable once for no more than 60 additional days.

Symbology in amended emergency sections. New language added to an existing section is indicated by the text being underlined. [Brackets] and ~~strike-through~~ of text indicates deletion of existing material within a section.

TITLE 34. PUBLIC FINANCE

Part IV. Employees Retirement System of Texas

Chapter 73. Benefits

34 TAC §73.35

The Employees Retirement System of Texas adopts on an emergency basis §73.35, concerning supplemental payment. The section is being amended in order to allow a supplemental one-time payment in the fiscal year ending August 31, 1999.

The section is adopted on an emergency basis in order to timely prepare and distribute the supplemental payments.

The amendment is adopted on an emergency basis under Tex. Gov't Code §814.603(d), which provides authorization for the board to authorize a supplemental one-time payment during any fiscal year, if the payments are in compliance with Tex. Gov't Code §811.006.

§73.35. Supplemental Payment.

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

(c) In accordance with Government Code, §814.603, subsection (d), a supplemental payment is authorized in the fiscal year ending August 31, 1999.

Filed with the Office of the Secretary of State, on December 14, 1998.

TRD-9818324
Sheila W. Beckett
Executive Director
Employees Retirement System of Texas
Effective date: December 14, 1998
Expiration date: March 13, 1999
For further information, please call: (512) 867-7125

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PROPOSED RULES

Before an agency may permanently adopt a new or amended section or repeal an existing section, a proposal detailing the action must be published in the ***Texas Register*** at least 30 days before action is taken. The 30-day time period gives interested persons an opportunity to review and make oral or written comments on the section. Also, in the case of substantive action, a public hearing must be granted if requested by at least 25 persons, a governmental subdivision or agency, or an association having at least 25 members.

Symbology in proposed amendments. New language added to an existing section is indicated by the text being underlined. [Brackets] and ~~strike-through~~ of text indicates deletion of existing material within a section.

TITLE 7. BANKING AND SECURITIES

Part I. State Finance Commission

Chapter 9. Rules of Procedure for Contested Case Hearings, Appeals, and Rulemakings

Subchapter B. Contested Case Hearings

7 TAC §§9.16, 9.25, 9.39

The Finance Commission of Texas, the Texas Department of Banking, the Savings and Loan Commissioner and the Consumer Credit Commissioner (the agencies) propose amendments to §9.16 and §9.25, concerning certain pleading requirements, and new §9.39, concerning disposition of exhibits.

Pursuant to Chapter 9, a simplified system of pleading has been adopted for agency administrative proceedings under which opposing parties are presumed to contest all material allegations in an application or complaint without the necessity of filing pleadings. The purpose of the proposed amendment to §9.16(b) is to require written advance notice to be given the agency of any "affirmative defenses." This requirement is desirable so that the agency will have a reasonable opportunity to investigate the facts surrounding any affirmative defenses in advance of the hearing. The related amendment of §9.25 to add new subsection (f) will make clear that the standard Texas rule regarding the burden of proof on affirmative defenses will apply in agency administrative hearings. (See Ray, 1 Texas Practice, Law of Evidence (3rd Edition 1980) §43.)

The purpose of proposed new §9.39 is to alleviate the storage problem created by oversized exhibits introduced in hearings by permitting the return of exhibits to the parties after cases have become final and all appeals exhausted. This proposed rule will be supplemented by a request to the Texas State Library to authorize the agencies to dispose of exhibits in this manner under agency records retention schedules.

Larry Craddock, administrative law judge for the agencies, has determined that for the first five-year period the sections are in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the sections.

Mr. Craddock also has determined that for each year of the first five-year period the sections as proposed will be in effect, the public benefit anticipated as a result of the amendment will be clarification of ambiguous language to facilitate prompt and efficient administrative hearings at the agencies. 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.

Comments on the proposal may be submitted in writing to Larry Craddock, Administrative Law Judge, Finance Commission of Texas, 2601 North Lamar Boulevard, Austin, Texas, 78705-4294, or by e-mail to larry.craddock@banking.state.tx.us.

The sections are proposed pursuant to Government Code §2001.004, which requires all administrative agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. The sections are also proposed under specific rulemaking authority in the substantive statutes administered by the agencies.

Finance Code, §31.003(a)(5), authorizes the finance commission to adopt rules necessary or reasonable to facilitate the fair hearing and adjudication of matters before the banking commissioner and the finance commissioner.

Finance Code, §152.102, authorizes the finance commission to adopt rules necessary for the enforcement and orderly administration of that chapter (regulating sale of checks).

Finance Code, §153.002, authorizes the finance commission to adopt rules necessary to implement that chapter (regulating currency exchange and transmission).

Finance Code, §154.051(b), authorizes the department of banking to adopt rules concerning matters incidental to the enforcement and orderly administration of that chapter (regulating prepaid funeral benefits).

Finance Code, §11.302, authorizes the finance commission to adopt rules applicable to state savings associations or to savings banks. Finance Code, §96.002(a)(2), and §66.002, also authorize the savings and loan commissioner and the

finance commission to adopt procedural rules for deciding applications filed with the savings and loan commissioner or the savings and loan department.

Finance Code, §11.304, authorizes the finance commission to adopt rules necessary for supervising the consumer credit commissioner and for ensuring compliance with Finance Code, Chapter 14 and Title 4, plus amendments to the source law made by Acts 1997, 75th Legislature, Chapter 1396). Texas Civil Statutes, Article 5069-3A.901, also authorizes the finance commission to adopt rules necessary for the enforcement of Article 5069-3A.001. Finance Code, §371.006, further authorizes the consumer credit commissioner to adopt rules necessary for the enforcement of Finance Code, Chapter 371.

No other statutes, articles, or codes are affected by the proposal of these amendments.

§9.16. Pleadings.

(a) (No change.)

(b) In addition, a party may file such other pleadings as the party considers appropriate to fully explain and present the party's side of the case. A party who wishes to raise an "affirmative defense" as defined in Texas Rules of Civil Procedure, Rule 94, must notify the agency in writing at least seven days before the hearing unless the administrative law judge allows a shorter notification period pursuant to Texas Rules of Civil Procedure, Rule 63.

(c) (No change.)

§9.25. The Hearing.

(a)-(e) (No change.)

(f) A party pleading an "affirmative defense" as defined in Texas Rules of Civil Procedure, Rule 94, has the burden to establish it by a preponderance of the evidence.

§9.39. Disposition of Exhibits.

The agency may dispose of exhibits after a case is final in the manner provided in Texas Rules of Civil Procedure, Rule 14b, and the order of the Texas Supreme Court adopted pursuant to Rule 14b effective January 1, 1988.

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 December 11, 1998.

TRD-9818289
Everette D. Jobe
Certifying Official
State Finance Commission
Proposed date of adoption: February 19, 1998
For further information, please call: (512) 475–1300

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TITLE 16. ECONOMIC REGULATION

Part II. Public Utility Commission of Texas

Chapter 23. Substantive Rules

Subchapter C. Rates

16 TAC §23.23

(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.)

The Public Utility Commission of Texas (commission) proposes the repeal of §23.23, relating to Rate Design. Project Number 17709 has been assigned to this proceeding. The Appropriation Act of 1997, HB 1, Article IX, Section 167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the commission is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to (1) satisfy the requirements of Section 167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. As a result of this reorganization, §23.23 will be duplicative of proposed new §§25.234 of this title (relating to Rate Design), 25.235 of this title (relating to Fuel Costs - General), and 25.236 of this title (relating to Recovery of Fuel Costs), 25.237 of this title (relating to Fuel Factors), and 25.238 of this title (relating to Power Cost Recovery Factors (PCRF)) in Chapter 25, Substantive Rules Applicable to Electric Service Providers; and proposed new §26.205 of this title (relating to Rates for Intrastate Access Services) in Chapter 26, Substantive Rules Applicable to Telecommunications Service Providers.

Mr. Christopher Green and Mr. Martin Wilson, assistant general counsels, Office of Regulatory Affairs, have determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Mr. Green and Mr. Wilson have determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repeal will be the elimination of a duplicative rule. There will be no effect on small businesses as a result of repealing this section. There is no anticipated economic cost to persons as a result of repealing this section.

Mr. Green and Mr. Wilson have also determined that for each year of the first five years the repeal is in effect there will be no impact on employment in the geographic area affected by the repeal of this section.

Comments on the proposed repeal (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 N. Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. All comments should refer to Project Number 17709, repeal of §23.23.

This repeal is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (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.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002.

§23.23. Rate Design.

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 December 7, 1998.

TRD-9818191
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 936–7308

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Subchapter H. Telephone

16 TAC §23.102

(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.)

The Public Utility Commission of Texas (commission) proposes the repeal of §23.102 relating to Imputation. Project Number 17709 has been assigned to this proceeding. The Appropriations Act of 1997, House Bill 1, Article IX, §167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the commission is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to: (1) satisfy the requirements of §167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. As a result of this reorganization, §23.102 will be duplicative of proposed new §26.274 of this title (relating Imputation) in Chapter 26, Substantive Rules Applicable to Telecommunications Service Providers.

Mr. Martin Wilson, assistant general counsel, Office of Regulatory Affairs, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Mr. Wilson has determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repeal will be the elimination of a duplicative rule. There will be no effect on small businesses as a result of repealing this section. There is no anticipated economic cost to persons as a result of repealing this section.

Mr. Wilson has also determined that for each year of the first five years the repeal is in effect there will be no impact on employment in the geographic area affected by the repeal of this section.

Comments on the proposed repeal (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. All comments should refer to Project Number 17709, repeal of §23.102.

The repeal is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (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.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002.

§23.102. Imputation.

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 December 14, 1998.

TRD-9818298
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 936–7308

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16 TAC §23.103

(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.)

The Public Utility Commission of Texas (commission) proposes the repeal of §23.103 relating to IntraLATA Equal Access. Project Number 17709 has been assigned to this proceeding. The Appropriations Act of 1997, House Bill 1, Article IX, §167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the commission is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to: (1) satisfy the requirements of §167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. As a result of this reorganization, §23.103 will be duplicative of proposed new §26.275 of this title (relating IntraLATA Equal Access) in Chapter 26, Substantive Rules Applicable to Telecommunications Service Providers.

Mr. Martin Wilson, assistant general counsel, Office of Regulatory Affairs, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Mr. Wilson has determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repeal will be the elimination of a duplicative rule. There will be no effect on small businesses as a result of repealing this section. There is no anticipated economic cost to persons as a result of repealing this section.

Mr. Wilson has also determined that for each year of the first five years the repeal is in effect there will be no impact on employment in the geographic area affected by the repeal of this section.

Comments on the proposed repeal (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. All comments should refer to Project Number 17709, repeal of §23.103.

The repeal is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (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.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002.

§23.103. IntraLATA Equal Access.

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 December 14, 1998.

TRD-9818300
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 936–7308

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Chapter 25. Substantive Rules Applicable to Electric Service Providers

Subchapter J. Costs, Rates and Tariffs

16 TAC §§25.234–25.238

The Public Utility Commission of Texas (commission) proposes new §§25.234 relating to Rate Design; 25.235 relating to Fuel Costs - General; 25.236 relating to Recovery of Fuel Costs; 25.237 relating to Fuel Factors; and 25.238 relating to Purchased Power Cost Recovery Factors. The proposed new sections will replace §23.23 of this title (relating to Rate Design) as it pertains to electric service providers, update the rule, and facilitate future amendments. The proposed new sections will allow utilities to recover fuel and purchased power costs through tariffs and a fuel cost factor approved by the commission. The new sections will also provide utilities with an incentive to increase off-system sales, in order to lower overall system costs. Project Number 19865 has been assigned to this proceeding.

The Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the commission is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to (1) satisfy the requirements of Section 167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. Chapter 25 has been established for all commission substantive rules applicable to electric service providers. The duplicative sections of Chapter 23 will be proposed for repeal as each new section is proposed for publication in the new chapter.

General changes to rule language:

The proposed new sections reflect different section, subsection, and paragraph designations due to the reorganization of the rules. Citations to the Public Utility Regulatory Act have been updated to conform to the Texas Utilities Code throughout the sections and citations to other sections of the commission's rules have been updated to reflect the new section designations. Some text has been proposed for deletion as unnecessary in the new sections, as a result of making the new chapters industry specific, changes in the industry, or because the dates and requirements in the text no longer apply due to the passage of time and/or fulfillment of the requirements. References to the terms "public utility" or "utility" have been changed to "electric utility" where needed as a result of definition changes in the Texas Utilities Code.

The *Texas Register* will publish these sections as all new text. Persons who desire a copy of the proposed new sections as they reflect changes to the existing section in Chapter 23 as it relates to electric service providers may obtain a redlined version from the commission's Central Records under Project Number 19865. The redlined version is industry specific and does not include the telecommunications portions of existing §23.23.

Other changes specific to each section:

The proposed new sections for Chapter 25 do not include a corresponding section for §23.23(a) concerning guidelines for certifying long-term fuel contracts. Subsection (a) has been deleted as unnecessary. Subsection (a) related to the certification of fuel contracts with a term of at least five years. During the five years that the commission's rules have permitted certification of long-term fuel contracts, no contract has received such certification. Utilities have instead chosen to present fuel contracts for review during a fuel reconciliation proceeding.

Other additions, deletions, and modifications to the rule include: Proposed new §25.236(a)(5) and §25.236(a)(7)(D) have been added to eliminate from eligible fuel expenses the revenues from

and payments to affiliated companies for the purpose of equalizing or balancing the financial responsibility of differing levels of investment and operating costs associated with transmission assets (*e.g.* transmission equalization payments). Proposed new §25.236(a)(7)(B) has been added to exclude from eligible fuel the wheeling revenues received by non-ERCOT electric utilities because the FERC regulates the transmission service for the non-ERCOT electric utilities. Proposed new §25.236(a)(8) has been added to permit qualifying utilities the opportunity to retain a share of margins from off-system energy sales. The commission proposes deletion of §§23.23(b)(2)(C)(i)(I)-(V), 23.23(b)(2)(C)(ii)(I)-(V), and 23.23(b)(3)(A)(i)-(v) as unnecessary descriptions of filing requirements in fuel factor and fuel reconciliation proceedings, because the rule references a commission-approved application that requests the same information. Proposed new §25.236(c)(4) and (5) have been added because a summary of the filing is now required by the commission. Proposed new §25.236(e)(5) will replace corresponding §23.23(b)(3)(C)(v) of this title, which required all refunds and surcharges to be made through a one-time bill credit or charge. The commission proposes to permit utilities to surcharge customers for fuel underrecoveries over a period up to 12 months. Proposed new §25.236(e)(6) has been added to clarify the procedural deadlines that govern the processing of a fuel refund or surcharge if requested apart from a fuel reconciliation proceeding. Finally, the commission proposes deletion of §23.23(c), which provided for expedited approval of changes in rates for electric distribution cooperatives. Currently only a few cooperatives remain regulated, and very few of those cooperatives have ever filed under §23.23(c). If a rate regulated electric distribution cooperative filed a rate case, the commission could still process the case expeditiously under Procedural Rule §22.243 of this title (relating to Rate Change Proceedings) and §23.21 of this title (relating to Cost of Service) by using case-specific good cause waivers to the rules as appropriate. Since §23.23(c) is no longer relevant or valuable, unless compelling comments are filed as to why §23.23(c) continues to be necessary, it will be eliminated upon adoption.

Questions for parties who comment on these regulations: (1) Should the commission permit utilities to retain a share of the margins from off-system energy sales? If so, what is the appropriate share for retention by utility shareholders? (2) In determining the utilities' incentive to make off-system sales, should the utilities only be allowed to retain a share of the margins over and above a three year historical average? (3) Should the commission place conditions on the eligibility of a utility to retain a share of the margins from off-system energy sales? If so, what conditions are appropriate? (4) Should the commission delete §25.238(a)(3), which requires commission approval of purchased power contracts with unregulated entities, given wholesale market competition and the need for participants to have greater operational flexibility? (5) Should the commission incorporate into these regulations language to address the proper handling of sulfur dioxide (SO_2) allowances? (6) Should the commission incorporate into these regulations language to address the proper handling of hedging gains and losses? (7) How should the commission incorporate the following language into this rule?: "All utilities who must file fuel reconciliations shall also survey the next-day and within the day electricity markets. The survey shall be done every business day and include price and quantity. The within the day survey shall be done more than once as conditions merit. Utilities shall document this survey in electronic format. Parties may substitute information from an electronic exchange or bulletin board upon showing that such information is representative of the market. They shall also document in electronic format the existence or absence of market opportunities by comparing the survey information with the appropriate expected incremental or decremental generation cost. All utilities who conduct a market survey shall file the results monthly in electronic format and with their fuel reconciliations. Utilities who do not have contractual or other authority to engage in the purchase and sale of electricity in the wholesale market would be exempt from this requirement."

Christopher Green, assistant general counsel, Office of Regulatory Affairs, has determined that for each year of the first five-year period the proposed sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Green has determined that for each year of the first five years the proposed sections are in effect the public benefit anticipated as a result of enforcing these sections will be the adoption of rates that are not unreasonably preferential, prejudicial, or discriminatory, and allow the utilities to recover reasonable fuel and purchased power costs in an efficient and timely manner. Also, §25.236 should increase off-system sales and therefore benefit the public from a decrease in overall unit fuel costs. There will be no effect on small businesses as a result of enforcing these sections. There is no additional anticipated economic cost to persons who are required to comply with the sections as proposed.

Christopher Green has also determined that for each year of the first five years the proposed sections are in effect there will be no impact on employment in the geographic area affected by implementing the requirements of the sections.

Comments on the proposed sections (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 N. Congress Avenue, P.O. Box 13326, Austin, Texas 78711- 3326, within 30 days after publication. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed sections. The commission will consider the costs and benefits in deciding whether to adopt the sections. The commission also invites specific comments regarding the Section 167 requirement as to whether the reason for adopting §23.23 continues to exist in adopting the new sections. All comments should refer to Project Number 19865.

These new sections are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (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 §§34.171, 34.172, 36.203, 36.204, 36.205. Section 34.171 grants the commission authority to allow additional incentives for purchased power. Section 34.172 allows the commission to adopt rules regarding the reconciliation of recovered costs. Section 36.203 directs the commission to adopt rules which provide for the reconciliation of a utility's fuel costs, and adjustment of fuel factor. Section 36.204 grants the commission authority to allow additional incentives for purchased power. Section 36.205 grants the commission authority over purchased power cost recovery.

Cross Index to Statutes: Public Utility Regulatory Act §§14.002, 34.171, 34.172, 36.203, 36.204, 36.205.

§25.234. Rate Design.

(a) Rates shall not be unreasonably preferential, prejudicial, or discriminatory, but shall be sufficient, equitable, and consistent in application to each class of customers, and shall be based on cost.

(b) Rates will be determined using revenues, billing and usage data for a historical test year adjusted for known and measurable changes, and costs of service as defined in §23.21 of this title (relating to Cost of Service).

§25.235. Fuel Costs - General.

(a) Purpose. The commission will set an electric utility's rates at a level that will permit the electric utility a reasonable opportunity to earn a reasonable return on its invested capital and to recover its reasonable and necessary expenses, including the cost of fuel and purchased power. The commission recognizes in this connection that it is in the interests of both electric utilities and their ratepayers to adjust charges in a timely manner to account for changes in certain fuel and purchased-power costs. Pursuant to the Public Utility Regulatory Act (PURA) §36.203 this section establishes a procedure for setting and revising fuel factors and a procedure for regularly reviewing the reasonableness of the fuel expenses recovered through fuel factors.

(b) Notice of fuel proceedings. In addition to the notice required by the Administrative Procedure Act (APA) to be given by the commission, the electric utility is required to give notice of a fuel proceeding at the time the petition is filed.

(1) Method of notice. Notice of fuel proceedings will be given by the electric utility as follows:

(A) Notice in all proceedings involving refunds, surcharges, or a proposal to change the fuel factor, shall be by one-time publication in a newspaper having general circulation in each county of the service area of the electric utility or by individual notice to each customer;

(B) Notice in all reconciliation proceedings shall be by publication once each week for two consecutive weeks in a newspaper having general circulation in each county of the service area of the electric utility and by individual notice to each customer.

(2) Contents of notice.

(A) All notices required by this section shall provide the following information:

(i) the date the petition was filed;

(ii) a general description of the customers, customer classes, and territories affected by the petition;

(iii) the relief requested;

(iv) the statement, "Persons with questions or who want more information on this petition may contact (utility name) at (utility address) or call (utility toll-free telephone number) during normal business hours. A complete copy of this petition is available for inspection at the address listed above"; and

(v) the statement, "The commission has assigned Control Number (provided by utility) to this proceeding. Persons who wish to formally participate in this proceeding , or who wish to express their comments concerning this petition should contact the Public Utility Commission of Texas, Office of Customer Protection, P.O. Box 13326, Austin, Texas 78711-3326, or call (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may call (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989."

(B) Notices to revise fuel factors must also state the proposed fuel factors by type of voltage and the period for which the proposed fuel factors are expected to be in effect.

(C) Notices to revise fuel factors, to refund, or to surcharge must contain the statement that, "these changes will be subject to final review by the commission in the electric utility's next reconciliation," unless, in the case of refunds or surcharges, the change is a result of a reconciliation proceeding.

(D) Notices to reconcile fuel expenses must also state the period for which final reconciliation is sought.

(3) Proof of notice may be demonstrated by appropriate affidavit. In fuel proceedings initiated by a person other than an electric utility, the notice required in this subsection must be provided in accordance with a schedule ordered by the presiding officer.

(c) Reports; confidentiality of information. Matters related to submitting reports and confidential information will be handled as follows:

(1) The commission will monitor each electric utility's actual and projected fuel-related costs and revenues on a monthly basis. Each electric utility shall maintain and provide to the commission, in a format specified by the commission, monthly reports containing all information required to monitor monthly fuel-related costs and revenues, including generation mix, fuel consumption, fuel costs, purchased power quantities and costs, and system and off-system sales revenues.

(2) Contracts for the purchase of fuel, fuel storage, fuel transportation, fuel processing, or power are discoverable in fuel proceedings, subject to appropriate confidentiality agreements or protective orders.

(3) The electric utility shall prepare a confidentiality disclosure agreement to be included as part of the fuel reconciliation petition. The format for the agreement shall be the same as that contained in the commission approved rate filing package. In addition to the agreement itself, Attachment 1 of the agreement shall present a complete listing of the information required to be filed which the electric utility alleges are confidential. Upon request and execution of the confidentiality agreement, the electric utility shall provide any information which it alleges is confidential. If the electric utility fails to file a confidentiality agreement, the deadline for a commission final order in the case is tolled until a protective order is entered or a confidentiality agreement is filed. Use of the confidentiality disclosure agreement does not constitute a finding that any information is proprietary and/or confidential under law, or alter the burden of proof on that issue. The form of agreement contained in the commission approved rate filing package does not bind the examiner or the commission to accept the language of the agreement in the consideration of any subsequent protective order that may be entered.

(4) A party that cannot view a confidential document without receiving advantage as a competitor or bidder may hire outside counsel and consultants to view the document subject to a protective order.

§25.236. Recovery of Fuel Costs.

(a) Eligible fuel expenses. Eligible fuel expenses include expenses properly recorded in the Federal Energy Regulatory Commission Uniform System of Accounts, numbers 501, 503, 518, 536, 547, 555, and 565, as modified in this subsection, as of April 1, 1997, and the items specified in paragraph (7) of this subsection. Any later amendments to the System of Accounts are not incorporated into this

subsection. Subject to the commission finding special circumstances under paragraph (6) of this subsection, eligible fuel expenses are limited to:

(1) For any account, the electric utility may not recover, as part of eligible fuel expense, costs incurred after fuel is delivered to the generating plant site, for example, but not limited to, operation and maintenance expenses at generating plants, costs of maintaining and storing inventories of fuel at the generating plant site, unloading and fuel handling costs at the generating plant, and expenses associated with the disposal of fuel combustion residuals. Further, the electric utility may not recover maintenance expenses and taxes on rail cars owned or leased by the electric utility, regardless of whether the expenses and taxes are incurred or charged before or after the fuel is delivered to the generating plant site. The electric utility may not recover an equity return or profit for an affiliate of the electric utility, regardless of whether the affiliate incurs or charges the equity return or profit before or after the fuel is delivered to the generating plant site. In addition, all affiliate payments must satisfy PURA §36.058.

(2) For Accounts 501 and 547, the only eligible fuel expenses are the delivered cost of fuel to the generating plant site excluding fuel brokerage fees. For Account 501, revenues associated with the disposal of fuel combustion residuals will also be excluded.

(3) For Accounts 518 and 536, the only eligible fuel expenses are the expenses properly recorded in the Account excluding brokerage fees. For Account 503, the only eligible fuel expenses are the expenses properly recorded in the Account, excluding brokerage fees, return, non-fuel operation and maintenance expenses, depreciation costs and taxes.

(4) For Account 555, the electric utility may not recover demand or capacity costs.

(5) For Account 565, an electric utility may not recover transmission expenses paid to affiliated companies for the purpose of equalizing or balancing the financial responsibility of differing levels of investment and operating costs associated with transmission assets.

(6) Upon demonstration that such treatment is justified by special circumstances, an electric utility may recover as eligible fuel expenses fuel or fuel related expenses otherwise excluded in paragraphs (1) - (5) of this subsection. In determining whether special circumstances exist, the commission shall consider, in addition to other factors developed in the record of the reconciliation proceeding, whether the fuel expense or transaction giving rise to the ineligible fuel expense resulted in, or is reasonably expected to result in, increased reliability of supply or lower fuel expenses than would otherwise be the case, and that such benefits received or expected to be received by ratepayers exceed the costs that ratepayers otherwise would have paid or otherwise would reasonably expect to pay.

(7) In addition to the expenses designated in paragraphs (1)-(6) of this subsection, unless otherwise specified by the commission, eligible fuel expenses shall be offset by:

(A) revenues from steam sales included in Accounts 504 and 456 to the extent expenses incurred to produce that steam are included in Account 503; and

(B) revenues from wheeling transactions except for non-ERCOT electric utilities; and

(C) revenues from off-system sales in their entirety, except as permitted in paragraph (8) of this subsection.

(D) no revenues from affiliated companies for the purpose of equalizing or balancing the financial responsibility of differing levels of investment and operating costs associated with transmission assets.

(8) Shared margins from off-system sales. An electric utility may retain 10% of the margins from off-system energy sales if it meets the following criteria:

(A) it participates in a transmission region governed by an independent system operator or other regional transmission provider;

(B) it offers a regional transmission tariff; and

(C) it conducts no transactions to the detriment of its retail customers.

(b) Reconciliation of fuel expenses. Electric utilities shall file petitions for reconciliation on a periodic basis so that any petition for reconciliation shall contain a maximum of three years and a minimum of one year of reconcilable data and will be filed no later than six months after the end of the period to be reconciled. However, notwithstanding the previous sentence, a reconciliation shall be requested in any general rate proceeding under the PURA, Chapter 36, Subchapters C and E and may be performed in any general rate proceeding under the PURA, Chapter 36, Subchapter D. Upon motion and showing of good cause, a fuel reconciliation proceeding may be severed from or consolidated with other proceedings.

(c) Petitions to reconcile fuel expenses. In addition to the commission prescribed reconciliation application, a fuel reconciliation petition filed by an electric utility must be accompanied by a summary and supporting testimony that includes the following information:

(1) a summary of significant, atypical events that occurred during the reconciliation period that constrained the economic dispatch of the electric utility's generating units, including but not limited to transmission line constraints, fuel use or deliverability constraints, unit operational constraints, and system reliability constraints;

(2) a general description of typical constraints that limit the economic dispatch of the electric utility's generating units, including but not limited to transmission line constraints, fuel use or deliverability constraints, unit operational constraints, and system reliability constraints;

(3) the reasonableness and necessity of the electric utility's eligible fuel expenses and its mix of fuel used during the reconciliation period;

(4) a summary table that lists all the fuel cost elements which are covered in the electric utility's fuel cost recovery request, the dollars associated with each item, and where to find the item in the prefiled testimony; and

(5) tables and graphs which show generation (MWh), capacity factor, fuel cost (cents per kWh and cents per MMBtu), variable cost and heat rate by plant and fuel type, on a monthly basis.

(d) Fuel reconciliation proceedings. Burden of proof and scope of proceeding are as follows:

(1) In a proceeding to reconcile fuel factor revenues and expenses, an electric utility has the burden of showing that:

(A) its eligible fuel expenses during the reconciliation period were reasonable and necessary expenses which acquired the maximum amount of power at the lowest mix of cost and risk feasible to provide reliable electric service to retail customers;

(B) if its eligible fuel expenses for the reconciliation period included an item or class of items supplied by an affiliate of the electric utility, the prices charged by the supplying affiliate to the electric utility were reasonable and necessary and no higher than the prices charged by the supplying affiliate to its other affiliates or divisions or to unaffiliated persons or corporations for the same item or class of items; and

(C) it has properly accounted for the amount of fuel-related revenues collected pursuant to the fuel factor during the reconciliation period.

(2) The scope of a fuel reconciliation proceeding includes any issue related to determining the reasonableness of the electric utility's fuel expenses during the reconciliation period and whether the electric utility has over- or under-recovered its reasonable fuel expenses.

(e) Refunds. All fuel refunds and surcharges shall be made using the following methods.

(1) Interest shall be calculated on the cumulative monthly ending under- or over-recovery balance at the rate established annually by the commission for overbilling and underbilling in §23.45(h) of this title (relating to Billing). Interest shall be calculated based on principles set out in subparagraphs (A) - (E) of this paragraph.

(A) Interest shall be compounded annually by using an effective monthly interest factor.

(B) The effective monthly interest factor shall be determined by using the algebraic calculation $x = (1 + i)^{(1/12)} - 1$; where i = commission-approved annual interest rate, and x = effective monthly interest factor.

(C) Interest shall accrue monthly. The monthly interest amount shall be calculated by applying the effective monthly interest factor to the previous month's ending cumulative under/over recovery fuel and interest balance.

(D) The monthly interest amount shall be added to the cumulative principal and interest under/over recovery balance.

(E) Interest shall be calculated through the end of the month of the refund or surcharge.

(2) Rate class as used in this subparagraph shall mean all customers taking service under the same tariffed rate schedule, or a group of seasonal agricultural customers as identified by the electric utility.

(3) Interclass allocations of refunds and surcharges, including associated interest, shall be developed on a month-by-month basis and shall be based on the historical kilowatt-hour usage of each rate class for each month during the period in which the cumulative under- or over-recovery occurred, adjusted for line losses using the same commission-approved loss factors that were used in the electric utility's applicable fixed or interim fuel factor.

(4) Intraclass allocations of refunds and surcharges shall depend on the voltage level at which the customer receives service from the electric utility. Retail customers who receive service at transmission voltage levels, all wholesale customers, and any groups of seasonal agricultural customers as identified by the electric utility shall be given refunds or assessed surcharges based on their individual actual historical usage recorded during each month of the period in which the cumulative under- or over-recovery occurred, adjusted for line losses if necessary. All other customers shall be given refunds or assessed surcharges based on the historical kilowatt-hour usage of their rate class.

(5) Unless otherwise ordered by the commission, all refunds shall be made through a one-time bill credit and all surcharges shall be made on a monthly basis over a period not to exceed 12 months through a bill charge. However, refunds may be made by check to municipally-owned electric utility systems if so requested. Retail customers who receive service at transmission voltage levels, all wholesale customers, and any groups of seasonal agricultural customers as identified by the electric utility shall be given a lump-sum credit or assessed a lump-sum surcharge. All other customers shall be given a credit or assessed a surcharge based on a factor which will be applied to their kilowatt-hour usage over the refund or surcharge period. This factor will be determined by dividing the amount of refund or surcharge allocated to each rate class by forecasted kilowatt-hour usage for the class during the period in which the refund or surcharge will be made.

(6) A petition to surcharge or refund a fuel under- or over-recovery balance not associated with a proceeding under subsection (d) of this section shall be processed in accordance with the deadlines in §25.237(e) of this title (relating to Fuel factors).

(f) Procedural schedule. Upon the filing of a petition to reconcile fuel expenses in a separate proceeding, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding within one year after a materially complete petition was filed. However, if the deadlines result in a number of electric utilities filing cases within 45 days of each other, the presiding officers shall schedule the cases in a manner to allow the commission to accommodate the workload of the cases irrespective of whether such procedural schedule enables the commission to issue a final order in each of the cases within one year after a materially complete petition is filed.

§25.237. Fuel Factors.

(a) Use and calculation of fuel factors. An electric utility's fuel costs will be recovered from the electric utility's customers by the use of a fuel factor that will be charged for each kilowatt-hour (kWh) consumed by the customer.

(1) Fuel factors are determined by dividing the electric utility's projected net eligible fuel expenses, as defined in §25.236(a) of this title (relating to Recovery of Fuel Costs), by the corresponding projected kilowatt-hour sales for the period in which the fuel factors are expected to be in effect. Fuel factors must account for system losses and for the difference in line losses corresponding to the type of voltage at which the electric service is provided. An electric utility may have different fuel factors for different times of the year to account for seasonal variations. A different method of calculation may be allowed upon a showing of good cause by the electric utility.

(2) An electric utility may initiate a change to its fuel factor as follows:

(A) An electric utility may petition to adjust its fuel factor as often as once every six months according to the schedule set out in subsection (d) of this section.

(B) An electric utility may petition to change its fuel factor at times other than provided in the schedule if an emergency exists as described in subsection (f) of this section.

(C) An electric utility's fuel factor may be changed in any general rate proceeding.

(3) Fuel factors are temporary rates, and the electric utility's collection of revenues by fuel factors is subject to the following adjustments:

(A) The reasonableness of the fuel costs that an electric utility has incurred will be periodically reviewed in a reconciliation proceeding, as described in §25.236 of this title, and any unreasonable costs incurred will be refunded to the electric utility's customers.

(B) To the extent that there are variations between the fuel costs incurred and the revenues collected, it may be necessary or convenient to refund overcollections or surcharge undercollections. Refunds or surcharges may be made without changing an electric utility's fuel factor, but requests by the electric utility to make refunds or surcharges may only be made at the times allowed by this paragraph. An electric utility may petition to make refunds or surcharges at the specified times that these rules allow an electric utility to change its fuel factor irrespective of whether the electric utility actually petitions to change its fuel factor at that time. An electric utility shall petition for a surcharge at the next date allowed for setting a fuel factor by the schedule set out in subsection (d) of this section when it has materially undercollected its fuel costs and projects that it will continue to be in a state of material undercollection. An electric utility shall petition to make a refund at any time that it has materially overcollected its fuel costs and projects that it will continue to be in a state of material overcollection. "Materially" or "material," as used in this section, shall mean that the cumulative amount of over- or under-recovery, including interest, is greater than or equal to 4.0% of the annual estimated fuel cost figure most recently adopted by the commission, as shown by the electric utility's fuel filings with the commission.

(b) Petitions to revise fuel factors. During the first five business days of the months specified in subsection (d) of this section, each electric utility using one or more fuel factors may file a petition requesting revised fuel factors. A copy of the filing shall also be delivered to the Office of Regulatory Affairs and the Office of Public Utility Counsel. Each petition must be accompanied by the commission prescribed fuel factor application and supporting testimony that includes the following information:

(1) For each month of the period in which the fuel-factor has been in effect up to the most recent month for which information is available,

(A) the revenues collected pursuant to fuel factors by customer class;

(B) any other items that to the knowledge of the electric utility have affected fuel factor revenues and eligible fuel expenses; and

(C) the difference, by customer class, between the revenues collected pursuant to fuel factors and the eligible fuel expenses incurred.

(2) For each month of the period for which the revised fuel factors are expected to be in effect, provide system energy input and sales, accompanied by the calculations underlying any differentiation of fuel factors to account for differences in line losses corresponding to the type of voltage at which the electric service is provided.

(c) Fuel factor revision proceeding. Burden of proof and scope of proceeding are as follows:

(1) In a proceeding to revise fuel factors, an electric utility has the burden of proving that:

(A) the expenses proposed to be recovered through the fuel factors are reasonable estimates of the electric utility's eligible fuel expenses during the period that the fuel factors are expected to be in effect;

(B) the electric utility's estimated monthly kilowatt-hour system sales and off- system sales are reasonable estimates for the period that the fuel factors are expected to be in effect; and

(C) the proposed fuel factors are reasonably differentiated to account for line losses corresponding to the type of voltage at which the electric service is provided.

(2) The scope of a fuel factor revision proceeding is limited to the issue of whether the petitioning electric utility has appropriately calculated its estimated eligible fuel expenses and load.

(d) Schedule for filing petitions to revise fuel factors. A petition to revise fuel factors may be filed with any general rate proceeding. Otherwise, except as provided by subsection (f) of this section which addresses emergencies, petitions by an electric utility to revise fuel factors may only be filed during the first five business days of the month in accordance with the following schedule:

(1) January and July: El Paso Electric Company and Central Power and Light Company;

(2) February and August: Texas Utilities Electric Company and Brazos Electric Power Cooperative, Inc.;

(3) March and September: West Texas Utilities Company and Entergy Gulf States, Inc.

(4) April and October: Houston Lighting & Power Company and Southwestern Electric Power Company;

(5) May and November: Southwestern Public Service Company and Lower Colorado River Authority; and

(6) June and December: Texas-New Mexico Power Company, South Texas Electric Cooperative, Inc., San Miguel Electric Cooperative, Inc., and any other electric utility not named in this subsection that uses one or more fuel factors.

(e) Procedural schedule. Upon the filing of a petition to revise fuel factors in a separate proceeding, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding as follows:

(1) within 60 days after the petition was filed, if no hearing is requested within 30 days of the petition; and

(2) within 90 days after the petition was filed, if a hearing is requested within 30 days of the petition. If a hearing is requested, the hearing will be held no earlier than the first business day after the 45th day after the application was filed.

(f) Emergency revisions to the fuel factor. If fuel curtailments, equipment failure, strikes, embargoes, sanctions, or other reasonably unforeseeable circumstances have caused a material under-recovery of eligible fuel costs, the electric utility may file a petition with the commission requesting an emergency interim fuel factor. Such emergency requests shall state the nature of the emergency, the magnitude of change in fuel costs resulting from the emergency circumstances, and other information required to support the emergency interim fuel factor. The commission shall issue an interim order within 30 days after such petition is filed to establish an interim emergency fuel factor. If within 120 days after implementation, the emergency interim factor is found by the commission to have been excessive, the electric utility shall refund all excessive collections with interest calculated on the cumulative monthly ending under- or

overrecovery balance in the manner and at the rate established by the commission for overbilling and underbilling in §23.45(g) of this title (relating to Billing). If, after full investigation, the commission determines that no emergency condition existed, a penalty of up to 10% of such over-collections may also be imposed on investor-owned electric utilities.

§25.238. Power Cost Recovery Factors (PCRF).

(a) Application. The provisions of this subsection apply to all investor-owned electric distribution utilities, river authorities and cooperative-owned electric utilities.

(1) An electric utility which purchases electricity at wholesale pursuant to rate schedules approved, promulgated, or accepted by a federal or state authority, or from qualifying facilities may be allowed to include within its tariff a PCRF clause which authorizes the electric utility to charge or credit its customer for the cost of power and energy purchased to the extent that such costs vary from the purchased power cost utilized to fix the base rates of the electric utility. Purchased electricity cost includes all amounts chargeable for electricity under the wholesale tariffs pursuant to which the electricity is purchased and amounts paid to qualifying facilities for the purchase of capacity and/or energy. The terms and conditions of such PCRF clause, which may include the method in which any refund or surcharge from the electric utility's wholesale supplier will be passed on to its customers, shall be approved by an order of the commission.

(2) Any difference between the actual costs to be covered through the PCRF and the actual PCRF revenues recovered shall be credited or charged to the electric utility's ratepayers in the second succeeding billing month unless otherwise approved by the commission.

(3) If the electric utility purchases power from an unregulated entity, such as a political subdivision of the State of Texas, the electric utility shall submit the purchased power contract to the commission for approval of the terms, conditions and price. If the commission issues an order approving the purchase, a PCRF may be applied to such purchases.

(4) If PCRF revenue collections exceed PCRF costs by 10% in any given month and the total PCRF revenues have exceeded total PCRF costs by 5.0% or more for the most recent 12-month period:

(A) investor-owned electric distribution utilities shall be subject to a 10% penalty on excess collection,

(B) cooperative-owned electric utilities shall report to the commission the justification for excess collection.

(5) The electric utility shall maintain and provide to the commission, monthly reports containing all information required to monitor the costs recovered through the PCRF clause. This information includes, but is not limited to, the total estimated PCRF cost for the month, the actual PCRF cost on a cumulative basis, total revenues resulting from the PCRF and the calculation of the PCRF.

(b) Application. The provisions of this subsection apply to all investor-owned generating electric utilities and river authorities.

(1) An electric utility which purchases electricity from qualifying facilities may be allowed to include within its tariff a PCRF clause which authorizes the electric utility to charge or credit its customers for the costs of capacity purchased from cogenerators and small power producers. These costs shall be included in the PCRF only to the extent that such costs vary from the costs utilized to fix the base rates of the electric utility and to the extent that they comply with §23.66(h) of this title (relating to Arrangements between Qualifying Facilities and Electric Utilities). The terms and conditions of such PCRF shall be approved by an order of the commission.

(2) Purchased power costs that are recovered through the PCRF shall be excluded in calculating the electric utility's fixed fuel factor as defined in §25.237 of this title (relating to Fuel Factors).

(3) Costs recovered through a PCRF shall be allocated to the various rate classes in the same manner as the embedded costs of the electric utility's generation facilities allocated in the electric utility's last rate case, unless otherwise ordered by the commission. Once allocated, these costs shall be collected from ratepayers through a demand or energy charge.

(4) Any difference between the actual costs to be recovered through the PCRF and the PCRF revenues recovered shall be credited or charged to the customers in the second succeeding billing month.

(5) If PCRF revenue collections exceed PCRF costs by 10% in any given month and the total PCRF revenues have exceeded total PCRF costs by 5.0% or more for the most recent 12-month period, the electric utility shall be subject to a 10% penalty on excess collections.

(6) The electric utility shall maintain and provide to the commission, monthly reports containing all information required to monitor costs recovered through the PCRF. This information includes, but is not limited to, total estimated PCRF cost for the month, the actual PCRF cost, total revenue resulting from the PCRF and the calculation of the PCRF clause.

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 December 7, 1998.

TRD-9818189
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 936–7308

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Chapter 26. Substantive Rules Applicable to Telecommunications Service Providers

Subchapter J. Costs, Rates and Tariffs

16 TAC §26.205, §26.206

The Public Utility Commission of Texas (commission) proposes new §26.205 relating to Rates for Intrastate Access Services and §26.206 relating to Depreciation Rates. Proposed §26.205 will replace §23.23(d) of this title (relating to Rate Design). Proposed §26.206 will replace §23.61(h) of this title (relating to Telephone Utilities) as it concerns depreciation rates. Project Number 19866 has been assigned to this proceeding.

The Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an as-

sessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the commission is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to (1) satisfy the requirements of Section 167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. Chapter 26 has been established for all commission substantive rules applicable to telecommunications service providers. The duplicative sections of Chapter 23 will be proposed for repeal as each new section is proposed for publication in the new chapter.

General changes to rule language:

The proposed new sections reflect different section, subsection, and paragraph designations due to the reorganization of the rules. Citations to the Public Utility Regulatory Act have been updated to conform to the Texas Utilities Code throughout the sections and citations to other sections of the commission's rules have been updated to reflect the new section designations when necessary. Some text has been proposed for deletion as unnecessary in the new sections, as a result of making the new chapters industry specific; or because the dates and requirements in the text no longer apply due to the passage of time and/or fulfillment of the requirements. The *Texas Register* will publish these sections as all new text. Persons who desire a copy of the proposed new sections as they reflect changes to existing sections in Chapter 23 may obtain a redlined version from the commission's Central Records under Project Number 19866.

Other changes specific to each section:

Section 23.23(d)(2) concerning definitions has not been incorporated into §26.205. The definitions were moved to §26.5 of this title (relating to Definitions), which was adopted effective September 16, 1998. Section 23.23(d)(3) concerning switched access rates of incumbent local exchange companies has been deleted because sufficient guidance on the subject is given in PURA §53.113. Section 23.23(d)(6)(B) concerning meet point billing and §23.23(d)(6)(C) concerning equal access have been deleted as no longer necessary.

Martin Wilson, assistant general counsel, 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. Wilson has determined that for each year of the first five years the proposed sections are in effect the public benefit anticipated as a result of enforcing the sections will be clarity regarding requirements for intrastate access tariffs and appropriate depreciation practices of dominant certificated telecommunications utilities. There will be no effect on small businesses as a result of enforcing these sections. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Mr. Wilson has also determined that for each year of the first five years the proposed sections are in effect there will be no impact on employment in the geographic area affected by implementing the requirements of the sections.

Comments on the proposed sections (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 N. Congress Avenue, P.O. Box 13326, Austin, Texas 78711- 3326, within 30 days after publication. 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. The commission also invites specific comments regarding the Section 167 requirement as to whether the reason for adopting §23.23(d) and §23.61(h) continues to exist in adopting these sections to replace §23.23(d) and §23.61(h). All comments should refer to Project Number 19866.

These sections are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (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 §§53.001, 53.003, 53.056(d) and 60.001. Section 53.001 provides the commission authority to establish and regulate rates of a public utility. Section 53.003 requires the commission to ensure that rates charged by a public utility are just and reasonable, and establishes criteria for that determination. Section 53.056(d) provides that a company electing under PURA Chapter 58 may determine its own depreciation rates and amortizations but must report any changes thereto to the commission. Section 60.001 requires the commission to ensure that the rates of an incumbent local exchange company are not unreasonably preferential, prejudicial, or discriminatory and are applied equitably and consistently.

Cross Index to Statutes: Public Utility Regulatory Act §§14.002, 53.001, 53.003, 53.056(d) and 60.001.

§26.205. Rates for Intrastate Access Services.

(a) General. Dominant certificated telecommunications utility (DCTU) rates for intrastate access services shall be established in accordance with the provisions of this section. Nothing in this section precludes a DCTU from offering new, experimental, promotional, or competitive services in accordance with other provisions of this part authorizing such offerings.

(b) Access services. Each DCTU's tariff must include the recurring and nonrecurring charges for all access services offered by the DCTU. A DCTU is not required to include in its access tariff any access service that its network is technologically incapable of providing. A DCTU must include in its access tariff any access service which is provided on a special assembly basis if the service is provided to more than three customers or if the service is provided at more than three locations. DCTUs are prohibited from charging intrastate end user common line charges, intrastate subscriber line charges, or similar intrastate end user charges.

(c) Access rates. The structure and rates for all DCTUs' intrastate switched access services shall be established in accordance with the following requirements.

(1) Terminating common carrier line (CCL). Each DCTU's terminating CCL rate shall not exceed $ .08 per premium terminating rated access minute of use.

(2) Premium rates. The requirements of this paragraph apply to Southwestern Bell Telephone Company effective December

14, 1994 unless otherwise ordered by the commission. Premium access rates shall apply only to those switched access minutes that:

(A) terminate via Feature Group B;

(B) originate or terminate via Feature Group C;

(C) originate from an equal access end office via any switched access feature group;

(D) terminate to an equal access end office via any switched access feature group; or

(E) originate from a non-equal access end office and are routed over Feature Group D tandem connections.

(3) Local switching. There shall be one premium local switching rate element.

(4) Local transport rate structure and pricing. Local transport rates shall not contain unreasonable distance sensitivity. Each DCTU shall comply with subparagraphs (A)- (I) of this paragraph, unless indicated otherwise.

(A) Transport services. Each DCTU that is subject to this subparagraph shall offer transport services that consist of the following elements: entrance facilities, direct-trunked transport, tandem-switched transport, dedicated signaling transport, and a residual charge.

(B) Entrance facilities.

(i) All access customers that use the DCTU's facilities between the customer-designated point of demarcation and the serving wire center (SWC) shall be assessed a flat-rated entrance facilities charge based upon the service level ordered. Dominant certificated telecommunications utilities shall offer entrance facilities at voicegrade, DS1 and DS3 service levels.

(ii) Rates for entrance facilities shall be set no lower than 105% of the long run incremental cost (LRIC) for each service level stated in clause (i) of this subparagraph.

(iii) The DCTU may charge distance-sensitive rates for entrance facilities as enumerated in subparagraph (H) of this paragraph. Mileage shall be measured as airline mileage between the point of demarcation and the SWC.

(C) Direct-trunked transport.

(i) All access customers that use the DCTU's direct-trunked transport facilities shall be assessed a flat-rated direct-trunked transport charge based upon the service level ordered. Dominant certificated telecommunications utilities shall offer direct trunked transport at voice grade, DS1 and DS3 service levels.

(ii) Rates for direct-trunked transport facilities shall be set no lower than 105% of the LRIC for each service level in clause (i) of this subparagraph. Additionally, these rates shall be set consistent with the requirement in subparagraph (G) of this paragraph.

(iii) The DCTU may charge distance sensitive rates for direct-trunked transport, as enumerated in subparagraph (H) of this paragraph. Mileage shall be measured as airline mileage between the SWC and end office or between customer-designated points.

(iv) Centralized equal access providers are not required to provide direct- trunked transport services. DCTUs that do not have measurement and billing capabilities at their end offices are not required to provide direct-trunked transport services at those end offices.

(D) Tandem-switched transport.

(i) All access customers that use the DCTU's tandem-switched transport facilities shall be assessed the following rates:

(I) a per access minute tandem switching charge; and

(II) a per access minute tandem-switched transmission charge.

(ii) The rates for tandem-switched transport facilities shall be set no lower than 105% of the LRIC. Additionally, these rates shall be set consistent with the requirements in subparagraph (G) of this paragraph.

(iii) The DCTU may charge distance-sensitive rates for tandem-switched transmission elements, as enumerated in subparagraph (H) of this paragraph. Mileage shall be measured as airline mileage between the SWC and the end office, unless the customer has ordered tandem-switched transport between the tandem office and the end office, in which case mileage shall be measured as airline mileage between the tandem office and the end office.

(E) Dedicated Signaling Transport: Dedicated signaling transport shall be provided in accordance with the following requirements:

(i) Dedicated signaling transport shall consist of two subelements, a signaling link charge and a signaling transfer point (STP) port termination charge.

(ii) A flat-rated signaling link charge per unit of capacity shall be assessed upon all access customers that use facilities between the access customer's common channel signaling network and the DCTU's signaling transfer point or equivalent facilities. If the DCTU charges distance-sensitive rates for the signaling link, mileage shall be measured as airline mileage between the access customer's common channel signaling network and the DCTU's signaling transfer point.

(iii) A flat-rated STP port termination charge per port shall be assessed upon all access customers that use dedicated signaling transport.

(iv) Rates for dedicated signaling transport facilities shall be set no lower than 105% of the LRIC.

(F) Residual charge. The DCTU shall assess only one residual charge for each local switching access minute of use sold to those customers interconnecting with the DCTU's switched access network by ordering from the DCTU's access tariff.

(G) Transport rate differences. The rate differences between tandem-switched transport, DS1 direct-trunked transport and DS3 direct-trunked transport, shall be reasonable. The difference between the rate and 105% of the LRIC for DS1 direct-trunked transport shall not exceed 150% of the difference between the rate and 105% of the LRIC for DS3 direct-trunked transport, on an equivalent unit of capacity basis. The difference between the rate and 105% of the LRIC for DS0 direct-trunked transport shall not exceed 150% of the difference between the rate and 105% of the LRIC for DS3 direct-trunked transport, on an equivalent unit of capacity basis. The difference between the rate and 105% of the LRIC for tandem-switched transport shall not exceed 150% of the difference between the rate and 105% of the LRIC for DS3 direct-trunked transport, on an equivalent unit of capacity basis. To determine the rate and LRIC relationships between the transport options, the tandem switch LRIC must be included in the LRIC for the tandem-switched transport option.

(H) Distance sensitive rates. If the DCTU employs distance-sensitive rates for entrance facilities, direct-trunked transport and/or tandem-switched transmission elements, they shall be assessed in the following manner:

(i) a distance-sensitive component shall be charged for the use of the transmission facilities, including intermediate transmission circuit equipment between the end points of the transmission link; and

(ii) a nondistance-sensitive component shall be charged for the use of the circuit equipment at the ends of the transmission link.

(I) Tariff provisions.

(i) Tariffs shall not contain resale or sharing restrictions for switched transport services.

(ii) Initial tariffs filed in compliance with this section shall be filed pursuant to §23.26 of this title (relating to New and Experimental Services). Tariff revisions filed pursuant to this subparagraph shall not be combined in a single application with any other tariff revision. Initial tariff amendments shall not be permitted to become effective before expanded interconnection for switched transport services becomes available from the DCTU for those DCTUs subject to substantive rule §23.92 of this title (relating to Expanded Interconnection).

(iii) DCTUs not subject to substantive rule §23.91 of this title (relating to Long Run Incremental Cost Methodology for Dominant Certificated Telecommunications Utility (DCTU) Services) may propose charges that are the same as the charges in effect for the carrier's interstate provision of the same service or adopt the switched transport rates of another DCTU that are developed pursuant to the requirements of this section.

(iv) Within 120 days after the completion of LRIC cost studies required by substantive rule §23.91 of this title, any DCTU subject to that rule shall file tariff amendments in order to revise its local transport rates in conformity with this section based upon the new LRIC cost studies.

(5) Lower rates. Nothing in this subsection prevents a DCTU from charging a lower rate for any rate element than the amount specified herein; however, no DCTU shall charge any rate for switched access that is not contained in its switched access tariff.

(6) Rounding. The rates for all access services shall be assessed using conventional rounding of fractional units of applicable billing units, i.e., a fraction equal to or greater than 0.5 of one unit will be rounded up to the next higher whole unit, while fractions less than 0.5 of one unit will be rounded down to the next lower whole unit, except that local transport mileage may be rounded up to the next whole mile.

(d) Administrative provisions. The intrastate access service tariff of all DCTUs must contain, at a minimum, the requirements stated in paragraph (1) - (3) of this subsection, relating to percent interstate usage (PIU).

(1) Jurisdictional determination capability. If the DCTU possesses the network capability to determine the jurisdiction of an access service, a monthly PIU, based upon the actual jurisdictional determination of access services used by the access customer, must be calculated by the DCTU and applied to the monthly bill for each access customer.

(2) No jurisdictional determination capability. If a DCTU's network facilities are incapable of making a determination of the jurisdiction of an access service, such DCTU shall establish guidelines in its access tariff that permit an access customer to self-report. PIUs may be self-reported by access customers to DCTUs if all of the requirements of subparagraphs (A) - (F) of this paragraph are met.

(A) A DCTU must request and receive written representation from the self- reporting access customer that the access customer possesses a network technology or has established other reasonable methods which it can accurately determine the jurisdiction of each access service used by the access customer.

(B) The DCTU must request and receive a written representation from the access customer that the access customer calculates self-reported PIUs based upon the actual jurisdiction of each access service used by the access customer.

(C) The DCTU must request and receive from the access customer, at a minimum, an annual report supporting the self-reported PIUs.

(D) The DCTU's intrastate access tariff must establish a monitoring procedure for the annual monitoring of all self-reported PIUs and an auditing procedure for timely auditing of questionable self-reported PIUs.

(E) The DCTU's intrastate access service tariff must contain an adjustment procedure for the correction of up to 12 months of access service bills which were based upon an erroneous PIU as determined through a PIU audit.

(F) The DCTU's intrastate access tariff must specify that the DCTU is responsible for verifying the accuracy of the PIU report and the access customer is responsible for the accuracy of self-reported PIUs.

(3) Default PIU. If the DCTU's network facilities are incapable of determining call jurisdiction and the access customer fails to exercise its self-reporting option under paragraph (2) of this subsection, the DCTU must provide written notice to the access customer by certified mail that, if the customer fails to exercise one of its options within 30 days of receipt of such notice, a PIU will be established at 50%. Nothing in this paragraph prohibits the DCTU from auditing such access customer. If such an audit is conducted, the results of such audit will be used to determine that access customer's PIU.

§26.206. Depreciation Rates.

(a) General. Dominant certificated telecommunications utilities (DCTUs) shall use depreciation rates approved by the commission to determine depreciation expense and provide for accumulated depreciation (also referred to as depreciation reserve). For purposes of this section, depreciation rates used prior to September 1, 1976, and those in effect on September 1, 1976, shall be deemed appropriate for use, unless subsequently modified by the commission.

(b) Depreciation rate changes for telecommunications utilities subject to regulation of interstate depreciation rates by the Federal Communications Commission. Telecommunications utilities subject to interstate regulation by the Federal Communications Commission are also required to file for commission approval of intrastate depreciation rates. Filings should be made in the same format and on the same schedule as those required by the federal regulatory body, with the addition of proposed intrastate accrual changes calculated through use of jurisdictional separations procedures. The utility shall have the burden of proof to establish that requested intrastate depreciation rate changes are reasonable and in the public interest in proceedings before the commission.

(c) Depreciation rate changes for other dominant carriers. Any DCTU, except as covered in subsection (b) of this section, requesting a change in depreciation rates must request commission approval and include in its request the information set out in paragraphs (1) - (3) of this subsection.

(1) For each property account or subaccount for which a depreciation rate change is proposed:

(A) the plant in service and the accumulated depreciation as of the requested effective date for the proposed depreciation rates;

(B) the total of accruals, additions, retirements, gross salvage, and cost of removal for each of the preceding four years; and

(C) detailed justification for the proposed changes.

(2) The requested effective date of the changes. A request for an effective date that is earlier than January 1st of the year in which the request is filed must be fully justified in order to receive consideration.

(3) The change in annual depreciation expense that would result from adoption of the proposed depreciation rates, expressed both as a dollar amount and as a percentage of current total depreciation expense.

(d) Methods for figuring depreciation rates. On application by a utility, the commission shall fix depreciation rates that promote deployment of new technology and infrastructure. In setting depreciation rates, the commission shall consider depreciation practices of nonregulated telecommunications providers. Depreciation rates must be based on reasonable methods of depreciation; however, the commission reserves the right to specifically consider any and all appropriate methods of depreciation in each case.

(e) Burden of proof. A DCTU shall have the burden of proof to show that depreciation or amortization expense is reasonable, necessary and in the public interest. The DCTU shall also be required to show that depreciation rate changes were timely requested in accordance with prudent management practices. The burden of proof shall not be satisfied solely by demonstrating that the depreciation rates or amortization periods used were approved. If the DCTU fails to meet this burden the commission may deny as a cost of service that depreciation or amortization expense.

(f) Interim booking. Unless otherwise ordered by the commission, a DCTU may book depreciation and amortization expense on an interim basis based on proposed depreciation rates from the month of filing until interim or final action by the commission. Interim booking shall be adjusted upon final approval of depreciation rates and records must be maintained showing the interim booking and the adjustments, if any, that were made upon final approval of the rates.

(g) Special amortization. Where all or a substantial portion of a property account or subaccount is retired earlier than anticipated and the reserve for that account is less than the amount to be retired less salvage, or in other instances when an amortization is appropriate, special amortization may be requested.

(1) If the amortization period is two years or less, and the annual amount to be amortized is less than 2.0% of annual revenues, the DCTU shall advise the commission. The commission may review the appropriateness of such amortization during rate cases.

(2) If the amortization period is more than two years, or the amount to be amortized is more than 2.0% of annual revenues, commission approval is required.

(h) New depreciation rates. When a DCTU determines a need to establish a new depreciation rate for a new class of property, it may adopt a depreciation rate that has been approved by the commission for a similar DCTU for the same property class if similar depreciation parameters and methods are used to determine the rates. The DCTU must notify the commission that it has adopted such rates within 45 days of its adoption. The commission may review and modify such rates upon appropriate motion or in subsequent rate or depreciation proceedings.

(i) Public Utility Regulatory Act (PURA), Chapter 58 companies. A company electing under PURA Chapter 58 may determine its own depreciation rates and amortizations, but shall notify the commission of any subsequent changes to the rates or amortizations. Such company shall notify the commission using the same format required by the Federal Communications Commission for depreciation and amortization filings.

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 December 7, 1998.

TRD-9818190
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 936–7308

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Subchapter L. Wholesale Market Provisions

16 TAC §26.274

The Public Utility Commission of Texas (commission) proposes new §26.274 relating to Imputation. The proposed section will replace §23.102 of this title (relating to Imputation), and governs imputation of the price of a service as required by the Public Utility Regulatory Act. Project Number 17709 has been assigned to this proceeding.

The Appropriations Act of 1997, House Bill 1, Article IX, §167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the commission is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to: (1) satisfy the requirements of §167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. Chapter 26 has been established for all commission substantive rules appli-

cable to telecommunications service providers. The duplicative sections of Chapter 23 will be proposed for repeal as each new section is proposed for publication in the new chapter.

General changes to rule language:

The proposed new section reflects a different section designation due to the reorganization of the rules. Citations to the Public Utility Regulatory Act have been updated to conform to the Texas Utilities Code throughout the section and references to Basket I, II and III services have been changed to basic network services, discretionary services and competitive services respectively. The *Texas Register* will publish this section as all new text. Persons who desire a copy of the proposed new section as it reflects changes to the existing sections in Chapter 23 may obtain a redlined version from the commission's Central Records under Project Number 17709.

Other changes specific to each section:

The terms "retail service" and "wholesale service" as defined in §23.102 have not been included in proposed new §26.274, as they have been incorporated into §26.5 of this title (relating to Definitions). The term "competitively available" has been included in §26.274 as a section specific definition.

Mr. Martin Wilson, assistant general counsel, Office of Regulatory Affairs, 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. Wilson has 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 to prevent an incumbent local exchange company from selling a service or function to another telecommunications utility at a price that is higher than the rate the incumbent local exchange company implicitly includes in services it provides to retail customers. There will be no effect on small businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Mr. Wilson has also determined that for each year of the first five years the proposed section is in effect there will be no impact on employment in the geographic area affected by implementing the requirements of the section.

Comments on the proposed section (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. 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. The commission also invites specific comments regarding the §167 requirement as to whether the reason for adopting or readopting the rule continues to exist. All comments should refer to Project Number 17709 - §26.274 relating to Imputation.

This section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (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 §60.061 which requires the commission to adopt rules governing imputation of the price of a service.

Cross Index to Statutes: Public Utility Regulatory Act §14.002 and §60.061.

§26.274. Imputation.

(a) Application. This section applies to incumbent local exchange companies (ILECs) as that term is defined in the Public Utility Regulatory Act (PURA), §51.002(3). The obligations prescribed by this section may be applied to an ILEC with fewer than one million access lines in the state only on a bona fide request from a party having a justiciable interest.

(b) Purpose. This section implements the state's regulatory policy to prevent an ILEC from selling a wholesale service or function to another telecommunications utility at a price that is higher than the rate the ILEC implicitly includes in retail services it provides.

(c) Definition. The term "competitively available" when used in this section, shall mean a service that may be obtained from at least one source other than the ILEC to an extent sufficient to discipline the price charged by the ILEC in the state. In the context of an imputation test for a retail service, there shall be a rebuttable presumption that a wholesale service is competitively available if:

(1) the ILEC providing the retail service has elected under the Public Utility Regulatory Act, Chapter 58 and the wholesale service is a competitive service; or

(2) the service is available from a competitor, other than a pure reseller, to 60% of the access lines to which the retail service is or will be available.

(d) Services for which imputation is required. Except as provided otherwise in subsection (e) of this section, imputation of the price of a wholesale service is required in establishing the rates for a retail service if:

(1) the retail service cannot be purchased at wholesale rates for resale by a competitor; and

(2) a wholesale service that is not competitively available is necessary for the competitor to provide its competing service.

(e) Rates to which imputation is not required. The price of a retail local exchange telephone service that is a basic network service or a retail local exchange telephone service whose rate is capped pursuant to PURA Chapter 59 shall not be subject to the requirements of this section unless:

(1) the four year price cap under PURA Chapter 58 or the six-year price cap under PURA Chapter 59 has expired;

(2) the price cap applicable to the service is raised;

(3) the ILEC's rates for local exchange telephone service are restructured or rebalanced; or

(4) the service is reclassified from a basic network service to a discretionary or competitive service.

(f) Imputation on a service-by-service basis. Imputation shall be applied on a service- by-service basis, not on a rate-element-by-rate-element basis.

(g) Imputation methodology. An imputation study filed pursuant to this section shall demonstrate that the price the ILEC charges for a retail service recovers the cost of providing the service. Alternatively, the study may demonstrate that, no later than the second year after the retail service is first offered, the revenue the ILEC receives from the service recovers the cost of providing the service.

For purposes of this section, the cost of providing a retail service is defined as the sum of:

(1) specifically tariffed premium rates for the noncompetitive services or service functions, or elements of these noncompetitive services or service functions (or their functional equivalents) that are used to provide the retail service;

(2) the total service long-run incremental costs of the competitive services or service functions that are used;

(3) any costs, not otherwise reflected in paragraphs (1) or (2) of this subsection, that are specifically associated with provision of the retail service or group of services; and

(4) any cost or surcharge associated with an explicit subsidy that is applied to all providers of the retail service for the purpose of promoting universal service.

(h) Imputation study for a new service or a revised rate. In forecasting revenue and costs in an imputation study for a new service or a revised rate, it shall be the responsibility of the ILEC to demonstrate:

(1) the validity of the data on which the forecast is based;

(2) the validity of the statistical method or model on which the forecast is based; and

(3) the validity of the interpretation and application of the forecast in the imputation study.

(i) Timing of imputation studies. An imputation study shall be filed by an ILEC under any of the circumstances set out in paragraphs (1)-(5) of this subsection.

(1) Upon complaint by a party, and a finding by the commission that an imputation study is in the public interest, or on the commission's own motion. Upon receiving a complaint calling for an imputation study, the commission shall determine within 45 days whether an imputation study shall be required.

(2) When an ILEC files an application to reduce a rate for a retail service for which imputation is required.

(3) When an ILEC applies to increase a rate for a wholesale service that:

(A) is not competitively available; and,

(B) is necessary for a competitor to provide its competing service or is a component of a retail service for which imputation is required.

(4) In conjunction with an application to provide a new service or contract that uses a wholesale service that:

(A) is not competitively available; and

(B) is necessary for a competitor to provide its competing service.

(5) As otherwise ordered by the commission.

(j) Confidentiality of data. If a party classifies data filed with the commission as confidential, the party should designate the section of the Public Information Act (Chapter 522, Texas Government Code) that excepts the information from public disclosure. The commission will treat such information as confidential subject to the provisions of the Public Information Act and protective orders issued by the commission applicable to the data.

(k) Waiver provisions.

(1) The commission may waive the imputation requirement for a public interest service such as 9-1-1 or dual party relay service if the commission determines that the waiver is in the public interest.

(2) After notice and hearing, and subject to the requirements of law, the commission may waive any provision of this section for good cause.

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 December 14, 1998.

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Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 936–7308

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16 TAC §26.275

The Public Utility Commission of Texas (commission) proposes new §26.275 relating to IntraLATA Equal Access. The proposed section will replace §23.103 of this title (relating to IntraLATA Equal Access) and is necessary to comply with Public Utility Regulatory Act §55.009(c), which requires the commission to ensure that customers may designate a provider of their choice to carry "0+" and "1+" intraLATA calls and that equal access in the public network is implemented so that the provider may carry the calls. Project Number 17709 has been assigned to this proceeding.

The Appropriations Act of 1997, House Bill 1, Article IX, §167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the commission is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to: (1) satisfy the requirements of §167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. Chapter 26 has been established for all commission substantive rules applicable to telecommunications service providers. The duplicative sections of Chapter 23 will be proposed for repeal as each new section is proposed for publication in the new chapter.

General changes to rule language:

The proposed new section reflects different section, subsection, and paragraph designations due to the reorganization of the rules. Some text has been proposed for deletion as unnecessary in the new section because the dates and requirements in the text no longer apply due to the passage of time and/or fulfillment of the requirements. The *Texas Register* will publish

these sections as all new text. Persons who desire a copy of the proposed new sections as they reflect changes to existing sections in Chapter 23 may obtain a redlined version from the commission's Central Records under Project Number 17709.

Other changes specific to each section:

The definitions in existing §23.103(c) have not been included in proposed §26.275, as these definitions are now in the general definitions section for Chapter 26 (§26.5 relating to Definitions).

Mr. Martin Wilson, assistant general counsel, 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. Wilson has 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 to encourage competition in the intraLATA toll market by implementing two primary interexchange carrier "1+" and "0+" equal access for Texas customers. There will be no effect on small businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Mr. Wilson has also determined that for each year of the first five years the proposed section is in effect there will be no impact on employment in the geographic area affected by implementing the requirements of the section.

Comments on the proposed 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. 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. The commission also invites specific comments regarding the §167 requirement as to whether the reason for adopting or readopting the rule continues to exist. All comments should refer to Project Number 17709 - §26.275, relating to IntraLATA Equal Access.

This section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (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 §55.009, which requires the commission to ensure that customers may designate a provider of their choice to carry "0+" and "1+" intraLATA toll calls and that intraLATA equal access in the public network is implemented so that the provider may carry the calls.

Cross Index to Statutes: Public Utility Regulatory Act §14.002 and §55.009

§26.275. IntraLATA Equal Access.

(a) Application. This section applies to certified telecommunications utilities (CTUs) providing local exchange telephone service in Texas.

(b) Purpose. The purpose of this section is to encourage competition in the intraLATA toll market by implementing two primary interexchange carrier (two-PIC) 1+ and 0+ equal access for Texas telephone customers. Additionally, this section imposes the obligation on a CTU to file an implementation plan describing the measures the CTU will take to make two-PIC intraLATA equal access available to all interexchange carriers and the State of Texas network in all areas of the state in which the CTU is certified to provide local exchange service.

(c) Implementation plan.

(1) Requirements. An implementation plan shall conform to the following requirements:

(A) An implementation plan shall describe the measures the CTU will take to make two-PIC intraLATA equal access available to all interexchange carriers and the State of Texas network in all areas of the state in which the CTU is certified to provide local exchange service.

(B) If a CTU does not implement intraLATA equal access simultaneously throughout its service territory, its implementation plan shall include a schedule of implementation specifying, for each wire center:

(i) the common language location identifier (CLLI) code and exchange name;

(ii) the month in which intraLATA equal access will be available;

(iii) the type of switch serving the wire center; and

(iv) a list of the NPA-NXXs affected by the conversion to intraLATA equal access.

(C) Eighteen copies of the implementation plan shall be filed in the commission's Central Records office. The commission shall publish notice of the implementation plan in the *Texas Register.*

(2) Timing. Except as provided in subparagraphs (A)-(B) of this paragraph or as otherwise ordered by the commission, a CTU shall file with the commission an implementation plan to provide intraLATA equal access no later than February 8, 1999.

(A) No later than 90 days before filing an application with the Federal Communications Commission (FCC) for authorization to provide interLATA telecommunications service in Texas pursuant to the federal Telecommunications Act of 1996 §271(d)(1), a Bell Operating Company (BOC) shall file with the commission an implementation plan to provide intraLATA equal access coincident with the exercise of its authority to provide interLATA services.

(B) A CTU other than a BOC that begins providing in-region interLATA toll service on its own behalf or through an affiliate after the effective date of this section shall file with the commission an implementation plan no later than 180 days prior to the date on which it begins providing in-region interLATA toll service and shall implement intraLATA equal access throughout the state no later than the date on which it begins providing in-region interLATA service.

(3) Small CTUs. A CTU with fewer than 2.0% of the nation's subscriber lines may petition the commission for a suspension or modification of the requirements of this subsection. The commission shall act on the petition within 180 days of receiving such petition. Pending such action, the commission may suspend enforcement of this subsection with respect to the petitioner. It shall be the duty of the petitioner to demonstrate that such suspension or modification is consistent with the public interest, convenience, and necessity; and is necessary to:

(A) avoid a significant adverse economic impact on users of telecommunications services generally;

(B) avoid imposing a requirement that is unduly economically burdensome; or

(C) avoid imposing a requirement that is technically infeasible.

(4) Eighteen copies of the implementation plan shall be filed in the commission's central records office. The commission shall publish notice of the implementation plan in the *Texas Register.*

(d) Administrative review. An implementation plan filed under this section shall be reviewed administratively unless an administrative law judge, for good cause, determines at any point during the review that the plan should be docketed. Denial of a plan for failure to meet the requirements of this section does not relieve the CTU of its obligations under subsection (c) of this section.

(e) Cost recovery. A dominant certified telecommunications utility (DCTU) may impose an annual surcharge on intraLATA toll providers to recover over a three- year period its total service long run incremental cost (TSLRIC) of implementing intraLATA equal access. A DCTU shall file with the commission by February 15 of each year an application for approval of a tariff imposing this surcharge for recovery of its recoverable cost for the previous year. The application shall include detailed cost support for the recoverable cost and shall be reviewed administratively. The surcharge shall be billed by the DCTU to intraLATA toll providers using its intraLATA switched access services and shall be due and payable no later than June 30 of each year for recoverable cost for the previous year.

(1) Recoverable costs. Costs that are recoverable for a given calendar year are equal to one-third of the TSLRIC to provide intraLATA equal access multiplied by a factor equal to 1 minus the DCTU's share of that cost. The DCTU's share of costs shall be computed by dividing the total intraLATA toll minutes of use originated by the DCTU for end users during the year by the sum of total originating intraLATA switched access minutes purchased from the DCTU and total intraLATA toll minutes of use originated by the DCTU for end users during the year. In calculating its share of costs, the DCTU may convert its intraLATA toll minutes of use to equivalent access minutes by adjusting for call set-up. Recoverable costs shall include, but not be limited to, the following:

(A) costs of processing a customer's initial PIC selection pursuant to subsection (f); and

(B) costs of providing customer notice pursuant to subsection (h) of this section.

(2) Nonrecoverable items. A DCTU may not recover the following:

(A) costs of converting a wire center in which inter- and intraLATA equal access are introduced simultaneously;

(B) costs of switching equipment whose installation was planned before the implementation plan was filed;

(C) costs of marketing its intraLATA toll services;

(D) lost toll revenue; or

(E) costs associated with a PIC selection by a customer more than six months after implementation of intraLATA equal access in the customer's exchange.

(3) The amount of the surcharge payable to a DCTU by an intraLATA toll provider for a given year shall be equal to the DCTU's recoverable costs for that year multiplied by the intraLATA toll provider's share of the DCTU's recoverable costs. An intraLATA toll provider's share of a DCTU's recoverable costs for a calendar year shall be computed by dividing the originating intraLATA switched access minutes the intraLATA toll provider purchased from the DCTU during the year by the total originating intraLATA switched access minutes purchased from the DCTU during the year.

(f) PIC selection. An end user may select one carrier for all 1+ and 0+ interLATA toll calls and either the same carrier or a different carrier for all 1+ and 0+ intraLATA toll calls. When a customer places an order to move or establish service, the CTU shall inform the customer of his opportunity to choose both an intraLATA and an interLATA PIC.

(1) Multiple PIC requests. If a customer has selected more than one intraLATA PIC, the CTU shall process the PIC with the latest customer authorization date.

(2) Default intraLATA PIC.

(A) A new customer who does not choose an intraLATA PIC shall dial a carrier access code to route his intraLATA toll calls to the carrier of his choice until the customer makes a permanent, affirmative selection for intraLATA 1+ and 0+ calls.

(B) An existing customer who does not make a choice for an intraLATA PIC when intraLATA equal access becomes available shall default to the serving CTU for intraLATA 1+ and 0+ calls where the serving CTU is an intraLATA toll provider. Otherwise, the customer shall dial a carrier access code to route his intraLATA toll calls to the carrier of his choice until he or she makes a permanent, affirmative selection for intraLATA 1+ and 0+ calls.

(3) Balloting of customers shall not be required in areas in which interLATA equal access is available.

(4) Initial PIC request. A customer's initial PIC request, made prior to implementation or within six months after implementation of intraLATA equal access, shall be made at no charge. Thereafter, a CTU may bill the customer a PIC change charge at a rate no greater than the rate for the selection of an interLATA PIC.

(5) PIC freezes. An account carrying an interLATA PIC freeze indicator shall not be automatically frozen by the CTU for intraLATA PIC selection. A customer may request a CTU to freeze his or her inter- or intraLATA PIC or both. A customer's request for an intraLATA PIC freeze may not be processed until the customer has received notice of intraLATA equal access pursuant to subsection (h) of this section.

(g) Pay telephone equal access. IntraLATA 0+ and 1+ equal access shall be required for all pay telephones. A location provider shall be allowed to select both the intraLATA and interLATA PIC for a pay telephone. Nothing in this section shall affect any contract existing between a location provider and a provider of pay telephone service or an interLATA or intraLATA carrier that is in force as of the effective date of this section. A pay telephone service provider may negotiate with a location provider concerning the intraLATA carriers presubscribed to the location provider's pay telephones.

(h) Customer notice. A CTU shall provide notice by direct mail or bill insert to affected customers of implementation of intraLATA equal access. The text of the notice shall state: "The Public Utility Commission of Texas has directed all local telephone companies to give residential and business customers the option of selecting an intraLATA (local toll) 1+ and 0+ long-distance company other than (insert name of CTU). Texas is divided into major long-distance calling areas called LATAs. (See enclosed map.) Currently, (insert name of CTU) carries all your 1+ and 0+ calls within your LATA. After (insert implementation date), long-distance calling within the LATA (as distinct from between LATAs, which is already competitive) will be open to competition. With this change,

customers will have the option of selecting a long-distance company for intraLATA 1+ and 0+ calling. Beginning on (insert date) and until (insert date), you may select an intraLATA (local toll) long-distance company at no charge by notifying your local telephone company or by directly contacting the long-distance carrier of your choice. If you change your intraLATA carrier after (insert date) or after your initial selection, you will incur a ($ insert charge) change charge."

(i) Expiration. The provisions of this section shall expire December 31, 2002.

(j) Waiver. After notice and hearing, and subject to the requirements of law, the commission may waive any provision of this section for good cause.

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 December 14, 1998.

TRD-9818299
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 936–7308

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TITLE 19. EDUCATION

Part II. Texas Education Agency

Chapter 92. Interagency Coordination

Subchapter AA. Memoranda of Understanding

19 TAC §92.1003

The Texas Education Agency (TEA) proposes new §92.1003, concerning a memorandum of understanding (MOU) relating to the Communities In Schools (CIS) program. The new section implements an MOU between the TEA and the Texas Workforce Commission (TWC), authorized under the Labor Code, §305.013. The purpose of the MOU is to specify the roles of the TEA and TWC to increase the effectiveness of the CIS program. The new section defines responsibilities relating to: (1) sharing student performance data; (2) developing program and student performance measures; (3) increasing quality of services by identifying professional development opportunities; and (4) encouraging local businesses to participate in local CIS programs.

Virgil E. Flathouse, chief of staff, 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 new section.

Mr. Flathouse and Criss Cloudt, associate commissioner for policy planning and research, have 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 increasing the effectiveness of the CIS program by ensuring a coordination of services such as counseling and tutoring for students at risk of dropping out of school. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed new section.

Comments on the proposal may be submitted in writing to Criss Cloudt, Policy Planning and Research, 1701 North Congress Avenue, Austin, Texas, 78701, (512) 463-9701. Comments may also be submitted electronically to *rules@tmail.tea.state.tx.us* or faxed to (512) 475-3499. All requests for a public hearing on the proposed section submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of a proposed change in the section has been published in the *Texas Register*.

The new section is proposed under the Labor Code, §305.013, which authorizes the adoption of rules to implement a memorandum of understanding between the Texas Education Agency and the Texas Workforce Commission to enhance the effectiveness of the Communities In Schools program.

The new section implements the Texas Education Code, §§29.051-29.064.

§92.1003. Memorandum of Understanding Concerning the Communities In Schools Program.

(a) Purpose. This memorandum of understanding is a non-financial, mutual agreement between the Texas Education Agency (TEA) and the Texas Workforce Commission (TWC), established pursuant to the Labor Code, §305.013. The purpose of this agreement is to define specific responsibilities of the TEA and TWC that will increase the effectiveness of the Communities In Schools (CIS) Program.

(b) Participation.

(1) The TWC and the TEA agree to the following joint responsibilities:

(A) clarify requirements and procedures for school districts and local CIS programs pertaining to sharing student performance information;

(B) share participant data, within the parameters of federal law and each agency's confidentiality and data collection policies;

(C) identify strategies for supporting local school district academic improvement initiatives for students at risk of dropping out of school;

(D) identify training and professional development opportunities for CIS state staff or direct service personnel that will increase the quality of services to CIS participants;

(E) provide information about CIS to the education community, the business community, and the general public throughout the state;

(F) cooperate in identifying, obtaining, and implementing any federal or state funds available to either agency for programs that will serve the goals of CIS; and

(G) develop program and student performance measures.

(2) The TWC's responsibilities under this agreement shall be as follows:

(A) evaluate the CIS program regularly and identify improvement needs that will increase the effectiveness of the CIS program at all levels of implementation;

(B) implement a public information strategy to encourage local business community involvement and participation in local CIS programs;

(C) work in partnership with the local workforce development boards and chief elected officials to obtain support for the CIS program and ensure that local needs are being met;

(D) provide presentations that will promote and market the CIS program to all public and private sectors in local communities that have not established a CIS program; and

(E) ensure that the duties of the CIS state coordinator specified under the Labor Code, §305.012, are fully implemented.

(3) The TEA's responsibilities under this agreement shall be as follows:

(A) designate a CIS liaison from the TEA's central administration that will coordinate information sharing and responsibilities under this memorandum of understanding with the TWC's CIS state coordinator;

(B) encourage school districts with CIS programs to participate in exemplary programs, teaching methods, professional development conferences, and other activities that will enhance the quality of the local CIS programs; and

(C) provide the CIS state coordinator with the appropriate data needed from the Public Education Information Management System to evaluate the effectiveness of the CIS program in preventing students from dropping out of school, within the parameters of federal law and the TEA's confidentiality and data collection policies.

(c) Terms of the memorandum of understanding. This memorandum of understanding shall be effective February 28, 1999. The memorandum shall be considered annually for expansion, modification, or amendment upon the mutual agreement of the executive officers of the named agencies.

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 December 14, 1998.

TRD-9818303
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 463–9701

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TITLE 22. EXAMINING BOARDS

Part XV. Texas State Board of Pharmacy

Chapter 291. Pharmacies

22 TAC §291.93

The Texas State Board of Pharmacy proposes amendments to §291.93, concerning Operational Standards for Class D (Clinic) Pharmacies. The amendment, if adopted, will: (1) clarify some terms, update titles for library references, and correct citations to Board rules; (2) eliminate butorphanol (Stadol) from the list of prohibited drugs in a Class D pharmacy since it is now a controlled substance and is now included in the prohibition for controlled substances; (3) allow physician assistants to provide prepackaged drugs to patients in the same manner that licensed nurses currently can, in a Class D pharmacy with an expanded formulary; (4) allow partial directions for use on the label of prepackaged drugs under certain conditions; and (5) clarify that petitions to the Board for expanded formularies or alternative visitation schedules must contain notarized signatures.

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

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be increased efficiencies in the operation of a Class D (Clinic) Pharmacy. There are no economic costs anticipated for individuals required to comply with the rule. The rule, as proposed, will not have adverse economic effects on large businesses or small businesses, defined by section 2006.002 of the Texas Government Code. Class D Pharmacies which meet certain requirements may experience a slight decrease in labeling and inventory costs.

Comments on the proposal may be submitted to Gay Dodson, R.Ph., Executive Director/Secretary, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Box 21, Austin, Texas, 78701-3942.

The amendment is proposed under sections 4, 16(a), 17(b) of the Texas Pharmacy Act (Article 4542a-1, Texas Civil Statutes). The Board interprets section 4 as authorizing the agency to adopt rules to protect the public health, safety, and welfare through the effective control and regulation of the practice of pharmacy. The Board interprets section 16(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets section 17(b) as authorizing the agency to adopt rules to regulate the delivery or distribution of prescription drugs as they relate to the practice of pharmacy.

The statutes affected by this rule: Texas Civil Statutes, Article 4542a-1.

§291.93. Operational Standards.

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

(c) Equipment. Each clinic pharmacy shall maintain the following equipment and supplies:

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

(3) if the clinic pharmacy compounds prescription drug orders [~~prescriptions~~], a properly maintained Class A prescription balance (with weights) or equivalent analytical balance. It is the responsibility of the pharmacist-in-charge to have such balance inspected at least every three years by the appropriate authority as prescribed by local, state, or federal law or regulations.

(d) Library. A reference library shall be maintained which includes the following:

(1) (No change.)

(2) current copies of at least two of the following references:

(A) Facts and Comparisons with current supplements;

(B) AHFS Drug Information; [~~American Hospital Formulary Service with current supplements;~~]

(C)-(E) (No change.)

(F) Hansten's and Horn's Drug Interactions Analysis and Management; [~~Phillip D. Hansten's Drug Interactions;~~]

(G)-(H) (No change.)

(e) Drugs and devices.

(1) Formulary.

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

(C) The formulary shall not contain the following drugs or types of drugs:

(i) Nalbuphine (Nubain);

(ii) [~~Butorphanol (Stadol);~~]

[~~(iii)~~] Propranol or other beta adrenergic receptor blocking agents;

(iii) [~~(iv)~~] antipsychotics; and

(iv) [~~(v)~~] Schedule I-V controlled substances.

(D) Clinics with a patient population which consists of at least 80% indigent patients may petition the board to operate with a formulary which includes types of drugs and/or devices, other than those listed in subparagraph (B) of this paragraph based upon documented objectives of the clinic, under the following conditions.

(i) Such petition shall contain an affidavit with the notarized signatures of [~~signed by~~] the medical director, the pharmacist-in-charge, and the owner/chief executive officer of the clinic, and include the following documentation:

(I)-(V) (No change.)

(ii) (No change.)

(iii) The following additional requirements shall be satisfied.

(I) Supportive personnel who are providing drugs shall be licensed nurses or physician assistants.

(II) The pharmacist-in-charge, consultant pharmacist, or staff pharmacist shall make on-site visits to the clinic at least monthly.

(iv) (No change.)

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

(4) Prepackaging and labeling for provision.

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

(C) The label of the prepackaged unit shall bear:

(i) the name and address of the clinic;

(ii) directions for use, which may include incomplete directions for use provided:

(I) labeling with incomplete directions for use has been authorized by the pharmacy and therapeutics committee;

(II) precise requirements for completion of the directions for use are developed by the pharmacy and therapeutics committee and maintained in the pharmacy policy and procedure manual; and

(III) the directions for use are completed by practitioners, pharmacists, licensed nurses or physician assistants in accordance with the precise requirements developed under subclause (II) of this clause;

(iii)-(vi) (No change.)

(D) Records of prepackaging shall be maintained according to §291.94(c) [~~(b)~~] of this title (relating to Records).

(5) Labeling for provision of drugs and/or devices in an original manufacturer's container.

(A) (No change.)

(B) Drugs and/or devices in an original manufacturer's container may be labeled by:

(i) (No change.)

(ii) supportive personnel in a Class D pharmacy, provided the drugs and/or devices and control records required by §291.94(d) [~~(c)~~] of this title (relating to Records) are quarantined together until checked and released by a pharmacist.

(C) Records of labeling for provision of drugs and/or devices in an original manufacturer's container shall be maintained according to §291.94(d) [~~(c)~~] of this title (relating to Records).

(6) Provision.

(A)-(E) (No change.)

(F) Such drugs and/or devices shall be labeled by a pharmacist licensed by the board; however, when drugs and/or devices are provided under the supervision of a physician according to standing delegation orders or standing medical orders, supportive personnel may at the time of provision print on the label the following information:

(i) patient's name;

(ii) any information necessary to complete the directions for use in accordance with paragraph (4)(C)(ii) of this subsection;

(iii) [~~(ii)~~] date of provision; and

(iv) [~~(iii)~~] practitioner's name.

(G) Records of provision shall be maintained according to §291.94(e) [~~(d)~~] of this title (relating to Records).

(H) Controlled substances may not be provided or dispensed.

(7) (No change.)

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

(h) Supervision.

(1) (No change.)

(2) The pharmacist-in-charge, consultant pharmacist, or staff pharmacist shall personally visit the clinic every three months to ensure that the clinic is following set policies and procedures, provided, however, that clinics who are operated by state or local governments and clinics who are funded by public money may petition the board for an alternative visitation schedule under the following conditions.

(A) Such petition shall contain an affidavit with the notarized signatures of [~~signed by~~] the medical director, the pharmacist-in-charge, and the owner/chief executive officer of the clinic, which

states that the clinic has a current policy and procedure manual on file, has adequate security to prevent diversion of dangerous drugs, and is in compliance with all rules governing Class D pharmacies.

(B)-(C) (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 December 10, 1998.

TRD-9818256
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 305-8028

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Chapter 295. Pharmacies

22 TAC §295.8

The Texas State Board of Pharmacy proposes an amendment to §295.8, concerning Continuing Education Requirements. The amendment, if adopted, will permit course work completed as part of a professional degree program in an accredited college of pharmacy to apply towards a pharmacist's requirement for continuing education.

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

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be the increased competency for those pharmacists participating in an accredited professional degree program. There are no economic costs anticipated for individuals required to comply with this rule. The rule, as proposed, will not have adverse economic effects on large businesses or small businesses, defined by section 2006.002 of the Texas Government Code.

Comments on the proposal may be submitted to Gay Dodson, R.Ph., Executive Director/Secretary, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Box 21, Austin, Texas, 78701-3942.

The amendment is proposed under sections 4, 16(a), 24A of the Texas Pharmacy Act (Article 4542a-1, Texas Civil Statutes). The Board interprets section 4 as authorizing the agency to adopt rules to protect the public health, safety, and welfare through the effective control and regulation of the practice of pharmacy. The Board interprets section 16(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets section 24A as authorizing the agency to adopt rules relating to the approval of continuing education programs.

The statutes affected by this rule: Texas Civil Statutes, Article 4542a-1.

§295.8. Continuing Education Requirements.

(a) (No change.)

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

(1)-(8) (No change.)

(9) Credit hour – A unit of measurement for continuing education equal to 12 contact hours.

(10) [~~(9)~~] Home-study and other mediated instruction–Continuing education activities that are not conducted as live programs, including audiotapes, videotapes, cable television, computer assisted instruction, journal articles, or monographs.

(11) [~~(10)~~] Initial license period–The time period between the date of issuance of a pharmacist's license and the next expiration date.

(12) [~~(11)~~] License year–The time period between consecutive expiration dates of a license.

(13) [~~(12)~~] Live programs–On-site continuing education activities including lectures, symposia, live teleconferences, or workshops.

(14) [~~(13)~~] Standardized pharmacy examination The North American Pharmacy Licensing Examination (NAPLEX). [~~The National Association of Boards of Pharmacy Licensing Examination (NABPLEX)~~]

(c) Methods for obtaining continuing education. A pharmacist may satisfy the continuing education requirements by either:

(1) successfully completing 12 contact hours (1.2 CEUs) of board approved programs during the preceding license year; [~~or~~]

(2) successfully completing during the preceding license year, one credit hour which is a part of the professional degree program in a college of pharmacy the professional degree program of which has been accredited by ACPE; or

(3) [~~(2)~~] taking and passing the standardized pharmacy examination (NAPLEX) [~~(NABPLEX)~~]during the preceding license year, which shall be equivalent to 12 contact hours (1.2 CEUs) of continuing education.

(d) Reporting requirements.

(1) Renewal of a pharmacist license. To renew a license to practice pharmacy on or after September 1, 1991, a pharmacist must report on the renewal application completion of the required number of contact hours of continuing education. The following is applicable to the reporting of continuing education contact hours.

(A) (No change.)

(B) A pharmacist who reports the completion of more than 12 contact hours of approved programs during a license year may carry forward to the next license year up to 12 contact hours (1.2 CEUs).

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

(2)-(4) (No change.)

(e) Approved programs.

(1) Any program presented by an ACPE approved provider [~~shall be an approved program~~] subject to the following conditions.

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

(2) Courses which are part of a professional degree program in a college of pharmacy the professional degree program of which has been accredited by ACPE.

(A) Pharmacists may receive credit for the completion of the same course only once during a license year.

(B) Pharmacists who teach these courses may receive credit towards their continuing education, but such credit may be received only once for teaching the same course during a license year.

(3) [~~(2)~~] Cardiopulmonary resuscitation (CPR) courses which lead to CPR certification by the American Red Cross or the American Heart Association shall be recognized as approved programs. Pharmacists may receive credit for one contact hour (0.1 CEU) towards their continuing education requirement for completion of a CPR course only once during a license year. Proof of completion of a CPR course shall be the certificate issued by the American Red Cross or the American Heart Association.

(4) [~~(3)~~] Upon demonstrated need the board may establish criteria to approve programs presented by non-ACPE approved providers.

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

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

Filed with the Office of the Secretary of State on December 10, 1998.

TRD-9818255
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 305-8028

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Chapter 303. Destruction of Dangerous Drugs and Controlled Substances

22 TAC §303.1, §303.2

The Texas State Board of Pharmacy proposes amendments to §303.1, concerning Destruction of Dispensed Drugs, and §303.2, concerning Disposal of Stock Prescription Drugs. The amendment, if adopted, will: (1) clarify the requirements for drug destruction and disposal in compliance with DEA and other state and federal requirements; (2) correct citations; (3) make changes due to the scheduling of butorphanol (Stadol) as a controlled substance; and (4) establish that the preferred method of destruction and disposal is to transfer possession of the drug to a properly registered disposal firm.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five-year period the rule is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rule. For pharmacies operated by state or local government, costs to properly dispose of prescription drugs will be the same as for small or large businesses.

Ms. Dodson has determined that, for each year of the first five-year period the rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be the proper accountability, control, and disposal of outdate, damaged, or otherwise unwanted prescription drugs. There are no economic costs anticipated for individuals. Economic cost for licensed pharmacies owned by both small and large businesses to properly dispose of prescription drugs in compliance with all applicable state and federal requirements depends on the amount destroyed and the method or firm chosen for the destruction. This cost is estimated to vary from no cost to $1,000 per pharmacy per year.

Comments on the proposal may be submitted to Gay Dodson, R.Ph., Executive Director/Secretary, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, box 21, Austin, Texas, 78701-3942.

The amendment is proposed under the Texas Pharmacy Act (Article 4542a-1, Texas Civil Statutes): (1) Section 4 which specifies that the purpose of the Act is to protect the public through the effective control and regulation of the practice of pharmacy; (2) Section 16(a) which gives the Board the authority to adopt rules for the proper administration and enforcement of the Act; and (3) Section 17(b) which gives the Board the authority to regulate the delivery or distribution of prescription drugs as they relate to the practice of pharmacy.

The statutes affected by this rule: Texas Civil Statutes, Article 4542a-1.

§303.1. Destruction of Dispensed Drugs.

(a) Drugs dispensed to patients in health care facilities or institutions.

(1) Destruction by the consultant pharmacist. The consultant pharmacist, if in good standing with the Texas State Board of Pharmacy, is authorized to destroy dangerous drugs and controlled substances dispensed to patients in health care facilities or institutions, providing the following conditions are met.

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

(C) The drugs are destroyed in a manner to render the drugs unfit for human consumption and disposed of in compliance with all applicable state and federal requirements.

(D) The actual destruction of the drugs is witnessed by one of the following:

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

(v) both the facility administrator and: [~~the director of nursing; and~~]

(I)-(II) (No change.)

(E) (No change.)

(2) Destruction by a waste disposal service. A consultant pharmacist may utilize a waste disposal service to destroy dangerous drugs and controlled substances dispensed to patients in health care facilities or institutions, provided the following conditions are met.

(A)-(D) (No change.)

(E) A record of the transfer to the waste disposal service is maintained and attached to the inventory of drugs specified in subparagraph (B) of this paragraph [~~paragraph (1) of this subsection~~]. Such record shall contain the following information:

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

(F) The waste disposal service shall provide the facility with proof of destruction of the sealed container. Such proof of

destruction shall contain the date, location, and method of destruction of the container and shall be attached to the inventory of drugs specified in subparagraph (B) of this paragraph [~~paragraph (1) of this subsection~~].

(3) (No change.)

(b) Drugs returned to a pharmacy. A pharmacist, licensed by the board, is authorized to destroy dangerous drugs and controlled substances which have been previously dispensed to a patient and returned to a pharmacy by the patient or an agent of the patient. The following procedures shall be followed in destroying these drugs.

(1) Dangerous drugs other than tripelennamine (e.g., PBZ), [~~butorphanol (e.g., Stadol),~~] nalbuphine (e.g., Nubain), and carisoprodol (e.g., Soma).

(A) The dangerous drugs shall be destroyed in a manner to render the drugs unfit for human consumption and disposed of in compliance with all applicable state and federal requirements.

(B) (No change.)

(2) Controlled substances and tripelennamine (e.g., PBZ), [~~butorphanol (e.g., Stadol),~~] nalbuphine (e.g., Nubain), and carisoprodol (e.g., Soma).

(A) Controlled substances and triplennamine (PBZ), [~~butorphanol (Stadol), and~~] nalbuphine (Nubain) , and carisoprodol (e.g., Soma) shall be destroyed in a manner to render the drugs unfit for human consumption and disposed of in compliance with all applicable state and federal requirements.

(B)-(C) (No change.)

§303.2. Disposal of Stock Prescription Drugs.

(a) (No change.)

(b) Disposal of stock dangerous drugs. A pharmacist, licensed by the board, is authorized to destroy stock dangerous drugs owned by a licensed pharmacy if such dangerous drugs are destroyed in a manner to render the drugs unfit for human consumption and disposed of in compliance with all applicable state and federal requirements. [~~; provided, however,~~] However, the following procedures shall be followed in destroying any brand or dosage form of tripelennamine (e.g., PBZ), [~~butorphanol (e.g., Stadol),~~] nalbuphine (e.g., Nubain), and carisoprodol (e.g., Soma):

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

(c) Disposal of stock controlled substances. A pharmacist, licensed by the board, may dispose of stock controlled substances owned by a licensed pharmacy in accordance with procedures authorized by the Federal and Texas Controlled Substances Acts and sections adopted pursuant to such Acts. Disposal of controlled substances is deemed to be in accordance with the Federal and Texas Controlled Substances Acts and sections adopted pursuant to such Acts if any one of the following actions is taken:

(1) transfer to a controlled substances registrant authorized to possess controlled substances is the preferred method of disposal (e.g., DEA registered disposal firm); if transferred, the stock controlled substances shall be documented by appropriate invoices, federal Drug Enforcement Administration (DEA) order forms, or other documents legally transferring the controlled substances;

(2) inventorying the controlled substances to be destroyed on DEA Form 41 and with prior DEA approval, delivering the controlled substances to a DEA divisional office or agent, either in person or by common carrier;

(3) (No change.)

(4) with prior DEA approval, destruction of the controlled substances according to following guidelines.

(A) Community (Class A) pharmacies. This method of drug destruction may be used only one time in each calendar year.

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

(iii) The controlled substances shall be destroyed beyond reclamation and disposed of in compliance with all applicable state and federal requirements on the approved date/time/place in the presence of one of the following witnesses:

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

(iv)-(v) (No change.)

(B) Institutional (Class C) pharmacies.

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

(iii) The controlled substances shall be destroyed beyond reclamation and disposed of in compliance with all applicable state and federal requirements in the presence of one of the following witnesses:

(I)-(V) (No change.)

(iv)-(v) (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 December 10, 1998.

TRD-9818254
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 305-8028

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Part XXIII. Texas Real Estate Commission

Chapter 535. Provisions of the Real Estate License Act

Subchapter N. Suspension and Revocation of Licensure

22 TAC §535.154

The Texas Real Estate Commission (TREC) proposes an amendment to §535.154, concerning misleading advertising by real estate licensees. The amendment would provide a more comprehensive definition of the term "advertisement", including all electronic media such as E-mail and the Internet, and clarify advertising disclosure requirements for licensees using electronic media in their business. The amendment also would provide a specific time for reporting use of an assumed name and make non-substantive language changes for consistency of style with other TREC rules.

Real estate licensees are required by The Real Estate License Act, Article 6573a, Texas Civil Statutes, §15(a)(6)(P), to identify themselves as a broker or agent in their advertisements. The proposed amendment would clarify how licensees using the Internet, an electronic bulletin board, or a similar mechanism would comply with the law by including the statutory disclosure and any other information required by the section on each page on which the licensee's advertisement appears. Licensees using electronic communications such as E-mail and E-mail discussion groups would be required to include the disclosures on the first and last page of all communications.

The amendment also would require licensees using assumed names to notify TREC in writing within 30 days after beginning to transact business using an assumed name; the current section does not require salespersons to notify TREC of their use of an assumed name and does not specify when notice must be given. The notification assists TREC in identifying licensees who are the subject of consumer complaints.

Mark A. Moseley, general counsel , 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. There is no anticipated impact on local or state employment as a result of implementing the section.

Mr. Moseley also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be clarification of statutory advertising disclosure requirements for real estate licensees.. There is no anticipated adverse effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Comments on the proposal may be submitted to Mark A. Moseley, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendment is proposed under Texas Civil Statutes, Article 6573a, §5(h), which authorize the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties.

The statute which is affected by this proposal is Texas Civil Statutes, Article 6573a.

§535.154. Misleading Advertising.

(a) For the purposes of this section, "advertisement" includes, but is not limited to all publications, radio or television broadcasts, all electronic media including E-mail and the Internet, business stationary, business cards, signs and billboards. The provisions of this section apply to all advertisements by a real estate licensee unless the context of a particular provision indicates that it is intended to apply to a specific form of advertisement.

(b) [~~(a)~~] A licensee may [~~should~~] not utilize a copyrighted trade name unless the licensee has legal authority to use the [~~such trade~~] name.

(c) [~~(b)~~] A licensee shall notify the commission in writing of the licensee's use of an assumed name within 30 days after the licensee begins to transact business using the assumed name. [~~A broker must file an assumed name certificate with the commission if the broker transacts real estate business under a name other than the broker's legal name.~~]

(d) [~~(c)~~] If a broker advertises under an assumed name, and that assumed name does not readily identify the broker as a real estate agent, the broker's advertisement must include an additional designation such as "agent," "broker" or a trade association name which serves clearly to identify the advertiser as a real estate agent.

(e) [~~(d)~~] A listing may be solicited and accepted only in a broker's name. Advertisements concerning a broker's listings must include information identifying the advertiser as a real estate broker or agent. The name of a salesperson sponsored by the broker may also be included in the advertisement, but in no case may [~~shall~~] a broker or salesperson place an advertisement which contains only the salesperson's name or in any way implies that the salesperson is the person responsible for the operation of a real estate brokerage.

(f) [~~(e)~~] Where a business name includes the name of a licensed salesperson as well as a licensed broker, the broker's name should appear first to avoid the possibility that the public would be misled to believe that the salesperson is a broker. A licensee may not conduct business solely under the name of a real estate salesperson; provided, however, that a corporation licensed as a real estate broker may do business in the name in which it was incorporated by the Secretary of State.

(g) [~~(f)~~] A licensee's advertising must not cause a member of the public to believe that a person not authorized to conduct real estate brokerage is personally engaged in real estate brokerage, provided that an advertisement of a trade, business, or assumed name does not constitute a holding out that a specific person is engaged in real estate brokerage.

(h) [~~(g)~~] An advertisement placed where it is likely to attract the attention of passing motorists or pedestrians must contain language that clearly and conspicuously identifies as a real estate broker or agent the person publishing the advertisement. Advertisements in which the required language is not clear and conspicuous shall be deemed by the commission to be deceptive and likely to mislead the public for the purposes of Texas Civil Statutes, Article 6573a (the Act), §15(a)(6)(P). The commission shall consider language as clear and conspicuous if it is in at least the same size of type or print as the largest telephone number in the advertisement, or it otherwise clearly and conspicuously identifies as a real estate broker or agent the person who published it. The commission shall consider advertisements not to be in compliance with this subsection if the required language is in print or type so small that it cannot be easily read from the street or sidewalk. This subsection does not apply to signs placed on real property listed for sale, rental or lease with the broker who has placed the sign, provided the signs otherwise comply with this section and the provisions of the Act regarding advertising.

(i) A real estate licensee advertising on the Internet, electronic bulletin board, or similar mechanism must include on each page on which the licensee's advertisement appears any information required by this section and the disclosure relating to the advertiser's status as a broker or agent required by §15(a)(6)(P) of the Act.

(j) A real estate licensee who places advertisements using any electronic communication, including but not limited to E-mail and E-mail discussion groups, must include on the first and last page of all communications any information required by this section and the disclosure relating to the advertiser's status as a broker or agent required by §15(a)(6)(P) of the Act.

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 December 9, 1998.

TRD-9818229

Mark A. Moseley
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 465–3900

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TITLE 25. HEALTH SERVICES

Part I. Texas Department of Health

Chapter 28. Third-Party Resources

25 TAC §§28.101, 28.111, 28.121, 28.131

(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 Health or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

Subject to the approval of the State Medicaid Director, the Texas Department of Health (department) proposes to repeal §§28.101, 28.111, 28.121, 28.131 and new §§28.101-28.102, 28.201-28.203, and 28.301-28.302, 28.401-28.404, relating to third party recovery in the Medicaid program. The Social Security Act, §1902a(25) (codified at 42 U.S.C. §1396a(a)(25)) requires the department to implement reasonable procedures to identify, establish, and seek recovery from third parties who may have a legal liability to pay for services provided by Medicaid. The Human Resources Code, §32.033, establishes the requirement that an applicant who applies for, or receives medical assistance assign his or her right of recovery from third parties to the department and creates a separate and distinct cause of action in favor of the department to recover from liable third parties. Federal regulations found at 42 C.F.R. §§447.15 and 447.20, require that the state limit participation in the Medicaid program to providers who agree to accept Medicaid payment as payment in full for covered services provided to Medicaid recipients and places restrictions upon providers when there are third party resources available for payment of some or all of services provided by Medicaid. In addition to the above requirements, there has been a concerted effort on the part of both state and federal government to prevent, detect and prosecute fraud and abuse in state and federal healthcare programs. States have been called upon to implement effective programs and procedures to enhance their ability to prevent and detect fraud and abuse in the Medicaid program.

The existing rules which are being repealed will be replaced by the new rules. The existing rules are being repealed to provide for adoption of a complete readoption of the rules which will provide more information about the laws that apply, the process and procedures to follow and be more easily understood. The new rules also implement an alternative process to ensure the collection of money under a third party reimbursement right under the provisions of Government Code, §531.0391, which was passed by the 75th Legislature, 1997, and directs the Health and Human Services Commission (or a health and human services agency) to either: contract with a contractor to recover third party reimbursement rights; or, develop alternative policies to ensure the collection of money under a subrogation or third-party reimbursement.

The following affected parties were provided an opportunity to assist in the development of the rules: the Texas Trial Lawyers Association (TTLA); the Texas Association of Defense Counsel (TADC); The Association of Texas Hospitals and Health Care Organizations (THA); the Texas Medical Association (TMA); the Texas Osteopathic Medical Association (TOMA); Advocacy, Inc.; Texas Legal Services Center; and the State Bar of Texas. The department met with representatives of TTLA, TADC, THA, TMA and TOMA to invite their active participation and comments on the proposed rules. It was determined after the first two meetings that the members of TTLA and THA would be most affected by the new rules. The department had numerous telephone conferences, E-mails and meetings with members of each of these groups during the development of the rule. TTLA and THA actively participated in and provided important and insightful comments and recommendations. The department would like to express its sincere appreciation to the time and effort the members of TTLA and THA put into assisting the department in the development of the proposed rule. The department would like to individually acknowledge and thank Rick Freeman, a member of TTLA, for his practical and helpful advice and recommendations, and Carol Taylor of TTLA and Charles Bailey of THA for coordinating and communicating with the department on behalf of the members of their organizations.

The new sections will: clarify the department's legal and procedural requirements; provide notice to recipients, providers and attorneys about their rights and responsibilities; protect the state's right to recovery of third party resources; enhance the department's ability to monitor third party resources and recoveries; improve the department's ability to deter and detect fraud and abuse in the Medicaid program; and, implement the Legislature's intent to improve recoveries from third parties to which the state is entitled arising from payment of medical expenses.

Mr. Joe Moritz, Health Care Financing Budget Director, has determined that for the first five-year period the sections are in effect, there will be a cost savings to the state as a result of enforcing and administering the sections as proposed. The amount of savings will result in cost avoidance where there are third party resources available for payment and reimbursement from liable third parties for payments for health care services made by the Medicaid payment. The amount of cost savings to the state cannot be determined at this time and will depend upon the availability of third party resources to Medicaid recipients, over which the department has no control.

Mr. Moritz also has determined that for each year of the five years the sections are in effect, the public benefit anticipated as a result of enforcing these sections is recovery of costs for providing Medicaid covered services from liable third parties. An additional public benefit resulting from the enhanced ability to prevent and detect fraud and abuse in the Medicaid program should also result from these rules. No estimate has been made regarding the amount of savings which will result from fraud and abuse prevention and detection in the third party recovery program. There will be no effect on small business. There is no anticipated cost increase for attorneys who are required to comply with the sections as proposed. The proposed rules will provide authority for the department to pay attorney fees out of recoveries obtained by attorneys, which were not previously provided for by the rules. Providers who wish to obtain payment in excess of Medicaid payable amounts will incur the costs of notifying the department and recipients of their intent to do so and for all costs incurred in pursuing their claims. There may be minimal postage costs which are not reimbursable for

providers, recipients and attorneys. There will be no impact on local employment.

Comments on the proposal may be submitted to Joan Carol Bates, Attorney, Office of General Counsel, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3168, (512) 458-7236. Comments may also be submitted by E-mail to joan.bates@tdh.state.tx.us. Comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The repeal is proposed under the Human Resources Code, §32.033 which gives the department the authority to adopt rules for the enforcement of its third party recovery rights, and Government Code, §531.021, which gives the Health and Human Services Commission the authority to adopt rules to administer the state's medical assistance program and is submitted by the Texas Department of Health under its agreement with the Health and Human Services Commission to operate the purchased health services program and as authorized under Chapter 15, §1.07, Acts of the 72nd Legislature, First Called Session (1991).

The repeal affects Chapter 32 of the Human Resources Code.

§28.101. Basis and Scope.
§28.111. Provider Right of Recovery.
§28.121. Recipient Right of Recovery.
§28.131. Notice of 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 December 8, 1998.

TRD-9818194
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 458-7236

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Chapter 28. Medicaid Third Party Recovery

Subchapter A. General Provisions

25 TAC §28.101, §28.102

The new sections are proposed under the Human Resources Code, §32.033 which gives the department the authority to adopt rules for the enforcement of its third party recovery rights, and Government Code, §531.021, which gives the Health and Human Services Commission the authority to adopt rules to administer the state's medical assistance program and is submitted by the Texas Department of Health under its agreement with the Health and Human Services Commission to operate the purchased health services program and as authorized under Chapter 15, §1.07, Acts of the 72nd Legislature, First Called Session (1991).

The new rules affect Chapter 32 of the Human Resources Code.

§28.101. Basis and Purpose.

This chapter implements the requirements of Texas Department of Health (department) under federal and state law to:

(1) set forth the requirements of Medicaid applicants and recipients, and representatives of applicants and recipients regarding assignment, identification, and cooperation with the department in establishing third party liability and recovery;

(2) set forth the rights, restrictions, and limitations of providers to third party recovery; and

(3) establish the priority of distributions of third party recoveries, including distributions into a trust established under the provisions of the Social Security Act §1917(d)(4) (codified at 42 U.S.C 1396p(d)(4)).

§28.102. Definitions.

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

(1) Applicant - An individual, or the parent or legal guardian of an individual, who has applied to the department or another agency of the state for medical assistance from the Medicaid program.

(2) Commissioner - The Commissioner of the Texas Department of Health

(3) Department - The Texas Department of Health and its designee.

(4) Provider - Any individual or entity enrolled with the Medicaid program to provide services to Medicaid recipients for which claims for payment are submitted to the department.

(5) Recipient - A person who has been certified as eligible to receive medical assistance from the Medicaid program by the department or other agency of the state.

(6) State Plan - The comprehensive written statement submitted by the single state agency describing the nature and scope of the Medicaid program and giving assurances that the Medicaid program will be administered in compliance with Title XIX requirements and federal regulations.

(7) Third party - Any person, or the insurer of a person, who is or may be liable to pay all or part of the expenditures for medical assistance furnished under the State Plan.

(8) Third party claim - A demand or right of action which a Medicaid recipient may assert against a third party or third party health insurer.

(9) Third party health insurer - Any commercial insurance company offering health or casualty insurance to individuals or groups (including both experience-rated insurance contracts and indemnity contracts); any for profit or nonprofit prepaid plan offering either medical services or full or partial payment for medical services; and any organization administering health or casualty insurance plans for professional associations, unions, fraternal groups, employer-employee benefit plans, and any similar organization offering these payments or services, including self-insured and self-funded plans.

(10) Title IV-D agency - The Office of the Attorney General, the agency in the State of Texas with the responsibility for administering or supervising the administration of the State Plan for child support enforcement under Title IV-D of the Social Security Act.

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 December 8, 1998.

TRD-9818195

Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 458-7236

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Subchapter B. Applicant and Recipient Requirements

25 TAC §§28.201-28.203

The new sections are proposed under the Human Resources Code, §32.033 which gives the department the authority to adopt rules for the enforcement of its third party recovery rights, and Government Code, §531.021, which gives the Health and Human Services Commission the authority to adopt rules to administer the state's medical assistance program and is submitted by the Texas Department of Health under its agreement with the Health and Human Services Commission to operate the purchased health services program and as authorized under Chapter 15, §1.07, Acts of the 72nd Legislature, First Called Session (1991).

The new rules affect Chapter 32 of the Human Resources Code.

§28.201. Applicant and Recipient Assignment of Rights.

As a condition for eligibility, each applicant for or recipient of Medicaid benefits assigns to the department his or her rights, or the rights of any other individual eligible for Medicaid benefits under the State Plan for whom he or she can legally make an assignment, to medical support and payment for medical care from any third party health insurer or third party.

(1) No separate assignment from the applicant or recipient is required by the department to enforce the department's right to recover amounts paid by the department for the recipient's medical care.

(2) The department's right of recovery against a third party health insurer or third party is limited to the amount paid by the department on all claims submitted for Medicaid-covered services by Medicaid providers for a recipient's medical care.

§28.202. Duty of Applicant or Recipient to Inform and Cooperate.

(a) An applicant or recipient of Medicaid benefits has a duty and responsibility to inform the department, at the time of application, during the period of eligibility, or at any time after receiving services from the Medicaid program, of the following:

(1) any pending or unsettled claim for injuries for which a claim for medical services has or will be submitted to the Medicaid program for payment;

(2) the name and address of any attorney the applicant or recipient hires to represent the applicant or recipient in any claim for injuries for which a claim for medical services has or will be submitted to the Medicaid program for payment;

(3) any court or administrative order requiring any person to make medical support payments to the recipient or the Title IV-D agency; this duty and responsibility does not apply to any woman defined in the §1905(n)(1) (poverty level pregnant women) (codified at 42 U.S.C 1396d(n)(1));

(4) the identity of the father of any child who is an applicant or recipient of Medicaid benefits, and to cooperate with the Title IV-D Agency in establishing paternity and medical support payments for the child;

(5) any third party health insurer or third party who is or may be responsible for paying for or providing health coverage to the applicant or recipient, including the name and relationship of the insured, the name of the policyholder, the policy number, the dates coverage is in effect, the date of occurrence of any accident or injury and any other information required by the department or the third party health insurer or third party to file a claim or identify the recipient as an insured or covered person; and

(6) any other resource that is or becomes available to provide or pay for medical services covered by the Medicaid program.

(b) An applicant or recipient, or an attorney or other person who represents or acts on behalf of an applicant or recipient, must notify and provide information regarding the existence or potential existence of any of the resources listed in subsection (a) of this section. The applicant must provide the information at the time of application, and the recipient must provide notice and information within 60 days of learning of or discovering the existence of the resource, or at the time of recertification, whichever is sooner. Notice may be provided to the department either by telephone or by mail to the telephone number and mailing address listed in Subchapter D of this chapter for notices and department contact.

(c) An applicant or recipient will have his or her application for benefits denied, and a recipient will have his or her benefits terminated if the applicant or recipient fails or refuses to assign his or her own rights and/or those of any other individual for whom they can legally make an assignment, or fails or refuses to cooperate with the department as required by subsection (a) of this section, unless cooperation is waived under the procedures specified at 45 Code of Federal Regulations, Part 232 for child support enforcement, or the department's procedures for waiving cooperation for any other individual.

(d) The existence of an unsettled claim for damages for personal injuries will not be used by the department to deny or discontinue medical services under the Medicaid program.

§28.203. Duty of Attorney or Representative of a Recipient.

(a) An attorney or other person who represents or acts on behalf of a recipient in a third party claim or action for damages for personal injuries, regardless of whether a legal action has been filed, for which medical services are provided and paid for by Medicaid must send written notice of representation to the department. The written notice must be signed by the attorney or representative of the recipient and sent to the address listed in Subchapter D of this chapter for notices and department contact. The written notice must be submitted within 45 days from the date the attorney or representative undertakes representation of the recipient, or from the date a potential third party is identified. The written notice must include the following information, if know at the time of initial filing:

(1) the name and address and identifying information of the recipient (either the date of birth and the Social Security number, or the date of birth and the Medicaid identification number);

(2) the name and address of any third party or third party health insurer against whom a third party claim is or may be asserted for injuries to the Medicaid applicant or recipient; and

(3) the name and address of any health care provider who has asserted a claim for payment provided to the Medicaid applicant or recipient for medical services provided to the Medicaid applicant or

recipient for which a third party may be liable for payment, whether or not the claim may have been submitted to or paid by the department.

(4) if any of the information described in subsection (a) is unknown at the time the initial notice is filed, this should be indicated on the notice, and revised if and when the information becomes known.

(b) An authorization to release information relating to the recipient directly to the attorney or representative may be included as a part of the notice and must be signed by the recipient. A notice containing an authorization for release of information will be considered valid until revoked in writing by the recipient, and no separate authorization will be required of the recipient or the attorney or the representative at the time of a request for information.

(c) Any settlement, trust, judgment, order or distribution of proceeds which is required to be disclosed to the department to carry out the purpose of this chapter is protected from further disclosure by the department or its agents under the provisions of the Social Security Act, §1902(a)(7) (codified at 42 U.S.C 1396a(a)(7)), relating to restrictions on information disclosure).

(d) The department must be paid all amounts owed under this chapter prior to placing any proceeds from a third party into a trust created under the provisions of the Social Security Act §1917(d)(4) (codified at 42 U.S.C 1396p(d)(4)), unless the department agrees otherwise.

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 December 8, 1998.

TRD-9818196
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 458-7236

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Subchapter C. Provider Requirements

25 TAC §28.301, §28.302

The new sections are proposed under the Human Resources Code, §32.033 which gives the department the authority to adopt rules for the enforcement of its third party recovery rights, and Government Code, §531.021, which gives the Health and Human Services Commission the authority to adopt rules to administer the state's medical assistance program and is submitted by the Texas Department of Health under its agreement with the Health and Human Services Commission to operate the purchased health services program and as authorized under Chapter 15, §1.07, Acts of the 72nd Legislature, First Called Session (1991).

The new rules affect Chapter 32 of the Human Resources Code.

§28.301. Provider Billing and Recovery From Third Party Health Insurer.

(a) Providers must make a good faith effort to determine whether a recipient is or may be insured by a third party health insurer at the time services are provided, including examining the recipient's Medicaid eligibility card for third party resources and making reasonable oral or written inquiry of the recipient.

(b) If a third party health insurer is identified, providers are required to bill the third party health insurer before submitting a claim for payment to the department under the provisions of §29.3 of this title (relating to Time Limits for Submitted Claims) unless otherwise directed by the department.

(c) Providers who identify a third party, within 12 months from the date of service, and wish to pursue a claim against the third party health insurer after a claim for payment has been submitted and paid by the department must refund any amounts paid by Medicaid prior to pursuing a third party for payment.

(d) Providers are limited to the Medicaid payable amount and the provider is required to accept the amount paid by the department as payment in full if:

(1) a claim for payment is submitted to and paid by the department; and

(2) the provider failed to inform the department at the time the claim was filed, or any time thereafter, that a third party health insurer was also billed for the same service.

(e) Payments made by a third party health insurer to a provider who is limited to the Medicaid payable amount under subsection (d) of this section must be forwarded to the department for distribution according to the provisions of Subchapter D of this chapter.

(f) If the amount paid by a third party health insurer is less than the amount payable for the service by Medicaid, the department may be billed for the difference between the amount paid by the third party health insurer and the Medicaid payable amount, if a claim was timely filed with the department under the provisions of §29.3 of this title.

(g) Any provider who accepts Medicaid payment as payment in full for services and retains any amount in excess of the Medicaid payable amount from a third party and conceals or fails to account to the department for the third party amount, resulting in excessive or duplicate payment for the same service, may be referred for investigation and prosecution for violations of state and/or federal Medicaid or false claims laws.

(h) Providers are prohibited from seeking payment or co-payment for any Medicaid-covered service from a Medicaid eligible recipient or the representative of a recipient, regardless of whether a claim for payment for the service is submitted to the department.

(1) If a provider seeks recovery from a recipient in excess of the Medicaid payable amount, the department may provide for a reduction of an amount otherwise payable to the provider in addition to referring the provider for investigation and prosecution for violations of state and/or federal Medicaid or false claims laws.

(2) The amount of the reduction may be up to three times the amount the provider sought in excess of the Medicaid payable amount.

(i) Eventual recovery, repayment or recoupment of money by the department or the recipient will not release or preclude referral by the department for investigation, prosecution or liability under any civil or criminal law which would otherwise apply to the unlawful conduct.

(j) The department will not accept any claim for payment under this subsection submitted after 18 months from the date of service, regardless of whether an informational claim has been timely filed.

§28.302. Provider Billing and Recovery from Other Third Parties.

(a) Providers must make a good faith effort to determine, at the time services are delivered or at any time thereafter, whether the services being provided to the recipient are a result of injuries caused by a person who is or may be liable for payment for the services.

(1) The good faith effort required by this section may be satisfied by examination and verification of the recipient's Medicaid eligibility card for third party resources and/or making reasonable oral or written inquiry of the recipient at the time services are provided.

(2) Providers must submit information relating to the existence or possible existence of third party liability obtained from the recipient or legal representative of the recipient at the time a claim is submitted to the department for payment, or at any time thereafter, or when an informational claim is submitted under the provisions of §29.3 of this title (relating to Time Limits for Submitted Claims).

(b) Providers are required to pursue recovery from third parties whose liability has been established or is undisputed, before submitting a claim for payment to the department unless otherwise directed by the department.

(c) Providers who identify a third party, within 12 months from the date of service, and wish to pursue a recovery from the third party after a claim for payment has been submitted and paid by the department must:

(1) refund any amounts paid by Medicaid prior to pursuing the third party for payment; and

(2) comply with the provisions of subsection (d) of this section.

(d) Providers may retain a payment from a third party in excess of the amount Medicaid would otherwise have paid only if the following requirements are met:

(1) the provider submits an informational claim to the department within the claim filing deadline contained in §29.3 of this title (relating to Time Limits for Submitted Claims) indicating the identity of the third party from whom recovery is being pursued;

(2) the provider gives notice to the recipient, or the attorney or representative of the recipient that the provider may not or will not submit a claim for payment to Medicaid and the provider may or will pursue a third party, if one is identified, for payment of the claim. The notice must contain a prominent disclosure that the provider is prohibited from billing the recipient or a representative of the recipient for any Medicaid-covered services, regardless of whether there is an eventual recovery or lack of recovery from the third party or Medicaid;

(3) the provider establishes its right to payment separate of any amounts claimed and established by the recipient; and

(4) the provider obtains a settlement or award in its own name separate from a settlement obtained by or on behalf of the recipient or award obtained by or on behalf of the recipient, or there is an agreement between the recipient or attorney or representative of the recipient and the provider, that specifies the amount which will be paid to the provider after a settlement or award is obtained by the recipient.

(e) Providers who have filed informational claims with the department but have not made a recovery from a third party within 18 months from the date of service must make a choice before the end of the 18th month from the date of service to:

(1) continue to pursue a claim against the third party for payment and forego the right to submit a claim for payment to Medicaid; or

(2) convert the informational claim to a claim for payment from the department and receive payment from the department as payment in full for all Medicaid-covered services.

(f) Providers who pursue a third party for payment and who subsequently fail to recover from the third party within 18 months from the date of service, or recover less than the Medicaid payable amount within 18 months from the date of service, may submit a claim for payment to the department for the difference between the amount recovered and the Medicaid payable amount, only if the requirements of subsection (c) and/or (d) of this section are met.

(g) Providers are limited to the Medicaid payable amount and the provider is required to accept the amount paid by the department as payment in full if a claim for payment is submitted and paid by the department:

(1) before a third party claim is paid; and

(2) the provider failed to comply with each of the requirements under subsection (c) and/or (d) of this section.

(h) Except as provided by subsection (c) of this section, payments made by third parties to a provider after the provider has been paid by the department must be forwarded by the provider to the department for distribution according to the provisions of Subchapter D of this chapter.

(i) Any provider who accepts Medicaid payment as payment in full for services and retains any amount in excess of the Medicaid payable amount from a third party and conceals or fails to account to the department for the third party amount, resulting in excessive or duplicate payment for the same service may be referred for investigation and prosecution for violations of state and/or federal Medicaid or false claims laws.

(j) Providers are prohibited from seeking payment or co-payment for any Medicaid-covered service from a Medicaid eligible recipient or the legal representative of a recipient, regardless of whether a claim for payment for the service is submitted to the department.

(1) If a provider seeks to recover from a recipient in excess of the Medicaid payable amount the department may provide for a reduction of an amount otherwise payable to the provider.

(2) The amount of the reduction may be up to three times the amount the provider sought in excess of the Medicaid payable amount.

(3) In addition to the amount of any reduction in paragraphs (1) and (2) of this subsection, the provider may be referred for investigation and prosecution for violations of state and federal Medicaid or false claims laws.

(k) The department will not accept and can not pay any claim for payment under this subsection submitted after 18 months from the date of service, regardless of whether an informational claim has been timely filed.

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 December 8, 1998.

TRD-9818197

Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 458-7236

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Subchapter D. Duties of the Department

25 TAC §§28.401-28.404

The new sections are proposed under the Human Resources Code, §32.033 which gives the department the authority to adopt rules for the enforcement of its third party recovery rights, and Government Code, §531.021, which gives the Health and Human Services Commission the authority to adopt rules to administer the state's medical assistance program and is submitted by the Texas Department of Health under its agreement with the Health and Human Services Commission to operate the purchased health services program and as authorized under Chapter 15, §1.07, Acts of the 72nd Legislature, First Called Session (1991).

The new rules affect Chapter 32 of the Human Resources Code.

§28.401. Requests for Information.

(a) The department will provide assistance and cooperation to recipients, attorneys and representatives of recipients who seek recovery on behalf of the department for amounts owed to the department under this chapter. The department will provide information, evidence and documents required to settle and receive judgment for the amounts owed the department and provide appropriate and necessary releases and authorizations to settle and distribute amounts owed to the department under this chapter.

(b) The department is required to safeguard the best interests of the recipient under the provisions of Social Security Act §1902(a)(19) (codified at 42 U.S.C 1396a(a)(19)).

(c) The department is required to provide safeguards which restrict the use and disclosure of information concerning applicants and recipients to purposes directly connected with the administration of the Medicaid program under the provisions of Social Security Act §1902(a)(7) (codified at 42 U.S.C 1396a(a)(7)).

(d) Requests for information relating to third party recoveries under this chapter must fall within the requirements of subsections (a) and (b) of this section.

(e) A recipient or an attorney or representative of a recipient may request information relating to claims submitted or paid or payable by the department, and records within the custody and control of the department, as they relate to this chapter if:

(1) the request is signed by the recipient or a person with legal authority to act on behalf of the recipient; or

(2) the attorney or representative making the request has filed a notice which complies with the requirements of §28.203(c) of this title (relating to Duty of Attorney or Representative of a Recipient).

(f) The department will respond to all requests for information within 10 business days from receipt of the request. The department will produce records and provide information to a person making a request under this section only if all requirements of this subsection are met. The department will provide the requested information, if all requirements of this subsection are met, within 15 business days from receipt of the request.

(g) The department has no duty produce records or provide information which do not meet the requirements of this subsection, or which would disclose information which the department is prohibited from disclosing by state or federal law.

§28.402. Distribution of Recoveries.

(a) The department will distribute third party recoveries as follows:

(1) the department will receive an amount equal to the department's Medicaid expenditures for the recipient, or another individual eligible for Medicaid benefits under the State Plan for whom he or she can legally make an assignment to medical support and payment;

(2) the federal government will receive the federal share of the Medicaid expenditures, minus any incentive payment authorized by federal law; and

(3) the recipient will receive any remaining amount. Any amount distributed to the recipient is income or resources for purposes of establishing eligibility for Medicaid benefits.

(b) The department may pay reasonable and necessary attorney fees of fifteen percent (15%) of the entire amount recovered on behalf of the department, and reasonable expenses, to a person authorized to recover amounts from third parties, other than a person contracted by the department to recover on behalf of the department, if the recovery is made in compliance with these rules.

(c) The department may pay prorated expenses not to exceed ten percent (10%) of the entire amount recovered on behalf of the department if attorney fees are allowed under subsection (b) of this section.

(d) No attorney fees will be paid if the recovery made on behalf of the Medicaid program is waived in whole or in part by the commissioner under the provisions of §28.403 of this title (relating to Waiver Authority of the Commissioner).

(e) The amount recovered on behalf of the department, for which attorney fees are authorized under this section, must be deducted from the total amount of the recovery before attorney fees and expenses are deducted under the terms of the recipient's contract.

(f) The department may pay reasonable and necessary attorney fees and expenses to a person contracted by the department to recover amounts from third parties on behalf of the Medicaid program.

§28.403. Waiver Authority of the Commissioner.

The commissioner has the authority to waive all or part of the department's right to recover from liable third parties when:

(1) the commissioner finds that enforcement of the department's right of recovery would tend to defeat the purpose of public assistance; or

(2) the cost of recovery exceeds the amount which could be recovered.

§28.404. Notices and Payments.

Notices and payments required to be submitted to the department under this chapter must be submitted to the following address: Texas Department of Health, 1100 West 49th Street, Austin, TX 78756-3171, Attention: Medicaid Third Party Recovery, telephone (512) 338-6497, facsimile (512) 338-6495.

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 December 8, 1998.

TRD-9818198
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 458-7236

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Part XI. Texas Cancer Council

Chapter 701. Policies and Procedures

25 TAC §701.1, §701.9

(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 Cancer Council or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Cancer Council proposes the repeal of §701.1, concerning the Council, and §701.9, concerning employee training. The Council finds that the reasons for the two rules no longer exist.

Ms. Mickey Jacobs, Executive Director of the Texas Cancer Council, has determined that for the first five-year period there will be no fiscal implications for state or local government as a result of repealing the rules.

Ms. Jacobs also has determined that for each year of the first five years the public benefit anticipated as a result of repealing the rules will be the deletion of duplicative language that already exists in statute. There are no anticipated economic costs to persons who were required to comply with the rules.

Comments on the proposed repeals may be submitted to Ms. Mickey Jacobs, Executive Director, Texas Cancer Council, P. O. Box 12097, Austin, Texas 78711.

The repeals are proposed under the Texas Health and Safety Code Annotated §102.002 and §102.009 which provide the Texas Cancer Council with the authority to develop and implement the *Texas Cancer Plan*, and the Texas Government Code Annotated, §2001.004 (Vernon 1998 Pamphlet).

There is no other statute, article or code that is affected by the proposed repeals.

§701.1. Council.

§701.9. Employee Training.

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 December 14, 1998.

TRD-9818329
Ms. Mickey L. Jacobs, M.S.H.P.
Executive Director
Texas Cancer Council
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 463–3190

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25 TAC §§701.2, 701.4–701.8

The Texas Cancer Council proposes amendments to §§701.2, 701.4-701.8 concerning the *Texas Cancer Plan*, committees, the executive director, meetings, actions requiring Council approval, and charges for copies of public records. The amendments are being proposed because in:

§701.2, Texas Cancer Plan-

The amendment cites the codified version of the Administrative Procedures Act, because the Act no longer appears in the civil statutes previously cited. The language of the Act will be easier to locate by citing the codified version.

§701.4, Committees-

The language was changed to clarify the intent of the Council that the Council has the final decision-making authority over any actions taken by the executive committee. The language of subsection (b)(3) was changed to clarify the role of committee members that are not Council members.

§701.5, Executive Director-

The Executive Director is delegated the authority to transfer funds within the budget in order to facilitate quick decision making in the approval of payment for certain items.

§701.6, Meetings-

The amendment clarifies the committee meetings are subject to the Open Meetings Act. The rule cites the codified version of the Open Meetings Act, because the cited Act no longer appears in the civil statutes previously cited. The language of the Act will be easier to locate by citing the codified version. The amendment deletes unnecessary language from the rule that merely restates the language of the Act. The amendment which deletes subsection (i) releases the Council from the requirement that it follow Roberts' Rules of Order in conducting Council meetings to allow the Council flexibility to address matters as the Council deems appropriate.

§701.7, Actions Requiring Council Approval-

The Council deems it appropriate for the executive director to establish internal administrative personnel procedures and policies to carry out the functions of the Council without requiring Council approval, unless the Council specifically requests it.

§701.8, Charges for Copies of Public Records:

The language was changed to specify the effective date of the rules the Council will follow in assessing charges for copies. This will help to ensure that the Council can identify the rules that they are required to follow.

Ms. Mickey Jacobs, the Executive Director of the Texas Cancer Council, has determined that for the first five-year period the rules are in effect there will be no foreseeable implications relating to costs or revenues for state or local government as a result of enforcing or administering the amendments.

Ms. Jacobs also has determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be clarification of the policies and procedures the Council will follow to implement the *Texas Cancer Plan*. There are no anticipated economic costs to persons who are required to comply with the amendments as proposed.

Comments on the proposed amendments may be submitted to Ms. Mickey Jacobs, Executive Director, Texas Cancer Council, P. O. Box 12097, Austin, Texas 78711.

The amendments are proposed under the Texas Health and Safety Code Annotated, §§102.002 and 102.009 which provide the Texas Cancer Council with the authority to develop and implement the *Texas Cancer Plan*, and the Texas Government Code Annotated, §2001.004 (Vernon 1998 Pamphlet).

There is no other statute, article or code that is affected by the proposed amendments.

§701.2. Texas Cancer Plan.

The document *Texas Cancer Plan: A Guide to Action* [~~Actions and Directions for the future 1986–2000~~] is adopted by reference. The document is available from the Texas Cancer Council, P. O. Box 12097, Austin, Texas 78711-2097. This document may be revised and updated after public review and comment as provided by the Administrative Procedure Act, Texas Government Code Annotated, §2001.001 et seq. [~~and Texas Register Act, Texas Civil Statutes, Article 6252-13a.~~]

§701.4. Committees.

(a) Executive committee. The council will have an executive committee consisting of the chairperson, the vice-chairperson, the member of the House of Representatives, the member of the Senate, and the secretary. The executive committee has the power to act for the council although actions taken shall be [~~are subject to~~] reviewed for [~~review and~~] approval by the full Council [~~committee~~] at its next meeting.

(b) Standing and ad hoc committees.

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

(3) The chairperson or the executive director may appoint non-council members to serve as voluntary committee members on an advisory [~~a consultant or voluntary~~] basis, subject to council approval.

(4)-(5) (No change.)

§701.5. Executive Director.

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

(c) The executive director duties will include the following:

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

(3) maintain liaison with state agencies and other organizations and agencies as directed by the council; [~~and~~]

(4) prepare necessary reports; and

(5) maintain the authority to transfer funds within the administrative budget.

§701.6. Meetings.

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

(c) Open meetings. All council and committee meetings are subject to the requirements of the Texas Open Meetings Act, Texas Government Code Annotated, Chapter 551 [~~Texas Civil Statutes, Article 6252–17. Regular, special, and committee meetings of the council shall be open to the public. All or part of the proceedings in any public meeting of the council or any committee of the council may be recorded by any person in attendance by means of tape recorder, video camera, or any other means of audio or visual reproduction. The presiding officer of each such meeting may determine the location of any such equipment and the manner in which the recording is conducted, provided that such determination does not prevent or unreasonably impair audio or video recording~~].

[~~(d) Executive sessions. Executive sessions of the council or its committees are meetings with only council members and invited persons present and are subject to the following requirements under the Texas Open Meetings Act, Texas Civil Statutes, Article 6252-17.~~]

(d) [~~(1)~~] Executive sessions are held only to consider the following items as provided by law:

(1) [~~(A)~~] involving the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee or to hear complaints or charges against such officer or employee, unless such officer or employee requests a public hearing;

(2) [~~(B)~~] with respect to the purchase, exchange, lease, or value of real property and negotiated contracts for prospective gifts or donations to the state or the governmental body, when such discussion would have a detrimental effect on the negotiating position of the council as between the council and a third person, firm, or corporation;

(3) [~~(C)~~] regarding the deployment, or specific occasions for implementation of security personnel or devices; or

(4) [~~(D)~~] in private consultations between a governmental body and its attorney, in instances in which the council seeks the attorney's advice with respect to pending or contemplated litigation, settlement offers, and matters where the duty of council's counsel to his client, pursuant to the Code of Professional Responsibility of the State Bar of Texas, clearly conflicts with applicable statutory provisions.

(e) [~~(2)~~] For each of its meetings that is closed to the public, except for consultations in accordance with subsection (d) of this section [~~paragraph (1)(D) of this subsection~~], the council or committee of the council shall take one of the following actions.

(1) [~~(A)~~] The council shall keep an agenda of the proceedings certified by the presiding officer that each agenda is a true and correct record of such proceedings. The certified agenda shall:

(A) [~~(i)~~] include an announcement by the presiding officer at the beginning and end of the closed session or meeting indicating date and time;

(B) [~~(ii)~~] state the subject matter of each deliberation and include a record of any further action taken; and

(C) [~~(iii)~~] be made available for public inspection and copying only upon court order in an action brought under the Texas Open Records Act, Texas Civil Statutes, Article 6252-17a.

(2) [~~(B)~~] In lieu of the certified agenda requirement of paragraph (1) of this subsection [~~subparagraph (A) of this paragraph~~], the council may make a tape recording of the proceedings which shall include an announcement made by the presiding officer at the beginning and end of the meeting indicating the date and time.

(f) [~~(3)~~] A certified agenda or tape recording of any closed meeting of the council or committee of the council shall be made available for inspection by any member of the council or as otherwise provided by the Texas Open Meetings Act, Texas Civil Statutes, Article 6252-17.

(g) [~~(4)~~] Actions of the council or its committees as a result of deliberation in executive session shall be announced in open meeting.

[~~(e) Notice of meeting. The executive director shall furnish written notice of the time and place of any regular meeting to the secretary of state for posting at the Capitol building at least seven~~

~~days prior to each meeting. In cases of emergency or urgent public necessity, notice shall be given as authorized by the Texas Open Meetings Act, Texas Civil Statutes, Article 6252-17.]~~

(h) [~~(f)~~] Agendas. The executive director shall submit a preliminary copy of the agenda to members of the council prior to each meeting. The chairperson will approve the official agenda. Official agendas will be distributed the day of the meeting.

(i) [~~(g)~~] Quorum. Nine members shall constitute a quorum.

(j) [~~(h)~~] Representatives of council members. The chairperson of the Texas Board of Human Services and the chairperson of the Texas Board of Health, as members of the council, may designate a representative to serve on the council on his or her behalf. Each chairperson- member shall give written notice of [~~to~~] such designation to the Council [~~council~~] chair [~~chairperson~~]. The designated representative may vote as a regular member of the council.

~~[(i) Rules of order. The council shall use Roberts Rules of Order, Revised, except that the chairperson may vote on any action as any other member of the council, and any other exception as provided in council policies or by statute.]~~

(k) [~~(j)~~] Minutes. Official minutes approved by the council shall be kept in the office of the council.

(l) [~~(k)~~] Public participation. The public may participate in the council's deliberations by submitting written comments at least 30 days in advance of a regular meeting or by personal appearance through arrangements with the chairperson.

(m) [~~(l)~~] Dissents. During a meeting, a council member may dissent against any council action and may enter a written statement into the official minutes to reflect such opposition.

(n) [~~(m)~~] Public statements. When making public statements concerning matters under the jurisdiction of the Council, members shall not imply that their individual opinion necessarily reflects the opinion or policy of the Council.

§701.7. Actions Requiring Council Approval.

Council approval is required for the following actions:

~~[(1) adoption of administrative procedures and policies to carry out the functions of the Texas Cancer Council or when requested by the executive director;]~~

(1) [~~(2)~~] adoption of the annual operating budget of the council and any changes in the approved budget;

(2) [~~(3)~~] approval or cancellation of any grants, contracts, and agreements;

(3) [~~(4)~~] submission of the legislative appropriation request; and

(4) [~~(5)~~] when required by law, requested by the executive director, or desired by the council.

§701.8. Charges for Copies of Public Records.

(a) The charge to any person requesting copies of any public record of the Council will be the charge established by the General Services Commission at 1 TAC 111.61-111.70 (relating to Costs of Copies of Open Records [~~Public Information~~]) as amended [~~in effect~~] on September 18, 1996.

(b) (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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Ms. Mickey L. Jacobs, M.S.H.P.

Executive Director

Texas Cancer Council

Earliest possible date of adoption: January 24, 1999

For further information, please call: (512) 463–3190

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Chapter 702. Relationship Between Council and Private Organizations and Donors

25 TAC §702.1, §702.3

The Texas Cancer Council proposes amendments to §702.1 and §702.3 concerning Council authority to accept funds, purpose for the rule, and standards of conduct of employees and the Council. The amendments in this section are being proposed because in:

§702.1, Authority and Purpose-

The rule is amended to properly cite the statute that required the adoption of the rule. The statute cited was codified and no longer appears in the civil statutes. The language of the statute will be easier to locate by citing the codified version.

§702.3, Standards of Conduct-

The rule is amended to properly cite the statute that required the adoption of the rule. The statute cited was codified and no longer appears in the civil statutes. The language of the statute will be easier to locate by citing the codified version.

Ms. Mickey Jacobs, Executive Director of the Texas Cancer Council, has determined that for the first five-year period the rules are in effect there will be no foreseeable implications relating to costs or revenues for state or local government as a result of enforcing or administering the amendments.

Ms. Jacobs also has determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the amendments will be clarification of the established guidelines for the relationship between the Council and private organizations or donors as required by Texas Government Code Annotated §2255.001 (Vernon 1998). There are no anticipated economic costs to persons who are required to comply with the amendments as proposed.

Comments on the proposed amendments may be submitted to Mickey Jacobs, Executive Director, Texas Cancer Council, P. O. Box 12097, Austin, Texas 78711.

The amendments are proposed under the Texas Health and Safety Code Annotated, §102.002 and §102.009 which provide the Texas Cancer Council with the authority to develop and implement the *Texas Cancer Plan*, and the Texas Government Code Annotated, §2001.004 (Vernon 1998 Pamphlet).

There is no other statute, article or code that is affected by this proposed amendment.

§702.1. Authority and Purpose.

(a) These rules are adopted under the provisions of Texas Government Code Annotated, Chapter 2255 [~~Texas Civil Statutes, Article 6252-11f~~].

(b) (No change.)

§702.3. Standards of Conduct.

(a) Standards of conduct of members and employees of the council are governed by Texas Government Code Annotated, Chapter 570 [~~Texas Civil Statutes, Article 6252-9b~~].

(b)-(f) (No change.)

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

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Ms. Mickey L. Jacobs, M.S.H.P.

Executive Director

Texas Cancer Council

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For further information, please call: (512) 463–3190

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Chapter 703. Project Contracts and Grants

25 TAC §§703.4, 703.7, 703.9, 703.10, 703.13

The Texas Cancer Council proposes amendments to §§703.4, 703.7, 703.9, 703.10, and 703.13 concerning application requirements, project approval, audits, funding restrictions, and termination of grant contracts. The amendments are being proposed because in:

§703.4, Application Requirements-

The language is changed to properly identify the file of an applicant and more accurately characterize the duties of an entity that receives a grant from the Council.

§703.7, Project Approval-

The language of this rule is changed to conform with the changes made by the Governor's Office of Budget and Planning to the grant management standards it amended in January 1988. The language also was amended to properly cite the acts referenced in the rule. The acts cited in subsection (i) were codified and no longer appear in the civil statutes. The language of the acts will be easier to locate by citing the codified versions.

§703.9, Audits-

The word "relative" is changed to "reasonable" to clarify the types of audit costs that the Council will reimburse to a grantee.

§703.10, Funding Restrictions-

Language is being added to clarify the applicability of the restrictions that the Council previously adopted.

§703.13, Termination of Contract-

Certain steps for the reconsideration of application denials are deleted to streamline the process of handling reconsideration requests. The rules, as amended, will provide applicants with a generous system for review without imposing on the parties undue costs and delays that termination hearings would require.

Ms. Mickey Jacobs, Executive Director of the Texas Cancer Council, has determined that for the first five-year period the rule is in effect there will be no foreseeable implications relating to cost or revenues for state or local government as a result of enforcing or administering the amendments.

Ms. Jacobs also has 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 amendments will be clarification of the procedures and requirements concerning the submission, approval and cancellation of grants related to the implementation of the *Texas Cancer Plan.* There are no anticipated economic costs to persons who are required to comply with the amendments as proposed.

Comments on the proposed amendments may be submitted to Mickey Jacobs, Executive Director, Texas Cancer Council, P. O. Box 12097, Austin, Texas 78711.

The amendments are proposed under the Texas Health and Safety Code Annotated, §102.002 and §102.009 which provide the Texas Cancer Council with the authority to develop and implement the *Texas Cancer Plan*, §102.010 (b) which authorizes the Board to adopt rules governing the submission and approval of grant requests and the cancellation of grants, and the Texas Government Code Annotated, §2001.004 (Vernon 1998 Pamphlet).

There is no other statute, article or code that is affected by this proposed amendment.

§703.4. Application Requirements.

(a) (No change.)

(b) Format Content. The format consists of the forms and related material that the applicant shall complete to submit a grant application [~~perform services~~].

(1)-(5) (No change.)

§703.7. Project Approval.

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

(e) The contractor must give assurances that the contractor will abide by the terms of the contract, or the Uniform Grant [~~and Contract~~] Management Standards (UGMS) [~~(where applicable)~~] as determined by Council staff, and this subchapter as adopted by the Governor's Office of Budget and Planning.

(f)-(h) (No change.)

(i) Contracts awarded to state and local governmental agencies may be awarded under the provisions of the Interagency Cooperation Act, Texas Government Code Annotated, Chapter 771 [~~Texas Civil Statutes, Article 4413(32),~~] or the Interlocal Cooperation Act, Texas Government Code Annotated, Chapter 791 [~~Texas Civil Statutes, Article 4413(32c),~~].

§703.9. Audits.

Audits of contractors are required in accordance with the requirements of the Uniform Grant [~~and Contract~~] Management Standards [~~(UGCMS)~~]. The Council shall reimburse the contractor for the reasonable [~~relative~~] cost of the required audit.

§703.10. Funding Restrictions.

Contractors will be subject to the following funding restrictions, unless statute or Council rules require otherwise:

(1) [~~(a)~~] Projects are funded only on a reimbursement basis. No advance payments for services will be made.

(2) [~~(b)~~] The council does not pay indirect costs of projects.

(3) [~~(c)~~] Disallowable costs.

(A) [~~(1)~~] The following are the most common types of costs which are disallowed:

(i) [~~(A)~~] out-of-state travel unless the travel is essential for the overall success of the project;

(ii) [~~(B)~~] payment of fees to professional associations;

(iii) [~~(C)~~] cost-of-living salary increases that exceed the rate approved by the Legislature for state employees;

(iv) [~~(D)~~] merit raises exceeding 5%;

(v) [~~(E)~~] liability insurance coverage;

(vi) [~~(F)~~] payment for direct services to patients for screening, diagnosis, or other support services if third-party coverage is currently available.

(B) [~~(2)~~] Items not listed in paragraph (1) of this section are not necessarily allowable.

(4) [~~(d)~~] Project Income. Any revenues received from projects funded by the council must be reported quarterly on forms provided by the council.

(A) [~~(1)~~] Project income shall be used for any purpose which furthers the objectives of the program, implementation of the Texas Cancer Plan, and scope of work of the council contract. Project income generally includes all fees, royalties, registrations, et cetera, that are generated by services, activities, or products provided through the funded project.

(B) [~~(2)~~] Project income must be deducted from total project costs to determine the net costs on which the council's reimbursement will be based. Any remaining revenue may be retained by the contractor as long as it is used for activities which further implementation of the Texas Cancer Plan.

(C) [~~(3)~~] If income is generated through the activities or materials developed with council funding, the council may require a Memorandum of Agreement with the contracting agency that specifies the conditions under which the income will be used.

(D) [~~(4)~~] For this subsection, "project" refers to activities financed by the council through a contract and "program" refers to a cancer prevention or control effort of which the council-funded project is a component.

§703.13. Termination of Contract.

(a) (No change)

(b) The contractor shall have the opportunity to request a reconsideration of the proposed termination. The contractor must file a written request for a reconsideration with the Executive Director, Texas Cancer Council, P.O. Box 12097, Austin, Texas 78711-2097, no later than 30 days after the contractor receives notice of the council's intent to terminate. If a contractor does not request a reconsideration in writing within the 30-day period, the contractor will be deemed to have waived the review and the contract will be terminated.

~~[(1) The contractor may file a written rebuttal within the 30-day notice period described in subsection (b) of this section. The contractor may request the reconsideration to be limited to a review of the council's file and the rebuttal statement.]~~

~~[(2) The contractor may request a hearing to offer testimony and other evidence. Hearings shall be conducted in accordance with subsection (c) of this section.]~~

~~[(c) Contract termination hearings will be heard by a contract review committee consisting of the chairperson and at least two other council members appointed by the chairperson. The chairperson shall preside. The contractor will be provided at least seven days notice of the hearing. The contractor will have the opportunity to appear and present testimony, cross-examine witnesses, and submit evidence for review. The decision of the contract review committee shall be final.]~~

(c) [~~(d)~~] Between the time of the proposed termination and the final decision of the contract review committee, the council may withhold further funding. In the event the contract review committee's decision is favorable to the contractor, the funds shall be promptly distributed to the contractor.

(d) [~~(e)~~] The contract shall be subject to automatic termination if the council's funds are reduced or upon mutual agreement of the contractor and the council.

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 December 14, 1998.

TRD-9818332
Ms. Mickey L. Jacobs, M.S.H.P.
Executive Director
Texas Cancer Council
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 463–3190

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TITLE 28. INSURANCE

Part I. Texas Department of Insurance

Chapter 11. Health Maintenance Organizations

Subchapter W. Single Service HMOS, Including Dental and Vision

28 TAC §11.2200, §11.2206

The Texas Department of Insurance proposes amendments to §11.2200 and new §11.2206 concerning dental health maintenance organizations (HMOs). These proposed amendments and new section are necessary to implement legislation enacted by the 75th Legislature in Senate Bill 385 which requires dental HMOs with more than 10,000 enrollees in Texas to offer a dental point-of-service plan to an employer, association, or other private group arrangement that employs or has 25 or more employees or members. The rules set out disclosure requirements about the point-of-service plan that must be included in the group enrollment application, allowing a consumer to make informed, objective decisions in selecting dental care coverage.

Section 11.2200 is amended to include definitions for "insurer," "point-of-service group enrollment application," "point-of-service plan," and "qualified actuary." New §11.2206 is proposed to set forth the disclosure requirements required as part of each group enrollment application and the requirement that the HMO retain certification that the indemnity benefits correspond with benefits arranged or provided by the HMO.

Karen Thrash, Deputy Commissioner, HMO/URA Division, has determined that for each of the first five years the proposed new amendment and new section will be in effect there will be no fiscal implications for state and local government. There will be

no measurable effect on local government, local employment, or the local economy as a result of the proposal.

Ms. Thrash has also determined that for each year of the first five years the proposed amended section and new section are in effect, the public benefits anticipated as a result of the proposal will be increased consumer awareness of available coverage for dental benefits.

Ms. Thrash estimates that the majority of the costs to persons required to comply with the proposed amended section and the new section is the result of the legislative enactment of Art. 20A.38. One component of these rules which is expected to result in costs in excess of the requirements imposed by statute are the costs of providing disclosures about the point-of service plan and the benefits arranged or offered by the HMO in the group enrollment application offered to the each employer, association, or other private group arrangement required by proposed new §11.2206(a). Should the employer, association, or other private group arrangement elect to accept the point-of-service plan, the disclosure must also be included in each group enrollment application offered to the prospective enrollees of the employer, association, or other private group arrangement. The department estimates that the required disclosure should take up no more than one page of the application. The printing cost and paper is estimated by the department to be $.02 per page, thereby increasing the cost of each application by two cents. Since the disclosures are included in the group enrollment applications which are prepared by the HMO there should be no additional mailing costs. The total cost to HMOs affected by the proposed amended section and new section is not dependent upon the size of the HMO, but rather is dependent on the number of employers, associations, or other private group arrangements to whom the HMO offers coverage, and, in turn, the number of potential enrollees associated with each employer, association, or other private group arrangement that accepts the point-of-service plan. Both small businesses and the largest businesses affected by these sections would incur the same additional cost per application. The number of applications distributed by an HMO would be dependent upon the entities each HMO targets for its business and the potential enrollees associated with the entities who accept the point-of-service plan marketed by the HMO. Article 20A.38 requires each affected HMO, regardless of whether it is considered to be a small or large business, to make this information available to consumers and potential consumers of its services. Therefore, it is the department's position that these rules are mandated by the underlying state statute, and considering the statute's purposes, it would be neither legal nor feasible to reduce their effect on small businesses as doing so would cause potential enrollees from receiving the required disclosures.

Another potential cost could be generated if an HMO elected to utilize a qualified actuary to prepare the certification that the indemnity benefits and HMO coverage offered under the point-of-service plan are comparable as provided by §11.2206(b). However, the rule does not require certification to be done by an actuary. The statute requires each HMO to offer a point-of-service plan that provides comparable indemnity and HMO benefits. This information must be gathered and confirmed by the HMO in determining which indemnity insurer to work with in making the comparable benefits available. The certification is simply a confirmation that the HMO has in fact done what the statute requires it to do. Section 11.2206(b) permits the certification to be prepared by an HMO's own corporate officers. An HMO could also have the insurer with whom the HMO contracts to provide the indemnity benefits to prepare the certification as part of the process of negotiating the provision of the indemnity benefits by the insurer. An HMO with an in-house actuary or an existing contract with a qualified actuary who is working for the HMO in its preparation of a point-of-service plan would also be able to produce a certificate as part of its day to day business. Only if an HMO were to elect to retain a qualified actuary to produce a certification would an additional cost be incurred. Since the information must be obtained by the HMO in the course of preparing a point-of service plan that complies with the statute, the cost of engaging a qualified actuary to certify that the plan does offer comparable benefits is estimated to be no more than $500 per certificate. Again, the underlying state statute requires every affected HMO, regardless of size, to offer corresponding benefits. The rules ensure that each HMO can confirm that it is in compliance with the law. Therefore, it would be neither legal nor feasible to reduce their effect on small businesses in this respect.

Comments on the proposal must be submitted in writing within 30 days after publication of the proposal in the Texas Register to Lynda H. Nesenholtz, 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 should be submitted to Linda Von Quintus, Deputy Commissioner, Regulation and Safety, Mail Code 107-2A, 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.

The amendment and new section are proposed under the Insurance Code Articles 20A.38, 20A.22, and 1.03A. Article 20A.38 requires an HMO with more than 10,000 enrollees in Texas that offers dental benefits to offer a dental point-of-service plan to an employer, association, or other private group arrangement that employs or has 25 or more employees or members. In addition an HMO must offer a point-of-service plan to an employer if its dental provider panel is the sole delivery system of dental benefits to its employees. Insurance Code Article 20A.38 Section (c)(1) requires an HMO to provide disclosure statements in the group enrollment application as required by rules adopted under the Insurance Code for each dental plan offered. Insurance Code Article 20A.22 Section (a) authorizes the Commissioner of Insurance to promulgate rules and regulations to carry out the provision of the Act. Insurance Code Article 1.03A provides that the Commissioner of Insurance may adopt rules and regulations to execute the duties and functions of the Texas Department of Insurance as authorized by statute.

Insurance Code, Chapters 3, 10, 20, 20A, 22, and Article 21.21 are affected by this proposal.

§11.2200. 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) Insurer – An insurance company, a group hospital service corporation operating under Chapter 20 of the Texas Insurance Code, a fraternal benefit society operating under Chapter 10 of the Code, or a stipulated premium insurance company operating under Chapter 22 of the Code.

(7) Point-of-service group enrollment application – An application provided by an HMO that provides dental benefits which the HMO must provide to:

(A) an employer, an association or other private group arrangement to whom the HMO must offer a dental point-of-service plan; and

(B) any prospective enrollees in a dental point-of service plan.

(8) Point-of-service plan – A plan provided through a contractual arrangement under which indemnity benefits for the cost of dental care services other than emergency care or emergency dental care are provided by an insurer in conjunction with corresponding benefits arranged or provided by an HMO that provides dental benefits and under which an enrollee may choose to obtain benefits or services under either the indemnity plan or the HMO plan in accordance with specific provisions of Insurance Code, Article 20A.38.

(9) Qualified actuary – An actuary who is either:

(A) a Fellow of the Society of Actuaries, or

(B) a Member of the American Academy of Actuaries.

§11.2206. Group Enrollment Applications for Point-of-Service Plans, Mandatory Disclosure Statements, Certificates.

(a) Each point-of-service group enrollment application shall include a disclosure statement written in readable and understandable format that includes the following information:

(1) a statement that the dental indemnity benefits are provided through an insurer and that the dental care services are offered or arranged by the HMO;

(2) the name of the insurer and the name of the HMO offering the benefits;

(3) an explanation that, in order to receive benefits:

(A) from the HMO, an enrollee must utilize only network providers, except for emergency dental care, and pay the copayments specified in the evidence of coverage;

(B) under the indemnity plan, the enrollee may utilize any provider but prior to receiving reimbursement, the enrollee must meet the required deductible and is responsible for the coinsurance amount specified in the policy or certificate; and

(4) separate listings of the premium applicable to the indemnity contract and the premium applicable to the HMO evidence of coverage.

(b) Each HMO offering a point-of-service plan shall retain on file a certification by an HMO officer that the point-of-service plan includes dental indemnity benefits that correspond to the benefits contained in the HMO evidence of coverage. The HMO may enter into agreement with the insurer or a qualified actuary to prepare the certification, provided that the HMO retains responsibility for obtaining the certification and shall keep the certification in its possession.

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 December 14, 1998.

TRD-9818326
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation

Chapter 330. Municipal Solid Waste

The Texas Natural Resource Conservation Commission (TNRCC or commission) proposes amendments to §330.4 and §330.65, concerning municipal solid waste management.

EXPLANATION OF PROPOSED RULE The purpose of these rules is to modify existing rule language regarding municipal solid waste (MSW) transfer station authorization and design requirements. The proposed rules will clarify that an MSW transfer station may be authorized within the permitted boundaries of any MSW landfill, including a Type IV landfill, with a registration instead of a permit. The proposed rules will also prohibit construction of transfer stations before authorization, modify transfer station odor control criteria, specify public notice requirements, and provide for a motion for reconsideration.

The executive director has received comments that existing rules are unclear with respect to the level of authorization required for an MSW transfer station located within the permit boundary of a Type IV facility. A Type IV facility is a type of MSW facility that is authorized by the commission for the disposal of brush, construction-demolition waste, and rubbish that is free of putrescible and household wastes. This proposed rule will clearly state that an MSW transfer station may be authorized to operate at an existing Type IV facility by registration as opposed to a permit. One of the primary differences between a registration and a permit is that a contested case hearing has historically not been required in the MSW program for MSW program registered facilities. The commission has been directed by Texas Health and Safety Code, §361.0861 and §361.111, to register certain kinds of transfer stations and to exempt them from permits.

This rule will prohibit construction of a transfer station prior to completion of the authorization process. The new prohibition is in response to questions raised during a recent contested case hearing regarding whether construction of a facility prior to commission authorization effectively limits the commission's ability to provide comment on and request changes to proposed facility design or operational standards during the application review period and biases the commission's decision toward authorization. The proposed prohibition is similar to existing policy for some MSW facilities such as liquid waste transfer, and grease and grit trap waste processing facilities.

Odor control standards have been strengthened in response to questions voiced by protestants during a contested case hearing and address situations where potentially highly odorous waste material is brought to a transfer station located within the permit boundary of a landfill that is not accepting potentially highly odorous waste. Protestants questioned whether the design and operational requirements contained within existing rules relating to transfer stations provide adequate nui-

sance odor control and are sufficiently protective of area neighborhoods regarding nuisance odor issues. The proposed rule would require a transfer station operator to control openings to process buildings to prevent releases of nuisance odors to the atmosphere; properly maintain and operate all odor control equipment; and to employ odor control measures. The odor standards proposed by this rule are essentially the same as those contained in existing rules for transfer stations that recover material from the waste stream (existing 30 TAC 330.65(f)(2)).

Public notice requirements are proposed which will provide notification to the public prior to facility authorization that a transfer station authorization is pending and that a public meeting has been scheduled. The proposed public notice requirements are in response to comments provided at a contested case hearing that existing transfer station rules do not require an applicant to provide notice of public meeting prior to facility authorization. The proposed rule will update the public notice rule reference and also establish public notice requirements that are consistent with those required for similar MSW facility registrations (existing 30 TAC 330.71(d)(2)).

An opportunity for a motion for reconsideration has been added as a result of questions from outside parties and to be consistent with current policy for similar facilities. Outside parties correctly stated that although other MSW registrations allow for a motion for reconsideration, existing MSW transfer station rules do not contain a motion for reconsideration provision. In accordance with the proposed rule, a motion to request the commission to reconsider a decision to approve a registration may be filed. The proposed motion for reconsideration provision is consistent with an existing commission rule for registered facilities (existing 30 TAC 332, section 332.35(e)).

Section 330.4(d)(4) is proposed to be amended to clarify that a transfer station can be authorized on any MSW landfill via a registration. This proposed change is to clearly state that transfer stations may be located on Type I, Type II, Type III, or Type IV landfill facilities by means of a registration in lieu of a permit. Previously, the rules and program practice was to allow the establishment of MSW transfer stations on landfills by registration, but the rule language did not explicitly state that MSW transfer stations could be authorized on Type IV landfills. A Type IV facility is a type of MSW facility that is authorized by the commission for the disposal of brush, construction-demolition waste, and rubbish, that are free of putrescible and household wastes.

Section 330.4(q) is proposed to be amended by deleting language that references §330.65(f). Portions of §330.65(f) regarding air pollution control are being moved to §330.65(e)(5) for organizational purposes to consolidate air pollution requirements and this reference to §330.65(f) will no longer be accurate, and consequently it will be deleted.

Section 330.4(q)(5)-(7) is proposed to be modified in order to delete unnecessary language providing for the suspension and/or revocation of transfer facility operation. The suspension of operations language was for the situation where registered transfer facilities are operated in a manner that causes or results in a nuisance. The commission is responsible for all actions regarding solid waste management. In instances where nuisance conditions are found to be occurring, remedies through normal enforcement procedures may be sought by the commission. The commission is authorized to suspend and/or revoke registrations under the general authority of the Texas Health and Safety Code, Chapter 361, the Solid Waste Disposal Act, §§361.011; §7.303, Texas Water Code; and 30 Texas Administrative Code §305.66 (relating to Permit Denial, Suspension, and Revocation).

Section 330.65(b)(1) is proposed to be amended to prohibit transfer facility construction prior to authorization. The new prohibition is in response to questions raised during a recent contested case hearing regarding whether construction of a facility prior to commission authorization effectively limits the commission's ability to provide comment on and request changes to proposed facility design or operational standards during the application review period and biases the commission's decision toward authorization.

Section 330.65(b)(2) is proposed to be amended to add the requirement that transfer station facilities registered under the proposed rules must initiate facility construction within two years of obtaining a registration, or within two years of the conclusion of the appeals process whichever is longer, or the registration will automatically terminate and no longer be effective. Section 330.65(b)(2) also proposes a requirement that transfer station facilities registered under previous a rule must begin facility construction within two years of the effective date of the proposed rules, or within two years of the conclusion of the appeals process whichever is longer, or the registration will automatically terminate and no longer be effective. The proposed registration termination provision will ensure that construction of registered transfer stations begins within a period of time the commission considers reasonable. The proposed registration termination provision is consistent with an existing commission rule for liquid waste processing facilities (existing 30 TAC 330.71(d)(6)).

Section 330.65(b)(3) is proposed to be amended to add language causing the automatic withdrawal of registration applications filed under the proposed rule which have not completed all registration requirements within one year of filing. It will also result in the automatic withdrawal of transfer facility registration applications filed under a previous rule that have not completed all registration requirements of this section within one year of the effective date of the proposed rule. Under current rule, transfer station applicants often prolong the authorization process by satisfying §330.65 registration requirements with the exception of the public meeting notice. This delay results in additional tracking and processing activities that the commission believes to be unnecessary. The proposed application withdrawal provision would ensure that transfer station applications filed under previous and proposed rule are processed within a period of time the commission considers reasonable. The commission estimates that there are 23 registration applications currently pending of which approximately 5 may be affected by this rule. The average amount of time to process an MSW registration is approximately 180 days. It is believed that one year is sufficient time to complete registration requirements.

A proposed modification to §330.65(d)(2) states the contents expected for a site plan. The contents of a site plan under §330.65(d)(2) include information regarding the site boundary, access to public roadway, site access control features, site drainage features, and pertinent design information as determined by the executive director.

A proposed modification to §330.65(d)(3)(C) only reflects a change in a reference made in a previous rulemaking regarding the notice of public meetings.

The proposed amendment to §330.65(d)(3)(D) will require the registration application to include a list of landowners located within 500 feet of the facility, their addresses, and a map locating their property. The information required by this section will be used in notifying landowners located within 500 feet of the site of a public meeting, issuance of the registration, and rights of the public regarding motions for reconsideration.

A proposed modification to §330.65(d)(7) updates a reference and makes the intent more explicit regarding evidence of financial assurance. It is the current program practice to require financial assurance for registered transfer stations. The proposed rule will ensure this practice will be continued by modifying the existing language to specifically require financial assurance for transfer stations. The proposed rule will not increase the financial assurance amount currently required for registered transfer station facilities.

A proposed modification to §330.65(d)(8) regarding the applicant's statement merely rearranges a form by removing the serialization of subparagraphs (A) and (B) along with the language "Notary Public's Certification". No new requirements are established.

The proposed change to §330.65(e)(5) establishes an odor standard for these facilities. In general the facility is required to be designed and operated to prevent nuisance odors from leaving the property boundary of the facility. This odor standard is consistent with one currently found in an existing rule for transfer stations that recover material from the waste stream (existing 30 TAC 330.65(f)(2)).

Also, the proposed amendment to §330.65(e)(5), regarding odor control for MSW transfer stations, identifies the standards and measures to be used for ventilation and odor control at MSW transfer stations. The proposed ventilation and odor control standards and measures are consistent with those required for transfer stations that recover material.

Also, the proposed change to §330.65(e)(5) adds discretionary language to the odor and ventilation control measures that must be employed by allowing the executive director to exercise discretion regarding types of odor and ventilation control equipment to be employed.

The proposed change to §330.65(f) moves language regarding odor control to §330.65(e)(5).

The proposed change to §330.65(f)(2) regarding the operational design standards adds language which states that transfer station operational design standards must be included in the site operating plan.

Proposed new §330.65(g) establishes a means for a motion for reconsideration once a registration has been issued allowing affected persons a means of appealing the registration decision.

The proposed rule removes references to air quality permitting requirements as these requirements are contained in other commission rules. All facilities constructed pursuant to this registration which are sources of air pollution (including odor control and air pollution abatement devices) are required to obtain authorization pursuant to Chapter 116 (relating to Control of Air Pollution by Permits for New Construction or Modifications) prior to start of construction, or qualify for exemption from air quality permitting under Chapter 106.

The statutory basis for the rules is found in the Texas Health and Safety Code, Chapter 361, the Solid Waste Disposal Act, §§361.011, 361.024, 361.0861, and 361.111.

FISCAL NOTE Matthew Johnson, Financial Administration Division, has determined that for the first five-year period the sections as proposed are in effect there will be fiscal implications as a result of administration and enforcement of the sections. The effect on state government will be a reduction in the costs of processing MSW registration applications where previously permit applications were required. These savings, which are prospective and cannot be determined at this time, are not anticipated to significantly reduce agency operating costs, as the number of instances is relatively few where permits were previously required but would no longer be required under the proposed rules. Generally, there are no significant fiscal implications anticipated for state or local governments as a result of enforcement or administration of the section.

Some small businesses could be affected by provisions of the proposed rule. The provisions of these rules for public notice represent a potential cost to small and large businesses, as well as local governments, to the extent that local governments operate MSW transfer stations. The new costs for public notice are estimated to range from $500 to $3,000 depending on the publication charges of the local newspaper. Also, the odor control provisions of these rules could, if required, increase a small business or any operator's costs to operate or capitalize a transfer station, depending on the control method selected. Such costs could range from $0.00 for addition of on-site buffer for odor control at sites where the registrant already owns sufficient acreage to comply with the buffer requirements of the proposed rules to as much as $30,000 for a mechanical odor control device such as an air scrubber. In contrast to these potential cost increases, operators of MSW transfer stations may realize cost savings where registrations now will replace permits as authorizations to operate. A comparison between small business and large business costs of the proposed rule changes has been prepared. A small business having a range of employees of 1 to 100 will have costs between $330 and $33,000 per employee for the highest possible expenditures associated with both the public notice requirements and odor control requirements. For a large business having 70,000 employees, the costs will be $.47 per employee for the highest possible expenditures associated with both the public notice requirements and odor control requirements. Texas Government Code, §2002.006(a) requires a state agency considering the adoption of a rule that would have an adverse economic effect on small businesses to reduce that effect if doing so is legal and feasible considering the purpose of the statute under which the rule is to be adopted. Texas Government Code, §2006.002(b) authorizes an agency to reduce the effect on a small business by: establishing separate compliance or reporting requirements for small businesses; through the use of performance standards in place of design standards for small businesses; or by exempting small businesses from all or part of the rule. The commission has chosen to reduce the effect on a small business by the use of performance standards in place of design standards. The performance standard used is in proposed §330.65(e)(5)(C). Section 330.65(e)(5)(C)(i)-(iv) provides the measures to meet the performance standard. The commission has provided two options in the proposed rule by which the adverse effect, on any registrant, including a small businesses, regarding odor control requirements can be avoided. Small businesses can

avoid additional odor control costs by using on-site buffer zones for odor control or using additional waste handling procedures, storage procedures, and clean-up procedures for odor control when accepting putrescible waste.

PUBLIC BENEFIT Mr. Johnson also has determined that for the first five-year period the sections as proposed are in effect the public benefit anticipated as the result of enforcement of and compliance with the sections will be more cost-effective regulation and control of municipal solid waste.

The effect of the sections as proposed will be to increase the potential costs of obtaining authorization to operate these types of facilities for solid waste management due to public notice requirements. Some additional costs for the facility operation may occur due to possible odor control measures. There are some small potential economic costs identified for individuals subject to the sections as proposed and these costs are addressed above.

DRAFT REGULATORY IMPACT ANALYSIS The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act, and it does not meet any of the four applicability requirements listed in §2001.0225(a). The rule does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, because the rule is designed to protect the environment and reduce the risk to human health from environmental exposure.

The economy, a sector of the economy, productivity, competition, or jobs, will not be adversely affected in a material way because the additional costs caused by the rule are minimal when compared to the revenue that may be generated by such a facility. The rules will potentially add costs for notice to be provided to the public and may add additional costs for odor control. The additional costs added by this rule are not substantial when compared to the revenue that the facility may generate. The additional costs added by this rule are a one time only cost. Additional costs for odor control may be avoided by using one of two options. One low cost odor control option is to use clean-up and management procedures for odor control, and the other low cost odor control option is to use additional buffer space that is normally available at landfills and is frequently available in rural areas. Public notice costs are usually lower in rural areas and are based on the costs attributed to newspaper publication of the public notice. Consequently, additional costs for these facilities to be located in a rural area will be minimal. The public notice costs will be the same as for similar MSW registered facilities. In contrast to these potential cost increases, operators of MSW transfer stations may realize cost savings where registrations will replace permits as authorizations to operate.

The rule does not adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state, because the rule is designed to protect the environment and reduce the risk to human health from exposure to nuisances.

The purpose of these rules is to modify existing rule language regarding municipal solid waste transfer facility authorization requirements and design requirements. The proposed rules will clarify that a transfer facility can be established on any municipal solid waste landfill including a Type IV landfill with a registration authorization, prohibit construction of transfer stations prior to authorization, modify transfer facility odor control criteria, specify public notice requirements, and provide for a motion for reconsideration. The proposal is not directly related to and does not result in the protection of the environment or human health; only carries out a requirement of state law.

This proposal does not exceed a standard set by federal law and is specifically required by state law (§361.0861 of the Texas Health and Safety Code, Chapter 361, Solid Waste Disposal Act). Permit exemptions for MSW transfer facilities are authorized by Texas Health and Safety Code, Chapter 361, the Solid Waste Disposal Act, §361.0861 and §361.111. One of the primary differences between a registration and a permit is that a contested case hearing has historically not been required in the MSW program for MSW program registered facilities although a costly contested hearing is potentially required for a permitted facilities. The commission has been directed by Texas Health and Safety Code, §361.0861 and §361.111, to register certain kinds of transfer facilities and to exempt them from permits.

This proposal does not exceed the requirements of a delegation agreement or contract between the state and federal government, as there is no agreement or contract between the commission and the federal government concerning MSW transfer facilities.

The rules are not proposed solely under the general powers of the commission; instead, they are proposed under a specific state law. The proposed changes to §330.4 and §330.65 are not being made under the general powers of the commission. Rather, the changes are being made under the requirements of a specific state law that allows the commission to exempt MSW transfer stations from permits, allows the commission to establish rules for the design and operational requirements for MSW transfer stations, and requires a public meeting on each new transfer station. Specific state law includes, Texas Health and Safety Code, Chapter 361, §361.0861 and §361.111, Solid Waste Disposal Act.

TAKINGS IMPACT ASSESSMENT The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code, §2007.043. The following is a summary of that Assessment. The specific purpose of the rules is to adopt a set of rules that modify authorization, design, and operation requirements for municipal solid waste transfer stations. The proposed rules would substantially advance this stated purpose by adopting rules that follow the requirements of a specific state law that allows the commission to exempt MSW transfer stations from permits, allows the commission to establish rules for the design and operational requirements for MSW transfer stations, and requires a public meeting on each new transfer station. Specific state law includes Texas Health and Safety Code, Chapter 361, §361.0861 and §361.111, Solid Waste Disposal Act. Promulgation and enforcement of these rules will somewhat burden private real property that is the subject of the rules because the proposed changes will limit or restrict a person's rights in private real property by adding additional costs for notice to be provided to the public and may add additional costs for odor control. The additional costs added by this rule are not substantial when compared to the revenue that the facility may generate. The additional costs added by this rule are a one time only cost. Additional costs for odor control may be avoided by using one of two options. One low cost odor control option is to use clean-up and management procedures for odor

control, and the other low cost odor control option is to use additional buffer space that is normally available at landfills and is frequently available in rural areas. Public notice costs are usually lower in rural areas and based on the costs attributed to newspaper publication of the public notice. Consequently, additional costs for these facilities to be located in a rural area will be minimal. The public notice costs as proposed will be the same as those costs for similar MSW registered facilities. In contrast to these potential cost increases, operators of MSW transfer stations may realize cost savings where registrations now will replace permits as authorizations to operate. These cost savings may be expected in lowered legal and consulting fees because a public hearing will not be required. The rules are necessary to advance the agency's mission of providing adequate public health and safety relative to the management of municipal solid waste. The rules will provide significant changes regarding the procedures and criteria to be used by the commission and the regulated community in the requirements for the review and approval of registration applications for regulated activities under this chapter.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW The commission has determined that this rulemaking action is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et. seq.), the rules of the Coastal Coordination Council (31 TAC Chapters 501-506), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning consistency with the Texas Coastal Management Program. As required by 31 TAC §505.11(b)(4) and 30 TAC §281.45(a)(3) relating to actions and rules subject to the CMP, agency rules regarding solid waste management must be consistent with the goals and policies of the CMP to protect the coastal area.

The commission has prepared a consistency determination for the proposed rules pursuant to 31 TAC §505.22 and has found the proposed rulemaking is consistent with the applicable CMP goals and policies. The following is a summary of that determination. The CMP goal applicable to the proposed rules is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. CMP policies applicable to the proposed rules include the administrative policies and the policies for specific activities related to construction and operation of solid waste treatment, storage, and disposal facilities.

Promulgation and enforcement of these rules is consistent with the applicable CMP goals and policies because the proposed transfer station rule modifications will encourage safe and appropriate storage, management, and treatment of municipal solid waste, which will result in an overall environmental benefit across the state, including coastal areas. In addition, the proposed rules do not violate any applicable provisions of the CMP's stated goals and policies. The commission seeks public comment on the consistency of the proposed rules.

Therefore, in compliance with 31 TAC §505.22(e), the commission affirms that this rule is consistent with CMP goals and policies, and the rule will have a negligible impact upon the coastal area.

PUBLIC HEARING A public hearing on this proposal will be held January 14, 1999, at 10:00 a.m. in Room 2210 of TNRCC Building F, located at 12100 Park 35 Circle, Austin. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

SUBMITTAL OF COMMENTS Written comments regarding this proposal may be mailed to Bettie Bell, TNRCC Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 98010-330-WS. Comments must be received by 5:00 p.m., January 25, 1999. For further information, please contact Wayne Lee, of the Waste Policy and Regulations Division, at (512) 239-6815.

Subchapter A. General Information

30 TAC §330.4

STATUTORY AUTHORITY The amended section is proposed under the authority of the Texas Water Code, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state, and pursuant to the Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.024, which provides the commission with the authority to regulate municipal solid waste and adopt rules as necessary to regulate the operation, management, and control of solid waste under its jurisdiction.

The amendment is also proposed under the commission's authority to control the management of municipal solid waste under Texas Health and Safety Code, §361.011, and to implement §361.0861 and §361.111, Texas Health and Safety Code, Chapter 361, Solid Waste Disposal Act.

§330.4. Permit Required.

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

(d) A permit is not required for a municipal solid waste transfer station facility that is used in the transfer of municipal solid waste to a solid waste processing or disposal facility from:

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

(4) a transfer station located within the permitted boundaries of a municipal solid waste Type I, Type II, Type III, or Type IV facility as specified in §330.41 of this title (relating to Types of Municipal Solid Waste Facilities) [~~landfill facility~~].

(e)-(p) (No change.)

(q) In addition to permit exemptions established in subsection (d) of this section, a permit is not required for any new municipal solid waste Type V transfer station that includes a material recovery operation that meets all of the requirements established by this subsection. Owners and operators of Type V transfer facilities meeting the requirements of this subsection are allowed to register their operations in lieu of permitting them. Owners and operators of transfer stations that meet the permit exemption requirements and wish to exercise the exemption option must register their operation in accordance with §330.65 of this title (relating to Registration for Solid Waste Management Facilities) [~~, meet the additional design criteria of §330.65(f) and operate the facility in accordance with Subchapter G of this chapter (relating to Operational Standards for Solid Waste Processing and Experimental Sites)~~].

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

[~~(5) Executive director's notice of nuisance. If registered transfer facilities are operated in a manner which causes or results in a nuisance, as defined in §330.2 of this title (relating to Definitions), and the executive director gives written notice that a nuisance exists, the registered facility shall cease operations and the facility's registration shall be suspended until such time as the facility owner or operator receives written notice of the executive director's determination that the nuisance no longer exists.~~]

[~~(6) Receipt of registration. As a condition of receipt of a registration by a transfer facility under this subsection, the owner and operator of that facility agrees that if the facility operates in a manner which causes or results in a nuisance as defined in §330.2, and the executive director sends written notice pursuant to paragraph (5) of this subsection, the facility will immediately cease operations until the executive director notifies the facility of its determination that a nuisance no longer exists at the facility and that the facility may be reopened for operation.~~]

[~~(7) Request for commission decision. If a registered transfer facility is notified that nuisance conditions exist due to the operations of the facility, and that its registration is therefore suspended, the owner or operator of the registered facility may request that the question of whether or not a nuisance exists be decided by the Commission. This request must be in writing and filed within 20 calendar days of receipt of the executive director's written notice of suspension of the registration.~~]

(r)-(w) (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 December 11, 1998.

TRD-9818278
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 239–6087

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Subchapter E. Permit Procedures

30 TAC §330.65

STATUTORY AUTHORITY The amended section is proposed under the authority of the Texas Water Code, §5.103 and §5.105, which provide the Texas Natural Resource Conservation Commission (commission) with the authority to adopt any rules necessary to carry out the powers and duties under the provisions of the Texas Water Code and other laws of this state, and pursuant to the Texas Solid Waste Disposal Act, Texas Health and Safety Code, §361.024, which provides the commission with the authority to regulate municipal solid waste and adopt rules as necessary to regulate the operation, management, and control of solid waste under its jurisdiction.

The amendment is also proposed under the commission's authority to control the management of municipal solid waste under Texas Health and Safety Code, §361.011, and to implement §361.111 and §361.0861.

§330.65. Registration for Solid Waste Management Facilities.

(a) Applicability. This section applies [~~shall apply~~] to a municipal solid waste management facility that [~~which~~] is exempt from permit requirements under §330.4(d), (g), and (q) of this title (relating to Permit Required).

(b) Construction and operation.

(1) The construction of the transfer facility shall not begin until the registration has been issued by the executive director. Operation of the facility shall not begin until the registration has been issued and a pre-opening inspection is conducted by commission staff.

(2) If a registered facility does not begin construction within two years of issuance of a registration or within two years of the conclusion of the appeals process whichever is longer , the registration shall automatically terminate and will no longer be effective under §330.4(d)(4). If a facility registered under previous rule does not begin construction within two years of the effective date of this section, or within two years of the conclusion of the appeals process whichever is longer, the registration shall automatically terminate and will no longer be effective.

(3) If a transfer station registration application was filed under a previous rule but the registration has not been issued, the applicant shall complete all registration requirements within one year of the effective date of this section or the application will be automatically withdrawn. If a registration application is filed under this section, the applicant shall complete all registration requirements within one year of the date of receipt by the commission or the application will be automatically withdrawn.

(4) Owners/operators must comply with all applicable regulations, and shall remain responsible for making corrections and/or other changes that are necessary to meet the requirements, prior to beginning operation of the facility. [~~Owners/operators may proceed with construction of a solid waste management facility meeting all the requirements of this section without prior executive director approval, provided that a public meeting is held pursuant to subsection (d)(3)(C) of this section and the applicant has submitted an application complete with all information demonstrating compliance with these rules to the executive director. The operation of the facility shall not begin until after a pre-opening inspection has been conducted and authorization to accept waste has been given by the executive director. Owners/operators must comply with all applicable regulations, and shall remain responsible for making corrections and/or other changes that are necessary to meet the requirements, prior to beginning operation of the facility.~~]

(c) (No change.)

(d) Application. The complete registration application shall include Part I of a permit application as required by §330.52 of this title (relating to Technical Requirements of Part I of the Application), including but not limited to, documentation of population or incoming waste rate, site plan, land use narrative, site operating plan, legal description, evidence of competency, evidence of financial assurance, and an applicant's statement, and shall be submitted as follows:

(1) (No change.)

(2) Site plan. The site plan shall include all the general design criteria which could be incorporated in a set of construction plans and specifications. A site layout plan, signed and sealed by a registered professional engineer, and a location map shall be included in the plan.

(A) The site plan or location map, or both, shall identify:

(i) The site boundary,

(ii) Access to public roadway,

(iii) Site access control features,

(iv) Site drainage features, and

(v) Pertinent design information as determined by the executive director.

(B) Site drawings shall include a north arrow, legend, and scale. All design features shall be labeled.

(C) The site plan may be supplemented with additional sheets as needed to depict all design features.

(3) Land use narrative.

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

(C) The applicant and the commission shall conduct a public meeting in the local area, prior to [~~the beginning of construction of the~~] facility authorization, to describe the proposed action to the general public. Notice of the public meeting shall be as specified in §39.101(d) of this title (relating to Notice of Public Meeting). [~~The public meeting shall be held as prescribed in the Health and Safety Code, §361.0791 (relating to Public Meeting and Notice Requirement) and §305.107 of this title (relating to Public Meeting and Notice Requirements).~~]

(D) Landowners list and land ownership maps. The applicant shall provide a list of landowners owning land within 500 feet of the site which includes their addresses along with a map locating the property owned by those persons. This map and list shall identify property owned by adjacent landowners and show all property ownership within 500 feet of the site.

(4)-(6) (No change.)

(7) Evidence of financial assurance. Evidence of financial assurance shall be provided for all facilities registered under this section and those facilities shall comply with provisions of Subchapter K, [~~in accordance with §330.9 and~~] §§330.280-330.286 of this Chapter (relating to Financial Assurance).

(8) Statement of applicant. The applicant shall provide documentation that the person signing the application meets the requirements of §305.44 of this title (relating to Signatories to Applications). The following document shall be signed, notarized, and submitted with the application: [~~.~~]
Figure: 30 TAC §330.65(d)(8)

[~~(C) The applicant shall provide documentation that the person signing the application meets the requirements of §305.44 of this title (relating to Signatories to Applications).~~]

(e) Design criteria.

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

(5) Air pollution and ventilation. Ventilation of structures designed in accordance with applicable codes shall be provided. The facility shall be designed and operated to prevent nuisance odors from leaving the property boundary of the facility. [~~The applicant shall consult with the Texas Air Control Board for assistance and any permit requirements.~~]

(A) Openings to process buildings shall be controlled to prevent releases of nuisance odors to the atmosphere.

(B) All odor control equipment shall be properly maintained and operated during the process operation.

(C) The applicant shall employ one or more of the following measures:

(i) air scrubber units for odor control;

(ii) on-site buffer zones for odor control;

(iii) additional waste handling procedures, storage procedures, and clean-up procedures for odor control when accepting putrescible waste, or

(iv) Other ventilation and odor control measures approved by the executive director.

(6)-(9) (No change.)

(10) Site facilities. The site shall provide facilities for potable water, sanitary purposes, office, maintenance, [~~recyclable materials collection,~~] and solid waste transfer. Concrete pads with raised curbs around the perimeter or asphalt paved areas with berms shall be utilized to control spills and contaminated water.

(11) (No change.)

(f) Additional design criteria. [~~This subsection applies only to transfer stations that recover 10% or more material from the incoming nonsegregated waste which are exempted from a permit under §330.4(q).~~]

(1) Process area. The process area for transfer stations that recover material from solid waste that contains putrescibles shall be maintained totally within an enclosed building.

[~~(2) Additional ventilation and odor control. The facility shall be designed to prevent nuisance odors from leaving the property boundary of the facility. If during the operation of the facility, nuisance odors are found to be passing the facility boundary, the facility owner or operator may be required to suspend operations until the nuisance is abated pursuant to §330.4(q)(5)-(7), and the registrant shall take all necessary measures to eliminate nuisance odors. The applicant shall consider:~~]

[~~(A) air scrubber units for odor control;~~]

[~~(B) additional on-site buffer zones for odor control; or~~]

[~~(C) additional waste handling procedures, storage procedures, and clean-up procedures for odor control when accepting putrescible waste for material recovery. All odor control and air pollution abatement devices constructed pursuant to this registration must obtain authorization, pursuant to Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modifications), from the Office of Air Quality prior to start of construction. Openings to process buildings shall be controlled to prevent releases of nuisance oders to the atmosphere. All odor control equipment shall be properly maintained and operated during the process operation.~~]

(2) [~~(3)~~] Operational design standards. In designing the transfer facility the applicant shall ensure that all requirements of operation required by Subchapter G of this chapter (relating to Operational Standards for Solid Waste Processing and Experimental Sites) will be met. Operational design standards shall be included in the site operating plan.

(3) [~~(4)~~] Safety plan. The applicant shall provide a written safety plan for site workers that operate material recovery equipment or that will hand sort recoverable material from the nonsegregated incoming waste.

(g) Motion for Reconsideration. The applicant or a person affected may file with the chief clerk a motion for reconsideration of the executive director's final approval of an application, under §50.39(b)-(f) of this title (relating to Motion for Reconsideration), of the executive director's final approval of an application. The criteria regarding motions for reconsideration shall be explained in public notices given under Chapter 39 of this title (relating to Public Notice) and §50.33 of this title (relating to Executive Director Action on Application). Notice of issuance of registration shall be mailed to landowners as shown on the land ownership map and landowners list required by §330.65(d)(3)(D) of this title (relating to Application), and to any other person requesting notice.

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 December 11, 1998.

TRD-9818277
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 239–6087

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TITLE 34. PUBLIC FINANCE

Part I. Comptroller of Public Accounts

Chapter 9. Property Tax Administration

Subchapter A. Practice and Procedure

34 TAC §9.105

The Comptroller of Public Accounts proposes an amendment to §9.105, concerning tax refunds for economic development. This section is being amended to add new definitions in subsection (a); to add the base comparison year and base comparison year's appraised value to the statement from the chief appraiser in subsection (b)(4)(A)(iv); to clarify that the entity the abatement agreement is to be filed with is the state in subsection (b)(4)(A)(v); to add copies of the Texas Workforce Commission returns for the year the agreement is entered into in subsection (b)(4)(A)(vi); and to make the necessary changes to the application as a result of these amendments.

Mike Reissig, chief revenue estimator, has determined that for the first five-year period the amendment will be in effect, there will be no significant fiscal impact on the state or units of local government.

Mr. Reissig also has determined that for each year of the first five years the amended rule is in effect, the public benefit anticipated as a result of adopting the amendment will be in providing additional definitions and new information regarding tax responsibilities. The proposed amendment will have no significant fiscal impact on small businesses.

Comments on the proposal may be submitted to Buddy Breivogel, Manager, Property Tax Division, P.O. Box 13528, Austin, Texas 78711-3528.

This amendment is proposed under the Tax Code, §111.303, which requires the comptroller to adopt forms and rules for the administration of the provisions of the Tax Code, §111.301 and §111.302.

The amendment implements the Tax Code, §§111.301-111.304.

§9.105. Tax Refund for Economic Development.

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

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

(5) Entered into - same as executed. An agreement is entered into when it has been approved by the appropriate governing body and signed and dated by all parties.

(6) Initial base comparison year - the calendar year in which the tax abatement is entered into or executed.

(b) Tax refund for economic development.

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

(3) Eligibility for the refund.

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

(C) The following is an example of how the refund available under this subsection will be administered.
Figure: 34 TAC 9.105(b)(3)(C)

(4) Application for refund.

(A) An application for the refund must:

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

(iv) include an attached signed statement from the county appraisal district's chief appraiser verifying that an exemption from property tax was granted and showing the current appraised value, the initial base comparison year and the beginning or initial base comparison year's appraised value of the property subject to the abatement agreement;

(v) include an attached statement from each applicable city or county official verifying that the abatement agreement has been filed with the state entity responsible for maintaining a registry of tax abatements;

(vi) include attached copies of Texas Workforce Commission returns for the calendar year the agreement was entered into and the calendar year subject to the claim, showing an increase in payroll since entering the abatement agreement, if the person is applying for the refund based on an increase in payroll; and

(vii) (No change.)

(B)-(I) (No change.)

(J) Application for refund. An application for refund must be substantially in the form of an Application for Refund of State Taxes Paid by Person Owning Certain Abated Property (Form AP-186). The comptroller adopts this amended form by reference. Copies of the form are available for inspection at the office of the Texas Register or may be obtained from the Comptroller of Public Accounts, P.O. Box 13528, Austin, Texas 78711. Copies may also be requested by calling our toll-free number, 1-800-252-9121. In Austin, call (512) 365-9999. From a Telecommunications Device for the Deaf (TDD), call 1-800-248-4099, toll free. In Austin, the local TDD number is (512) 463-4621.

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 December 11, 1998.

TRD-9818273
Martin Cherry
Chief, General Law
Comptroller of Public Accounts
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 463–3699

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Part III. Teacher Retirement System of Texas

Chapter 41. Insurance

34 TAC §41.13

The Teacher Retirement System of Texas (TRS) proposes an amendment to §41.13 concerning participation in the Texas Public School Employees Group Insurance Program by public school districts.

The proposed amendment would allow school districts to exclude employees with coverage under a spouse's plan from a 75% participation requirement in the current rule. The TRS actuary recommends that we allow schools this latitude.

Ronnie Jung, Chief Financial Officer, has determined that for each year of the first five years the section as amended will be in effect, there will be no fiscal impact to TRS and there will be no fiscal implications to other state or local governments as a result of enforcing or administering the section.

Ronnie Jung, Chief Financial Officer, has determined that the public benefit will be the possibility of greater participation by local school districts in the active insurance plan as a result of the less strict criteria and that there will be no anticipated economic cost to the public, small businesses, or to the persons who are required to comply with the sections as proposed for each year of the first five years the proposals will be in effect.

Comments may be submitted to Charles L. Dunlap, Executive Director, 1000 Red River, Austin, Texas, 78701, (512) 397-6400.

The amendment is proposed under the Government Code, Chapter 825, §825.102, which authorizes the Board of Trustees of Teacher Retirement System to adopt rules for the administration of the funds of the retirement system. In addition, §5 of Article 3.50-4 of the Insurance Code allows the Board to adopt rules necessary to administer and implement the laws regarding the group insurance program.

The Insurance Code, Article 3.50-4 is affected by this proposed amendment.

§41.13. Participation in the Texas Public School Employees Group Insurance Program by Public School Districts

(a) (No change.)

(b) Eligibility requirements. In order to be eligible to participate in the program a school district must meet the following requirements.

(1) Enrollment rate requirements. A participating school district must initially enroll and thereafter maintain at least a 75% employee enrollment rate in the program. For purposes of this rule, an employee covered under a spouse's health care coverage may be excluded from the employee pool if the employee presents written evidence of such coverage to the employer. If a school district employee rate drops below 75% that school district may not remain in the program beyond the current plan year. The trustee may waive this requirement in instances where it determines that there will be no significant adverse financial impact on the program.

(2)-(4) (No change.)

(c) (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 December 14, 1998.

TRD-9818327
Charles Dunlap
Executive Director
Teacher Retirement System of Texas
Proposed date of adoption: January 29, 1999
For further information, please call: (512) 391–2115

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Part IV. Employees Retirement System of Texas

Chapter 73. Benefits

34 TAC §73.35

(Editor's note: The Employees Retirement System of Texas proposes for permanent adoption the amended section it adopts on an emergency basis in this issue. The text of the amended section is in the Emergency Rules section of this issue.)

The Employees Retirement System of Texas proposes an amendment to §73.35, concerning supplemental payment. The amendment is being proposed in order to allow a supplemental one-time payment in the fiscal year ending August 31, 1999.

William S. Nail, Deputy Executive Director and General Counsel has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Nail also has 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 retirees will receive a supplemental one-time payment in the fiscal year ending August 31, 1999. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed rule amendment may be submitted to William S. Nail, Deputy Executive Director and General Counsel, Employees Retirement System of Texas, P. O. Box 13207, Austin, Texas 78711-3207, or e-mail Mr. Nail at wnail@ers.state.tx.us.

The amendment is proposed under Tex. Gov't Code §814.603(d), which provides authorization for the board to authorize a supplemental one-time payment during any fiscal year, if the payments are in compliance with Tex. Gov't Code §811.006.

No other statutes are affected by this amendment.

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 December 14, 1998.

TRD-9818325
Sheila W. Beckett
Executive Director
Employees Retirement System of Texas
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 867-7125

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part I. Texas Department of Public Safety

Chapter 15. Drivers License Rules

Subchapter B. Application Requirements-Original, Renewal, Duplicate, Identification Certificates

37 TAC §15.23

The Texas Department of Public Safety proposes an amendment to §15.23, concerning Application Requirements-Original, Renewal, Duplicate, Identification Certificates. §15.23 is being amended to be compatible with proposed new §15.24 which provides for better, more positive identification of applicants for Texas driver's licenses and identification certificates.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Mr. Haas also has 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 more positive identification of license and certificate holders. There is no anticipated economic cost to small or large businesses. The anticipated cost to persons who are required to comply with the section as proposed will be the cost of obtaining a driver's license or identification certificate.

Comments on the proposal may be submitted to Mary Ann Courter, Chief of Legal Services, Texas Department of Public Safety, Box 4087, Austin, Texas, 78773-0140, (512) 424-2890.

The amendment is proposed pursuant to Texas Government Code, §411.006(4), which authorizes the director of the Texas Department of Public Safety to adopt rules, subject to commission approval, considered necessary for the control of the department and Texas Transportation Code, §521.005.

Texas Government Code, §411.006(4) and Texas Transportation Code, §521.005 are affected by this proposal.

§15.23. Names.

The applicant's full name is required on all applications for driver's license and identification certificates.

(1) A married woman may choose the surname she wishes to use, either her maiden name or she may adopt the surname of her husband or the surname of a previous husband (Attorney General's Opinion H-432). However, no name will be used that has not been documented. If she elects not to adopt her husband's surname, she will simply list her name as if unmarried on the application. If she chooses to adopt her husband's surname, the application should list married name, first name, and middle name, or the maiden name may be used in lieu of middle name at the option of the applicant. The first name of the applicant must be used as the first name on the application and on the transaction card, even if the applicant normally uses a middle name as the given name. Middle names will not be substituted for first names. Examples: Mary Ellen Smith marries Brown; she may list her name as Brown, Mary Ellen or Brown, Mary Smith.[~~A married woman's middle name may be used as her first name if desired. Example: Mary Ellen Smith marries Brown; she may list her name as Brown, Mary Ellen or Brown, Mary Smith, or Brown, Ellen Smith.~~] In all cases, three full names will be used, unless the applicant does not have three names, including[~~wish to use~~] the maiden name.

(A) Change of name because of marriage, divorce, annulment, or by death of spouse may be certified by the applicant's signature. The licensee then may choose to either keep her current married name, or revert to her maiden name, or adopt a previous husband's surname. However, no name will be used that has not been documented. If the name is changed for reasons other than those set out above, a court order verifying such change is required and the name shown on the order is acceptable.

(B) Persons[~~Women~~] who are currently licensed and request that they be allowed to change their name may apply for a duplicate and exercise the same privilege in name selection as an original applicant.

(C) The above rules pertaining to names are applicable to both sexes.

(2) Foreign language names will be spelled as they appear on the identification documents presented–thus: Perez, Juan must be used on the license or certificate. The English version (Perez, John) will not be substituted for the actual name.[~~the applicant usually spells his name using English and/or his native tongue–thus: Perez, Juan R. (only) or Perez, John R. (only).~~] Latin American males and single females will list surname (of father), given first name, and middle name. Married Latin American females may list their names the same way as described in paragraph (1) of this section.

(3) Ecclesiastical names such as Brother Thomas, Sister Mary, or Father Kelly are not used.

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 December 11, 1998.

TRD-9818282
Dudley M. Thomas
Director
Texas Department of Public Safety
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 424–2890

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37 TAC §15.24

(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 Department of Public Safety or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Public Safety proposes the repeal of §15.24, concerning Identification of Applicants. The section is proposed for repeal with simultaneous proposal of new §15.24 which changes the title of the section and provides for better, more positive identification of applicants for Texas driver's licenses and identification certificates.

Tom Haas, Chief of Finance, has determined that for each year of the first five years the repeal is in effect there will be no fiscal implications for state or local government.

Mr. Haas also has determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be better, more positive identification of applicants for Texas driver's licenses and identification certificates, thereby reducing public and private sector losses due to fraud that is committed using fictitious identification. There is no anticipated economic cost to small or large businesses. There is no anticipated cost to individuals.

Comments on the repeal may be submitted to Mary Ann Courter, Chief of Legal Services, Texas Department of Public Safety, Box 4087, Austin, Texas, 78773-0140, (512) 424-2890.

The repeal is proposed pursuant to Texas Government Code, §411.006(4), which authorizes the director of the Department of Public Safety to adopt rules, subject to commission approval, considered necessary for the control of the department and Texas Transportation Code, §521.005.

Texas Government Code, §411.006(4) and Texas Transportation Code, §521.005 are affected by this proposal.

§15.24. Birth Certificate Or Other Acceptable Evidence.

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 December 11, 1998.

TRD-9818280
Dudley M. Thomas
Director
Texas Department of Public Safety
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 424–2890

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The Texas Department of Public Safety proposes new §15.24, concerning Application Requirements-Original, Renewal, Duplicate, Identification Certificates. New §15.24 is proposed simultaneously with the repeal of the current §15.24. New §15.24 changes the title of the rule and provides for better, more positive identification of applicants for Texas driver's licenses and identification certificates.

Tom Haas, Chief of Finance, has determined that for each year of the first five years the new section is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Mr. Haas also has 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 more positive identification of license and certificate holders. There is no anticipated economic cost to small or large businesses. The anticipated cost to persons who are required to comply with the section as proposed will be the cost of obtaining a driver's license or identification certificate.

Comments on the proposal may be submitted to Mary Ann Courter, Chief of Legal Services, Texas Department of Public Safety, Box 4087, Austin, Texas, 78773-0140, (512) 424-2890.

The new section is proposed pursuant to Texas Government Code, §411.006(4), which authorizes the director of the Texas Department of Public Safety to adopt rules, subject to commission approval, considered necessary for the control of the department and Texas Transportation Code, §521.005.

Texas Government Code, §411.006(4) and Texas Transportation Code, §521.005 are affected by this proposal.

§15.24. Identification of Applicants.

All original applicants for driver's license or identification certificates must present proof of identity satisfactory to the department. There are three categories of documents that may be presented to establish that acceptable proof of identity.

(1) Standalone identification. These items are complete within themselves and require no supporting instruments:

(A) valid or expired Texas driver's license (DL) or identification (ID) with photo;

(B) United States passport;

(C) United States citizenship (naturalization) certificate with identifiable photo;

(D) United States Immigration and Naturalization Service document with verified data and identifiable photo. This would include a valid passport issued by a foreign country with a valid United States visa;

(E) valid photo DL or photo ID issued by another (United States) state, Puerto Rico, or the District of Columbia; or,

(F) United States military ID card with identifiable photo.

(2) Documented identification. These items are recorded governmental documents (United States, 1 of the 50 states, a United States territory, District of Columbia) whose authenticity can be verified (traceable to an original source for confirmation or refutation):

(A) original or certified copy of a birth certificate issued by the appropriate State Bureau of Vital Statistics or equivalent agency;

(B) original or certified copy of United States Department of State Certification of Birth (issued to United States citizens born abroad); or

(C) original or certified copy of court order with name and date of birth (DOB).

(D) For applicants born before 1961, the following items would be acceptable in this category:

(i) original or certified copy of Form DD-214;

(ii) original or certified copy of other state or federal governmental record that states name and DOB (such as United States census records or Social Security records).

(3) Supporting identification. These items consist of other records or documents that aid examining personnel in establishing the

identity of the applicant. The following items are listed as examples only and should not be construed as an absolute list of "must have" items:

(A) public school records;

(B) infant baptismal records;

(C) insurance policy (at least two years old);

(D) vehicle title;

(E) home mortgage records;

(F) marriage license;

(G) two years of utility bills;

(H) children's birth certificates;

(I) library card;

(J) military records;

(K) award or certificate from educational institution;

(L) original or certified copy of marriage license or divorce decree;

(M) voter registration card;

(N) Social Security card;

(O) pilot's license;

(P) concealed handgun license; or

(Q) Texas driver's license temporary receipt.

(4) Every original applicant must present:

(A) one piece of standalone identification, or

(B) one piece of documented identification plus one or more pieces of support identification.

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 December 11, 1998.

TRD-9818281
Dudley M. Thomas
Director
Texas Department of Public Safety
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 424–2890

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Part XI. Texas Juvenile Probation Commission

Chapter 349. Standards for Child Abuse and Neglect Investigations in Secure Juvenile Facilities

Subchapter A. Intake, Investigation, and Assessment

37 TAC §349.107

The Texas Juvenile Probation Commission proposes amendments to §349.107 concerning child abuse and neglect investigations in secure juvenile facilities. The standard is being amended to add criteria for administrative closure and to clarify interview techniques when investigating allegations of child abuse and neglect.

Lisa Capers, Deputy Executive Director and General Counsel, has determined that for the first five year period the amended standard is in effect there will be no fiscal implications for state or local government as a result of enforcement or administration.

Ms. Capers has also determined that for each year of the first five years the amended standard is in effect, the public benefit anticipated as a result of enforcement will be to ensure prompt and proper investigation of alleged child abuse or neglect in secure juvenile facilities. There are no anticipated economic costs to persons who are required to comply with this standards as amended. There will be no effect on small businesses.

Comments regarding this amendment may be directed to Erika Sipiora, staff attorney, Texas Juvenile Probation Commission, P.O. Box 13547, Austin, Texas 78711.

The amendment to this standard is proposed under §261.401(b) of the Family Code and §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules, including those which provide uniform procedures for investigating child abuse and neglect and which provide minimum standards for juvenile boards.

No other code or article is affected by these new standards.

§349.107. Investigation Interviews.

(a) (No change.)

(b) Response to allegations of abuse or neglect. TJPC staff may respond to allegations of abuse or neglect in one of three ways.

(1) Preliminary investigation (administrative closure).

(A) Under certain circumstances, a report which was initially assigned for investigation may be closed administratively as a result of additional information, such that the situation no longer appears to meet the statutory definitions of abuse/neglect or risk of abuse/neglect. Criteria TJPC uses for consideration when deciding to administratively close a case include, but are not limited to, situations where a preliminary investigation reveals that:

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

(iii) TJPC does not have the authority to finish the investigation because:

(I) (No change.)

(II) the initial collateral contacts refute the allegations and do not support evidence of abuse or neglect or risk thereof. This includes when a investigator finds no corroboration of abuse or neglect in a preliminary investigation of an anonymous report; or [.]

(iv) along with any of the factors listed in clauses (i)-(iii) of the subparagraph, TJPC may consider an internal investigation conducted by a secure juvenile facility in deciding whether to administratively close an investigation.

(B)-(C) (No change.)

(2) Abbreviated investigation with a disposition of "ruled out/no risk." To conclude an investigation with findings of "ruled out/no risk," TJPC staff must, at a minimum:

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

(D) An interview for an abbreviated Priority II investigation may occur through a recorded telephone conversation so long as the alleged victim child and the facility staff person knows the telephone interview is being recorded.

(3) Thorough investigation.

(A) (No change.)

(B) Conducting a thorough investigation for Priority I complaints may include all of the basic steps specified in subsection (a) of this section, but must, at a minimum include:

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

(C) Conducting a thorough investigation for a Priority II complaint may include all of the basic steps specified in subsection (a) of this section, but must at a minimum include:

(i) an interview of the alleged victim child;

(ii) an interview with at least one facility staff person; and

(iii) an interview with the alleged perpetrator. Exception: If the alleged perpetrator is in police custody, TJPC staff must obtain authorization from the investigation police officer before conducting the interview to ensure that the alleged perpetrator's rights under criminal law are protected.

(D) Any interview required under this subsection may occur through a recorded telephone conversation so long as the alleged victim child, facility staff person, and the alleged perpetrator know the conversation is being recorded.

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 December 10, 1998.

TRD-9818269
Steve Bonnell
Deputy Executive Director
Texas Juvenile Probation Commission
Earliest possible date of adoption: January 24, 1999
For further information, please call: (512) 424-6681

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WITHDRAWN RULES

An agency may withdraw a proposed action or the remaining effectiveness of an emergency action by filing a notice of withdrawal with the ***Texas Register***. The notice is effective immediately upon filling or 20 days after filing as specified by the agency withdrawing the action. If a proposal is not adopted or withdrawn within six months of the date of publication in the ***Texas Register***, it will automatically be withdrawn by the office of the Texas Register and a notice of the withdrawal will appear in the ***Texas Register.***

TITLE 31. NATURAL RESOURCES AND CONSERVATION

Part X. Texas Water Development Board

Chapter 363. Financial Assistance Programs

Subchapter A. General Provisions

Division 7. Grants for Emergency

31 TAC §363.85

The Texas Water Development Board has withdrawn from consideration for permanent adoption new §363.85, which appeared in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12203).

Filed with the Office of the Secretary of State on December 14, 1998.

TRD-9818323
Suzanne Schwartz
General Counsel
Texas Water Development Board
Effective date: December 14, 1998
For further information, please call: (512) 463–7981

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ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the ***Texas Register***. The section becomes effective 20 days after the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federal statute or regulation requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 1. ADMINISTRATION

Part II. Texas Ethics Commission

Chapter 50. Legislative Salaries and Per Diem

1 TAC §50.1

The Texas Ethics Commission adopts an amendment to §50.1, concerning legislative per diem. The amendment is adopted with changes to the proposed text as published in the October 30, 1998, issue of the *Texas Register* (23 TexReg 11009).

This section sets the per diem for members of the legislature and the lieutenant governor at $118 for each day during the regular legislative session and any special session. The adopted amendment was lowered to $118 from the proposed amount of $119. The change was made to reflect the federal per diem rate for Austin, Texas, effective January 1, 1999, as published in the December 2, 1998, issue of the *Federal Register* (63 FedReg 66674, 66698 (1998)).

No comments were received regarding the amendment.

This amendment is adopted under the Texas Constitution, Article III, §24a, which provides that the commission shall set the per diem of members of the legislature and the lieutenant governor, and the Government Code, Chapter 571, §571.062, which authorizes the Texas Ethics Commission to adopt rules to implement laws administered and enforced by the commission.

The amended section affects the Texas Constitution, Article III, §24, Article III, §24a, and Article IV, §17.

§50.1. Legislative Per Diem.

(a) Effective January 1, 1999, the legislative per diem is $118.

(b) The per diem is intended to be paid to each member of the legislature and the lieutenant governor for each day during the regular session and for each day during any special session.

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 December 11, 1998.

TRD-9818283
Tom Harrison
Executive Director
Texas Ethics Commission
Effective date: December 31, 1998
Proposal publication date: October 30, 1998
For further information, please call: (512) 463–5800

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TITLE 7. BANKING AND SECURITIES

Part I. State Finance Commission

Chapter 4. Currency Exchange

7 TAC §4.3

The Finance Commission of Texas (the commission) adopts an amendment to §4.3, concerning reporting and recordkeeping. The section is adopted without changes to the proposed text as published in the October 23, 1998, issue of the *Texas Register* (23 TexReg 10774), and the text will not be republished.

The amendment to §4.3(d) grants the agency the flexibility to reduce informational requirements in quarterly report forms as needed. Quarterly reports currently contain data that the agency believes it can obtain by other means.

The commission received no comments regarding the proposals.

The amendment is adopted pursuant to the Finance Code, §153.002(2), which authorizes the commission to adopt rules "necessary to implement this chapter, including ... recordkeeping and reporting requirements of a license holder."

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 December 11, 1998.

TRD-9818288
Everette D. Jobe
General Counsel
State Finance Commission
Effective date: December 31, 1998
Proposal publication date: October 23, 1998
For further information, please call: (512) 475–1300

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Part II. Texas Department of Banking

Chapter 19. Trust Company Loans and Investments

Subchapter C. Real Estate

7 TAC §19.51

The Finance Commission of Texas (the commission) adopts new §19.51, concerning the treatment of other real estate owned (OREO) by a state trust company. The sections are adopted with changes to the proposed text as published in the October 23, 1998, issue of the *Texas Register* (23 TexReg 10775).

Under Texas Civil Statutes, Article 342a-5.104, a trust company may not invest its restricted capital in real estate except as an investment in trust company facilities, or as otherwise permitted by Texas Civil Statutes, Article 342a-101 et seq, or rules adopted thereunder, or if necessary to minimize a loss on a loan or investment previously made in good faith. In addition, with prior approval of the banking commissioner, Texas Civil Statutes, Article 342a-5.104, permits a trust company to exchange real estate acquired with restricted capital for other real estate or personal property, to invest additional funds in or improve real estate acquired with restricted capital, or to acquire additional real estate to avoid or minimize loss on real estate acquired with restricted capital.

OREO is generally defined by Texas Civil Statutes, Article 342a-5.104, and §19.51(a)(10) as real property interests not used or intended to be used as trust company facilities. A trust company is not empowered to invest its restricted capital in real estate, other than for use in its own business, except in specified circumstances, such as acquisition of real estate through foreclosure of collateral securing debt previously contracted. A trust company may invest its secondary capital in real estate, subject to the exercise of prudent judgment using the factors contained in Texas Civil Statutes, Article 342a-5.101(f). The general prohibition on investing restricted capital in real property interests, and the permissible means of investing restricted capital in OREO, are set forth in §19.51(b) and (c). Permissible investment of secondary capital is addressed by §19.51(d). Section 19.51(e) specifies appraisal requirements for OREO acquired with restricted capital, and §19.51(f) permits the trust company to make additional investment in OREO acquired with restricted capital to preserve its value pending required disposition.

The trust company must dispose of OREO acquired with restricted capital within a specified period of time, or holding period, set forth in §19.51(g), and such efforts must be documented under §19.51(h). If secondary capital is adequate to reclassify OREO in a manner that does not impinge on restricted capital, the disposition requirement does not apply. Section 19.51(i) establishes those methods of disposition that will satisfy the statutory requirement. For example, disposition pursuant to a contract for deed is specifically permitted, even though legal title remains with the trust company until the contract is fully performed. Section 19.51(j) establishes that a trust company must account for OREO under regulatory accounting principles, defined in Texas Civil Statutes, Article 342a-1.002(a)(41) as generally accepted accounting principles, as modified by rule or applicable federal statute or regulation. At present, no rules modify generally accepted accounting principles for OREO.

One commenter submitted comments in response to the proposal and did not oppose adoption of the section as a whole. The commenter wrote to suggest both stylistic and substantive revisions regarding specific issues. The agency declines to revise the proposal as suggested for the reasons discussed in the following paragraph. However, §19.51(i)(6) is revised to correct an erroneous cross-reference in the proposal.

The commenter believes the requirement of an annual written evaluation for OREO, in addition to a formal appraisal every third year, is onerous, so long as all other rules relating to OREO are adhered to. OREO is normally a non-earning asset and its value is subject to wide fluctuations which can directly affect a trust company's financial condition through market value adjustments. The agency proposes to require a trust company to substantiate the carrying value of OREO by obtaining an appropriate evaluation of the real property annually. This requirement is consistent with the agency's safety and soundness responsibilities and with the annual evaluation of OREO required of state banks and by federal regulatory agencies to address safety and soundness concerns. Moreover, the requirement is not new. The longstanding policy of the agency requires state trust companies to comply with state and federal OREO requirements applicable to banking institutions. Further, trust companies were statutorily subject to these same state bank OREO provisions under prior law.

The section is adopted under Texas Civil Statutes, Article 342a-5.104(a)(1), which authorizes the commission to adopt rules regarding acquisition and retention of real estate.

§19.51. Other Real Estate Owned.

(a) Definitions. Words and terms used in this subchapter that are defined in Texas Civil Statutes, Articles 342a-1.001 et seq, have the same meanings as defined therein. The following words and terms when used in this subchapter shall have the following meanings unless the context clearly indicates the contrary.

(1) Appraisal–A written report by a state certified or licensed appraiser containing sufficient information to support the trust company's evaluation of OREO taking into consideration market value, analyzing appropriate deductions or discounts, and conforming to generally accepted appraisal standards, unless principles of safety and soundness applicable to trust companies require stricter standards.

(2) Appraiser–A state certified or licensed staff appraiser or a state certified or licensed third party fee appraiser with relevant and competent experience and background as related to a particular appraisal assignment.

(3) Trust company facility–Real property, including improvements, owned or leased, to the extent the lease or the leasehold improvements are capitalized, by a trust company if the real estate is held for the purposes set forth in Texas Civil Statutes, Article 342a-5.001(a)(1)-(4), and is not disqualified under Texas Civil Statutes, Article 342a-5.001(c). The term also includes capitalized leasehold improvements if held for the same purposes.

(4) Coterminous sublease–A lease with the same duration as the remainder of the master lease.

(5) Evaluation–A written report prepared by an evaluator describing the OREO and its condition, the source of information used in the analysis, the actual analysis and supporting information, and the estimate of the OREO's market value, with any limiting conditions.

(6) Evaluator–An individual who has related real estate training or experience and knowledge of the market relevant to the OREO but who has no direct or indirect interest in the OREO. An appraiser may be an evaluator.

(7) Generally accepted appraisal standards–The Uniform Standards of Professional Appraisal Practice (USPAP) promulgated

by the Appraisal Standards Board, Appraisal Foundation, Washington, D.C.

(8) Market value–The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

(A) buyer and seller are typically motivated;

(B) both parties are well informed or well advised, and acting in what they consider their own best interests;

(C) a reasonable time is allowed for exposure in the open market;

(D) payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and

(E) the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

(9) Non-coterminous sublease–A lease with a duration shorter than the remainder of the master lease.

(10) Other Real Estate Owned (OREO)–Real estate, including improvements, mineral interests, surface, and subsurface rights, owned in whole or in part or leased by a trust company, no matter how acquired, which is not a trust company facility as defined by paragraph (3) of this subsection or leasehold property as permitted under Texas Civil Statutes, Article 342a-5.202.

(11) Staff appraiser–An appraiser on the staff of a trust company who has no direct or indirect interest in the OREO.

(12) Third party fee appraiser–An appraiser who has an independent contractor relationship with a trust company and has no direct or indirect interest in the OREO.

(13) Year–For the purposes of this section, a calendar year.

(b) Prohibition on real estate ownership. A trust company may not acquire or hold real estate except as specifically provided under Texas Civil Statutes, Articles 342a-5.001, 342a-5.104, and 342a-5.202, and this section.

(c) Acquisition of OREO with restricted capital. A trust company may hold OREO purchased with the restricted capital of the trust company only if acquired:

(1) by purchase under judicial or nonjudicial foreclosure, or through a deed in lieu of foreclosure, of real estate that is security for a debt or debts previously contracted in good faith;

(2) by purchase to protect its interest in a debt or debts previously contracted if prudent and necessary to avoid or minimize loss;

(3) with prior written approval of the banking commissioner, by an exchange of OREO or personal property for real estate to avoid or minimize loss on the real estate exchanged or to facilitate the disposition of OREO;

(4) with prior written approval of the banking commissioner, by purchase of additional real estate to avoid or minimize loss on OREO currently held;

(5) by involuntary acquisition of an ownership interest or leasehold interest in real estate as a result of or incidental to a judicial or nonjudicial foreclosure, or by adverse possession, or by operation of law without any action on the part of the trust company to obtain such interest; or

(6) by loss of designation of real estate owned or leased by the trust company as a trust company facility.

(d) Acquisition of OREO with secondary capital. A trust company may hold OREO purchased with the secondary capital of the trust company, subject to the exercise of prudent judgment using the factors set forth in Texas Civil Statutes, Article 342a-5.101(f).

(e) Appraisal requirements.

(1) Subject to paragraph (2) of this subsection, when OREO is acquired, a trust company must substantiate the market value of the OREO by obtaining an appraisal within 60 days of the date of acquisition. An evaluation may be substituted for an appraisal if the recorded book value of the OREO is less than $250,000.

(2) An additional appraisal or evaluation is not required when a trust company acquires OREO if a valid appraisal or appropriate evaluation was made in connection with a real estate loan that financed the acquisition of the OREO and the appraisal or evaluation is less than one year old.

(3) An evaluation shall be made on all OREO at least once a year. An appraisal shall be made at least once every three years on OREO with a recorded book value in excess of $250,000.

(4) Notwithstanding another provision of this section, the banking commissioner may require an appraisal of OREO if the banking commissioner considers an appraisal necessary to address safety and soundness concerns.

(f) Additional expenditures on OREO. A trust company may re-fit OREO for new tenants or make normal repairs and incur routine maintenance costs to preserve or protect the value of the OREO or to render the OREO in saleable condition without prior notification to or approval by the banking commissioner. Other advances or additional expenditures on OREO acquired with the restricted capital of the trust company must have the prior written approval of the banking commissioner, and must not be:

(1) made for the purpose of speculation in real estate;

(2) made for the purpose of changing or altering the current status or intended use of the OREO; or

(3) inconsistent with principles of safety and soundness applicable to trust companies.

(g) Holding period.

(1) A trust company must dispose of OREO acquired with the restricted capital of the trust company, except for real estate which became OREO pursuant to Texas Civil Statutes, Article 342a-5.001(c), no later than five years after it was acquired or ceases to be used as a trust company facility, unless an extension of time for disposing of the real estate is granted in writing by the banking commissioner pursuant to Texas Civil Statutes, Article 342a-5.104(d). A trust company must dispose of real estate which becomes OREO pursuant to Texas Civil Statutes, Article 342a-5.001(c), within two years of the date it ceases to be a trust company facility, unless a delay in the improvement and occupation of the property is approved in writing by the banking commissioner pursuant to Texas Civil Statutes, Article 342a-5.001(c).

(2) The holding period commences on the date that:

(A) ownership is acquired by the trust company pursuant to subsection (c)(1)-(5) of this section;

(B) OREO is acquired by the trust company through merger/consolidation, conversion, or purchase and assumption;

(C) the trust company first learns of its ownership interest in real estate which has devolved to the trust company by operation of law under subsection (c)(6) of this section;

(D) the trust company ceases to use a former trust company facility or completes its relocation from a former trust company facility to a new trust company facility; or

(E) is three years following the acquisition of real estate as a trust company facility for future expansion or relocation of the trust company if the real estate has not been occupied by the trust company, unless the banking commissioner has granted written approval to a further delay in the improvement and occupation of the real estate.

(3) The banking commissioner may grant one or more additional extensions of time for disposing of OREO acquired with the restricted capital of the trust company if the commissioner finds that the trust company has made a good faith effort to dispose of the OREO or that disposal of the OREO would be detrimental to the safety and soundness of the trust company.

(h) Disposition efforts; documentation. A trust company must make diligent and ongoing efforts to dispose of OREO acquired with the restricted capital of the trust company and must maintain documentation adequate to reflect those efforts. Such documentation must be available for inspection by the commissioner. If secondary capital is adequate to reclassify OREO in a manner that does not impinge on restricted capital, this disposition requirement does not apply.

(i) Disposition of OREO. A trust company may dispose of OREO by:

(1) selling the OREO in a transaction that qualifies as a sale under regulatory accounting principles;

(2) selling the OREO pursuant to a land contract or contract for deed;

(3) retaining the property for its own use as a trust company facility, subject to the approval of the commissioner;

(4) transferring the OREO for market value to an affiliate, subject to Texas Civil Statutes, Article 342a-4.107, and applicable federal law, including 12 United States Code, §§371c, 371c-1, and 1828(j);

(5) if the OREO is a master lease, obtaining a coterminous sublease or an assignment of a coterminous sublease, provided that if the trust company acquires or obtains assignment of a non-coterminous sublease, the holding period during which the master lease must be divested is suspended for the duration of the sublease and will commence running again upon termination of the sublease; or

(6) entering into a transaction that does not qualify for disposal under paragraphs (1)-(5) of this subsection; provided that its obligation to dispose of the OREO is not met until the trust company receives or accumulates from the purchaser an amount in cash, principal and interest payments, and private mortgage insurance totaling 10% of the sales price, as measured in accordance with regulatory accounting principles.

(j) Accounting for OREO. Investment in OREO, and disposition of OREO, must be accounted for in accordance with regulatory accounting principles.

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 December 11, 1998.

TRD-9818284
Everette D. Jobe
General Counsel
Texas Department of Banking
Effective date: December 31, 1998
Proposal publication date: October 23, 1998
For further information, please call: (512) 475–1300

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Chapter 21. Trust Company Corporate Activities

Subchapter A. Fees and Other Provisions of General Applicability

7 TAC §21.2

The Finance Commission of Texas (the commission) adopts amendments to §21.2, regarding filing and investigation fees applicable to trust company notices and applications. The section is adopted without changes to the proposed text as published in the October 23, 1998, issue of the *Texas Register* (23 TexReg 10777), and the text will not be republished.

The amendments improve cross-references to governing law and regulations as well as to authorize reduced fees for filings that qualify for expedited processing. The amendments are adopted in connection with adoption of new sections governing certain applications, published in this issue of the *Texas Register*.

One commenter submitted comments in response to the proposal, stating that the proposed fees did not appear to be unreasonable.

The amendments are adopted under Texas Civil Statutes, Articles 342a-1.003(a)(4), which authorizes the commission to adopt rules to provide for recovery of the cost of maintenance and operation of the department and the cost of enforcing Texas Civil Statutes, Articles 342a-1.001 et seq, through the imposition and collection of ratable and equitable fees for notices, applications, and examinations.

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 F. Application for Merger Conversion, or Sale of Assets

7 TAC §§21.61–21.64, 21.67–21.76

The Finance Commission of Texas (the commission) adopts new Subchapter F, §§21.61-21.64 and 21.67-21.76, concerning applications for mergers, conversions, and share exchange transactions, by or involving trust companies. The sections are adopted with changes to the proposed text as published in the October 23, 1998, issue of the *Texas Register* (23 TexReg 10778).

Effective September 1, 1997, Texas Civil Statutes, Articles 342a-1.001 et seq (the Texas Trust Company Act, §§1.001 et seq), became the governing law for Texas-chartered trust companies. The adopted sections address various corporate applications, notices, and approvals applicable to trust companies. Not currently proposed are §21.65 and §21.66, anticipated to concern purchase and sale of assets. These section numbers are reserved for future expansion. Purchases and sales of assets by and involving trust companies involve inherent complexities deserving of further study prior to proposal.

The adopted sections set out application requirements and the information which must be included in an application; set publications standards; establish parameters for required opinions of counsel; define confidentiality provisions, and clarify the role of the banking commissioner in the approval process.

One commenter submitted comments in response to the proposal and did not oppose adoption of the sections as a whole. The commenter wrote to suggest both stylistic and substantive revisions regarding specific issues. The agency declines to revise the proposal as suggested for the reasons discussed in following paragraphs. However, the word "compiled" has been changed to "complied" in §21.64(b)(12)(E) to correct a typographical error.

The commenter was of the opinion that the term "conversion," presumably as used in §21.67, was not properly defined. The commenter assumed the term to mean "conversion of a trust company into another fiduciary institution." The agency has carefully reviewed the use of this term and finds no ambiguity in meaning. Section 21.67 is limited to the conversion of a trust company into another financial institution. In the opinion of the agency no definition is required. The term "fiduciary institution " is defined in §21.61(b).

The commenter noted that, under §21.63(d), the agency has "essentially absolute discretion as to whether or not to accept an expedited filing although there are seven guideline criteria which are to be considered in making that decision." The commenter suggested that there "could be some set of known criteria that would determine objectively whether or not an expedited approach is proper or not." The agency declines to revise the proposal as requested. The agency believes that the commissioner would be dilatory in her duties to allow expedited treatment based solely on the adherence to a finite set of criteria that did not include the presence of other regulatory issues, whatever their nature. In order to assist applicants the agency believes that it is more constructive to give notice of specific types of situations in which expedited treatment may be denied. This notice is contained in both proposed §21.63(d) and existing §21.3. Further, this section mirrors state bank expedited filing requirements in existing §15.3 and §15.103. The agency has not experienced any difficulty in implementing state bank expedited filing requirements.

Section 21.64(b)(12) sets the parameters for an opinion of legal counsel related to applications for mergers or share exchanges. The commenter questions whether the requirement for content in the legal opinions was "not so broad as to be a burden to completing transactions." The agency intends for §21.64(b)(12) and related provisions to foster some uniformity in the types of opinions received by the agency. Analysis of legal opinions is extraordinarily time consuming and can slow processing times. Uniformity, as required by §21.64(b)(12), will enable the agency to process applications more quickly. The agency notes that similar provisions exist relating to state bank merger and share exchange applications and the legal profession has had little difficulty in conforming to the opinion requirements in that context. The requirements also do not appear to have impeded bank transactions.

The commenter also questioned whether the requirement in §21.64(b)(19) for an "analysis of the 'anticipated competitive effect' of a transaction could be overly burdensome, especially for smaller transactions." The agency believes that this section is not as burdensome as envisioned by the commenter. The smaller the transaction, the less likely it is that the transaction will have an adverse competitive effect. In a small transaction in which the applicant has evidence that the competitive effect will be minimal or nonexistent, the applicant should so state. The agency is of the opinion that no need exists to place limitations on the antitrust analysis requirement in the section.

The commenter also found it "troublesome" that §21.64(e)(3) does not require the agency to act on an application. While noting that §21.72(a) requires the agency to approve or deny an application within 60 days after the date of filing, the commenter suggested the addition of stated consequences for missing the deadline. Section 21.72 does establish mandatory time frames in which the commissioner must approve or deny an application. Section 21.64(e)(3) was included solely for the purpose of notifying the applicant of the necessity to conform with Texas Business Corporation Act, Article 10.03, which relates to delayed effectiveness of certain filings. Under Article 10.03, a corporation required to make a filing with the secretary of state may specify a delayed effective date not be later than 90 days after the date of filing. Section 21.64(e)(3) simply recognizes that the applicant must refile with the secretary of state and the commissioner if for some reason the commissioner does not approve an application within 90 days after the required filing with the secretary of state. An applicant's principal remedy, if the banking commissioner does not approve or deny an application filed under the subchapter within specified timeframes, is to request a hearing under §21.72(d).

The new sections are adopted under the Texas Trust Company Act, §1.003, which authorizes the commission to adopt rules to accomplish the purposes of the Act, to implement and clarify the Act, to preserve the safety and soundness of state trust companies, to grant the same rights and privileges to state trust companies with respect to the exercise of fiduciary powers that are or may be granted to a state or national bank that is domiciled in this state and exercising fiduciary powers, and to facilitate the fair hearing and adjudication of matters before the banking commissioner and the finance commission.

§21.61. Definitions.

(a) Words and terms used in this subchapter that are defined in Texas Civil Statutes, Articles 342a-1.001 et seq, have the same meanings as defined therein.

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

(1) Annual report–Formal financial statements and accompanying narrative of management issued yearly for the benefit of shareholders and other interested parties.

(2) Chartering agency–A government authority that has chartering jurisdiction over an entity involved in a transaction under this subchapter.

(3) Corporation or domestic corporation–A corporation for profit subject to the provisions of the Texas Business Corporation Act, except a foreign corporation.

(4) Current financial statements– Audited financial statements dated as of a date not more than 180 days prior to the date of submission of an application, or unaudited financial statements dated as of a date not more than 90 days prior to the date of submission of an application.

(5) Fiduciary institution–A bank, savings association, savings bank, credit union, or other financial institution with the power to act as a fiduciary under applicable law.

(6) Low-quality asset–An asset as defined in 12 United States Code, §371c(b)(10), currently an asset that falls in any one or more of the following categories:

(A) an asset classified as "substandard," "doubtful," or "loss," or treated as "other loans especially mentioned" in the most recent report of examination or inspection of an affiliate prepared by either a federal or state supervisory agency;

(B) an asset in a nonaccrual status;

(C) an asset on which principal or interest payments are more than 30 days past due; or

(D) an asset whose terms has been renegotiated or compromised due to the deteriorating financial condition of the obligor.

(7) Material administrative proceeding–A past or pending proceeding by a state, federal, or foreign regulatory agency against the applicant or other person involved in a transaction under this subchapter that resulted in or could result in the issuance of a cease and desist, removal, enforcement action, determination letter or other order, including an order of supervision or conservatorship; excluding, however, a past proceeding that resulted in an order, other than a removal order, that has been satisfied or otherwise terminated more than five years prior to the date the application or notice requesting such information is submitted.

(8) Material legal proceeding–

(A) a past or pending criminal proceeding against the applicant or other person involved in a transaction under this subchapter that resulted or may result in conviction of the applicant or other person of a crime under a state or federal law or the law of a foreign country relating to fiduciaries, banks or other financial institutions, securities, financial instrument reporting, or another crime involving moral turpitude; or

(B) a past or pending proceeding that has or may result in a judgment against the applicant or other person or entity involved in a transaction under this subchapter and the loss contingency must be disclosed in the financial statements of the entity under generally accepted accounting principles, or is otherwise material.

(9) Merger–A transaction that is:

(A) the division of a trust company into two or more new trust companies, fiduciary institutions, or other entities, or into a surviving trust company and one or more new trust companies, fiduciary institutions, or other entities; or

(B) the combination of one or more trust companies with one or more fiduciary institutions or other entities, resulting in:

(i) one or more surviving trust companies, fiduciary institutions, or other entities;

(ii) the creation of one or more new trust companies, fiduciary institutions, or other entities; or

(iii) one or more surviving trust companies, fiduciary institutions, or other entities and the creation of one or more new trust companies, fiduciary institutions, or other entities.

(10) Other entity–An entity, whether or not organized for profit, including a corporation, limited or general partnership, joint venture, joint stock company, cooperative, association, or another legal entity organized pursuant to the laws of this state or another state or country to the extent such laws or the constituent documents of that entity, consistent with such laws, permit that entity to enter into a merger or share exchange subject to this subchapter.

(11) Principal executive officer–An officer primarily responsible for the execution of board policies and operation of a trust company or other entity.

(12) Purchase of assets–The purchase other than in the ordinary course of business of all, substantially all, or a part of the assets of a trust company, fiduciary institution, or other entity, including but not limited to fiduciary rights pertaining to client accounts.

(13) Regulatory restriction–A memorandum of understanding, determination letter, notice of determination, order to cease and desist, or other state or federal administrative enforcement order issued by a state or federal banking regulatory agency, or another limitation imposed on a fiduciary institution or other entity by a state or federal banking regulatory agency that restricts its ability to act without authorization from the regulatory agency imposing the condition.

(14) Resulting trust company–A trust company that is a surviving or newly created entity in a merger.

(15) Sale of assets–The sale, lease, exchange, or other disposition of substantially all of the assets of a trust company, including but not limited to fiduciary rights pertaining to client accounts, other than in the ordinary course of business.

(16) Share exchange–A transaction by which one or more trust companies, fiduciary institutions, or other entities acquire all of the outstanding shares of one or more classes or series of one or more trust companies under the authority of Texas Civil Statutes, Article 342a-3.301, and the Texas Business Corporation Act, Article 5.02.

(17) Trust company–A state trust company as defined by Texas Civil Statutes, Article 1.002(a)(46).

(18) Verified–Documents submitted by the applicant that have been attested to as true and correct, but not necessarily notarized.

§21.62. General.

Without the prior written consent of the banking commissioner, a trust company may not consummate a merger, conversion, sale of assets, purchase of assets, or share exchange. Except as otherwise provided by Texas Civil Statutes, Article 342a, Chapter 3, Subchapters D, E, and F, or this subchapter, an application must be filed with the banking commissioner for review and consideration of the proposed transaction.

§21.63. Expedited Filings.

(a) An eligible trust company as defined in §21.1(4) of this title (relating to Definitions) may file an expedited filing in lieu of an application required under §21.64 of this title (relating to Application for Merger or Share Exchange) and simultaneously tender the required filing fee pursuant to §21.2 of this title (relating to Filing and Investigation Fees).

(b) An expedited filing consists of a letter application including, except to the extent waived by the banking commissioner, the following items:

(1) a summary of the transaction;

(2) a current pro forma balance sheet and income statement for all parties to the transaction, with adjustments, reflecting the proposed transaction as of the most recent quarter ended immediately prior to the filing of the application, demonstrating that each resulting trust company meets the statutory capital requirement or capital requirement imposed by order or condition of the banking commissioner. The pro forma must include a statement of fiduciary assets as well as corporate assets;

(3) an executed opinion of counsel conforming to the requirements of §21.64(b)(12) of this title;

(4) copies of all other required regulatory notices or filings submitted to other state or federal regulatory agencies concerning the transaction; and

(5) a copy of the public notice published in conformity with §21.64(d) of this title.

(c) The banking commissioner shall notify the applicant on or before a date that is 15 days after receipt of the application if expedited filing treatment is not available under this section for any reason. Such notification must be in writing and must indicate the reason expedited treatment is not available. Notification is effective when mailed by the banking commissioner and is not subject to appeal.

(d) The banking commissioner may deny expedited filing treatment to an eligible trust company if, in the exercise of discretion, the banking commissioner finds that the application involves one or more of the following:

(1) the proposed transaction involves significant policy, supervisory, or legal issues;

(2) approval of the proposed transaction is contingent on additional statutory or regulatory approval by the banking commissioner or another state or federal regulatory agency;

(3) the proposed transaction contemplates a resulting entity that is not an authorized fiduciary institution;

(4) the proposed transaction involves a fiduciary institution or other entity that is not domiciled in Texas;

(5) the proposed transaction would cause the corporate or fiduciary assets of a resulting trust company to increase by more than 100%;

(6) the proposed transaction involves a trust company that has experienced, since the last commercial examination by a state or federal regulatory agency, corporate or fiduciary asset growth, through acquisition or otherwise, greater than 100%; or

(7) a resulting fiduciary institution that is not "well capitalized" as defined in 12 Code of Federal Regulations, §325.103, or that will not meet capital requirements imposed by its principal regulator.

(e) The banking commissioner shall approve or deny an expedited filing on or before a date that is 30 days after the date the expedited filing is accepted for filing pursuant to §21.4 of this title (relating to Required Information and Abandoned Filings). The banking commissioner may, in the exercise of discretion, before the expiration of the period for decision, give the applicant written notice that the banking commissioner will convene a hearing to obtain evidence related to the application, and the decision will thereafter be made in accordance with §21.82 of this title (relating to Approval; Conditional Approval; Denial of Application; Hearings).

(f) The applicant bears the burden to supply all material information necessary to enable the banking commissioner to make a fully informed decision regarding the expedited filing.

§21.64. Application for Merger or Share Exchange.

(a) Scope. This section governs an application for merger or share exchange pursuant to Texas Civil Statutes, Articles 342a-3.301 et seq. This section does not apply to a merger that results in a trust company becoming another fiduciary institution under another regulatory system pursuant to Texas Civil Statutes, Article 342a-3.501, or other applicable law, and such transactions are governed by §21.67 of this title (relating to Merger, Reorganization, or Conversion of a Trust Company Into Another Fiduciary Institution).

(b) Form of application. The applicant shall submit a fully completed, verified application on a form prescribed by the banking commissioner and simultaneously tender the required filing fee pursuant to §21.2 of this title (relating to Filing and Investigation Fees). The application must, except to the extent waived by the banking commissioner, include the following information:

(1) a summary of the proposed transaction;

(2) a copy of all agreements related to the proposed transaction executed by an authorized representative of each party to the merger or share exchange;

(3) articles and plan of merger or share exchange in accordance with the Texas Business Corporation Act, Part V, which must include the following:

(A) a current draft of the articles of merger or share exchange, and such number of additional copies equal to the number of surviving, new, or acquired entities, executed and acknowledged by an authorized officer for each party to the merger or share exchange;

(B) the plan of merger or share exchange;

(C) the articles or restated articles of association of each resulting trust company;

(D) the articles or restated articles of incorporation or association, or other constitutive documents, of each newly created or surviving entity other than a resulting trust company; and

(E) if a party to a merger is an entity required to file documents with the Texas secretary of state before the transaction can be legally consummated, a provision in the articles of merger conditioning the merger upon the approval of the banking commissioner, containing wording substantially as follows, as applicable: This merger shall become effective upon the final approval and filing of the articles of merger by the Secretary of State of Texas and with the Banking Commissioner of Texas which shall be on or before _____ (date), which is the 90th day after the date of filing of such articles of merger with the Secretary of State;

(4) for each party to the merger or share exchange, a certified copy of those portions of the minutes of board meetings and shareholder or participant meetings (or their equivalent) at which action was taken regarding approval of the merger or share exchange, or a certificate of an officer verifying the action taken by the board of directors and the shareholders or participants approving the merger or share exchange, or an explanation of the basis for concluding such action was not required;

(5) for each resulting trust company, an assessment of its future prospects, proposed officers and directors, and proposed offices and other locations;

(6) an assessment of the current regulatory and financial condition of each party to the transaction;

(7) a copy of current financial statements for each entity involved in the proposed transaction, accompanied by an affidavit of no material change dated no earlier than 30 days prior to the date of submission of the application;

(8) a copy of the latest annual report for each fiduciary institution and holding company involved in the proposed transaction;

(9) a copy of that portion of the most recent watch list for each fiduciary institution involved in the proposed transaction that identifies low-quality assets;

(10) a description of the due diligence review conducted by or for each trust company that is a party to the transaction and a summary of findings;

(11) a description of all material legal or administrative proceedings involving any party to the merger or share exchange;

(12) an opinion of legal counsel that conforms with §21.68 of this title (relating to Opinion of Legal Counsel), concluding the following:

(A) each resulting trust company will be solvent and will have adequate capitalization for its business and location;

(B) the merger or share exchange has been duly authorized by the board and shareholders or participants of each participating trust company, fiduciary institution, or other entity, including trust companies in accordance with applicable law;

(C) the merger or share exchange will not cause or result in a material violation of the laws of this state relative to the organization and operation of trust companies;

(D) all liabilities of each trust company that is a party to the merger or share exchange will be discharged or otherwise assumed or retained by a trust company or other fiduciary;

(E) each surviving, new, or acquiring entity that is not authorized to engage in the trust business will not engage in the trust business and has in all respects complied with the laws of this state;

(F) all conditions with respect to the merger or share exchange that have been imposed by the banking commissioner have been satisfied or otherwise resolved or, to the best knowledge of legal counsel, no such conditions have been imposed;

(13) a copy of each filing or application regarding the proposed merger or share exchange that is required to be made with another state or federal regulatory agency, complete with all related attachments, exhibits, and correspondence;

(14) a current pro forma balance sheet and income statement for each party to the transaction, with adjustments, reflecting the proposed merger or share exchange as of the most recent quarter ended immediately prior to the filing of the application. The pro forma must include a statement of fiduciary assets as well as corporate assets;

(15) for each resulting trust company, a copy of the strategic plan that complies with the banking commissioner's Memorandum 1009, including projections of the balance sheet and income statement of each resulting trust company as of the quarter ending one year from the date of the pro forma financial statement required by paragraph (14) of this subsection;

(16) an explanation of compliance with or nonapplicability of provisions of governing law relating to rights of dissenting shareholders or participants to the merger or share exchange;

(17) a copy of all securities offering documents, proxy statements, or other disclosure materials delivered or to be delivered to shareholders or participants of a party concerning the merger or share exchange;

(18) an explanation of the manner and basis of converting or exchanging any of the shares or other evidences of ownership of an entity that is a party to the merger or share exchange into shares, obligations, evidences of ownership, rights to purchase securities, or other securities of one or more of the surviving, acquiring, or new entities, into cash or other property, including shares, obligations, evidences of ownership, rights to purchase securities, or other securities of another person or entity, or into a combination of the foregoing;

(19) for antitrust purposes, an analysis of the anticipated competitive effect of the proposed transaction in the affected markets and a statement of the basis of the analysis of the competitive effects, or if applicable, a copy of the analysis of competitive effects of the proposed transaction addressed in a companion federal regulatory agency application; and

(20) such other information that the banking commissioner, in the exercise of discretion, requires to be included in the particular application as considered necessary to an informed decision to approve or deny the proposed merger or share exchange.

(c) Applicant's duty to disclose. The applicant bears the burden to supply all material information necessary to enable the banking commissioner to make a fully informed decision regarding the application.

(d) Public notice. Within 14 days prior to or after submission of the initial application, the applicant shall publish notice in accordance with the requirements of §21.5 of this title (relating to Public Notice) in the specified communities where home office of the applicant, the target entity, and the resulting trust company are located.

(e) Approval by the banking commissioner and filings with a chartering agency.

(1) The banking commissioner shall approve a merger or share exchange only if the application indicates substantial compliance with all conditions of Texas Civil Statutes, Article 342a-3.302(c).

(2) If any party is required to file with its chartering agency after acceptance for filing pursuant to §21.4(b) of this title (relating to Required Information and Abandoned Filings), an applicant for merger or share exchange shall file the original articles of merger or share exchange as certified by the chartering agency with the banking commissioner.

(3) After approval of an application under this section by the banking commissioner, the articles of merger or share exchange previously filed with the chartering agency, if applicable, will be accepted and a certificate of merger or share exchange will be issued by the banking commissioner who shall perform the duties required by Texas Civil Statutes, Article 342a-3.303(a). With respect to a transaction that requires filing with the Texas secretary of state, if the banking commissioner does not approve the articles of merger or share exchange on or before the 90th day after the filing of the articles of merger with the Texas secretary of state, the applicant must refile the articles of merger or share exchange with both the Texas secretary of state and with the banking commissioner.

(4) After issuance of the certificate of merger or share exchange by the banking commissioner, the applicant shall file a statement with the chartering authority, if applicable, certifying that any future event upon which the effectiveness of the merger or share exchange was conditioned, has been satisfied and the date upon which the condition was satisfied.

(5) The date of issuance of the certificate of merger or share exchange by the banking commissioner constitutes the date of approval pursuant to Texas Civil Statutes, Article 342a-3.303(b), unless the merger or exchange agreement provides for a later effective date which has been approved by the banking commissioner.

§21.67. Notice of Merger, Reorganization, or Conversion of a Trust Company Into Another Fiduciary Institution.

(a) Scope. This section governs notice of the merger, reorganization, or conversion of a trust company into another form of fiduciary institution in a manner that results in extinguishment of the trust company charter, pursuant to Texas Civil Statutes, Article 342a-3.501, or other applicable law.

(b) Form of notice. A trust company does not cease to be subject to the jurisdiction of the banking commissioner until the banking commissioner is given written notice of intent to merge, reorganize, or convert into another form of fiduciary institution before the 31st day preceding the date of the proposed transaction and the merger, reorganization, or conversion has otherwise become effective. The notice must, except to the extent waived by the banking commissioner, include the following information:

(1) a summary of the proposed transaction;

(2) a copy of all agreements or other documentation related to the proposed transaction executed by an authorized representative of the applicant and other parties, if any;

(3) a copy of each filing regarding the proposed transaction that is required to be filed with other state or federal regulatory agencies, complete with all related attachments, exhibits, and correspondence;

(4) a certified copy of the relevant portions of the minutes of board meetings and shareholder or participant meetings (or their equivalent) at which action was taken regarding approval of the transaction, or a certificate of an officer verifying the action taken by the board of directors and the shareholders or participants approving the merger, reorganization, or conversion;

(5) Opinion of legal counsel. An opinion of legal counsel that conforms with the requirements of §21.68 of this title (relating to Opinion of Legal Counsel), concluding the following:

(A) the merger, reorganization, or conversion of the trust company has been duly authorized by its board and shareholders or participants in accordance with the Texas Business Corporation Act;

(B) all liabilities of the trust company will be discharged or otherwise retained by the successor fiduciary institution; and

(C) all conditions with respect to the merger, reorganization, or conversion imposed by the banking commissioner have been satisfied or otherwise resolved or, to the best knowledge of legal counsel, no such conditions have been imposed;

(6) a publisher's certificate showing publication of notice as required by subsection (c) of this section; and

(7) an explanation of compliance with the provisions of the Texas Business Corporation Act relating to rights of dissenting shareholders or participants.

(c) Notices, publication, and certificate of authority.

(1) The applicant shall submit a copy of the published notice of the proposed transaction required by the successor regulatory authority or shall publish notice as required by §21.5 of this title (relating to Public Notice). Submission of such notice, with the publisher's certificate required by subsection (b)(6) of this section, is considered notice of the transaction in accordance with Texas Civil Statutes, Article 3421-3.501(c)(2). The banking commissioner may require, upon written notice to the applicant, such other publication requirements at such times and places and in such manner as considered appropriate.

(2) Within 14 days after receipt of the certificate of authority to do business, or such other document issued by the successor regulatory authority that authorizes the consummation of the merger, reorganization, or conversion, the successor fiduciary institution shall provide written notice to the banking commissioner of the effective date and a copy of the certificate of authority or other document.

(d) Filing fees. A filing fee is not required in connection with notice under this section.

§21.68. Opinion of Legal Counsel.

(a) An opinion of legal counsel required by this subchapter must be addressed to the banking commissioner and state the opinions expressed, the specific documents reviewed and the matters considered of both law and fact, as legal counsel has considered necessary or appropriate in the exercise of professional judgment for the opinions expressed, and the assumptions, qualifications, limitations, and exceptions made or taken with respect to the opinions expressed. A draft opinion may be submitted with an application under this chapter provided a final, signed opinion is delivered to the banking commissioner prior to final action on the application. Any variation in the final opinion from the draft version must be specifically called to the attention of the banking commissioner.

(b) An opinion letter required under this subchapter will be governed by and interpreted in accordance with the Third Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section

of Business Law (American Bar Association, 1991), available in pamphlet form as reprinted from the November 1991 issue of The Business Lawyer (Volume 47, Number 1, Page 167), (the Accord), or a successor document officially promulgated by an appropriate authority.

(c) Unless specifically noted in the opinion, the banking commissioner will assume that the opinions expressed are based upon and subject to the assumptions, qualifications, limitations and exceptions set forth in the Accord, provided the Accord is incorporated by reference. In addition, whether or not stated in the Accord, if specifically noted in the opinion, counsel:

(1) need not express an opinion as to the laws of the United States or a foreign jurisdiction unless such an opinion is specifically requested by the banking commissioner;

(2) may assume that the parties to the transaction have engaged only in activities provided in their respective constitutive documents, and that all surviving parties to the transaction will engage only in activities provided in their respective constitutive documents;

(3) may assume that the transaction will be consummated in accordance with its terms as disclosed in the application; and

(4) may qualify the opinions given as opinions solely for the benefit of the banking commissioner that may not be quoted in whole or in part or otherwise referred to in another document or report, and that may not be furnished to a person or entity other than the banking commissioner and the department without the written consent of counsel, except as may be permitted or required by law, including Texas Civil Statutes, Article 342a-2.101 et seq, and Government Code, Chapter 552.

(d) Legal counsel shall specifically notify the banking commissioner of any substantive deviation from the assumptions, qualifications, limitations and exceptions allowed in this section and the Accord, and any substantive deviation from the opinion requirements of the section of this subchapter that governs a particular application. Deviations may result in a processing delay of the application to the extent additional analysis is required to understand the purpose of the deviation. A substantive deviation from the requirements of this subchapter applicable to legal opinions that is not brought to the attention of the banking commissioner will be considered a material misrepresentation in the application.

(e) Legal counsel rendering an opinion under this subchapter shall be an attorney in good standing admitted to practice before the highest court of a state, territory or district of the United States. However, legal counsel shall be well versed and professionally competent in applicable Texas law, or should seek the advice and opinion of an attorney in good standing admitted to practice before the highest courts in this state if legal counsel may not properly and ethically render opinions regarding applicable Texas law. An opinion of local legal counsel must be disclosed if relied on by legal counsel.

(f) Legal counsel rendering an opinion under this subchapter shall be independent of the applicant, the notice provider, or another person or entity required to submit an opinion of counsel pursuant to this section. Legal counsel is considered independent if able to exercise independent professional judgment and render candid advice, whether in private practice or employed by an applicant.

§21.69. Rights of Dissenting Shareholders.

The rights of dissenting shareholders or participants to a transaction under this subchapter may be governed by the Texas Business Corporation Act or other applicable law relating to the rights of dissenters, and applicants shall provide evidence of compliance with or inapplicability of such provisions of law.

§21.70. Investigation of Application.

(a) Authority. An application under this subchapter is subject to such investigation as considered necessary, in the banking commissioner's sole discretion, in order to make an informed decision regarding an application.

(b) Costs and fees. An applicant under this subchapter shall pay reasonable costs incurred in the investigation including the cost of a required examination, as provided by §21.2 of this title (relating to Filing and Investigation Fees).

(c) Examinations. The banking commissioner may consider the following factors in determining whether to require an examination of one or more of the entities to the transaction:

(1) a question exists regarding the solvency or potential solvency of the applicant or one or more of the fiduciary institutions or other entities involved in the proposed transaction;

(2) a trust company or other fiduciary institution involved in the transaction has not been examined by a state, federal, or foreign regulatory agency within the 18-month period immediately preceding the date of submission of the application;

(3) a trust company or other fiduciary institution involved in the proposed transaction has numerous substantive violations cited in its last examination report, or has a less than satisfactory corporate or trust regulatory rating;

(4) a question exists regarding the experience, ability, standing, trustworthiness, or integrity of the existing or proposed officers, directors, managers or managing participants of a party involved in the proposed transaction;

(5) a question exists whether a resulting trust company will operate in compliance with the law;

(6) a question exists whether a resulting trust company will be free from improper or unlawful influence or interference from its principal shareholders with respect to operation in compliance with the law;

(7) a question exists whether a resulting trust company will have adequate capitalization;

(8) one or more of the parties to the transaction are under a regulatory restriction; or

(9) such other factors as determined in the sole discretion of the banking commissioner.

§21.71. Waiver of Requirements.

The banking commissioner, in the exercise of discretion, reserves the right to waive a requirement in this subchapter, unless specifically required by Texas Civil Statutes, Articles 342a-1.001 et seq, or other applicable provision of federal or state law.

§21.72. Approval; Conditional Approval; Denial of Application; Hearings.

(a) Approval, conditional approval, or denial. Except for as otherwise provided by §21.63 of this title (relating to Expedited Filings), the banking commissioner shall approve or deny an application filed under this subchapter on or before a date that is 60 days after the date the application is accepted for filing pursuant to §21.4 of this title (relating to Required Information and Abandoned Filings).

(b) Pre-decision hearing. The banking commissioner may, in the exercise of discretion, before the expiration of the initial period for

decision provided by subsection (a) of this section, give the applicant written notice that the banking commissioner will convene a hearing to obtain evidence related to the application. Such notice by the banking commissioner suspends the specified period for approval or denial of an application, and the banking commissioner shall approve or deny the application on or before a date that is 30 days after the date the final proposal for decision resulting from the hearing is provided to the banking commissioner and the applicant.

(c) Acceptance of conditional approval. The banking commissioner may give the applicant written notice that the application has been approved subject to certain conditions. The applicant shall provide the banking commissioner with written confirmation of acceptance of the conditions on or before a date that is 10 days after the date of notification to the applicant of the conditional approval. An agreement between the applicant and the banking commissioner concerning conditional approval is enforceable against the applicant. In the event an applicant who has received conditional approval does not provide the banking commissioner with written confirmation as required by this subsection, consummation of the transaction constitutes confirmation of acceptance of the conditions imposed by the banking commissioner and is considered for all purposes an agreement enforceable against the applicant.

(d) Requests for hearing. An applicant may request a hearing on or before a date that is 30 days after the effective date of notice of denial or conditional approval of an application under this subchapter by the banking commissioner. The request for hearing must be in writing and state with specificity the reasons the applicant alleges that the decision of the banking commissioner is in error. The applicant has the burden of proof for each issue specified in the request for hearing. The request for hearing and the banking commissioner's decision to deny or condition the application will be made a part of the record.

(e) Hearings on denial of applications. Requests for hearing under this subchapter will be forwarded to the administrative law judge who shall enter appropriate orders and conduct the hearing on or before a date that is 60 days after the date the request for hearing was received, or as soon after that as is reasonably possible, under Chapter 9 of this title (relating to Rules of Procedure for Contested Case Hearings, Appeals, and Rulemaking) and the Government Code, Chapter 2001. A proposal for decision, exceptions and replies to such proposal for decision, the final decision of the banking commissioner, and motions for rehearing are governed by Chapter 9 of this title. An applicant may not appeal denial of an application or conditional approval of an application until a final order is issued. After a hearing and final order, the applicant may appeal the final order as provided in the Act, §31.202.

§21.73. Consummation of a Transaction.

A transaction under this subchapter must be consummated as proposed in the application, in the agreement concerning conditional approval, or as provided in a final order. An approved transaction under this subchapter must be consummated within 12 months after the date of approval by the banking commissioner unless an extension is granted in writing. Until a transaction is consummated, the banking commissioner may alter, suspend, or withdraw approval should an interim development warrant such action.

§21.74. Notification.

A notification by the banking commissioner under this subchapter may be by registered or certified mail, return receipt requested, and is complete when the notification is deposited in the United States mail postage prepaid, return receipt requested, mailed to the address furnished in the application. Notification may also be made in person to the applicant, or to the trust company or another person, fiduciary institution, foreign corporation or domestic corporation, or other entity subject to this subchapter, by agent-receipted delivery or by courier-receipted delivery to the address furnished in the application, or by telephonic document transfer to the applicant's telecopier number as furnished in the application. Notice by telephonic document transfer served after 6:00 p.m. local time of recipient is considered as notice served on the following day.

§21.75. Abandoned Filing.

The banking commissioner may determine an application under this subchapter to be abandoned pursuant to §21.4 of this title (relating to Required Information and Abandoned Filings).

§21.76. Confidentiality.

Information obtained by the banking commissioner under this subchapter is presumed to be public information unless such information is confidential under Texas Civil Statutes, Articles 342a-2.101 et seq, or under exceptions contained in Government Code, Chapter 552. The applicant has the burden to request confidential treatment for specified information, to segregate and mark documents claimed to be confidential, and to specifically reference the provision of law that allows confidential treatment.

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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Everette D. Jobe
General Counsel
Texas Department of Banking
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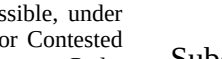

Subchapter G. Charter Amendments and Certain Changes in Outstanding Stock

7 TAC §21.91, §21.92

The Finance Commission of Texas (the commission) adopts new §21.91, concerning acquisition by a trust company of its own shares to be held as treasury stock, and new §21.92, concerning parameters and requirements for approval of a reverse stock split transaction by a trust company. The sections are adopted without changes to the proposed text as published in the October 23, 1998, issue of the *Texas Register* (23 TexReg 10784), and the text will not be republished.

The new sections comprise new Subchapter G entitled Charter Amendments and Certain Changes in Outstanding Stock.

Treasury Stock Purchases

Under Texas Civil Statutes, Article 342a-5.102, a trust company may acquire its own shares to be held as treasury stock without obtaining prior regulatory approval, provided the trust company has adequate undivided profits sufficient to absorb the acquisition of the shares under regulatory accounting principles. However, an acquisition of treasury stock by a trust company that is otherwise permissible under Texas Civil Statutes, Article 342a-5.102, may nevertheless violate other provisions of the

Texas Trust Company Act (Texas Civil Statutes, Article 342a-1.001, et seq).

For example, under Texas Civil Statutes, Article 342a-3.103, a trust company may not reduce or increase its restricted capital without the prior approval of the banking commissioner, with certain limited exceptions. The purchase of treasury stock by a trust company could result in a decrease in the restricted capital of the trust company, depending on the accounting method used to record the transaction. In addition, Texas Civil Statutes, Article 342a-5.101(b) requires a trust company to invest and maintain an amount equal to at least 40% of its restricted capital in readily marketable investment securities. The purchase of treasury stock by a trust company could affect the trust company's liquidity and the requirements of Texas Civil Statutes, Article 342a-5.101(b). Finally, the purchase of treasury stock by a trust company that is subject to ratable increases in required capital under §17.1(b) of this title could result in a trust company failing to maintain the minimum required level in restricted capital set forth therein, or under an applicable capital maintenance plan under Texas Civil Statutes, Article 342a-3.007(b).

Accordingly, to protect the safety and soundness of trust companies, new §21.91 requires all trust companies intending to acquire treasury stock to file, with the banking commissioner, a notice of intention to acquire treasury stock 30 days prior to the proposed consummation date. The banking commissioner may disapprove the proposed transaction if the plan will result in an acquisition of treasury stock at an aggregate cost in excess of its undivided profits, or if the plan of acquisition may otherwise threaten the adequacy of the trust company's liquidity or its equity capital, or could otherwise place the trust company in an unsafe or unsound condition.

With respect to any transaction that is consummated pursuant to §21.91, a modest disclosure requirement is imposed on the trust company to deliver a copy of its annual report and certain information regarding recent transactions to the person from whom shares are being acquired. The banking commissioner will make no determination regarding the fairness of the price offered or accepted provided the required disclosures are made.

Trust companies may use the par value method or the cost method of accounting for treasury stock, as permitted by generally accepted accounting principles, although use of the cost method may avoid the reduction in restricted capital that would be required under the par value method. In addition, trust companies are reminded that treasury stock may not be voted, directly or indirectly, at any meeting of shareholders, and may not be counted in determining the total number of outstanding shares at any given time.

Reverse Stock Splits

In a typical reverse stock split transaction some number of issued shares are converted into a single share by means of an amendment to the articles of association, and a shareholder who holds fewer than the number designated to become a single share will, after the reverse stock split, hold a fraction of a share. A common condition of such a transaction is that a fractional shareholder must accept cash for the fractional share at its fair value. Consequently, the device is favored by business corporations as a means of requiring minority shareholders to sell their shares to the corporation, thereby consolidating control in the hands of the majority shareholders. In some states, such transactions give rise to appraisal rights for dissenting shareholders in order to obtain a judicial determination of fair value, but not in Texas.

If appraisal rights apply to a transaction, such remedies are generally exclusive in the absence of fraud, see Texas Business Corporation Act (TBCA), Article 5.12(G). In the absence of appraisal rights, courts are generally more protective of the affected minority shareholders, and will require a business purpose independent of the mere desire to eliminate the minority shareholders in order to sanction the corporation's termination of the interest of such shareholders, see *Zauber v. Murray Savings Association*, 591 S.W.2d 932, 937-938 (Tex. Civ. App.–Dallas 1979, writ ref'd n.r.e.); *per curiam*, 601 S.W.2d 940 (Tex. 1980).

However, some have characterized the business purpose test as no more than a trap for the unskillful, requiring only a little imagination and proper planning and rhetoric on the part of lawyers in formulating a business reason for the transaction. Regardless of the label applied, the law appears to encourage a fair price and fair dealing for the minority shareholders and to discourage interference with the valid business purposes of the corporation itself, viewed as an entity distinct from the majority shareholders. Fair price must be determined by assessing all relevant factors to the corporation's economic and financial prospects, including its assets, market value, earnings, future prospects, and other elements that could affect the intrinsic or inherent value of a corporation's stock, exclusive of any element of value arising from the accomplishment or expectation of the proposed transaction. Fair dealing embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and shareholders were obtained. The test for fairness is not that clearly bifurcated between fair dealing and fair price; a fair price is sufficient for finding fairness, regardless of some technical or minor failures with regard to fair dealing.

A Texas business corporation can engage in a reverse stock split. TBCA, Article 4.01, provides that a corporation can amend its articles of incorporation in any respect, provided its articles of incorporation as amended contain only lawful provisions. If a change in shares is to be made, the articles should also contain provisions necessary to effect the change. A reverse stock split constitutes such a change. Subject to the equitable considerations discussed in previous paragraphs, TBCA, Article 2.20, allows the corporation considerable leeway in dealing with fractional shares once the reverse stock split has been accomplished. A corporation may, for example, pay the fair value of fractional shares in lieu of distributing fractional shares. It may also issue scrip entitling the holder to receive a full share when the holder tenders enough scrip to equal a full share. Scrip may also be issued subject to conditions, including (i) that the scrip will become void if not exchanged for a certificate representing a full share before a specified date; (ii) that the corporation may sell the shares for which the scrip is exchangeable and distribute the proceeds to the holders of the scrip; or (iii) any other conditions the board of directors determines advisable.

Texas Civil Statutes, Article 342a-3.008, states that the TBCA applies to state trust companies to the extent not inconsistent with the Texas Trust Company Act or with the proper business of a trust company. Under Texas Civil Statutes, Article 342a-3.101, a trust company may amend its articles of association for any lawful purpose. TBCA, Article 4.01 and Article 2.20, when considered in light of judicially imposed, equitable restric-

tions, do not appear to be inconsistent with the Texas Trust Company Act. However, the agency believes that determinations of business purpose, fair pricing, and fair dealing must be demonstrated in connection with the application seeking regulatory approval of the proposed transaction. Litigation arising out of perceived unfairness to the minority shareholders has the potential to adversely affect the safety and soundness of the trust company.

New §21.92 requires a trust company to make written disclosure to shareholders, prior to the shareholder vote on a proposed reverse stock split, of all material information necessary to an informed decision regarding the proposed transaction, specifically including specified information set forth in §21.92(c). The agency believes this requirement does not impose a burden on state trust companies that is not already imposed by federal and state securities laws.

After approval by shareholders, a trust company is required to submit an application with accompanying documents to the banking commissioner as specified in §21.92(c). Under §21.92(d), the banking commissioner will require that the reverse stock split be for valid business purposes of the trust company, viewed as an entity distinct from its affiliates, and be accomplished through fair dealing with and a fair price to unaffiliated shareholders. The banking commissioner may impose conditions on approval, including a condition that an independent appraisal report be obtained regarding the value of the unaffiliated shareholders' shares, exclusive of any element of value arising from the accomplishment or expectation of the proposed transaction, and without minority discount.

New §21.92(e) exempts from the scope of the rule any reverse stock split that (i) will not result in fractional shares; (ii) that can reasonably be characterized as voluntary on the part of all shareholders, as specified in that subsection; (iii) or that is exempted by the banking commissioner on written application.

One commenter submitted comments in response to the proposal. The agency declines to revise the proposal as suggested for the reasons discussed in the following paragraphs.

With respect to proposed §21.91, the commenter questions the need for prior notice requirements for an acquisition of treasury stock when the acquisition does not affect restricted capital. The agency disagrees with the premise that no need exists for prior notice. To address safety and soundness concerns the agency proposed to require a trust company to provide prior notice of a proposed acquisition of treasury stock. The purchase of treasury stock can affect a trust company's liquidity as well as raise other safety and soundness concerns. Further, any acquisition of treasury stock by a trust company can affect a trust company's restricted capital, sometimes merely because of the accounting method used to record the transaction. If a trust company demonstrates that a proposed plan of acquisition will not have adverse effects on the trust company's liquidity and capital, the transaction may be consummated, if not disapproved by the banking commissioner on other grounds set forth in §21.91.

With respect to §21.92, the commenter believes the application requirements for reverse stock splits appear overly detailed and voluminous. The agency disagrees. The application requirements were patterned on the regulation for reverse stock splits applicable to state banks, drawn from federal Securities and Exchange Commission disclosure requirements applicable to publicly traded corporations. The agency acknowledges that the application requirements are extensive, but believes such information is necessary to ensure that such transactions are for valid business purposes and accomplished through fair dealing and at a fair price to minority shareholders. Failure to comply with state and federal securities law requirements for full and fair disclosure of all material information to shareholders in connection with a reverse stock split can result exposure to substantial liability that could affect the safety and soundness of the trust company.

The sections are adopted under Texas Civil Statutes, Article 342a-1.003, which authorizes the commission to adopt rules necessary or reasonable to implement and clarify the Texas Trust Company Act (Texas Civil Statutes, Article 342a-1.001, et seq) and to preserve or protect the safety and soundness of trust companies.

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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Everette D. Jobe
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TITLE 16. ECONOMIC REGULATION

Part I. Railroad Commission of Texas

Chapter 12. Coal Mining Regulations

The Railroad Commission of Texas adopts amendments to 16 TAC §§12.2 (relating to Authority, Responsibility and Applicability); 12.3 (relating to Definitions); 12.188 (relating to Reclamation Plan: Protection of Hydrologic Balance); 12.201 (relating to Prime Farmland); 12.207 (relating to Public Notices of Filing of Permit Applications); 12.218 (relating to Permit Approval or Denial Actions); 12.226 (relating to Permit Revisions); 12.228 (relating to Permit Renewals: Completed Applications); 12.233 (relating to Requirements for New Permits for Persons Succeeding to Rights Granted Under a Permit); 12.237 (relating to Eligibility for Assistance); 12.243 (relating to Applicant Liability); 12.309 (relating to Terms and Conditions of the Bond); 12.312 (relating to Procedure for Seeking Release of Performance Bond); 12.313 (Criteria and Schedule for Release of Performance Bond); 12.338 (relating to Topsoil: Nutrients and Soil Amendments); 12.371 (relating to Coal Processing Waste Banks: Construction Requirements); 12.375 (relating to Disposal of Noncoal Wastes); 12.387 (relating to Backfilling and Grading: Thin Overburden); 12.388 (relating to Backfilling and Grading: Thick Overburden); 12.389 (relating to Regrading or Stabilizing Rills and Gullies); 12.399 (relating to Postmining Land Use); 12.508 (relating to Topsoil: Nutrients and Soil Amendments); and 12.568 (relating to Postmining Land Use) . The following sections are adopted without changes to the proposed text published in the September 11, 1998, issue of the *Texas Register* (23 TexReg 9201) and the text of these sections will not be republished: §§12.2, 12.188,

12.201, 12.207, 12.218, 12.226, 12.228, 12.233, 12.237, 12.243, 12.309, 12.313, 12.375, 12.508, 12.568. The following sections are adopted with changes to the proposed text published in the September 11, 1998, issue of the *Texas Register* (23 TexReg 9201) and the adopted text is published: §§12.3, 12.312, 12.338, 12.371, 12.387, 12.388, 12.389, 12.399.

Nonsubstantive amendments to the following sections have been made to correct internal references and grammatical errors: §§12.2(b)(4); 12.218(a)(4); 12.226(b)(2), (c), and (e); 12.228(b)(1)-(3); 12.233(b)(1); 12.338; 12.371(d); 12.389; 12.399(c)(9)(A); 12.508; and 12.568(c)(9)(A).

Amendments to §12.3 include new definitions for "previously mined area," "thick overburden," and "thin overburden." The commission also amends the definition of "qualified laboratory" to eliminate unnecessary references within that definition. These definitions conform to language recommended for inclusion in commission rules by the federal Office of Surface Mining Reclamation and Enforcement, United States Department of the Interior (OSM) for the commission to continue to demonstrate that its program is no less effective than the federal surface mining regulatory program. The commission has also amended §12.3 by numbering all definitions.

The commission amends §12.188(a) to include language that was left out of the rules when they were codified. The specific language relates to the requirement to include appropriate maps in a reclamation plan and is required by OSM.

The commission adds new §12.201(d)(5) to address concerns expressed by OSM that Texas' program is less stringent than the federal surface mining program with respect to prime farmland. The new provision prohibits post-mining decreases in aggregate total prime farmland acreage and requires that water bodies constructed during mining and reclamation operations be located within post-reclamation non-prime farmland areas, if possible. The new provision also requires approval of the commission and consent of landowners on the creation of such water bodies. As a practical matter, this change has little impact on the commission's program because there is virtually no prime farmland on surface mined acreage in Texas.

The commission amends §12.207(c)(1) by deleting the requirement that the Texas Department of Health be notified of the filing of a permit application. This change is made at the request of the Texas Department of Health.

The commission amends §12.237(2)(B) and (C) and §12.243(a)(4) and (5) to increase the annual production limit for those qualified to participate in the small operator assistance program from 100,000 to 300,000 tons to conform to changes in state law made during the last legislative session. Sections 12.237(2)(B) and (C) and 12.243(a)(4) and (5) are also amended to increase the ownership attribution amount from five percent to ten percent and to update the reimbursement liability provisions. All changes to §§12.237 and 12.243 are required by OSM.

The commission adds new §12.309(l) to afford a person who has an interest in collateral posted as a bond to notify the commission of his or her desire to receive notification of actions pursuant to the bond. This addition is required by OSM.

The commission amends §12.312(a) to limit filing of applications for bond release to certain times or seasons, determined by the commission, in order to properly evaluate the completed reclamation operations. Such times or seasons may be adopted by rule or established in the approved reclamation plan. Amendments to this provision also require notice of a bond release application to identify for the reader the name and address to which comments or requests of hearing or informal conferences should be sent. New paragraph (3) also requires that an applicant for bond release submit a notarized statement indicating that all applicable reclamation activities have been accomplished in accordance with the requirements of the approved reclamation plan. These amendments are required by OSM.

The commission amends §12.312(b) to provide that notice of action on a bond release application shall be provided to the permittee, the surety, and any person with an interest in collateral who requests such notification pursuant to new §12.309(l). This amendment is required by OSM.

The commission amends §12.313(a) to clarify that the commission can approve a bond release for an incremental area and to eliminate the 25 percent limitation on the amount of a Phase II bond release. Amendments to this subsection also update internal references. These changes are required by OSM.

The commission amends §12.313(b) to require that notice of action on a bond release be provided to the surety and any person with an interest in collateral who requests such notice pursuant to new §12.309(l). The commission also adopts nonsubstantive editorial changes to §12.313(d) and (f). These changes are required by OSM.

The commission amends §12.387 and §12.388 to conform the commission's rules to federal surface mining rules as required by OSM. The amendments impose flexible performance standards for reclamation of areas with thick and thin overburden, and delete existing more specific reclamation criteria for such areas. These amendments have little practical effect as there is currently no surface mined acreage in Texas with thick or thin overburden.

One commenter stated that it generally supported the proposed amendments which conform commission rules to federal surface mining rules as required by the Office of Surface Mining Reclamation and Enforcement, United States Department of the Interior. This commenter expressed concern about possible limitations imposed on the times and seasons for filing bond release applications as proposed in §12.312(a). The commenter believes that this requirement could result in unnecessary delay of bond release approvals. Based upon historical experience in Texas, the commenter believes that inspection and evaluation of completed reclamation operations can be successfully completed in Texas at almost any time during the year.

No change was made in response to this comment. First, the commission notes that the proposed amendment to §12.312(a) conforms this commission rule to the parallel federal rule. Commission rules impose very short timelines for the commission to act on a request for bond release. The proposed amendment is intended to ensure that the commission can obtain necessary information about the effectiveness of revegetation in a timely manner so that it can meet the timelines under the rules. The commission agrees with the commenter that the relatively mild Texas climate provides opportunities to inspect and evaluate reclamation operations at most times during the year. The commission also notes that the rule as proposed gives the operator control over bond release schedules in the first instance because the operator can propose such schedules in the reclamation plan. However, revegetative success cannot always be successfully evaluated during certain, relatively short, periods

during the year. During these times, the commission is not in a position to act on a bond release application as required under commission rules; bond release applications should not be filed during these short time periods.

One commenter expressed its strong support for the proposed amendment to §12.313(a) which clarifies that the commission can approve a bond release for an incremental area and also eliminates the 25 percent limitation on the amount of a Phase II bond release. The commission appreciates this comment. No change was made in response to this comment.

One commenter noted a typographical error in the definition of "previously mined area" in §12.3(124). The commenter noted that the date in that definition should be August 3, 1977, not August 3, 1997. The commission agrees with this commenter and has corrected the date in §12.3(124).

One commenter requested that the word "meet" be replaced with "meets" in §12.3(138). The commission agrees and has made the requested change. This commenter also recommended that "A combination of" be substituted for "includes" in §12.3(183) to remain consistent with current rule language. The commission disagrees. The word "includes" is appropriate for this definition. No change was made in response to this comment.

One commenter recommended that the definition of "rangeland" be put in alphabetical order in §12.3. The commission agrees and has rearranged the definitions accordingly.

One commenter recommended that "or" be replaced with the word "and" in §12.312(b)(2) to clarify that the permittee, the surety, persons with an interest in the collateral who have requested notification, and protestants, get notice of the commission's decision on a bond release application. The commission agrees and has made the requested change.

One commenter recommended that internal references in §§12.338, 12.371(d), 12.387(2), 12.388(2), 12.389(2), and 12.399(c)(9)(A) be corrected to include the appropriate heading of the referenced provision. The commission agrees and has made the recommended changes.

No groups or associations submitted comments on the proposed amendments.

Subchapter A. General

1. General

16 TAC §12.2, §12.3

These amendments are adopted under §134.013 of the Texas Natural Resources Code, which provides the commission the authority to promulgate rules pertaining to surface coal mining operations.

Texas Natural Resources Code, §134.013, is affected by the amendments.

§12.3. Definitions.

The following words and terms, when used in this Chapter (relating to Coal Mining Regulations), shall have the following meanings unless the context clearly indicates otherwise:

(1) Acid drainage–Water with a pH of less than 6.0 and in which total acidity exceeds total alkalinity, discharged from an active, inactive or abandoned surface coal mine and reclamation operation or from an area affected by surface coal mining and reclamation operations.

(2) Acid-forming materials–Earth materials that contain sulfide minerals or other materials which, if exposed to air, water, or weathering processes, form acids that may create acid drainage.

(3) Act or State Act–The "Texas Surface Coal Mining and Reclamation Act" (Texas Natural Resources Code, Chapter 134).

(4) Adjacent area–Land located outside the affected area or permit area, depending on the context in which adjacent area is used, where air, surface or ground water, fish, wildlife, vegetation or other resources protected by the Act may be adversely impacted by surface coal mining and reclamation operations.

(5) Administratively complete application–An application for permit approval or approval for coal exploration where required, which the Commission determines to contain information addressing each application requirement of the regulatory program and to contain all information necessary to initiate processing and public review.

(6) Affected area–Any land or water surface which is used to facilitate, or which is physically altered by surface coal mining and reclamation operations. Affected area includes the disturbed area; any area upon which surface coal mining and reclamation operations are conducted; any adjacent lands the use of which is incidental to surface coal mining and reclamation operations; all areas covered by new or existing roads used to gain access to, or for hauling coal to or from surface coal mining and reclamation operations; any area covered by surface excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, shipping areas; any areas which contain sited structures, facilities, or other property material on the surface resulting from, or incident to, surface coal mining and reclamation operations; and the area located above underground workings.

(7) Agricultural activities–With respect to alluvial valley floors, the use of any tract of land for the production of animal or vegetable life, where the use is enhanced or facilitated by subirrigation or flood irrigation associated with alluvial valley floors. These uses include, but are not limited to, the pasturing, grazing or watering of livestock, and the cropping, cultivation or harvesting of plants whose production is aided by the availability of water from subirrigation or flood irrigation. Those uses do not include agricultural practices which do not benefit from the availability of water from subirrigation or flood irrigation.

(8) Agricultural use–The use of any tract of land for the production of animal or vegetable life. The uses include, but are not limited to, the pasturing, grazing, and watering of livestock, and the cropping, cultivation, and harvesting of plants.

(9) Airblast–An airborne shock wave resulting from the detonation of explosives and which may or may not be audible.

(10) Alluvial valley floors–The unconsolidated stream-laid deposits holding streams with water availability sufficient for subirrigation or flood irrigation agricultural activities but does not include upland areas which are generally overlain by a thin veneer of colluvial deposits composed chiefly of debris from sheet erosion, deposits formed by unconcentrated runoff or slope wash, together with talus, or other mass-movement accumulations, and windblown deposits.

(11) Anthracite–Coal classified as anthracite in the American Society for Testing and Materials (ASTM) Standard D 388-77. Coal classifications are published by the ASTM under the title, "Standard Specification for Classification of Coals by Rank", ASTM D 388-77. This ASTM Standard is on file and available for inspection

at the Office of the Surface Mining and Reclamation Division, Railroad Commission of Texas, 1701 North Congress Avenue, Austin, Texas.

(12) APA–The "Administrative Procedure Act" (Texas Government Code, Chapter 2001).

(13) Applicant–Any person seeking a permit, permit revision, renewal, and transfer, assignment, or sale of permit rights from the Commission to conduct surface or underground coal mining and reclamation operations pursuant to the Act. With respect to Subchapter G of this chapter (relating to Surface Coal Mining and Reclamation Operations Permits and Coal Exploration Procedures Systems), this term includes a person who seeks to obtain exploration approval or a permit under that subchapter and the regulatory program. With respect to Subchapter M of this chapter (relating to Training), this term includes a person who submits an application to the Commission to request blaster training, examination or certification.

(14) Application–The documents and other information filed with the Commission under this chapter (relating to Coal Mining Regulations) for the issuance of permits; revisions; renewals; and transfers, assignment, or sale of permit rights for surface coal mining and reclamation operations or, where required, for coal exploration. With respect to Subchapter M of this chapter, this term includes a request submitted to the Commission on a prescribed form, and including any required fee and any applicable supporting evidence or other attachments.

(15) Approximate original contour–That surface configuration achieved by backfilling and grading of the mined areas so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls, spoil piles and coal refuse piles eliminated. Permanent water impoundments may be permitted where the Commission has determined that they comply with §134.092(a)(8) of the Act.

(16) Aquifer–A zone, stratum, or group of strata that can store and transmit water in sufficient quantities for a specific use.

(17) Arid or semiarid area–In the context of alluvial valley floors, an area west of the 100th meridian west longitude, experiencing water deficits, where water use by native vegetation equals or exceeds that supplied by precipitation. As an example, the Eagle Pass field in Texas is in an arid or semiarid area.

(18) Auger mining–A method of mining coal at a cliff or highwall by drilling holes into an exposed coal seam from the highwall and transporting the coal along an auger bit to the surface.

(19) Best Technology Currently Available (BTCA)–Equipment, devices, systems, methods, or techniques which will:

(A) prevent, to the extent possible, additional contributions of suspended solids to stream flow or runoff outside the permit area, but in no event result in contributions of suspended solids in excess of requirements set by applicable state or federal laws; and

(B) minimize, to the extent possible, disturbances and adverse impacts on fish, wildlife and related environmental values, and achieve enhancement of those resources where practicable. The term includes equipment, devices, systems, methods, or techniques which are currently available anywhere as determined by the Commission, even if they are not in routine use. The term includes, but is not limited to, construction practices, siting requirements, vegetative selection and planting requirements, animal stocking requirements, scheduling of activities and design of sedimentation ponds in accordance with §§12.330-12.403 and 12.500-12.572 of this title (relating to Permanent Program Performance Standards–Surface Mining Activities, and to Permanent Program Performance Standards–Underground Mining Activities). The Commission shall have the discretion to determine the best technology currently available on a case-by-case basis, as authorized by the Act and this chapter.

(20) Blaster–A person who is directly responsible for the use of explosives.

(21) Blaster certification–To issue to an applicant a Commission Blaster Certificate.

(22) Blasthole–A hole drilled for the placement of explosives in rock or other material to be blasted.

(23) Blasting crew–Persons whose function is to load explosive charges and assist blasters in the use of explosives.

(24) Cemetery–Any area of land where human bodies are interred.

(25) Certificate issuance–To grant to an applicant his or her first Commission blaster certificate.

(26) Certificate reissuance–To grant to an applicant, who has had a Commission blaster certificate that expired or was revoked, a subsequent certificate for which additional training and examination are required.

(27) Certificate renewal–To grant to an applicant, who holds a Commission blaster certificate that is currently valid and not expired or revoked, a subsequent certificate for which training and examination are not required.

(28) Certificate replacement–To grant to an applicant, who holds a Commission blaster certificate that is currently valid and not expired, suspended, or revoked, a duplicate certificate as a substitute for one that was lost or destroyed.

(29) Certified blaster–A person who has met the qualifications of Subchapter M of this chapter and who has been issued a Commission blaster certificate that is currently valid and not expired, suspended, or revoked.

(30) CFR–The federal Code of Federal Regulations.

(31) Close of public comment period–The close of a public hearing on a surface mining permit application. When no public hearing is held, this time shall be 30 days after the last publication of the newspaper notice required by §12.207(a) of this title (relating to Public Notices of Filing of Permit Applications).

(32) Coal–Combustible carbonaceous rock, classified as anthracite, bituminous, subbituminous, or lignite by ASTM Standard D 388-77.

(33) Coal exploration–The field gathering of:

(A) Surface or subsurface geologic, physical, or chemical data by mapping, trenching, drilling, geophysical, or other techniques necessary to determine the quality and quantity of overburden and coal of an area; or

(B) The gathering of environmental data to establish the conditions of an area before beginning surface coal mining and reclamation operations under the requirements of this chapter.

(34) Coal exploration operation–The substantial disturbance of the surface or subsurface for the purpose of coal exploration.

(35) Coal mine waste–Coal processing waste and underground development waste.

(36) Coal mining operation–The business of developing, producing, preparing or loading bituminous coal, subbituminous coal, anthracite, or lignite, or of reclaiming the areas upon which such activities occur.

(37) Coal preparation–Chemical or physical processing and the cleaning, concentrating, or other processing or preparation of coal.

(38) Coal processing plant or coal preparation plant–A facility where coal is subjected to chemical or physical processing or cleaning, concentrating, or other processing or preparation. It includes facilities associated with coal preparation activities, including, but not limited to, the following: loading facilities; storage and stockpile facilities; sheds, shops and other buildings; water treatment and water storage facilities; settling basins and impoundments; coal processing and other waste disposal areas; and, roads, railroads and other transport facilities. It does not include facilities operated by the final consumer of the coal, such as an electricity generating power plant, when, in the opinion of the Commission, the primary purpose of the facilities is to make the coal ready for conversion into a different energy form and the facilities are located at or near the electricity generating plant or other point of final consumption away from the mine site and outside of the approved mine permit area.

(39) Coal processing waste–Earth materials which are separated and wasted from the product coal during cleaning, concentrating, or other processing or preparation of coal.

(40) Combustible material–Organic material that is capable of burning, either by fire or through oxidation, accompanied by the evolution of heat and a significant temperature rise.

(41) Commission–The Railroad Commission of Texas.

(42) Commission Blaster Certificate–A certificate issued by the Commission to a person determined to be qualified under §§12.700-12.710 of this title (relating to Training, Examination, and Certification of Blasters) to be directly responsible for the use of explosives in mining operations regulated by the Commission.

(43) Commissioner–One of the elected or appointed members of the decision making body defined as the Commission.

(44) Community or institutional building–Any structure, other than a public building or an occupied dwelling, which is used primarily for meetings, gatherings or functions of local civic organizations or other community groups; functions as an educational, cultural, historic, religious, scientific, correctional, mental-health or physical health care facility; or is used for public services, including, but not limited to, water supply, power generation or sewage treatment.

(45) Compaction–Increasing the density of a material by reducing the voids between the particles and is generally accomplished by controlled placement and mechanical effort such as from repeated application of wheel, track, or roller loads from heavy equipment.

(46) Complete and accurate application–An application for permit approval or approval for coal exploration where required, which the Commission determines to contain all information required under the Act, this chapter, and the regulatory program that is necessary to make a decision on permit issuance.

(47) Cropland–Land used for the production of adapted crops for harvest, alone or in a rotation with grasses and legumes, and includes row crops, small grain crops, hay crops, nursery crops, orchard crops, and other similar specialty crops, but does not include quick cover crops grown primarily for erosion control.

(48) Cumulative impact area–The area, including the permit area, within which impacts resulting from the proposed operation may interact with the impacts of all anticipated mining on surface-water and ground-water systems. Anticipated mining shall include, at a minimum, the entire projected lives through bond release of:

(A) the proposed operation;

(B) all existing operations;

(C) any operation for which a permit application has been submitted to the Commission; and

(D) all operations required to meet diligent development requirements for leased federal coal for which there is actual mine development information available.

(49) Cumulative measurement period–As used in §§12.25-12.33 of this title (relating to Exemption for Coal Extraction Incidental to the Extraction of Other Minerals), the period of time over which both cumulative production and cumulative revenue are measured.

(A) For purposes of determining the beginning of the cumulative measurement period, subject to Commission approval, the operator must select and consistently use one of the following:

(i) for mining areas where coal or other minerals were extracted prior to August 3, 1977, the date extraction of coal or other minerals commenced at that mining area or August 3, 1977; or

(ii) for mining areas where extraction of coal or other minerals commenced on or after August 3, 1977, the date extraction of coal or other minerals commenced at that mining area, whichever is earlier.

(B) For annual reporting purposes pursuant to §12.33 of this title (relating to Reporting Requirements), the end of the period for which cumulative production and revenue is calculated is either:

(i) for mining areas where coal or other minerals were extracted prior to the effective date of §§12.25-12.33 of this title, the first anniversary of that date, and each anniversary of that date thereafter; or

(ii) for mining areas where extraction of coal or other minerals commenced on or after the effective date of §§12.25-12.33 of this title, the last day of the calendar quarter during which coal extraction commenced, and each anniversary of that date thereafter.

(50) Cumulative production–As used in §§12.25-12.33 of this title, the total tonnage of coal or other minerals extracted from a mining area during the cumulative measurement period. The inclusion of stockpiled coal and other mineral tonnages in this total is governed by §12.31 of this title (relating to Stockpiling of Minerals).

(51) Cumulative revenue–As used in §§12.25-12.33 of this title, the total revenue derived from the sale of coal or other minerals and the fair market value of coal or other minerals transferred or used, but not sold, during the cumulative measurement period.

(52) Department–The U.S. Department of the Interior.

(53) Direct financial interest–Ownership or part ownership by an employee of lands, stocks, bonds, debentures, warrants, partnership shares, or other holdings and also means any other arrangement where the employee may benefit from his or her holding

in or salary from coal mining operations. Direct financial interests include employment, pensions, creditor, real property and other financial relationships.

(54) Director–The Director or Acting Director, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, or the Director's representative.

(55) Disturbed area–An area where vegetation, topsoil, or overburden is removed or upon which topsoil, spoil, coal processing waste, underground development waste, or noncoal waste is placed by surface coal mining operations. Those areas are classified as disturbed until reclamation is complete and the performance bond or other assurance of performance required by Subchapter J of this chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations) is released.

(56) Diversion–A channel, embankment, or other manmade structure constructed to divert water from one area to another.

(57) Division–The Surface Mining and Reclamation Division of the Railroad Commission of Texas.

(58) Downslope–The land surface between the projected outcrop of the lowest coal bed being mined along each highwall and a valley floor.

(59) Embankment–An artificial deposit of material that is raised above the natural surface of the land and used to contain, divert, or store water, support roads or railways, or for other similar purposes.

(60) Employee–Shall include:

(A) any person employed by the Commission who performs any function or duty under the Act, including the Commissioners; and

(B) Advisory board or Commission members and consultants who perform any function or duty under the Act, if they perform decision making functions for the Commission under the authority of state law or regulations. However, members of advisory boards or commissions established in accordance with state law or regulations to represent multiple interests are not considered to be employees.

(61) Ephemeral stream–A stream which flows only in direct response to precipitation in the immediate watershed or in response to the melting of a cover of snow and ice, and which has a channel bottom that is always above the local water table.

(62) Essential hydrologic functions–The role of an alluvial valley floor in collecting, storing, regulating, and making the natural flow of surface or ground water, or both, usefully available for agricultural activities by reason of the valley floor's topographic position, the landscape and the physical properties of its underlying materials. A combination of these functions provides a water supply during extended periods of low precipitation.

(A) The role of the valley floor in collecting water includes accumulating runoff and discharge from aquifers in sufficient amounts to make the water available at the alluvial valley floor greater than the amount available from direct precipitation.

(B) The role of the alluvial valley floor in storing water involves limiting the rate of discharge of surface water, holding moisture in soils, and holding ground water in porous materials.

(C) The role of the alluvial valley floor in regulating:

(i) the natural flow of surface water results from the characteristic configuration of the channel flood plain and adjacent low terraces; and

(ii) the natural flow of ground water results from the properties of the aquifers which control inflow and outflow.

(D) The role of the alluvial valley floor in making water usefully available for agricultural activities results from the existence of flood plains and terraces where surface and ground water can be provided in sufficient quantities to support the growth of agriculturally useful plants, from the presence of earth materials suitable for the growth of agriculturally useful plants, from the temporal and physical distribution of water making it accessible to plants throughout the critical phases of the growth cycle either by flood irrigation or by subirrigation, from the natural control of alluvial valley floors in limiting destructive extremes of stream discharge, and from the erosional stability of earth materials suitable for the growth of agriculturally useful plants.

(63) Existing structure–A structure or facility used in connection with or to facilitate surface coal mining and reclamation operations for which construction began prior to approval of the state program.

(64) Experimental practice–The use of alternative surface coal mining and reclamation operation practices for experimental or research purposes.

(65) Explosives–Any chemical compound, mixture, or device by whose decomposition or combustion gas is generated with such rapidity that it can be used for blasting.

(66) Extraction of coal as an incidental part–The extraction of coal which is necessary to enable the construction to be accomplished. For purposes of §§12.21 and 12.22 of this title (relating to Applicability, and to Information to be Maintained On Site), only that coal extracted from within the right-of-way, in the case of a road, railroad, utility line or other such construction, or within the boundaries of the area directly affected by other types of government-financed construction, may be considered incidental to that construction. Extraction of coal outside the right-of-way or boundary of the area directly affected by the construction shall be subject to the requirements of the Act and this chapter.

(67) Federal Act–The "Surface Mining Control and Reclamation Act of 1977" (Pub. L. 95-87).

(68) Federal lands–Any land, including mineral interests, owned by the United States, without regard to how the United States acquired ownership of the lands or which agency manages the lands. It does not include Indian lands.

(69) Federal lands program–A program established by the Secretary, pursuant to Section 523 of the Federal Act, to regulate surface coal mining and reclamation operations on federal lands.

(70) Flood irrigation–With respect to alluvial valley floors, supplying water to plants by natural overflow or the diversion of flows, so that the irrigated surface is largely covered by a sheet of water.

(71) Flyrock–Rock or other blasted material that is propelled from a blast through the air or along the ground.

(72) Fragile lands–Areas containing natural, ecologic, scientific or esthetic resources that could be significantly damaged by surface coal mining operations. Examples of fragile lands include valuable habitats for fish or wildlife, critical habitats for endangered or threatened species of animals or plants, uncommon geologic forma-

tions, paleontological sites, National Natural Landmarks, areas where mining may result in flooding, environmental corridors containing a concentration of ecologic and esthetic features, and areas of recreational value due to high environmental quality.

(73) Fugitive dust–That particulate matter not emitted from a duct or stack which becomes airborne due to the forces of wind or surface coal mining and reclamation operations or both. During surface coal mining and reclamation operations, it may include emissions from haul roads; wind erosion of exposed surfaces, storage piles, and spoil piles; reclamation operations; and other activities in which material is either removed, stored, transported, or redistributed.

(74) Fund–The Abandoned Mine Reclamation Fund established pursuant to Section 401 of the Federal Act.

(75) General area–With respect to hydrology, the topographic and ground-water basin surrounding a permit area which is of sufficient size, including areal extent and depth, to include one or more watersheds containing perennial streams and ground-water zones and to allow assessment of the probable cumulative impacts on the quality and quantity of surface- and ground-water systems in the basins.

(76) Government financing agency–A federal, state, county, municipal, or local unit of government, or a department, bureau, agency or office of the unit which, directly or through another unit of government, finances construction.

(77) Government-financed construction–Construction funded 50% or more by funds appropriated from a government financing agency's budget or obtained from general revenue bonds, but shall not mean government financing agency guarantees, insurance, loans, funds obtained through industrial revenue bonds or their equivalent, or in-kind payments.

(78) Ground cover–The area of ground covered by the combined aerial parts of vegetation and the litter that is produced naturally onsite, expressed as a percentage of the total area of measurement.

(79) Ground water–Subsurface water that fills available openings in rock or soil materials to the extent that they are considered water saturated.

(80) Half-shrub–A perennial plant with a woody base whose annually produced stems die back each year.

(81) Head-of-hollow fill–A fill structure consisting of any material, other than coal processing waste and organic material, placed in the uppermost reaches of a hollow where side slopes of the existing hollow measured at the steepest point are greater than 20 degrees or the average slope of the profile of the hollow from the toe of the fill to the top of the fill is greater than 10 degrees. In fills with less than 250,000 cubic yards of material, associated with contour mining, the top surface of the fill will be at the elevation of the coal seam. In all other head-of-hollow fills, the top surface of the fill, when completed, is at approximately the same elevation as the adjacent ridge line, and no significant area of natural drainage occurs above the fill draining into the fill area.

(82) Highwall–The face of exposed overburden and coal in an open cut of a surface coal mining activity or for entry to underground mining activities.

(83) Historically used for cropland–Refers to:

(A) lands that have been used for cropland for any 5 years or more out of the 10 years immediately preceding the acquisition, including purchase, lease, or option, of the land for the purpose of conducting or allowing through resale, lease or option the conduct of surface coal mining and reclamation operations;

(B) lands that the Commission determines, on the basis of additional cropland history of the surrounding lands and the lands under consideration, that the permit area is clearly cropland but falls outside the specific 5-years-in-10 criterion, in which case the regulations for prime farmland may be applied to include more years of cropland history only to increase the prime farmland acreage to be preserved; or

(C) lands that would likely have been used as cropland for any 5 out of the last 10 years, immediately preceding such acquisition but for some fact of ownership or control of the land unrelated to the productivity of the land.

(84) Historic lands–Historic, cultural, or scientific resources. Examples of historic lands include archeological sites, National Historic Landmarks, properties listed on or eligible for listing on a state or National Register of Historic Places, properties having religious or cultural significance to Native Americans or religious groups, and properties for which historic designation is pending.

(85) Hydrologic balance–The relationship between the quality and quantity of water inflow to, water outflow from, and water storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. It encompasses the dynamic relationships among precipitation, runoff, evaporation, and changes in ground and surface water storage.

(86) Hydrologic regime–The entire state of water movement in a given area. It is a function of the climate and includes the phenomena by which water first occurs as atmospheric water vapor, passes into a liquid or solid form, falls as precipitation, moves along or into the ground surface, and returns to the atmosphere as vapor by means of evaporation and transpiration.

(87) Imminent danger to the health and safety of the public–The existence of any condition or practice, or any violation of a permit or other requirements of the Act in a surface coal mining and reclamation operation, which condition, practice, or violation could reasonably be expected to cause substantial physical harm to persons outside the permit area before such condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same condition or practices giving rise to the peril, would not expose himself to the danger during the time necessary for abatement.

(88) Impoundment–A closed basin, naturally formed or artificially built, which is dammed or excavated for the retention of water, sediment, or waste.

(89) Indian lands–All lands, including mineral interests, within the exterior boundaries of any federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe.

(90) Indian tribe–Any Indian tribe, band, group, or community having a governing body recognized by the Secretary.

(91) Indirect financial interest–The same financial relationships as for direct ownership, but where the employee reaps the benefits of such interests, including interests held by his or her spouse, minor child and other relatives, including in-laws, residing in the employee's home. The employee will not be deemed to have an indirect financial interest if there is no relationship between the employee's functions or duties and the coal mining operation in which the spouse, minor children or other resident relatives hold a financial interest.

(92) In situ processes–Activities conducted on the surface or underground in connection with in-place distillation, retorting, leaching, or other chemical or physical processing of coal. The term includes, but is not limited to, in situ gasification, in situ leaching, slurry mining, solution mining, borehole mining, and fluid recovery mining.

(93) Intermittent stream–A stream or reach of a stream that:

(A) drains a watershed of at least one square mile; or

(B) is below the local water table for at least some part of the year, and obtains its flow from both surface runoff and ground-water discharge.

(94) Irreparable damage to the environment–Any damage to the environment that cannot be or has not been corrected by actions of the applicant.

(95) Knowingly–With respect to §§12.696-12.699 of this title (relating to Individual Civil Penalties), that an individual knew or had reason to know in authorizing, ordering, or carrying out an act or omission on the part of a corporate permittee that such act or omission constituted a violation, failure, or refusal.

(96) Land use–Specific uses or management-related activities, rather than the vegetation or cover of the land. Land uses may be identified in combination when joint or seasonal uses occur. Changes of land use or uses from one of the following categories to another shall be considered as a change to an alternative land use which is subject to approval by the Commission.

(A) Cropland. Land used for the production of adapted crops for harvest, alone or in a rotation with grasses and legumes, and includes row crops, small grain crops, hay crops, nursery crops, orchard crops, and other similar specialty crops. Land used for facilities in support of cropland farming operations which is adjacent to or an integral part of these operations is also included for purposes of these land use categories.

(B) Pastureland or land occasionally cut for hay. Land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or occasionally cut and cured for livestock feed. Land used for facilities in support of pastureland or land occasionally cut for hay which is adjacent to or an integral part of these operations is also included.

(C) Grazingland. Includes both grasslands and forest lands where the indigenous vegetation is actively managed for grazing, browsing, or occasional hay production. Land used for facilities in support of ranching operations which are adjacent to or an integral part of these operations is also included.

(D) Forestry. Land used or managed for the long-term production of wood, wood fiber, or wood derived products. Land used for facilities in support of forest harvest and management operations which is adjacent to or an integral part of these operations is also included.

(E) Residential. Includes single- and multiple-family housing, mobile home parks, and other residential lodgings. Land used for facilities in support of residential operations which is adjacent to or an integral part of these operations is also included. Support facilities include, but are not limited to, vehicle parking and open space that directly relate to the residential use.

(F) Industrial/Commercial. Land used for:

(i) extraction or transformation of materials for fabrication of products, wholesaling of products, or for long-term storage of products. This includes all heavy and light manufacturing facilities, such as lumber and wood processing, chemical manufacturing, petroleum refining, and fabricated metal products manufacturing. Land used for facilities in support of these operations which is adjacent to or an integral part of that operation is also included. Support facilities include, but are not limited to, all rail, road, and other transportation facilities; or

(ii) retail or trade of goods or services, including hotels, motels, stores, restaurants, and other commercial establishments. Land used for facilities in support of commercial operations which is adjacent to or an integral part of these operations is also included. Support facilities include, but are not limited to, parking, storage or shipping facilities.

(G) Recreation. Land used for public or private leisure-time use, including developed recreation facilities such as parks, camps, and amusement areas, as well as areas for less intensive uses such as hiking, canoeing, and other undeveloped recreational uses.

(H) Fish and wildlife habitat. Land dedicated wholly or partially to the production, protection or management of species of fish or wildlife.

(I) Developed water resources. Includes land used for storing water for beneficial uses, such as stockponds, irrigation, fire protection, flood control, and water supply.

(J) Undeveloped land or no current use or land management. Land that is undeveloped or, if previously developed, land that has been allowed to return naturally to an undeveloped state or has been allowed to return to forest through natural succession.

(97) Materially damage the quantity or quality of water–With respect to alluvial valley floors, changes in the quality or quantity of the water supply to any portion of an alluvial valley floor where such changes are caused by surface coal mining and reclamation operations and result in changes that significantly and adversely affect the composition, diversity, or productivity of vegetation dependent on subirrigation, or which result in changes that would limit the adequacy of the water for flood irrigation of the irrigable land acreage existing prior to mining.

(98) Mining area–As used in §§12.25-12.33 of this title, an individual excavation site or pit from which coal, other minerals, and overburden are removed.

(99) Moist bulk density–The weight of soil (oven dry) per unit volume. Volume is measured when the soil is at field moisture capacity (1/3 bar moisture tension). Weight is determined after drying the soil at 105 degrees C.

(100) Monitoring–The collection of environmental data by either continuous or periodic sampling methods.

(101) Mulch–Vegetation residues or other suitable materials that aid in soil stabilization and soil moisture conservation, thus providing micro-climatic conditions suitable for germination and growth.

(102) Natural hazard lands–Geographic areas in which natural conditions exist which pose or, as a result of surface coal mining operations, may pose a threat to the health, safety or welfare of people, property or the environment, including areas subject to landslides, cave-ins, large or encroaching sand dunes, severe wind

or soil erosion, frequent flooding, avalanches and areas of unstable geology.

(103) Noxious plants–Species that have been included on official Texas list of noxious plants.

(104) Occupied dwelling–Any building that is currently being used on a regular or temporary basis for human habitation.

(105) Office–The Office of Surface Mining Reclamation and Enforcement, within the U.S. Department of the Interior, established under Title II of the Federal Act.

(106) Operator–Any person engaged in coal mining who removes or intends to remove more than 250 tons of coal from the earth or from coal refuse piles by mining within 12 consecutive calendar months in any one location.

(107) Other minerals–As used in §§12.25-12.33 of this title, any commercially valuable substance mined for its mineral value, excluding coal, topsoil, waste, and fill material.

(108) Other treatment facility–Any chemical treatments, such as flocculation or neutralization, or mechanical structures, such as clarifiers or precipitators, that have a point source discharge and are utilized:

(A) to prevent additional contributions of dissolved or suspended solids to streamflow or runoff outside the permit area; or

(B) to comply with all applicable state and federal water-quality laws and regulations.

(109) Outslope–The face of the spoil or embankment sloping downward from the highest elevation to the toe.

(110) Overburden–Material of any nature, consolidated or unconsolidated, that overlies a coal deposit, excluding topsoil.

(111) Owned or controlled and owns or controls–Any one or a combination of the following relationships:

(A) being a permittee of a surface coal mining operation;

(B) based on instrument of ownership or voting securities, owning of record in excess of 50% of an entity;

(C) having any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations; or

(D) the following relationships are presumed to constitute ownership or control unless a person can demonstrate that the person subject to the presumption does not, in fact, have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted:

(i) being an officer or director of an entity;

(ii) being the operator of a surface coal mining operation;

(iii) having the ability to commit the financial or real property assets or working resources of an entity;

(iv) being a general partner in a partnership;

(v) based on the instruments of ownership or the voting securities of a corporate entity, owning of record 10% through 50% of the entity; or

(vi) owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation.

(112) Owner of record or ownership interest of record–The owner and address as shown in the tax records of the Texas Assessor-Collector of taxes for the county where the property is located.

(113) Perennial stream–A stream or part of a stream that flows continuously during all of the calendar year as a result of ground-water discharge or surface runoff. The term does not include intermittent stream or ephemeral stream.

(114) Performance bond–A surety bond, collateral bond or self-bond or a combination thereof, by which a permittee assures faithful performance of all the requirements of the Act, this chapter, and the requirements of the permit and reclamation plan.

(115) Performing any function or duty under this Act–Those decisions or actions, which if performed or not performed by an employee, affect the programs under the Act.

(116) Permanent diversion–A diversion remaining after surface coal mining and reclamation operations are completed which has been approved for retention by the Commission and other appropriate state and federal agencies.

(117) Permanent impoundment–An impoundment which is approved by the Commission and, if required, by other state and federal agencies for retention as part of the postmining land use.

(118) Permit–A permit to conduct surface coal mining and reclamation operations issued by the Commission.

(119) Permit area–The area of land and water indicated on the map submitted by the operator with his application, as approved by the Commission, which area shall be covered by the operator's bond as required by §§134.121-134.127 of the Act and shall be readily identifiable by appropriate markers on the site. This area shall include, at a minimum, all areas which are or will be affected by the surface coal mining and reclamation operations during the term of the permit.

(120) Permittee–A person holding or required by the Act or this chapter to hold a permit to conduct surface or underground coal mining and reclamation operations issued by the Commission.

(121) Person–An individual, partnership, society, joint stock company, firm, company, corporation, business organization, governmental agency, or any organization or association of citizens.

(122) Person having an interest which is or may be adversely affected or person with a valid legal interest–Shall include any person:

(A) who uses any resources of economic, recreational, esthetic, or environmental value that may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Commission; or

(B) whose property is or may be adversely affected by coal exploration or surface coal mining and reclamation operations or any related action of the Commission.

(123) Precipitation event–A quantity of water resulting from drizzle, rain, snow, sleet, or hail in a limited period of time. It may be expressed in terms of recurrence interval. As used in these

regulations, precipitation event also includes that quantity of water emanating from snow cover as snowmelt in a limited period of time.

(124) Previously mined area–Land affected by surface coal mining operations prior to August 3, 1977, that has not been reclaimed to the standards of this Chapter.

(125) Prime farmland–Those lands which are defined by the Secretary of Agriculture in 7 CFR 657 and which have been historically used for cropland.

(126) Principal shareholder–Any person who is the record or beneficial owner of 10% or more of any class of voting stock.

(127) Probable cumulative impacts–The expected total qualitative, and quantitative, direct and indirect effects of mining and reclamation activities on the hydrologic regime.

(128) Probable hydrologic consequences–The projected result of proposed surface coal mining and reclamation operations which may reasonably be expected to change the quantity or quality of the surface- or ground-water flow, timing and pattern; the stream-channel conditions; and the aquatic habitat on the permit area and other affected areas.

(129) Professional specialist–A person whose training, experience, and professional certification or licensing are acceptable to the Commission for the limited purpose of performing certain specified duties under this chapter.

(130) Prohibited financial interest–Any direct or indirect financial interest in any coal mining operation.

(131) Property to be mined–Both the surface estates and mineral estates within the permit area and the area covered by underground workings.

(132) Public building–Any structure that is owned or leased, and principally used by a governmental agency for public business or meetings.

(133) Publicly-owned park–A public park that is owned by a federal, state or local governmental entity.

(134) Public office–A facility under the direction and control of a governmental entity which is open to public access on a regular basis during reasonable business hours.

(135) Public park–An area or portion of an area dedicated or designated by any federal, state, or local agency primarily for public recreational use, whether or not such use is limited to certain times or days, including any land leased, reserved, or held open to the public because of that use.

(136) Public road–Any thoroughfare open to the public for passage of vehicles.

(137) Qualified jurisdiction–A state or federal mining regulatory authority that has a blaster certification program approved by the U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement, in accordance with the Federal Act.

(138) Qualified laboratory–A designated public agency, private firm, institution, or analytical laboratory that can provide the required determination of probable hydrologic consequences or statement of results of test borings or core samplings or other services as specified at §§12.236 and 12.240 of this title (relating to Program Services, and Data Requirements), and that meets the standards of §12.241 of this title (relating to Qualified Laboratories).

(139) Rangeland–Land on which the natural potential (climax) plant cover is principally native grasses, forbs, and shrubs valuable for forage. This land includes natural grass lands and savannahs, such as prairies, and juniper savannahs, such as brushlands. Except for brush control, management is primarily achieved by regulating the intensity of grazing and season of use.

(140) Recharge capacity–The ability of the soils and underlying materials to allow precipitation and runoff to infiltrate and reach the zone of saturation.

(141) Reciprocity–The conditional recognition by the Commission of a blaster certificate issued by another qualified jurisdiction.

(142) Reclamation–Those actions taken to restore mined land as required by this chapter to a postmining land use approved by the Commission.

(143) Recurrence interval–The interval of time in which a precipitation event is expected to occur once, on the average. For example, the 10-year, 24-hour precipitation event would be that 24-hour precipitation event expected to occur on the average once in 10 years.

(144) Reference area–A land unit maintained under appropriate management for the purpose of measuring vegetation ground cover, productivity and plant species diversity that are produced naturally or by crop production methods approved by the Commission. Reference areas must be representative of geology, soil, slope, and vegetation in the permit area.

(145) Regional Director–A Regional Director of the Office or a Regional Director's representative.

(146) Registered professional engineer–A person who is duly licensed by the Texas State Board of Registration for Professional Engineers to engage in the practice of engineering in this state.

(147) Renewable resource lands–Aquifers and areas for the recharge of aquifers and other underground waters, areas for agricultural or silvicultural production of food and fiber, and grazing lands. With respect to Subchapter F of this chapter (relating to Lands Unsuitable for Mining), geographic areas which contribute significantly to the long-range productivity of water supply or of food or fiber products, such lands to include aquifers and aquifer recharge areas.

(148) Replacement of water supply–With respect to protected water supplies contaminated, diminished, or interrupted by coal mining operations, provision of water supply on both a temporary and permanent basis equivalent to premining quantity and quality. Replacement includes provision of an equivalent water-delivery system and payment of operation and maintenance costs in excess of customary and reasonable delivery costs for premining water supplies.

(A) Upon agreement by the permittee and the water-supply owner, the obligation to pay such operation and maintenance costs may be satisfied by a one-time payment in an amount which covers the present worth of the increased annual operation and maintenance costs for a period agreed to by the permittee and the water-supply owner.

(B) If the affected water supply was not needed for the land use in existence at the time of loss, contamination, or diminution, and if the supply is not needed to achieve the postmining land use, replacement requirements may be satisfied by demonstrating that a suitable alternative water source is available and could feasibly be developed. If the latter approach is selected, written concurrence must be obtained from the water-supply owner.

(149) Road–A surface right-of-way for purposes of travel by land vehicles used in surface coal mining and reclamation operations or coal exploration. A road consists of the entire area within the right-of-way, including the roadbed, shoulders, parking and side areas, approaches, structures, ditches, and surface. The term includes access and haulroads constructed, used, reconstructed, improved, or maintained for use in surface coal mining and reclamation operations or coal exploration, including use by coal-hauling vehicles to and from transfer, processing, or storage areas. The term does not include ramps and routes of travel within the immediate mining area or within spoil or coal mine waste disposal areas.

(150) Safety factor–The ratio of the available shear strength to the developed shear stress, or the ratio of the sum of the resisting forces to the sum of the loading or driving forces, as determined by accepted engineering practices.

(151) Secretary–The Secretary of the U.S. Department of the Interior, or the Secretary's representative.

(152) Sedimentation pond–A primary sediment control structure designed, constructed and maintained in accordance with §12.344 or §12.514 of this title (relating to Hydrologic Balance: Siltation Structures) and including but not limited to a barrier, dam, or excavated depression which slows down water runoff to allow sediment to settle out. A sedimentation pond shall not include secondary sedimentation control structures, such as straw dikes, riprap, check dams, mulches, dugouts and other measures that reduce overland flow velocity, reduce runoff volume or trap sediment to the extent that such secondary sedimentation structures drain to a sedimentation pond.

(153) Significant forest cover–An existing plant community consisting predominantly of trees and other woody vegetation.

(154) Significant, imminent environmental harm to land, air or water resources–Determined in the following context:

(A) An environmental harm is an adverse impact on land, air, or water resources, which resources include, but are not limited to, plant and animal life.

(B) An environmental harm is imminent, if a condition, practice, or violation exists which:

(i) is causing such harm; or

(ii) may reasonably be expected to cause such harm at any time before the end of the reasonable abatement time that would be set under §134.162 of the Act.

(C) An environmental harm is significant if that harm is appreciable and not immediately reparable.

(155) Significant recreational, timber, economic, or other values incompatible with surface coal mining operations–Those significant values which could be damaged by, and are not capable of existing together with, surface coal mining operations because of the undesirable effects mining would have on those values, either on the area included in the permit application or on other affected areas. Those values to be evaluated for their significance include:

(A) recreation, including hiking, boating, camping, skiing or other related outdoor activities;

(B) timber management and silviculture;

(C) agriculture, aquaculture or production of other natural, processed or manufactured products which enter commerce; and

(D) scenic, historic, archaeologic, esthetic, fish, wildlife, plants or cultural interests.

(156) Siltation structure–A sedimentation pond, a series of sedimentation ponds, or other treatment facility.

(157) Slope–Average inclination of a surface, measured from the horizontal, generally expressed as the ratio of a unit of horizontal distance to a given number of units of vertical distance (e.g., 5h:1v). It may also be expressed as a percent or in degrees.

(158) Soil horizons–Contrasting layers of soil parallel or nearly parallel to the land surface. Soil horizons are differentiated on the basis of field characteristics and laboratory data. The four master soil horizons are:

(A) A horizon. The uppermost mineral layer, often called the surface soil. It is the part of the soil in which organic matter is most abundant, and leaching of soluble or suspended particles is typically the greatest;

(B) E horizon. The layer commonly near the surface below an A horizon and above a B horizon. An E horizon is most commonly differentiated from an overlying A horizon by lighter color and generally has measurably less organic matter than the A horizon. An E horizon is most commonly differentiated from an underlying B horizon in the same sequum by color of higher value or lower chroma, by coarser texture, or by a combination of these properties;

(C) B horizon. The layer that typically is immediately beneath the E horizon and often called the subsoil. This middle layer commonly contains more clay, iron, or aluminum than the A, E, or C horizons; and

(D) C horizon. The deepest layer of soil profile. It consists of loose material or weathered rock that is relatively unaffected by biologic activity.

(159) Soil survey–A field and other investigation, resulting in a map showing the geographic distribution of different kinds of soils and an accompanying report that describes, classifies, and interprets such soils for use. Soil surveys must meet the standards of the National Cooperative Soil Survey.

(160) Spoil–Overburden that has been removed during surface coal mining operations.

(161) Stabilize–To control movement of soil, spoil piles, or areas of disturbed earth by modifying the geometry of the mass, or by otherwise modifying physical or chemical properties, such as by providing a protective surface coating.

(162) Steep slope–Any slope of more than 20 degrees or such lesser slope as may be designated by the Commission after consideration of soil, climate, and other characteristics of a region or state.

(163) Subirrigation–With respect to alluvial valley floors, the supplying of water to plants from underneath or from a semi-saturated or saturated subsurface zone where water is available for use by vegetation. Subirrigation may be identified by:

(A) diurnal fluctuation of the water table, due to the differences in nighttime and daytime evapotranspiration rates;

(B) increasing soil moisture from a portion of the root zone down to the saturated zone, due to capillary action;

(C) mottling of the soils in the root zones;

(D) existence of an important part of the root zone within the capillary fringe or water table of an alluvial aquifer; or

(E) an increase in streamflow or a rise in ground-water levels, shortly after the first killing frost on the valley floor.

(164) Substantial legal and financial commitments in a surface coal mining operation–Significant investments that have been made on the basis of a long-term coal contract in power plants, railroads, coal-handling, preparation, extraction or storage facilities and other capital-intensive activities. An example would be an existing mine, not actually producing coal, but in a substantial stage of development prior to production. Costs of acquiring the coal in place or the right to mine it without an existing mine, as described in the above example, alone are not sufficient to constitute substantial legal and financial commitments.

(165) Substantially disturb–For purposes of coal exploration, to significantly impact land, air or water resources by such activities as blasting; mechanical excavation; drilling or altering coal or water exploratory holes or wells; removal of vegetation, topsoil, or overburden; construction of roads or other access routes; placement of structures, excavated earth, or waste material on the natural surface of land; or by other such activities; or to remove more than 250 tons of coal.

(166) Successor in interest–Any person who succeeds to rights granted under a permit, by transfer, assignment, or sale of those rights.

(167) Surface coal mining and reclamation operations–Surface coal mining operations and all activities necessary or incidental to the reclamation of such operations. This term includes the term surface coal mining operations.

(168) Surface coal mining operations–Includes:

(A) activities conducted on the surface of lands in connection with a surface coal mine or, subject to the requirements of §134.015 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining; the use of explosives and blasting; in situ distillation or retorting; leaching or other chemical or physical processing; the cleaning, concentrating, or other processing or preparation of coal; and the loading of coal for interstate commerce at or near the mine-site. Provided, however, that such activities do not include the extraction of coal incidental to the extraction of other minerals, where coal does not exceed 16 2/3% of the tonnage of minerals removed annually from all sites operated by a person on contiguous tracts of land for purposes of commercial use or sale, or coal exploration subject to §134.014 and §134.031(d) of the Act; and provided further, that excavation for the purpose of obtaining coal includes extraction of coal from coal refuse piles; and

(B) areas upon which the activities described in subparagraph (A) of this definition occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities and for haulage and excavation, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are site structures, facilities, or other property or material on the surface, resulting from or incident to those activities.

(169) Surface coal mining operations which exist on the date of enactment–All surface coal mining operations which were being conducted on August 3, 1977.

(170) Surface mining activities–Those surface coal mining and reclamation operations incident to the extraction of coal from the earth by removing the materials over a coal seam, before recovering the coal, by auger coal mining, or by recovery of coal from a deposit that is not in its original geologic location.

(171) Surface operations and impacts incident to an underground coal mine–All activities involved in or related to underground coal mining which are either conducted on the surface of the land, produce changes in the land surface or disturb the surface, air or water resources of the area, including all activities listed in §134.004(19) of the Act and the definition of surface coal mining operations contained in this section.

(172) Suspended solids or nonfilterable residue–Expressed as milligrams per liter, organic or inorganic materials carried or held in suspension in water which are retained by a standard glass fiber filter in the procedure outlined by the U.S. Environmental Protection Agency regulations for wastewater and analyses (40 CFR 136).

(173) Temporary diversion–A diversion of a stream or overland flow which is used during coal exploration or surface coal mining and reclamation operations and not approved by the Commission to remain after reclamation as part of the approved postmining land use.

(174) Temporary impoundment–An impoundment used during surface coal mining and reclamation operations, but not approved by the Commission to remain as part of the approved postmining land use.

(175) Thick overburden- More than sufficient spoil and other waste materials available from the entire permit area to restore the disturbed area to its approximate original contour. More than sufficient spoil and other waste materials occur where the overburden thickness times the swell factor exceeds the combined thickness of the overburden and coal bed prior to removing the coal, so that after backfilling and grading the surface configuration of the reclaimed area would not:

(A) closely resemble the surface configuration of the land prior to mining; or

(B) blend into and complement the drainage pattern of the surrounding terrain.

(176) Thin overburden- Insufficient spoil and other waste materials available from the entire permit area to restore the disturbed area to its approximate original contour. Insufficient spoil and other waste materials occur where the overburden thickness times the swell factor, plus the thickness of other available waste materials, is less than the combined thickness of the overburden and coal bed prior to removing the coal, so that after backfilling and grading the surface configuration of the reclaimed area would not:

(A) closely resemble the surface configuration of the land prior to mining; or

(B) blend into and complement the drainage pattern of the surrounding terrain.

(177) Ton–2,000 pounds avoirdupois (0.90718 metric ton).

(178) Topsoil–The A and E soil-horizon layers of the four master soil horizons.

(179) Toxic-forming materials–Earth materials or wastes which, if acted upon by air, water, weathering, or microbiological processes, are likely to produce chemical or physical conditions in soils or water that are detrimental to biota or uses of water.

(180) Toxic mine drainage–Water that is discharged from active or abandoned mines or other areas affected by coal exploration or surface coal mining and reclamation operations, which contains a substance that through chemical action or physical effects is likely to kill, injure, or impair biota commonly present in the area that might be exposed to it.

(181) Transfer, assignment, or sale of rights–A change in ownership or other effective control over the right to conduct surface coal mining operations under a permit issued by the Commission.

(182) Unconsolidated streamlaid deposits holding streams–With respect to alluvial valley floors, all flood plains and terraces located in the lower portions of topographic valleys which contain perennial or other streams with channels that are greater than 3 feet in bankfull width and greater than 0.5 feet in bankfull depth.

(183) Underground development waste–Waste rock mixtures of coal, shale, claystone, siltstone, sandstone, limestone, or related materials that are excavated, moved, and disposed of during development and preparation of areas incident to underground mining activities.

(184) Underground mining activities–Includes:

(A) surface operations incident to underground extraction of coal or in situ processing, such as construction, use, maintenance, and reclamation of roads, above-ground repair areas, storage areas, processing areas, shipping areas, areas upon which are sited support facilities including hoist and ventilating ducts, areas utilized for the disposal and storage of waste, and areas on which materials incident to underground mining operations are placed; and

(B) underground operations such as underground construction, operation, and reclamation of shafts, adits, underground support facilities, in situ processing, and underground mining, hauling, storage, and blasting.

(185) Undeveloped rangeland–For purposes of alluvial valley floors, lands where the use is not specifically controlled and managed.

(186) Unwarranted failure to comply–The failure of the permittee to prevent the occurrence of any violation of the permit or any requirement of the Act, due to the indifference, lack of diligence, or lack of reasonable care, or the failure to abate any violation of such permit or the Act, due to indifference, lack of diligence, or lack of reasonable care.

(187) Upland areas–With respect to alluvial valley floors, those geomorphic features located outside the floodplain and terrace complex, such as isolated higher terraces, alluvial fans, pediment surfaces, landslide deposits, and surfaces covered with residuum, mud flows or debris flows, as well as highland areas underlain by bedrock and covered by residual weathered material or debris deposited by sheetwash, rillwash, or windblown material.

(188) Valid existing rights–Includes:

(A) except for haul roads:

(i) those property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorizes the applicant to produce coal by a surface coal mining operation; and

(ii) the person proposing to conduct surface coal mining operations on such lands either:

(I) had been validly issued, on or before August 3, 1977, all state and federal permits necessary to conduct such operations on those lands; or

(II) can demonstrate to the Commission that the coal is both needed for, and immediately adjacent to, an ongoing surface coal mining operation for which all permits were obtained prior to August 3, 1977;

(B) for haul roads, valid existing rights includes:

(i) A recorded right-of-way, recorded easement, or a permit for a coal haul road recorded as of August 3, 1977; or

(ii) Any other road in existence as of August 3, 1977.

(C) interpretation of the terms of the document relied upon to establish valid existing rights shall be based upon Texas case law concerning the interpretation of documents conveying mining rights. When no Texas case law exists, interpretation shall be based upon the usage and custom at the time and place where the document came into existence and upon a showing by the applicant that the parties to the document actually contemplated a right to conduct the same underground or surface mining activities for which the applicant claims a valid existing right.

(D) valid existing rights does not include mere expectation of a right to conduct surface coal mining operations or the right to conduct underground coal mining. (Examples of rights which alone do not constitute valid existing rights include, but are not limited to, coal exploration permits or licenses, applications or bids for leases, or where a person has only applied for a state or federal permit.)

(189) Valley fill–A fill structure consisting of any material other than coal waste and organic material that is placed in a valley where side slopes of the existing valley measured at the steepest point are greater than 20 degrees or the average slope of the profile of the valley from the toe of the fill to the top of the fill is greater than 10 degrees.

(190) Violation, failure, or refusal–With respect to §§12.696-12.699 of this title, a violation of or a failure or refusal to comply with any order of the Commission including, but not limited to, a condition of a permit, notice of violation, failure-to-abate cessation order, imminent harm cessation order, order to show cause why a permit should not be suspended or revoked, and order in connection with a civil action for relief, except an order incorporated in a decision issued under §134.175 of the Act.

(191) Violation notice–Any written notification from a governmental entity of a violation of law, whether by letter, memorandum, legal or administrative pleading, or other written communication.

(192) Water table–The upper surface of a zone of saturation, where the body of ground water is not confined by an overlying impermeable zone.

(193) Willfully–With respect to §§12.696-12.699 of this title, that an individual acted:

(A) either intentionally, voluntarily, or consciously; and

(B) with intentional disregard or plain indifference to legal requirements in authorizing, ordering, or carrying out a corporate permittee's action or omission that constituted a violation, failure, or refusal.

(194) Willful violation–An act or omission which violates the Act, state, or federal laws or regulations, or any permit condition required by the Act or this chapter, committed by a person who intends the result which actually occurs.

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. Surface Coal Mining and Reclamation Operations, Permits, and Coal Exploration Procedures Systems

9. Underground Mining Permit Applications-Minimum Requirements for Reclamation and Operation Plan

16 TAC §12.188

These amendments are adopted under §134.013 of the Texas Natural Resources Code, which provides the commission the authority to promulgate rules pertaining to surface coal mining operations.

The Texas Natural Resources Code, §134.013, is affected by the adopted amendments.

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10. Requirements for Permits for Special Categories of Mining

16 TAC §12.201

These amendments are adopted under §134.013 of the Texas Natural Resources Code, which provides the commission the authority to promulgate rules pertaining to surface coal mining operations.

The Texas Natural Resources Code, §134.013, is affected by the adopted amendments.

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11. Review, Public Participation, and Approval of Permit Application and Permit Terms and Conditions

16 TAC §12.207, §12.218

These amendments are adopted under §134.013 of the Texas Natural Resources Code, which provides the commission the authority to promulgate rules pertaining to surface coal mining operations.

The Texas Natural Resources Code, §134.013, is affected by the adopted amendments.

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13. Permit Reviews, Revisions, and Renewals, and Transfers, Sale, and Assignment of Rights Granted Under Permits

16 TAC §§12.226, 12.228, 12.233

These amendments are adopted under §134.013 of the Texas Natural Resources Code, which provides the commission the authority to promulgate rules pertaining to surface coal mining operations.

The Texas Natural Resources Code, §134.013, is affected by the adopted amendments.

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14. Small Operator Assistance

16 TAC §12.237, §12.243

These amendments are adopted under §134.013 of the Texas Natural Resources Code, which provides the commission the authority to promulgate rules pertaining to surface coal mining operations.

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Subchapter J. Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations

3. Form, Conditions, and Terms of Performance Bond and Liability Insurance

16 TAC §12.309

These amendments are adopted under §134.013 of the Texas Natural Resources Code, which provides the commission the authority to promulgate rules pertaining to surface coal mining operations.

The Texas Natural Resources Code, §134.013, is affected by the adopted amendments.

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4. Procedures, Criteria and Schedule for Release of Performance Board

16 TAC §§12.312, 12.313

These amendments are adopted under §134.013 of the Texas Natural Resources Code, which provides the commission the authority to promulgate rules pertaining to surface coal mining operations.

The Texas Natural Resources Code, §134.013, is affected by the adopted amendments.

§12.312. Procedure for Seeking Release of Performance Bond.

(a) Bond release application.

(1) The permittee may file a request with the Commission for the release of all or part of a performance bond or deposit. Applications may be filed only at times or during seasons authorized by the Commission in order to properly evaluate the completed reclamation operations. The times or seasons appropriate for the evaluation of certain types of reclamation shall be established in the regulatory program or identified in the mining and reclamation plan required in Subchapter G of this chapter (relating to Surface Coal Mining and Reclamation Operations Permits and Coal Exploration Procedures Systems) and approved by the Commission.

(2) Within 30 days after any application for bond or deposit release has been filed with the Commission, the operator shall submit a copy of an advertisement placed at least once a week for four successive weeks in a newspaper of general circulation in the locality of the surface coal mining operation. Such advertisement shall be considered part of any bond release application and shall contain the permittee's name, a notification of the precise location of the land affected, the number of acres, the permit number and date approved, the amount of the bond filed and the portion sought to be released, and the type and appropriate dates of reclamation work performed, and a description of the results achieved as they relate to the operator's approved reclamation plan, and the name and address of the Commission office to which written comments, objections, or requests for public hearings and informal conferences on the specific bond release may be submitted pursuant to §12.313(d) and (e) of this title (relating to Criteria and Schedule for Release of Performance Bond). In addition, as part of any bond release application, the permittee shall submit copies of letters which he or she has sent to adjoining property owners, local governmental bodies, planning agencies, sewage and water treatment authorities, and water companies in the locality in which the surface coal mining and reclamation activities took place, notifying them of the intention to seek release from the bond.

(3) The permittee shall include in the application for bond release a notarized statement which certifies that all applicable reclamation activities have been accomplished in accordance with the requirements of the Act, the regulatory program, and the approved reclamation plan. Such certification shall be submitted for each application or phase of bond release.

(b) Inspection by Commission.

(1) Upon receipt of the bond release application, the Commission shall, within 30 days, or as soon thereafter as weather conditions permit, conduct an inspection and evaluation of the reclamation work involved. Such evaluation shall consider, among other things, the degree of difficulty to complete any remaining reclamation, whether pollution of surface and subsurface water is occurring, the probability of future occurrence of such pollution, and the estimated cost of abating such pollution. The surface owner, agency, or lessee shall be given notice of such inspection and may participate with the Commission in making the bond release inspection. The Commission may arrange with the permittee to allow access to the permit area, upon request by any person with an interest in bond release, for the purpose of gathering information relevant to the proceeding.

(2) Within 60 days from the filing of the bond release application, if no public hearing is held pursuant to §12.313(d) of this title, or, within 30 days after a public hearing has been held pursuant to §12.313(d), the Commission shall notify in writing the permittee, the surety, and other persons with an interest in bond collateral who have requested notification under §12.309(l) of this title (relating to Terms and Conditions of the Bond), and the persons who either filed objections in writing or objectors who were a party to the hearing proceedings, if any, of its decision to release or not to release all or part of the performance bond.

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For further information, please call: (512) 463–7008

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Subchapter K. Permanent Program Performance Standards

2. Permanent Program Performance Standards-Surface Mining Activities

16 TAC §§12.338, 12.371, 12.375, 12.387, 12.388, 12.389, 12.399

These amendments are adopted under §134.013 of the Texas Natural Resources Code, which provides the commission the authority to promulgate rules pertaining to surface coal mining operations.

The Texas Natural Resources Code, §134.013, is affected by the adopted amendments.

§12.338. Topsoil: Nutrients and Soil Amendments.

Nutrients and soil amendments in the amounts determined by soil tests shall be applied to the redistributed surface soil layer, so that it supports the approved postmining land use and meets the revegetation requirements of §§12.390-12.393 and 12.395 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Soil Stabilizing Practices, and to Revegetation: Standards for Success). All soil tests shall be performed by a qualified laboratory using standard methods approved by the Commission.

§12.371. Coal Processing Waste Banks: Construction Requirements.

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

(d) Following grading of the coal processing waste bank, the site shall be covered with a minimum of 4 feet of the best available non-toxic and non-combustible material, in accordance with §12.335(e) of this title (relating to Topsoil: Removal), and in a manner that does not impede flow from subdrainage systems. The coal processing waste bank shall be revegetated in accordance with §§12.390-12.393 and 12.395 of this title (relating to Revegetation: General Requirement, to; Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Soil Stabilizing Practices, and to Revegetation: Standards for Success). The Commission may allow less than 4 feet of cover material based on physical and chemical analyses which show that the requirements of §§12.390-12.393 and 12.395 of this title will be met.

§12.387. Backfilling and Grading: Thin Overburden.

Where thin overburden occurs within the permit area, the permittee, at a minimum, shall:

(1) use all spoil and other waste materials available from the entire permit area to attain the lowest practicable grade, but not more than the angle of repose; and

(2) meet the requirements of §12.385 and §12.386 of this title (relating to Backfilling and Grading: General Grading Requirements, and to Backfilling and Grading: Covering Coal and Acid- and Toxic-Forming Materials).

§12.388. Backfilling and Grading: Thick Overburden.

Where thick overburden occurs within the permit area, the permittee at a minimum shall:

(1) restore the approximate original contour and then use the remaining spoil and other waste materials to attain the lowest practicable grade, but not more than the angle of repose;

(2) meet the requirements of §12.385 and §12.386 of this title (relating to Backfilling and Grading: General Requirements, and to Backfilling and Grading: Covering Coal and Acid- and Toxic-Forming Materials); and

(3) dispose of any excess spoil in accordance with §§12.363-12.366 of this title (relating to Disposal of Excess Spoil: General Grading Requirements, to Disposal of Excess Spoil: Valley Fills, to Disposal of Excess Spoil: Head-of-Hollow Fills, and to Disposal of Excess Spoil: Durable Rock Fills).

§12.389. Regrading or Stabilizing Rills and Gullies.

When rills and gullies deeper than 9 inches form in areas that have been regraded and topsoiled, the rills and gullies shall be filled, graded, or otherwise stabilized and the area reseeded or replanted according to §§12.390-12.393 and 12.395 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Soil Stabilizing Practices, and to Revegetation: Standards for Success). The Commission shall specify that rills or gullies of lesser size be stabilized and the area reseeded or replanted if the rills or gullies are disruptive to the approved postmining land use or may result in additional erosion and sedimentation.

§12.399. Postmining Land Use.

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

(c) Alternative land uses. Prior to the release of lands from the permit area in accordance with §12.313 of this title (relating to Criteria and Schedule for Release of Performance Bond), the permit area shall be restored, in a timely manner, either to conditions capable of supporting the uses they were capable of supporting before any mining, or to conditions capable of supporting approved alternative land uses. Alternative land uses may be approved by the Commission after consultation with the landowner or the land management agency having jurisdiction over the lands, if the following criteria are met:

(1)-(8) (No change.)

(9) proposals to change premining land uses of range, fish and wildlife habitat, forestland, hayland, or pasture to a postmining cropland use, where the cropland would require continuous maintenance such as seeding, plowing, cultivation, fertilization, or other similar practices to be practicable or to comply with applicable federal, state, and local laws, are reviewed by the Commission to ensure that:

(A) there is a firm written commitment by the person who conducts surface mining activities or by the landowner or land manager to provide sufficient crop management after release of applicable performance bonds under Subchapter J of this Chapter (relating to Bond and Insurance Requirements for Surface Coal Mining and Reclamation Operations) and §§12.390-12.393 and 12.395 of this title (relating to Revegetation: General Requirements, to Revegetation: Use of Introduced Species, to Revegetation: Timing, to Revegetation: Mulching and Other Soil Stabilizing Practices, and to Revegetation: Standards for Success), to assure that the proposed postmining cropland use remains practical and reasonable;

(B)-(C) (No change.)

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 December 9, 1998.

TRD-9818239
Mary Ross McDonald
Deputy General Counsel, Office of General Counsel
Railroad Commission of Texas
Effective date: December 29, 1998
Proposal publication date: September 11, 1998
For further information, please call: (512) 463–7008

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3. Permanent Program Performance Standards-Underground Mining Activities

16 TAC §12.508, §12.568

These amendments are adopted under §134.013 of the Texas Natural Resources Code, which provides the commission the authority to promulgate rules pertaining to surface coal mining operations.

The Texas Natural Resources Code, §134.013, is affected by the adopted amendments.

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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Deputy General Counsel, Office of General Counsel
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Part II. Public Utility Commission of Texas

Chapter 23. Substantive Rules

Subchapter H. Telephone

16 TAC §23.107

The Public Utility Commission of Texas adopts the repeal of §23.107, relating to Educational Percentage Discount Rates (E-Rates) with no changes to the proposed text as published in the September 4, 1998 *Texas Register* (23 TexReg 8958). The repeal is necessary to avoid duplicative rule sections. The commission has adopted §26.216 of this title (relating to Educational Percentage Discount Rates (E-Rates) to replace §23.107. This repeal is adopted under Project Number 17709.

The commission received no comments on the proposed repeal.

This repeal is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

Cross Index to Statutes: Public Utility Regulatory Act §14.002.

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-9818272
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
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Proposal publication date: September 4, 1998
For further information, please call: (512) 936–7308

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Chapter 26. Substantive Rules Applicable to Telecommunications Service Providers

Subchapter J. Costs, Rates and Tariffs

16 TAC §26.216

The Public Utility Commission of Texas (commission) adopts new §26.216, relating to Educational Percentage Discount Rates (E-Rates) with no changes to the proposed text as

published in the September 4, 1998 *Texas Register* (23 TexReg 8962). The proposed new section is responsive to the Federal Communication Commission's (FCC) Report and Order *In the Matter of Federal-State Joint Board on Universal Service* in CC Docket Number 96-45, FCC 97-157 (May 7, 1997) which implemented key portions of the federal Telecommunications Act of 1996 (FTA), §254, and adopted a federal universal service support mechanism to fund discounts on interstate and intrastate telecommunications services, Internet access, and internal connections for schools and libraries. This section was adopted under Project Number 17709.

The Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the commission is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to (1) satisfy the requirements of Section 167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. Chapter 26 has been established for all commission substantive rules applicable to telecommunications service providers.

The commission requested specific comments on the Section 167 requirement as to whether the reason for adopting or readopting the rule continues to exist. The commission received no comments on the proposed rule. The commission finds that the reason for adopting the rule continues to exist.

This section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

Cross Index to Statutes: Public Utility Regulatory Act §14.002.

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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Part IV. Texas Department of Licensing and Regulation

Chapter 62. Career Counseling Services

16 TAC §62.80

The Texas Department of Licensing and Regulation adopts amendments to §62.80 concerning the career counseling services fees without changes to the proposed text as published in the October 30, 1998, issue of the *Texas Register* (23 TexReg 11032) and will not be republished.

The amended section raises the fees for an original certificate of authority to cover the cost of administration and enforcement of the career counseling services program. The department is required to structure fees for each statute to pay for its own regulation and the fees currently in place are below the amount required by the department to cover costs.

The section will function by covering program costs.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Revised Civil Statutes Annotated, Article 5221a-8 (Vernon 1997) which authorizes the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of the Article.

The Articles affected by the amendment are Texas Revised Civil Statutes, Article 5221a-8 (Vernon 1997) and Texas Revised Civil Statutes Annotated, Article 9100 (Vernon 1991).

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-9818313
Rachelle A. Martin
Executive Director
Texas Department of Licensing and Regulation
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Proposal publication date: October 30, 1998
For further information, please call: (512) 463–7348

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Chapter 63. Personnel Employment Services

16 TAC §§63.80, 63.81

The Texas Department of Licensing and Regulation adopts amendments to §63.80 and §63.81 concerning the personnel employment services fee without changes to the proposed text as published in the October 30, 1998, issue of the *Texas Register* (23 TexReg 11033) and will not be republished.

The amended sections decrease the fees for an initial certificate of authority and the annual renewal for a certificate of authority. The department is required to structure fees for each statute to pay for its own regulation and the fees currently in place are above the amount required by the department to cover costs. The decrease would not adversely affect the administration or enforcement of the personnel employment services program.

The section will function by covering program costs.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Revised Civil Statutes Annotated, Article 5221a-7 (Vernon 1989) which authorizes the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of the Article.

The Articles affected by the amendments are Texas Revised Civil Statutes, Article 5221a-7 (Vernon 1989) and Texas Revised Civil Statutes Annotated, Article 9100 (Vernon 1991).

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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Rachelle A. Martin
Executive Director
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Chapter 64. Employers of Certain Temporary Common Workers

16 TAC §64.80

The Texas Department of Licensing and Regulation adopts amendments to §64.80 concerning the employers of temporary common workers licensing fees without changes to the proposed text as published in the October 30, 1998, issue of the *Texas Register* (23 TexReg 11033) and will not be republished.

The amended section decreases the fees for an initial license and for a renewal license. The department is required to structure fees for each statute to pay for its own regulation and the fees currently in place are above the amount required by the department to cover costs. The decrease would not adversely affect the administration or enforcement of the employers of temporary common workers program.

The section will function by covering program costs.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Texas Labor Code Annotated, Chapter 92 (Vernon 1995) which authorizes the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of the Code.

The Code and Article affected by the amended section are Texas Labor Code Annotated, Chapter 92 (Vernon 1995) and Texas Revised Civil Statutes Annotated, Article 9100 (Vernon 1991).

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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Rachelle A. Martin
Executive Director
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463–7348

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Chapter 70. Industrialized Housing and Buildings

16 TAC §70.80

The Texas Department of Licensing and Regulation adopts amendments to §70.80 concerning the industrialized housing and buildings fees without changes to the proposed text as published in the October 30, 1998, issue of the *Texas Register* (23 TexReg 11034) and will not be republished.

The amended section decrease the fees for a manufacturer's registration and an industrialized builder's registration. The department is required to structure fees for each statute to pay for its own regulation and the fees currently in place are above the amount required by the department to cover costs. The decrease would not adversely affect the administration or enforcement of the industrialized housing and buildings program.

The section will function by covering program costs.

No comments were received regarding adoption of the amendment.

The amendments are adopted under Texas Revised Civil Statutes Annotated, Article 5221f-1 (Vernon 1989) which authorizes the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of the Article.

The Articles affected by the amendments are Texas Revised Civil Statutes, Article 5221f-1 (Vernon 1989) and Texas Revised Civil Statutes Annotated, Article 9100 (Vernon 1991).

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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Rachelle A. Martin
Executive Director
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Chapter 76. Water Well Drillers and Water Well Pump Installers

16 TAC §§76.1, 76.10, 76.200–76.206, 76.220, 76.300, 76.600–76.602, 76.650, 76.700–76.707, 76.800, 76.900, 76.910, 76.1000–76.1009

The Texas Department of Licensing and Regulation adopts new rule §§76.1, 76.10, 76.200-76.206, 76.220, 76.300, 76.600-76.602, 76.650, 76.700-76.707, 76.800, 76.900, 76.910, and 76.1000-1009 concerning the licensing and regulation of water well drillers and water well pump installers. Sections 76.10, 76.201, 76.204-76.206, 76.300, 76.600, 76.601, 76.650, 76.700-76.703, 76.705-76.707, 76.800, 76.900, 76.1000-76.1002, 76.1004, 76.1005, 76.1008, and 76.1009 are adopted with changes to the proposed text as published in the August 28, 1998 issue of the *Texas Register* (23 TexReg 8786). Sections 76.1, 76.200, 76.202, 76.203, 76.220, 76.602, 76.704, 76.910, 76.1003, 76.1006, and 76.1007 are adopted without changes and will not be republished.

These rules are adopted to implement Senate Bill 1955, Acts of the 75th Legislature, Regular Session 1997 and establish procedures and requirements necessary for the licensing and regulation of water well drillers and water well pump installers.

The Texas Water Code, Chapters 32 and 33 (1997) and Texas Revised Civil Statutes Annotated, article 9100 (Vernon 1991) provide the department with the authority to license and regulate water well drillers and water well pump installers who operate in this state.

A public hearing was held on October 5, 1998 in Austin, Texas. Ten commenters submitted testimony during the comment period which closed on October 19, 1998. Opposing portions of the proposal was Emerald Underground Water Conservation District. Supporting the proposal with recommended changes were North Plains Groundwater Conservation District, Irion County Water Conservation District, Lipan-Kickapoo Water Conservation District, Plateau Underground Water Conservation & Supply District, Glasscock County Underground Water Conservation District, Springhills Water Management District, North Plains Ground Water Conservation District, Barton Springs Edwards Underground Water Conservation District and Hi-Plains Drilling, Inc.

Comments to §76.10 suggested adding the following definitions: Advisory Council or Council, Department, Deteriorated Well, Dewatering Well, Driller, Exam Fee, Executive Director, Injection Well, License Fee, Licensed Driller, Licensed Installer, Person, Pump Installation, Water Well and Water Well Driller. These definitions are in Chapters 32 and 33 of the Texas Water Code. The Department believes that reiterating statutory language in a rule is redundant, and outside the purpose of rule writing authority. It was also suggested that the definition of cement be changed to include additives to the cement and remove the definition of installer because it is defined in Chapter 33 of the Texas Water Code. The Department agrees with the comments and has added the appropriate language and deleted the definition of installer.

Comments to §76.206(d) suggested adding the word registered before apprentice. The Department agrees with the comment and has added the appropriate language. One commenter did not agree with continuing education requirements stating that the only benefit to it is to stay on top of technical requirements and regulations. Chapters 32 and 33 of the Texas Water Code gives the Department authority to require mandatory continuing education. The Department, with the Advisory Council's advice, will require annually, four (4) hours of continuing education.

Another comment suggested moving §76.300. Exemptions to §76.200. Licensing Requirements-General Requirements. The Department disagrees with the comment because of the Department's pre-existing rules format.

Comments made regarding §76.700 suggested that drillers be required to mail a copy of the State Well Reports to the local Ground Water Conservation District. The Department agrees with this comment and has added the appropriate language. Comments were also made to keep the State Well Reports confidential and suggested that the driller fill out the description of the stratus they drill through. This is a statutory requirement, Texas Water Code §32.005(c) and therefore can only be changed through legislation. Comments made regarding §76.700(1) suggested that drillers be required to mail the State Well Reports in 30 days not 60 days. There were some commenters who suggested keeping the requirement at 60 days. This is also a statutory requirement, Texas Water Code §32.005(a) and therefore can only be changed through legislation. Comments regarding §76.700(2) stated that it is unclear if the person is required to send a completed State Well Report or Plugging Report on any work or just for plugging a well. The Department agrees with the comment and has added the recommended language for clarification.

Comments regarding §76.701 suggested that a driller should inform the appropriate authorities if he "knowingly" encounters undesirable water or constituents. It would be impossible for a driller to know if he drilled through every undesirable water or constituents. The Department agrees with the comment and has added the recommended language for clarification. Comments regarding §76.702(e)(1) suggested that a driller immediately file a signed statement with the Department when undesirable water or constituents have been encountered; immediately should be defined to days or hours. The Department agrees with the comment and has deleted the word "immediately" and added "48 hours".

A licensed pump installer commented on §76.706(a)(c) stating that the Department is using industry as police and does not feel it is right. The Department agrees in part with the comment; regulatory agencies rely upon industry members to self regulate. Comments regarding §76.706(d) suggested the Department not require the name, address and telephone number of the Department on all proposals and invoices given to consumers. The Department disagrees with the comment because it is a requirement in 16 TAC, Chapter 60, the administrative rules to TDLR's enabling statute, Article 9100.

Comments made regarding §76.800 suggested that the Department should charge a one time fee, but not a renewal fee. The Department disagrees with the comment. Fees are required to cover the cost of program administration in Chapters 32 and 33 of the Texas Water Code and the Appropriations Act.

Comments regarding §76.1000(a)(1)(2) suggested cementing water wells 100 feet when they are less than 100 feet deep and/or the water formation is closer than 100 feet to the land surface. The Department agrees with the comments and has added the appropriate language. Comments regarding §76.1000(a)(1) stated that the annular space should be changed to borehole so as to remove confusion. It was also suggested adding bentonite grout as a sealer. The Department does not agree with the comment to delete the term annular space because the term is used in the water well industry. However, the Department agrees with the comment to add bentonite grout and has added the suggested language.

Some comments received on §76.1000(a)(2) suggested keeping water wells ten (10) feet from the property line while other comments agreed with the change to five (5) feet from the property line. The Department disagrees with the comment to keep the distance at ten (10) feet because the Department's rules should be consistent with septic tank rules, 30 TAC, Chapter 285, On-Site Sewage Facilities. Comments on §76.1000(b)(2) stated that the burden should not be on the driller to locate the property line. The Department disagrees with the comment because it's the driller's responsibility for the drilling and proper completion and location of wells.

Comments on §76.1001(c) and (d) and §76.1002(b) stated that the requirement to inject cement under pressure into the well is a danger with the use of PVC pipe failure and suggested using bentonite grout. Another comment suggested eliminating pressure cementing of constituents zones. The Department agrees with the comment regarding the use of pressure bentonite grout or pressure cementing undesirable water or constituents zones and has added the appropriate language. The Department disagrees with eliminating pressure because the best protection against well contamination is sealing the well by pressure injected cement or bentonite.

Comments regarding §76.1004(b)(c) suggested changing the weight of mud to 9.1 pounds per gallon and eliminate marsh funnel viscosity to 50 second or equivalent. The Department agrees with the comment and has added the appropriate language. Comments regarding §76.1005(b)(2)(C) stated that the top of the casing should be 36 inches above ground level, not two feet above known flood level. The Department agrees with the comment and has added the appropriate language.

Comment was also made that a person who removes or brakes the seal on a water well for the purpose of well rehabilitation should be required to have either a driller or pump installer license unless exempt under §76.300. The Department believes that the definition of Pump Installation in Chapter 33 of the Texas Water Code includes this type of work.

The new rules are adopted under the Texas Water Code, Chapters 32 and 33 (1997) which authorizes the Texas Department of Licensing and Regulation to promulgate and enforce a code of rules and take all action necessary to assure compliance with the intent and purpose of the Code.

The Code and Article affected by the new rules is Texas Water Code, Chapters 32 and 33 (1997) and Texas Revised Civil Statutes Annotated, article 9100 (Vernon 1991).

§76.10. Definitions.

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

(1) Abandoned well–A well that has not been used for six consecutive months. A well is considered to be in use in the following cases:

(A) a non-deteriorated well which contains the casing, pump, and pump column in good condition; or

(B) a non-deteriorated well which has been capped.

(2) Annular space–The space between the casing and borehole wall.

(3) Atmospheric barrier–A section of cement placed from two feet below land surface to the land surface when using granular sodium bentonite as a casing sealant or plugging sealant in lieu of cement.

(4) Bentonite–A sodium hydrous aluminum silicate clay mineral (montmorillonite) commercially available in powdered, granular, or pellet form which is mixed with potable water and used for a variety of purposes including the stabilization of borehole walls during drilling, the control of potential or existing high fluid pressures encountered during drilling below a water table, and to provide a seal in the annular space between the well casing and borehole wall.

(5) Bentonite grout–A fluid mixture of sodium bentonite and potable water mixed at manufacturers' specifications to a slurry consistency which can be pumped through a pipe directly into the annular space between the casing and the borehole wall. Its primary function is to seal the borehole in order to prevent the subsurface migration or communication of fluids.

(6) Capped well–A well that is closed or capped with a covering capable of preventing surface pollutants from entering the well and sustaining weight of at least 400 pounds and constructed in such a way that the covering cannot be easily removed by hand.

(7) Casing–A watertight pipe which is installed in an excavated or drilled hole, temporarily or permanently, to maintain the hole sidewalls against caving, advance the borehole, and in conjunction with cementing and/or bentonite grouting, to confine the ground waters to their respective zones of origin, and to prevent surface contaminant infiltration.

(A) Plastic casing–National Sanitation Foundation (NSF-WC) or American Society of Testing Material (ASTM) F-480 minimum SDR 26 approved water well casing.

(B) Steel Casing–ASTM A-53 Grade B or better and have a minimum weight and thickness of American National Standards Institute (ANSI) schedule 10.

(C) Monitoring wells may use other materials, such as fluoropolymer (Teflon), glass-fiber-reinforced epoxy, or various stainless steel alloys.

(8) Commission–The Texas Commission of Licensing and Regulation.

(9) Cement–A neat portland or construction cement mixture of not more than seven gallons of water per 94-pound sack of dry cement, or a cement slurry which contains cement along with bentonite, gypsum or other additives.

(10) Chemigation–A process whereby pesticides, fertilizers or other chemicals, or effluents from animal wastes is added to irrigation water applied to land or crop, or both, through an irrigation distribution system.

(11) Complainant–A person who has filed a complaint with the Texas Department of Licensing and Regulation (Department) against any party subject to the jurisdiction of the Department. The Department may be the complainant.

(12) Completed monitoring well–A monitoring well which allows water from a single water-producing zone to enter the well bore, but isolates the single water-producing zone from the surface and from all other water-bearing zones by proper casing and/or cementing procedures. The single water-producing zone shall not include more than one continuous water-producing unit unless a qualified geologist or a groundwater hydrologist has determined that all the units screened or sampled by the well are interconnected naturally.

(13) Completed to produce undesirable water–A completed well which is designed to extract water from a zone which contains undesirable water.

(14) Completed water well–A water well which has sealed off access of undesirable water to the well bore by proper casing and/or cementing procedures.

(15) Constituents–Elements, ions, compounds, or substances which may cause the degradation of the soil or ground water.

(16) Dry litter poultry facility–Fully enclosed poultry operation where wood shavings or similar material is used as litter.

(17) Easy access–Access is not obstructed by other equipment and the fitting can be removed and replaced with a minimum of tools without risk of breakage of the attachment parts.

(18) Edwards aquifer–That portion of an arcuate belt of porous, water bearing, predominantly carbonate rocks known as the Edwards and Associated Limestones in the Balcones Fault Zone trending from west to east to northeast in Kinney, Uvalde, Medina, Bexar, Hays, Travis, and Williamson Counties; and composed of the Salmon Peak Limestone, McKnight Formation, West Nueces Formation, Devil's River Limestone, Person Formation, Kainer Formation, Edwards Formation and Georgetown Formation. The permeable aquifer units generally overlie the less-permeable Glen Rose Formation to the south, overlie the less-permeable Comanche Peak and Walnut formations north of the Colorado River, and underlie the less-permeable Del Rio Clay regionally.

(19) Environmental soil boring–An artificial excavation constructed to measure or monitor the quality and quantity or movement of substances, elements, chemicals, or fluids beneath the surface of the ground. The term shall not include any well which is used in conjunction with the production of oil, gas, or any other minerals.

(20) Flapper–The clapper, closing, or checking device within the body of the check valve.

(21) Foreign substance–Constituents that includes recirculated tailwater and open-ditch water when a pump discharge pipe is submerged in the ditch.

(22) Freshwater–Water whose bacteriological, physical, and chemical properties are such that it is suitable and feasible for beneficial use.

(23) Granular sodium bentonite–Sized, coarse ground, untreated, sodium based bentonite (montmorillonite) which has the specific characteristic of swelling in freshwater.

(24) Groundwater conservation district–Any district or authority created under Article III, Section 52, or Article XVI, Section 59 of the Texas Constitution or under the provisions of Chapters 35 and 36 of the Texas Water Code that has the authority to regulate the spacing or production of water wells.

(25) Irrigation distribution system–A device or combination of devices having a hose, pipe, or other conduit which connects directly to any water well or reservoir connected to the well, through which water or a mixture of water and chemicals is drawn and applied to land. The term does not include any hand held hose sprayer or other similar device which is constructed so that an interruption in water flow automatically prevents any backflow to the water source.

(26) Monitoring well–An artificial excavation constructed to measure or monitor the quality and/or quantity or movement of substances, elements, chemicals, or fluids beneath the surface of the ground. Included within this definition are environmental soil borings, piezometer wells, observation wells, and recovery wells. The term shall not include any well which is used in conjunction with the production of oil, gas, coal, lignite, or other minerals.

(27) Mud–A relatively homogenous; viscous fluid produced by the suspension of clay-size particles in water.

(28) Piezometer–A device so constructed and sealed as to measure hydraulic head at a point in the subsurface.

(29) Piezometer well–A well of a temporary nature constructed to monitor well standards for the purpose of measuring water levels or used for the installation of piezometer resulting in the determination of locations and depths of permanent monitor wells.

(30) Plugging–An absolute sealing of the well bore.

(31) Pollution–The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, any water that renders the water harmful, detrimental, or injurious to humans, animals, vegetation, or property, or to public health, safety, or welfare, or impairs the usefulness or the public enjoyment of the water for any or reasonable purpose.

(32) Public water system–A system supplying water to a number of connections or individuals, as defined by current rules and regulations of the Texas Natural Resource Conservation Commission 30 TAC Chapter 290.

(33) Recharge zone–Generally, that area where the stratigraphic units constituting the Edward Aquifer crop out, including the outcrops of other geologic formations in proximity to the Edwards Aquifer, where caves, sinkholes, faults, fractures, or other permeable features would create a potential for recharge of surface waters into the Edwards Aquifer. The recharge zone is identified as that area designated as such in official maps in the appropriate regional office of the Texas National Resource Conservation Commission.

(34) Recovery well–A well constructed for the purpose of recovering undesirable groundwater for treatment or removal of contamination.

(35) Sanitary well seal–A water tight device to maintain a junction between the casing and the pump column.

(36) Undesirable water–Water that is injurious to human health and the environment or water that can cause pollution to land or other waters.

(37) Water or waters in the state–Groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.

(38) Well–A water well, injection well, dewatering well, monitoring well, piezometer well, observation well, or recovery well.

(39) State well report (Well Log)–A log recorded on forms prescribed by the Department, at the time of drilling showing the depth, thickness, character of the different strata penetrated, location of water-bearing strata, depth, size, and character of casing installed, together with any other data or information required by the Executive Director.

§76.201. Requirements for Issuance of a License.

(a) An application, accompanied by the required examination fee, must be submitted by each person desiring to obtain a water well driller's or pump installer's license.

(b) Within 90 days after approval, each applicant must pass an examination.

(c) Upon passing the examination, an applicant must submit the required license fee to the Department.

(d) A licensee, not licensed to perform all types of well drilling and pump installation, may apply for designation for additional types of well drilling or pump installation. Applications for additional designations shall be accompanied by the appropriate application fee and shall contain all information required by these rules for an initial license. Upon examination of the applicant's qualifications, the Executive Director, with advice of the Water Well Driller Advisory Council, shall deny or grant additional grades of licensure.

(1) An applicant who has demonstrated competency in water well drilling shall be deemed qualified for licensing for Dewatering, Injection , and Monitoring drilling which are regulated under these rules.

(2) An applicant who has demonstrated competency in all types of pump installation shall be deemed qualified for a master pump installer's license.

§76.204. License Renewal.

(a) On or before the expiration date of the license, the licensee shall pay an annual renewal fee to the Department and submit an application for renewal.

(b) To renew a license, the licensee is required to show proof of four hours of continuing education.

(c) If a person's license is expired 90 days or less, the person may renew the license by paying the Department the required renewal fee and a late fee equal to one-half the examination fee.

(d) If a person's license is expired for more than 90 days but less than two years, the person may be eligible for a license reissuance by paying all renewal fees and a late fee that is equal to the examination fee.

(e) If a person's license has been expired for two years or more, the person may not renew the license, but may apply for a new license.

§76.205. Registration for Driller or Pump Installer Apprenticeship.

(a) A person who wishes to undertake a Department approved apprentice program under the supervision of a licensed driller or a licensed pump installer who has been licensed for a minimum of two years, must submit a registration form to the department and provide proof that the licensed driller or pump installer has agreed to accept the responsibility of supervising the training. A driller or pump installer may not supervise more than three apprentices at any one time.

(b) A registered pump installer apprentice shall represent his supervising pump installer during operations at the well site.

(c) The Department, with advice of the Council, shall review driller and pump installer apprentice registration forms.

(d) A registered pump installer apprentice may not perform, or offer to perform, any services associated with procedures employed in the placement an d preparation for operation of equipment and material used to obtain water from a water well. A pump installer apprentice's registration may be revoked for engaging in prohibited activities.

(e) Registration forms shall include:

(1) the name, business address, and permanent mailing address of the apprentice in training;

(2) the name, business address, and license number of the licensed driller or pump installer who will supervise the training;

(3) a brief description of the training program;

(4) the effective commencement and termination date of the training program;

(5) a statement by the licensed driller or pump installer accepting financial responsibility for the activities of the apprentice associated with the training program or undertaken on behalf of the licensed driller or pump installer; and

(6) the signatures of the apprentice and the licensed driller or pump installer and the sworn statement of both that the information provided is true and correct.

(f) If the application conforms to the rules and the apprentice program meets Department requirements, the Department will notify the apprentice and the supervising driller or pump installer that the apprentice has been accepted as a registered driller or pump installer apprentice and that the registration form shall remain in the Department's files for the stated duration of the apprentice period.

(g) If the application and apprentice program do not conform to the rules and the registration is not approved, the apprentice and the licensed pump installer shall be notified by the Department.

§76.206. Responsibilities of the Apprentice.

(a) A registered driller apprentice shall:

(1) represent his supervising driller during operations at the well site;

(2) co-sign state well reports with the supervising driller; and

(3) perform services associated with drilling, deepening, or altering a water well under the direct supervision of the supervising driller.

(b) A registered driller apprentice may not perform, or offer to perform, any services associated with drilling, deepening, or altering a water well except under the direct supervision of a licensed driller and/or according to the supervising driller's express directions. A driller apprentice's registration may be revoked for engaging in prohibited activities.

(c) Upon completion of a training program of at least one year, an apprentice may apply to obtain a water well driller's or pump installer's license or renew the status as an apprentice. The supervising driller, pump installer, or apprentice may terminate the training program by written notice to the Department. A reason for termination is not required. Upon receipt of the notice, the Department shall terminate the apprentice's status as a registered apprentice.

(d) The licensed driller or licensed pump installer shall be present at the well site at all times during all operations or may be represented by a registered apprentice capable of immediate communication with the licensed driller or pump installer at all times, provided that the licensed driller is less than one hour from the well site and visits the well site at least once each day of operation to direct the manner in which the operations are conducted.

(e) The supervising licensed driller or licensed pump installer is responsible for compliance with the Texas Water Code, Chapters

32 and 33 (relating to Water Well Drillers and Water Well Pump Installers) and Department rules.

§76.300. Exemptions.

The following are not required to obtain a license under Chapters 32 and 33 of the Texas Water Code, however, must comply with standards set forth in §§76.701, 76.702, 76.1000, 76.1001, 76.1003 and 76.1004 of this chapter:

(1) any person who drills, bores, cores, or constructs a water well on his property for his own use.

(2) any person who assists in the construction of a water well under the direct supervision of a licensed water well driller and is not primarily responsible for the drilling operation;

(3) pursuant to 30 TAC, Chapter 334, Subchapter I: Underground Storage Tank Contractor Registration and Installer Licensing, any person who possesses a Class A or Class B Underground Storage Tank (UST) Installers' license who drills observation wells within the backfill of the original excavation for UST's, including associated piping and pipe trenches (tank plumbing and piping), to a depth of no more than two feet below the tank bottom. However, if the total depth exceeds 20 feet below ground surface, a licensed driller is required to drill the well;

(4) any person who drills environmental hand auger soil borings no more than 10 feet in depth;

(5) any person who installs or repairs water well pumps and equipment on his own property, or on property that he has leased or rented, for his own use;

(6) any person who assists in the procedure of pump installation under the direct supervision of a licensed installer and who is not primarily responsible for the installation;

(7) any person who is a ranch or farm employee whose general duties include installing or repairing a water well pump or equipment on his employer's property for his employer's use, but who is not employed or in the business of installation or repair of water pumps or equipment; or,

(8) any registered water well driller apprentice or pump installer apprentice.

(9) Pump manufacturers and sellers of new and used pumps and/or pump equipment including pump distributors and pump dealers who do not install pumps and/or pump equipment.

§76.600. Responsibilities of the Department-Certification by the Executive Director.

(a) The Department, with advice of the Council, shall review and pass upon each applicant's qualifications.

(b) In assessing an applicant's qualifications, the Department and the Council shall examine the letters of reference submitted, the applicant's experience and competence in water well drilling or pump installing, and any other relevant information which may be presented including, but not limited to, compliance history.

(c) An applicant, at the discretion of the Department, may not be certified for up to one-year following the revocation of the applicant's license or a finding that the applicant operated without a license.

(d) After assessing the qualifications of an applicant, the Department, with advice of the Council, shall determine the type(s) of well drilling or pump installation, the applicant is competent to perform. Types of drilling include water well, monitoring well, injection well, and dewatering well. Types of pump installation include: windmills, hand pumps, and pump jacks; fractional to five horsepower; submersible five horsepower and over; and line-shaft turbine pumps.

(e) The Executive Director may waive any applicant requirements stated herein.

§76.601. Responsibilities of the Department-General.

The Department may initiate field inspections and investigations of well drilling, capping, plugging, or completion operations.

§76.650. Advisory Council.

(a) Officers of the Council shall be elected at the first meeting of each fiscal year.

(b) All notices of regular or special meetings of the Council shall be directed to the residence of the members of the Council as they are recorded on the official records of the Council and Department.

(1) The chairman shall preside at all Council meetings and shall not vote except to break a tie vote.

(2) In the absence of the chairman or vice chairman of the Council, the members present shall choose one member to act as chairman.

(3) The permanent or temporary chairman may appoint any member of the Council present to act for any other officer of the Council who is not present.

(c) The Executive Director appoints Council members.

§76.700. Responsibilities of the Licensee-State Well Reports.

Every well driller who drills, deepens, or alters a well, within this state shall cause to be made and kept, a legible and accurate State Well Report on forms supplied by the Department. Each copy of a State Well Report, other than a Department copy, shall include the name, mailing address, and telephone number of the Department.

(1) Every well driller shall deliver or transmit by certified mail, the original of the State Well Report to the Department, and shall deliver or send by first-class mail a photocopy to the local groundwater conservation district, if applicable, and a copy to the owner or person for whom the well was drilled, within 60 days from the completion or cessation of drilling, deepening, or otherwise altering a well.

(2) The person that plugs a well described in subsection (a), (b), or (d) of §76.702 of this title (relating to Responsibilities of the Licensee and Landowner - Well Drilling, Completion, Capping and Plugging) shall, within 30 days after plugging is complete, submit a Plugging Report to the Department on forms supplied by the Department and mail a copy of the report to the local groundwater conservation district if applicable.

§76.701. Responsibilities of the Licensee-Reporting Undesirable Water or Constituents.

Each well driller shall inform, within 24 hours, the landowner or person having a well drilled, deepened, or otherwise altered or their agent when undesirable water or constituents have been knowingly encountered. The well driller shall submit, within 30 days of encountering undesirable water or constituents to the Department, the local groundwater conservation district if required by the local authority, and the landowner or person having the well drilled, deepened, or altered, on forms supplied by the Department, a statement signed by the well driller indicating that the landowner or person having the well drilled, deepened, or altered, has been informed that undesirable water or constituents have been encountered.

§76.702. Responsibilities of the Licensee and Landowner-Well Drilling, Completion,Capping and Plugging.

(a) All well drillers and persons having a well drilled, deepened, or altered shall adhere to the provisions of this chapter prescribing the location of wells and proper drilling, completion, capping, and plugging.

(1) Where a landowner, or person having the well drilled, deepened, or altered, denies a licensed well driller access to the well to complete the well to established standards and thereby precludes the driller from performing his or her duties under the Texas Water Code, Chapters 32 and 33 and this title, the well driller shall file with the Department a statement to that effect within five days of the denial. The landowner or person authorizing the well work must complete the well to established standards within ten days of notification by the Department.

(2) It is the responsibility of the landowner or person having the well drilled, deepened, or otherwise altered, to cap or have capped, under standards set forth in §76.1004 of this title (relating to Technical Requirements-Standards for Capping and Plugging of Wells and Plugging Wells that Penetrate Undesirable Water or Constituent Zones), any well which is open at the surface.

(3) It is the responsibility of the landowner or person having the well drilled, deepened, or otherwise altered to plug or have plugged a well which is abandoned under standards set forth in §76.1004 of this title.

(b) It shall be the responsibility of each licensed well driller to inform a landowner or person having a well drilled, deepened, or altered that the well must be plugged by the landowner, a licensed driller, or a licensed pump installer if it is abandoned.

(c) It is the responsibility of the licensed well driller or landowner to see that when undesirable water or constituents is knowingly encountered, the well is plugged or is converted into a monitoring well under the standards set forth in §76.1004 of this title. For class V injection wells which encounter undesirable water or constituents, the driller must comply with applicable requirements of the Texas Natural Resource Conservation Commission rules under 30 TAC, Chapter 331.

(d) It shall be the responsibility of the driller of a newly drilled well or the pump installer responsibility of a newly drilled well to place a cover over the boring or casing of any well that is to be left unattended with the pump removed.

(e) A licensed well driller is responsible for assuring that when undesirable water or constituents is knowingly encountered, the well is plugged or completed forthwith pursuant to the following:

(1) Where a person or landowner having the well drilled, deepened, or altered denies a licensed driller access to a well which requires plugging or completion or otherwise precludes the driller from plugging or completing a well which has encountered undesirable water or constituents, the driller shall, within 48 hours, file a signed statement to that effect with the Department and provide a copy of the statement to the local groundwater conservation district. The statement shall indicate that:

(A) The driller, or person under his or her supervision, encountered undesirable water or constituents while drilling the well;

(B) The driller has informed the person having the well drilled, deepened, or otherwise altered that undesirable water or constituents were encountered and that the well must be plugged or completed pursuant to the Texas Water Code Section 32.017;

(C) The person or landowner having the well drilled, deepened, or altered has denied the driller access to the well;

(D) The reason, if known, for which access has been denied and,

(E) if known, whether the person having the well drilled, deepened, or otherwise altered intends to have the well plugged or completed.

(2) For class V wells which encounter undesirable water or constituents, the driller must comply with applicable requirements of the Texas Natural Resource Conservation Commission rules under 30 TAC, Chapter 33.

(f) Each licensed well driller shall ensure that all wells are plugged, repaired, or properly completed pursuant to this Chapter and Texas Water Code Section 32.017 (relating to Plugging of Water Wells). Each pump installer shall install or repair pumps pursuant to this title and Texas Water Code Section 33.014 (relating to Completion, Repair, and Plugging of Water Wells).

(g) A licensed driller or licensed pump installer shall notify the Department, the local underground water conservation district if required by the local authority, and the landowner or person having a well drilled or pump installed when he encounters water injurious to vegetation, land, or other water, and inform the landowner that the well must be plugged, repaired, or properly completed in order to avoid injury or pollution.

(h) A licensed driller or licensed pump installer who knows of an abandoned or deteriorated well, as defined by Texas Water Code Section 32.017 and Section 33.014, and §76.1005(a) (relating to Technical Requirements-Standards for Water Wells drilled before June 1, 1983) shall notify the landowner or person possessing the well that the well must be plugged or capped in order to avoid injury or pollution.

§76.703. Responsibilities of the Licensee-Standards of Completion for Public Water

System Wells. A licensed water well driller shall complete a well supplying a public water system in accordance with plans approved by the Texas Natural Resource Conservation Commission under 30 TAC, Chapter 290 (relating to Water Hygiene).

(1) The licensed water well driller shall, to the best of his or her abilities, ascertain whether a well which is to be drilled, deepened, or altered is intended for use as part of a public water system and shall comply with all applicable rules and regulations of the Texas National Resource Conservation Commission under 30 TAC, Chapter 290 and any other local or regional regulations.

(2) The licensed water well driller shall inform the Department of the well's intended use, by submitting a State Well Report.

(3) The person or landowner having the well drilled, deepened, or altered is responsible for ensuring that a well intended for use as a part of a public water system meets the current rules and regulations of the Texas National Resource Conservation Commission under 30 TAC, Chapter 290 and any other local or regional regulations.

§76.705. Responsibilities of the Licensee-Representations.

(a) No licensee shall offer to perform services unless such services can be competently performed.

(b) A licensee shall accurately and truthfully represent to a prospective client his qualifications and the capabilities of his equipment to perform the services to be rendered.

(c) A licensee shall neither perform nor offer to perform services for which he is not qualified by experience or knowledge in any of the technical fields involved.

(d) A licensee shall not enter into a partnership or any agreement with a person, not legally qualified to perform the services to be rendered, and who has control over the licensee's equipment and/or independent judgment as related to construction, alteration, or plugging of a water well or installation of pumps or equipment in a water well.

(e) A licensee shall not make false, misleading, or deceptive representations.

(f) A licensee shall make known to prospective clients, all adverse, or suspicions of adverse conditions concerning the quantity or quality of groundwater in the area. If there is any uncertainty regarding the quality of water in any water well, the licensee shall recommend that the client have the suspected water analyzed.

§76.706. Responsibilities of the Licensee-Unauthorized Practice.

(a) A licensee shall inform the Department of any unauthorized well drilling or pump installation practice of which the licensee has knowledge.

(b) A licensee shall not aid or abet an unlicensed person to unlawfully drill or offer to drill water wells or install pump equipment.

(c) A licensee shall, upon request of the Department, furnish any information the licensee possesses concerning any alleged violation of the Texas Water Code, Chapters 32 and 33 (relating to Water Well Drillers or Water Well Pump Installers) or this title.

(d) A licensee shall have the following information on all proposals and invoices given to consumers: Regulated by The Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas, 78711, 1-800-803-9202, 512-463-7880.

§76.707. Responsibilities of the Licensee-Adherence to Statutes and Codes.

A licensee shall comply with Texas Revised Civil Statutes Annotated, article 9100 (Vernon 1991), 16 TAC, Chapter 60 (Vernon 1998), the Texas Water Code, Chapters 32 and 33, and this Chapter in connection with all water well drilling or pump installation services rendered.

§76.800. Fees.

(a) Exam Fees.

(1) Driller and Installer application exam fees are $125 per exam.

(2) Re-exam fee is $100 for each exam.

(b) License Fees.

(1) Driller's license is $125.

(2) Installer's license is $125.

(3) A combination Driller and Installer license is $175.

(4) Apprentice registration is $50.

(c) License Renewal Fees.

(1) Driller's renewal license is $125.

(2) Installer's renewal license is $125.

(3) A combination Driller and Installer license is $175.

(4) Apprentice renewal registration is $50.

(d) Lost, revised, or duplicate license $25.

(e) Variance request fee is $100.

§76.900. Disciplinary Actions.

(a) The Executive Director may assess an administrative penalty, reprimand a licensee, suspend or revoke a license, and the Texas Commission of Licensing and Regulation may assess administrative penalties or take any appropriate action described in 16 TAC, Chapter 60 (Vernon 1998), Texas Revised Civil Statutes Annotated, article 9100 (Vernon 1991), or the Texas Water Code, Chapters 32 and 33 (Vernon 1997) (relating to Water Well Drillers and Pump Installers) for violations of the statutes or Department rules.

(b) If a person violates the Texas Water Code, Chapters 32 and 33 (Vernon 1997), or a rule or order, of the Executive Director or Commission relating to the Code, proceedings may be instituted to impose administrative sanctions and/or recommend administrative penalties in accordance with the Code or Texas Revised Civil Statutes Annotated, article 9100 (Vernon 1991) and 16 TAC, Chapter 60 (Vernon 1998) of this title (relating to the Texas Department of Licensing and Regulation).

§76.1000. Technical Requirements-Locations and Standards of Completion for Wells.

(a) Wells shall be completed in accordance with the following specifications and in compliance with the local groundwater conservation district or incorporated city ordinances:

(1) The annular space to a minimum of ten feet shall be three inches larger in diameter than the casing and filled from ground level to a depth of not less than ten feet below the land surface or well head with cement slurry, bentonite grout, or eight feet solid column of granular sodium bentonite topped with a two foot cement atmospheric barrier, except in the case of monitoring, dewatering, piezometer, and recovery wells when the water to be monitored, recovered, or dewatered is located at a more shallow depth. In that situation, the cement slurry or bentonite column shall only extend down to the level immediately above the monitoring, recovery, or dewatering level. Unless the well is drilled within the Edwards Aquifer, the distances given for separation of wells from sources of potential contamination in subsection (b)(2) of this section may be decreased to a minimum of 50 feet provided the well is cemented with positive displacement technique to a minimum of 100 feet to surface or the well is tremie pressured filled to the depth of 100 feet to the surface provided the annular space is three inches larger than the casing. For wells less than 100 feet deep, the cement slurry, bentonite grout, or bentonite column shall be placed to the top of the producing layer. In areas of shallow, unconfined groundwater aquifers, the cement slurry, bentonite grout, or bentonite column need not be placed below the static water level. In areas of shallow, confined groundwater aquifers having artesian head, the cement slurry, bentonite grout, or bentonite column need not be placed below the top of the water-bearing strata. Wells which are subject to completion standards of the Texas Natural Resource Conservation Commission under 30 TAC, Chapter 331 for class V injection wells are exempt from this section.

(2) A well is cemented with positive displacement technique to a minimum of 100 feet to surface or the well is tremie pressured filled to the depth of 100 feet to the surface provided the annular space is three inches larger than the casing may encroach up to five feet of the property line. For wells less than 100 feet deep, the cement slurry, bentonite grout, or bentonite column shall be placed to the top of the producing layer. In areas of shallow, unconfined groundwater aquifers, the cement slurry, bentonite grout, or bentonite column need not be placed below the static water level. In areas of shallow, confined groundwater aquifers having artesian head,

the cement slurry, bentonite grout, or bentonite column need not be placed below the top of the water-bearing strata.

(b) Water wells located within public water supply system sanitary easements must be constructed to public well standards 30 TAC, Chapter 290.

(1) A well shall be located a minimum horizontal distance of 50 feet from any water-tight sewage and liquid-waste collection facility, except in the case of monitoring, dewatering, piezometer, and recovery wells which may be located where necessity dictates.

(2) Except as noted in subsection (a)(1)(2) of this section, a well shall be located a minimum horizontal distance of 150 feet from any concentrated sources of potential contamination such as, but not limited to, existing or proposed livestock or poultry yards, cemeteries, pesticide mixing/loading facilities, and privies, except in the case of monitoring, dewatering, piezometer, and recovery wells which may be located where necessity dictates. A well shall be located a minimum horizontal distance of 100 ft. from an existing or proposed septic system absorption field, septic systems spray area, a dry litter poultry facility and 50 feet from any property line provided the well is located at the minimum horizontal distance from the sources of potential contamination.

(3) A well shall be located at a site not generally subject to flooding; provided, however, that if a well must be placed in a flood prone area, it shall be completed with a watertight sanitary well seal, so as to maintain a junction between the casing & pump column, and a steel sleeve extending a minimum of 36 inches above ground level and 24 inches below the ground surface.

(4) The following are exceptions to the property line distance requirement where:

(A) groundwater district rules are in place regulating the spacing of wells;

(B) platted or deed restriction subdivision spacing of wells and on-site sewage systems are part of planning; or

(C) public wastewater treatment is provided and utilized by the landowner.

(c) In all wells where plastic casing is used, except when a steel or polyvinyl chloride (PVC) sleeve or pitless adapter, as described in paragraph (3) of this subsection, is used, a concrete slab or sealing block shall be placed above the cement slurry around the well at the ground surface.

(1) The slab or block shall extend laterally at least two feet from the well in all directions and have a minimum thickness of four inches and should be separated from the well casing by a plastic or mastic coating or sleeve to prevent bonding of the slab to the casing.

(2) The surface of the slab shall be sloped to drain away from the well.

(3) The top of the casing shall extend a minimum of 12 inches above the land surface except in the case of monitoring wells when it is impractical or unreasonable to extend the casing above the ground. Monitoring wells shall be placed in a waterproof vault the rim of which extends two inches above the ground surface and a sloping cement slurry shall be placed 18 inches around and two feet below the base of the vault between the casing and the wall of the borehole so as to prevent surface pollutants from entering the monitoring well. The well casing shall have a locking cap that will prevent pollutants from entering the well. The annular space of the monitoring well shall be sealed with an impervious bentonite or similar material from the top of the interval to be tested to the cement slurry below the vault of the monitoring well.

(4) The well casing of a temporary monitoring well shall have a locking cap and the annular space shall be sealed 0 to 1 foot below ground level with an impervious bentonite or similar material; after 48 hours, the well must be completed or plugged in accordance with this section and §76.1004 (relating to Technical Requirements-Standards for Capping and Plugging of Wells and Plugging Wells that Penetrate Undesirable Water or Constituent Zones).

(5) The annular space of a closed loop injection well used to circulate water or other fluids shall be backfilled to the total depth with impervious bentonite or similar material, closed loop injection well where there is no water or only one zone of water is encountered you may use sand, gravel or drill cuttings to back fill up to 30 feet from the surface. The top 30 feet shall be filled with impervious bentonite or similar materials and meets the standards pursuant to Texas Natural Resource Conservation Commission 30 TAC, Chapter 331.

(d) In wells where a steel or PVC sleeve is used:

(1) The steel sleeve shall be a minimum of 3/16 inches in thickness and/or the plastic sleeve shall be a minimum of Schedule 80 sun resistant and 24 inches in length, and shall extend 12 inches into the cement, except when steel casing or a pitless adapter as described in paragraph (2) of this subsection is used. The casing shall extend a minimum of 12 inches above the land surface, and the steel/plastic sleeve shall be two inches larger in diameter than the plastic casing being used; or

(2) A slab or block as described in subsection (c)(1)(2) of this section is required above the cement slurry except when a pitless adapter is used. Pitless adapters may be used in such wells provided that:

(A) the adapter is welded to the casing or fitted with another suitably effective seal;

(B) the annular space between the borehole and the casing is filled with cement to a depth not less than 20 feet below the adapter connection; and

(C) in lieu of cement, the annular space may be filled with a solid column of granular sodium bentonite to a depth of not less than 20 feet below the adapter connection.

(e) All wells, especially those that are gravel packed, shall be completed so that aquifers or zones containing waters that differ in chemical quality are not allowed to commingle through the borehole-casing annulus or the gravel pack and cause quality degradation of any aquifer or zone.

(f) The well casing shall be capped or completed in a manner that will prevent pollutants from entering the well.

(g) Each licensed well driller drilling, deepening, or altering a well shall keep any drilling fluids, tailings, cuttings, or spoils contained in such a manner so as to prevent spillage onto adjacent property not under the jurisdiction or control of the well owner without the adjacent property owners written consent.

(h) Each licensed well driller drilling, deepening, or altering a well shall prevent the spillage of any drilling fluids, tailings, cuttings, or spoils into any body of surface water.

(i) Unless waived by written request from the landowner, a new, repaired, or reconditioned well or pump installation or repair on a well used to supply water for human consumption shall be properly

disinfected. The well shall be properly disinfected with chlorine or other appropriate disinfecting agent under the circumstances. A disinfecting solution with a minimum concentration of 50 milligrams per liter (mg/l) (same as parts per million), shall be placed in the well as required by the American Water Works Association (AWWA), pursuant to ANST/AWWA C654-87 and the United States Environmental Protection Agency (EPA).

(j) Unless waived in writing by the landowner, after performing an installation or repair, the licensed installer shall disinfect the well by:

(1) treating the water in the well casing to provide an average disinfectant residual to the entire volume of water in the well casing of 50 mg/l. This may be accomplished by the addition of calcium hypochlorite tablets or sodium hypochlorite solution in the prescribed amounts;

(2) circulating, to the extent possible, the disinfected water in the well casing and pump column; and

(3) pumping the well to remove disinfected water for a minimum of 15 minutes.

(4) If calcium hypochlorite (granules or tablets) is used, it is suggested that the installer dribble the tablets of approximately five-gram (g) size down the casing vent and wait at least 30 minutes for the tablets to fall through the water and dissolve. If sodium hypochlorite (liquid solution) is used, care should be taken that the solution reaches all parts of the well. It is suggested that a tube be used to pipe the solution through the well-casing vent so that it reaches the bottom of the well. The tube may then be withdrawn as the sodium hypochlorite solution is pumped through the tube. After the disinfectant has been applied, the installer should surge the well at least three times to improve the mixing and to induce contact of disinfected water with the adjacent aquifer. The installer should then allow the disinfected water to rest in the casing for at least twelve hours, but for not more than twenty-four hours. Where possible, the installer should pump the well for a minimum of 15 minutes after completing the disinfection procedures set forth above until a zero disinfectant residual is obtained. In wells where bacteriological contamination is suspected, the installer should inform the well or property owner that bacteriological testing may be necessary or desirable.

§76.1001. Technical Requirements-Standards of Completion for Water Wells.

Encountering Undesirable Water or Constituents. If a water well driller knowingly encounters undesirable water or constituents and the well is not plugged or made into a completed monitoring well, the licensed well driller shall see that the well drilled, deepened, or altered is forthwith completed in accordance with the following:

(1) When undesirable water or constituents are encountered in a water well, the undesirable water or constituents shall be sealed off and confined to the zone(s) of origin.

(2) When undesirable water or constituents are encountered in a zone overlying fresh water, the driller shall case the water well from an adequate depth below the undesirable water or constituent zone to the land surface to ensure the protection of water quality.

(3) The annular space between the casing and the wall of the borehole shall be pressured grouted with cement or bentonite grout, an adequate depth below the undesirable water or constituent zone to the land surface to ensure the protection of groundwater. Bentonite grout may not be used if a water zone contains chloride water above 1,500 parts per million (milligrams per liter) or if hydrocarbons are present.

(4) When undesirable water or constituents are encountered in a zone underlying a fresh water zone, the part of the wellbore opposite the undesirable water or constituent zone shall be filled with pressured cement or bentonite grout to a height that will prevent the entrance of the undesirable water or constituents into the water well. Bentonite grout may not be used if a water zone contains chloride water above 1,500 parts per million (milligrams per liter) or if hydrocarbons are present.

(5) For class V injection wells which encounter undesirable water or constituents, the driller must comply with applicable requirements of the Texas Natural Resource Conservation Commission under 30 TAC, Chapter 331.

§76.1002. Technical Requirements-Standards for Wells Producing Undesirable Water or Constituents.

(a) Wells completed to produce undesirable water or constituents shall be cased to prevent the mixing of water or constituent zones.

(b) The annular space between the casing and the wall of the borehole shall be pressured grouted with cement or bentonite grout to the land surface. Bentonite grout may not be used if a water zone contains chloride water above 1,500 parts per million (milligrams per liter) or if hydrocarbons are present.

(c) Wells producing undesirable water or constituents shall be completed in such a manner that will not allow undesirable fluids to flow onto the land surface except when the Department's authorization is obtained by the landowner or the person(s) having the well drilled.

§76.1004. Technical Requirements-Standards for Capping and Plugging of Wells and Plugging Wells that Penetrate Undesirable Water or Constituent Zones.

(a) If a well is abandoned or deteriorating, all removable casing shall be removed from the well and the entire well pressure filled via a tremie pipe with cement from bottom up to the land surface.

(b) In lieu of the procedure in subsection (a) of this section, the well shall be pressure filled via a tremie tube with bentonite grout of a minimum 9.1 pounds per gallon weight followed by a cement plug extending from land surface to a depth of not less than two feet, or if the well to be plugged has 100 feet or less of standing water the entire well may be filled with a solid column of 3/8 inch or larger granular sodium bentonite hydrated at frequent intervals while strictly adhering to the manufacturers recommended rate and method of application. If a bentonite grout is used, the entire well from not less than two feet below land surface may be filled with the bentonite grout. The top two feet above any bentonite grout or granular sodium bentonite shall be filled with cement as an atmospheric barrier.

(c) Undesirable water or constituents, or the fresh water zone(s) shall be isolated with cement plugs and the remainder of the wellbore filled with bentonite grout of a minimum 9.1 weight followed by a cement plug extending from land surface to a depth of not less than two feet.

(d) Drillers may petition the Department, in writing, for a variance from the methods stated in subsection (a) of this section. The variance should state in detail, an alternative method proposed and all conditions applicable to the well that would make the alternative method preferable to those methods stated in subsection (a) and (b) of this section.

(e) A non-deteriorated well which contains casing in good condition and is beneficial to the landowner can be capped with a covering capable of preventing surface pollutants from entering the well and sustaining weight of at least 400 pounds and constructed in such a way that the covering cannot be easily removed by hand.

§76.1005. Technical Requirements-Standards for Water Wells (drilled before June 1, 1983).

(a) Wells drilled prior to June 1, 1983, unless abandoned, shall be grand fathered from this chapter without further modification unless the well is found to be a threat to public health and safety or to water quality. The following will be considered a threat to public health and safety or to groundwater quality:

(1) Annular space around the well casing is open at or near the land surface;

(2) An unprotected opening into the well casing that is above ground level;

(3) Top of well casing below known flood level and not appropriately sealed;

(4) Deteriorated well casing allowing commingling of aquifers or zones of water of different quality.

(b) If the annular space around the well casing is not adequately sealed as set forth in this section, it shall be the responsibility of each licensed driller or licensed pump installer to inform the landowner that the well is considered to be a deteriorated well and must be recompleted when repairs are made to the pump or well in accordance with this chapter, and the following specifications:

(1) The well casing shall be excavated to a minimum depth of four feet and the annular space shall be filled from ground level to a depth of not less than four feet below the land surface with cement. In areas of shallow, unconfined groundwater aquifers, the cement need not be placed below the static water level. In areas of shallow, confined groundwater aquifers having artesian head, the cement need not be placed below the top of the water bearing strata.

(2) A cement slab or sealing block shall be placed above the cement around the well at the ground surface except when a pitless adapter as described in §76.1000(d)(2) of this title (relating to Technical Requirements - Locations and Standards of Completion for Wells) or a steel or plastic sleeve as described in §76.1000(d)(1) of this title is used.

(A) The slab or block shall extend laterally at least two feet from the well in all directions and have a minimum thickness of four inches.

(B) The surface of the slab shall be sloped to drain away from the well.

(C) The top of the casing shall extend a minimum of 12 inches above ground level or 36 inches above known flood prone areas and unprotected openings into the well casing that is above ground shall be sealed water tight.

(3) If deteriorated well casing is allowing commingling of aquifers or zones of water of different quality and causing degradation of any water including groundwater, the well shall be plugged according to §76.1004 of this title (relating to Technical Requirements-Standards for Capping and Plugging of Wells and Plugging Wells that Penetrate Undesirable Water or Constituent Zones) or repaired. Procedures for repairs shall be submitted to the Department for approval prior to implementation.

(c) If a licensed well driller or pump installer finds any of the procedures described by this section to be inapplicable, unworkable, or inadequate, alternative procedures may be employed provided that the proposed alternative procedures will prevent injury and pollution and that the procedures shall be submitted to the Department for approval prior to their implementation, except for class V injection wells pursuant to 30 TAC, Chapter 331.

(d) Well covers shall be capable of supporting a minimum of 400 pounds and constructed in such a way that they cannot be easily removed by hand.

(e) This section shall not apply to a public water supply system well.

§76.1008. Technical Requirements-Pump Installation.

(a) During any repair or installation of a water well pump, the licensed installer shall make a reasonable effort to maintain the integrity of ground water and to prevent contamination by elevating the pump column and fittings, or by other means suitable under the circumstances.

(b) This section shall include every type of connection device, including but not limited to, flange connections, hose-clamp connections, and other flexible couplings. Except as provided by this chapter, a pump shall be constructed so that no unprotected openings into the interior of the pump or well casing exist.

(1) A hand pump, hand pump head, stand, or similar device shall have a spout, directed downward.

(2) A power driven pump shall be attached to the casing or approved suction or discharge line by a closed connection. For the purposes of this section a closed connection is defined to be a sealed connection.

(c) The provisions of this section relating to the requirement of closed connections shall not apply to the following types of pumps and pumping equipment:

(1) sucker rod pumps and windmills; and

(2) hand pumps.

(d) A new, repaired, or reconditioned well, or pump installation or repair on a well used to supply water for human consumption shall be properly disinfected. The landowner may waive the disinfection process by submitting a written request to the driller or pump installer.

§76.1009. Technical Requirements-Alternative Standards.

(a) If the party having the well drilled, deepened or altered, the licensed well driller, or the party, landowner or person drilling or plugging the well, finds any of the procedures prescribed by §76.1004 of this title (relating to Technical Requirements-Standards for Capping and Plugging of Wells and Plugging Wells that Penetrate Undesirable Water or Constituent Zones) and §76.1000 of this title (relating to Technical Requirements-Standards for Capping and Plugging of Wells and Plugging Wells that Penetrate Undesirable Water or Constituent Zones) inapplicable, unworkable, or inadequate, combinations of the prescribed procedures or alternative procedures may be employed, provided that the proposed alternative procedures will prevent injury and pollution.

(b) Proposals to use combinations of prescribed procedures or alternative procedures shall be considered application for a variance and must be submitted to the Department for approval prior to their implementation.

(c) This section shall not apply to a public water system well.

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 December 14, 1998.

TRD-9818317
Rachelle A. Martin
Executive Director
Texas Department of Licensing and Regulation
Effective date: January 3, 1999
Proposal publication date: August 28, 1998
For further information, please call: (512) 463–7348

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TITLE 22. EXAMINING BOARDS

Part XI. Board of Nurse Examiners

Chapter 215. Nurse Education

22 TAC §§215.1–215.20

The Board of Nurse Examiners adopts the repeal of §§215.1-215.20 concerning General Requirements and Purpose of Standards; Definitions; New Programs; Accreditation; Pass Rate of Graduates on the National Council Licensure Examination for Registered Nurses; Administration and Organization; Faculty Qualifications; Faculty Policies; Faculty Organization; Faculty Development and Evaluation; Mission and Goals (Philosophy and Outcomes); Curriculum; Curriculum Changes; Distance Education Initiatives; Students; Educational Resources and Facilities; Affiliate Agencies; Records and Reports; Total Program Evaluation; Closing a Nursing Program or a Distance Education Initiative.

The repeals are adopted without changes as published in the October 9, 1998, issue of the *Texas Register* (23 TexReg 10245) and will not be republished.

The adoption of the repeal allows for the adoption of new sections.

No written comments were received.

The repeals are adopted under the Nursing Practice Act, (Texas Civil Statutes), Article 4514, §1, which provides the Board of Nurse Examiners with the authority and power to make and enforce all rules and regulations necessary for the performance of its duties and conducting of proceedings before it and Article 4518, §1, which provides the Board of Nurse Examiners with the authority to prescribe and publish the minimum requirements and standards for a course of study in programs which prepare professional nurse practitioners.

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 December 10, 1998.

TRD-9818249
Katherine A. Thomas, MN, RN
Executive Director
Board of Nurse Examiners
Effective date: September 1, 1999
Proposal publication date: October 9, 1998
For further information, please call: (512) 305–6816

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22 TAC §§215.1–215.3

The Board of Nurse Examiners adopts new §§215.1-215.13 concerning General Requirements and Purpose of Standards; Definitions; Program Development, Expansion, and Closure; Accreditation; Mission and Goals (Philosophy and Outcomes); Administration and Organization; Faculty Qualifications and Faculty Organization; Students; Program of Study; Management of Clinical Learning Experiences and Resources; Facilities, Resources, and Services; Records and Reports; Total Program Evaluation. Sections 215.2 and 215.6 are adopted with changes to the proposed text as published in the October 9, 1998, issue of the *Texas Register* (23 TexReg 10244) and §§215.1, 215.3-215.5 and 215.7-215.13 are adopted without changes to the proposed text and will not be republished.

The new rules are being adopted after the Board of Nurse Examiners Advisory Committee on Education reviewed and recommended changes to the education rules. The committee met four times and drafted new rule language which was presented to the full board for consideration. The board met on September 17, 1998 and approved the proposed new language. A correction is being made in §215.2 definition number (10), the definition refers to §215.7(h) of this title. Definition number (10) should refer to §215.10(f)(5) of this title (relating to Management of Clinical Learning Experiences and Resources).

One written comment was received regarding 215.6(f)(4) concerning director requirements. Board staff reviewed the rule and determined that the language addressing the waiver procedure had been inadvertently left out. This section is being adopted with changes to correct the omission.

The amendments are adopted under the Nursing Practice Act, (Texas Civil Statutes), Article 4514, § 1, which provides the Board of Nurse Examiners with the authority and power to make and enforce all rules and regulations necessary for the performance of its duties and conducting of proceedings before it and Article 4518, §1, which provides the Board of Nurse Examiners with the authority to prescribe and publish the minimum requirements and standards for a course of study in programs which prepare professional nurse practitioners.

§215.2. Definitions.

Words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

(1) Accredited nursing program - A school, department, or division of nursing accredited/approved by the Board of Nurse Examiners for the State of Texas or other authority which has jurisdiction over accreditation/approval of nursing programs.

(2) Affiliate agency - An agency, other than the governing institution, which provides learning experiences for students.

(3) Alternative practice settings - settings which provide opportunities for clinical learning experiences although their primary function is not the delivery of health care.

(4) Articulation - A planned process between two or more educational systems to assist students to make a smooth transition from one level of education to another without duplication in learning.

(5) Baccalaureate degree program for registered nurses - A program leading to a bachelor's degree in nursing which admits only registered nurses.

(6) Basic nursing program - An educational unit whose purpose is to prepare practitioners of professional nursing and whose graduates are eligible to apply for initial licensure by examination.

(A) Associate degree program - A program leading to an associate degree in nursing conducted by an educational unit in nursing within the structure of a college or university.

(B) Baccalaureate degree program - A program leading to a bachelor's degree in nursing conducted by an educational unit in nursing which is a part of a senior college or university.

(C) Master's degree program - A program leading to a master's degree, which is an individual's first professional degree in nursing, and conducted by an educational unit in nursing within the structure of a senior college or university.

(D) Diploma program - A program leading to a diploma in nursing conducted by a single purpose school usually under the control of a hospital.

(7) Board - The Board of Nurse Examiners for the State of Texas composed of members appointed by the Governor for the State of Texas.

(8) Board survey visit - An on-site visit to a nursing program by a board representative for the purpose of evaluating the program of learning and gathering data to support whether the program is meeting the board's requirements as specified in §§215.2 - 215.13 of this title (relating to Definitions; Program Development, Expansion, and Closure; Accreditation; Mission and Goals (Philosophy & Outcomes); Administration and Organization; Faculty Qualifications and Faculty Organization; Students; Program of Study; Management of Clinical Learning Experiences and Resources; Facilities, Resources, and Services; Records and Reports; and Total Program Evaluation).

(9) Clinical learning experiences - Faculty-planned and guided learning activities designed to assist students to meet stated program and course outcomes and to safely apply knowledge and skills when providing nursing care to clients across the lifespan as appropriate to the role expectations of the graduates. These experiences occur in nursing skills and computer laboratories; in a variety of affiliate agencies or clinical practice settings including, but not limited to: acute care facilities, extended care facilities, clients' residences, and community agencies; and in associated clinical conferences.

(10) Clinical preceptor - A registered nurse or other licensed health profes- sional who meets the minimum requirements in §215.10(f)(5) of this title (relating to Management of Clinical Learning Experiences and Resources), not paid as a faculty member by the governing institution, and who directly supervises a student's clinical learning experience. A clinical preceptor facilitates student learning in a manner prescribed by a signed written agreement between the educational institution, preceptor, and affiliate agency (as applicable).

(11) Clinical preceptorship - An organized system of clinical learning experiences which allows a nursing student, under the direction of a faculty member, to attain specific learning objectives under the supervision of a qualified clinical preceptor.

(12) Clinical teaching assistant - A registered nurse licensed in Texas, who is employed to assist and work under the supervision of a Master's or Doctorally prepared faculty member and who meets the minimum requirements in §215.10(g)(4) of this title (relating to Management of Clinical Learning Experiences and Resources).

(13) Coordinator - A qualified faculty who has the delegated responsibility for the day to day administration of an accredited professional nursing program or one or more distance education initiatives.

(14) Course - A specific set of organized learning experiences that must be met within a stated time period. A course involves both organized subject matter and related activities. In a clinical nursing course, the didactic content shall be taught either prior to or concurrent with the related clinical learning experiences.

(15) Curriculum - Content designed to achieve specific educational outcomes.

(16) Dean/Director - A registered nurse who is accountable for adminis- tering one or more of the following: basic nursing program or a post-licensure baccalaureate or higher degree program for registered nurses and who meets the requirements as stated in §215.6(e) of this title (relating to Administration and Organization).

(17) Distance education initiative - Instruction delivered by an accredited nursing program by any means to any location(s) other than the main campus. A distance education initiative may range from offering a single course or multiple courses to offering the entire program of study.

(18) Dormant distance education initiative - No enrollment for a period of an academic year in a distance education initiative that provides the entire program of study.

(19) Essential competencies - The expected educational outcomes to be demonstrated by nursing students at the time of graduation, as published in Nursing Education Advisory Committee Report, Volume I, "Essential Competencies of Texas Graduates of Education Programs in Nursing", March 1993, as amended.

(20) Examination year - A twelve month period defined by the Board.

(21) Faculty currency/clinical competence - Maintenance of up-to-date knowledge and professional practice as demonstrated by certification and/or through participation in: continuing education, professional conferences, advanced academic courses, workshops, research projects, seminars, publications, clinical practice, and/or extended orientation.

(22) Faculty member - An individual employed to teach in the nursing program who meets the requirements as stated in §215.7 of this title (relating to Faculty Qualifications and Faculty Organization).

(23) Faculty petition - A request submitted to the board petitioning to employ an individual who does not meet the requirements stated in §215.7 of this title.

(24) Faculty role - The activities which require the time of the faculty member and are related, directly or indirectly, to the performance of his/her professional education duties and responsibilities.

(25) Faculty waiver - A waiver granted by the board to an individual who has a baccalaureate degree in nursing and is currently licensed in Texas to be employed as a faculty member for a limited period of time.

(26) Governing institution - An accredited college, university, or hospital responsible for the administration and operation of an accredited nursing program.

(27) Health care professional - An individual other than a RN who holds at least a bachelor's degree in the health care field, including, but not limited to: respiratory therapists, physical therapists, occupational therapists, dieticians, pharmacists, physicians, social workers and psychologists.

(28) Innovative approach to nursing education - A board approved approach to professional nursing education which departs from existing educational processes or guidelines and for which the nursing faculty establish an educational goal, identify educational intervention(s), and measure the outcomes of the intervention(s).

(29) Mission - The purpose and overall role of the educational unit in nursing which are consistent with those of the governing institution.

(30) Mobility - The ability to advance without educational barriers.

(31) Observational experience - An assignment to a facility or unit where students observe the functions of the facility and the role of nursing within the facility, but where students do not participate in patient/client care.

(32) Pass rate - The percentage of first time candidates within one examination year who pass the National Council Licensure Examination for Registered Nurses.

(33) Philosophy - The underlying belief system of the educational nursing unit.

(34) Post-Licensure nursing program - An educational unit the purpose of which is to provide mobility options for registered nurses to attain undergraduate academic degrees in nursing. Post-licensure programs may be components of educational units within basic nursing programs or independent baccalaureate degree programs for registered nurses as defined in this section.

(35) Professional nursing student - An individual enrolled in a professional nursing program who has met admission criteria and is designated as a nursing student according to governing institution's policies.

(36) Program goals/outcomes - The expected competencies of program graduates with regard to professional nursing practice.

(37) Program of study - The courses and learning experiences that constitute the requirements for completion of a basic nursing program (associate degree program, baccalaureate degree program, master's degree program, or diploma program) or a post-licensure nursing program.

(38) Shall and must - Mandatory requirements.

(39) Should - A recommendation.

(40) Staff - Employees of the Board of Nurse Examiners.

(41) Supervision - Immediate availability of a faculty member, clinical preceptor, or clinical teaching assistant to coordinate, direct, and observe at first hand the practice of students.

§215.6. Administration and Organization.

(a) The governing institution shall be accredited by a board recognized accrediting/approval agency.

(b) There shall be an organizational chart which demonstrates the rela- tionship of the professional nursing program to the governing institution, and indi- cates lines of responsibility and authority, and channels of communication.

(c) In colleges and universities, the program shall have comparable status with other academic units in such areas as salary, rank, promotion, tenure, leave, benefits and professional development.

(d) The governing institution shall provide financial support and resources needed to operate a program which meets the legal and educational requirements of the board and fosters achievement of program goals. The financial resources shall support adequate educational facilities, equipment, and qualified administrative and instructional personnel.

(e) Each basic nursing program shall be administered by a qualified nurse faculty member who is accountable for the planning, implementation and evaluation of the professional nursing education program. The dean/director shall:

(1) hold a current license to practice as a registered nurse in the state of Texas;

(2) hold a master's degree in nursing;

(3) hold a doctoral degree, if administering a baccalaureate or master's degree program;

(4) have a minimum of three years teaching experience in the type of program being administered; and

(5) have demonstrated knowledge, skills and abilities in administration within educational programs.

(f) When the director of the program changes, the director shall submit to the board written notification of the change indicating the final date of employment.

(1) A new director qualification form shall be submitted to the board office by the governing institution for approval prior to appointing a new director for an existing program or a new nursing program.

(2) A vitae and all official transcripts shall be submitted with the new director qualification form.

(3) If an acting director is appointed to fill the position of the director, this appointment shall not exceed one year.

(4) In a fully accredited professional nursing program, if the individual to be appointed as director does not meet the requirements for director as specified in subsection (e) of this section, the administration is permitted to petition for a waiver of the board's requirements prior to the appointment of said individual.

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 December 10, 1998.

TRD-9818250
Katherine A. Thomas, MN, RN
Executive Director
Board of Nurse Examiners
Effective date: September 1, 1999
Proposal publication date: October 9, 1998
For further information, please call: (512) 305–6816

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Part XV. Texas State Board of Pharmacy

Chapter 281. General Provisions

22 TAC §§281.1-281.21, 281.23-281.56, 281.58-281.63, 281.67-281.75, 281.79, 281.80

The Texas State Board of Pharmacy adopts the repeal of §§281.1-281.21, 281.23-281.56, 281.58-281.63, 281.67-281.75, 281.79-281.80 and simultaneously adopts new §§281.1-281.16, 281.21-281.56, 281.71-281.76 concerning administrative practice and procedure without changes to the proposed text in the October 9, 1998 issue of the *Texas Register* (23 TexReg 10255). A complete revision of Chapter 281 is necessary, due in part to the newly adopted State Office of Administrative Hearings rules and to efforts to streamline administrative procedures.

Adoption and enforcement of the rules will lead to increased consistency and clarity in administrative practice and procedures.

No comments were received on the repeal or new rules as proposed.

The repeals are adopted under section 4 and 16(a) of the Texas Pharmacy Act (Article 4542a-1, Texas Civil Statutes). The Board interprets section 4 as authorizing the agency to adopt rules to protect the public health, safety, and welfare through the effective control and regulation of the practice of pharmacy. The Board interprets section 16(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the rules: Texas Civil Statutes, Article 4542a-1.

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-9818257
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: December 30, 1998
Proposal publication date: October 9, 1998
For further information, please call: (512) 305-8028

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Chapter 281. Administrative Practice and Procedures

Subchapter A. General Provisions

22 TAC §§281.1-281.16

The new sections are adopted under ˇ4 and ˇ16(a) of the Texas Pharmacy Act (Article 4542a-1, Texas Civil Statutes). The Board interprets ˇ4 as authorizing the agency to adopt rules to protect the public health, safety, and welfare through the effective control and regulation of the practice of pharmacy. The Board interprets ˇ16(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the rules: Texas Civil Statutes, Article 4542a-1.

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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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: December 30, 1998
Proposal publication date: October 9, 1998
For further information, please call: (512) 305-8028

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Subchapter B. General Procedures in Contested Cases

22 TAC §§281.21-281.56

The new sections are adopted under ˇ4 and ˇ16(a) of the Texas Pharmacy Act (Article 4542a-1, Texas Civil Statutes). The Board interprets ˇ4 as authorizing the agency to adopt rules to protect the public health, safety, and welfare through the effective control and regulation of the practice of pharmacy. The Board interprets ˇ16(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the rules: Texas Civil Statutes, Article 4542a-1.

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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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: December 30, 1998
Proposal publication date: October 9, 1998
For further information, please call: (512) 305-8028

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Subchapter C. Rulemaking

22 TAC §§281.71-281.76

The new sections are adopted under ˇ4 and ˇ16(a) of the Texas Pharmacy Act (Article 4542a-1, Texas Civil Statutes). The Board interprets ˇ4 as authorizing the agency to adopt rules to protect the public health, safety, and welfare through the effective control and regulation of the practice of pharmacy. The Board interprets ˇ16(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by the rules: Texas Civil Statutes, Article 4542a-1.

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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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: December 30, 1998
Proposal publication date: October 9, 1998
For further information, please call: (512) 305-8028

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Part XXIII. Texas Real Estate Commission

Chapter 533. Practice and Procedure

22 TAC §§533.1–533.30

The Texas Real Estate Commission (TREC) adopts the repeal of §§533.1-533.30, concerning practice and procedure, without changes to the proposed text as published in the October 2, 1998, issue of the *Texas Register* (23 TexReg 9903). These sections have been replaced by new sections addressing rulemaking and the procedures in contested cases. Adoption of the repeals is necessary for TREC to develop a more concise procedural guide for rulemaking and contested cases.

No comments were received regarding the proposed repeals.

The repeals are adopted under Texas Civil Statutes, Article 6573a, §5(h), which authorize the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties.

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 December 9, 1998.

TRD-9818227
Mark A. Moseley
General Counsel
Texas Real Estate Commission
Effective date: December 29, 1998
Proposal publication date: October 2, 1998
For further information, please call: (512) 465–3900

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22 TAC §§533.31–533.39

The Texas Real Estate Commission (TREC) adopts new §§533.31-533.39, concerning practice and procedure. Sections 533.31 and 533.38 are adopted with changes to the proposed text as published in the October 2,1998, issue of the *Texas Register* (23 TexReg 9904). Sections 533.32 – 533.37 and 533.39 are adopted without changes and will not be republished. These sections address the procedures for rulemaking and contested cases before TREC. New §533.31 clarifies that the procedures for rulemaking and contested cases followed by TREC are governed by Chapter 533 and by the Administrative Procedure Act, Texas Government Code, Chapter 2001. New §533.32 deems a document in a contested case or rulemaking proceeding to be filed when the document is received by the agency. New §533.33 provides the method for calculating any period of time set forth for an action under the chapter. New §533.35 provides for notice and hearing for suspension or revocation of a license. New §533.36 addresses the authority of the staff hearings officer or member of the commission presiding in a contested case hearing. New §533.37 authorizes the limitation of witnesses if the expected testimony is merely cumulative. New §533.38 establishes the procedures for filing, responding to, and ruling upon motions for rehearing, modification of order, or probation before either a staff hearings officer or the members of the commission. New §533.39 provides for judicial review in accordance with the statute under which relief is being sought. Adoption of the new sections is necessary for TREC to develop a more concise procedural guide for rulemaking and contested cases.

No comments were received regarding the proposal. On final adoption, a typographical error was corrected in §533.31, and the commission determined that new §533.38 should be rearranged to emphasize the necessity of specifically requesting that a motion be considered by the members of the commission.

The new sections are adopted under Texas Civil Statutes, Article 6573a, §5(h), which authorize the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties.

§533.31. Procedures for Rulemaking and Contested Cases.
The procedures for rulemaking and contested cases before the Texas Real Estate Commission or a presiding officer authorized by the Texas Real Estate Commission are governed by this chapter and by The Administrative Procedure Act, Texas Government Code, §2001.001, et seq.

§533.38. Motions for Rehearing, Modification of Order, or Probation.

(a) Except in the case of an emergency decision or order, a motion for rehearing is a prerequisite to judicial review. In addition to any motion for rehearing, a party may file a motion to modify the prior order or a motion for probation of the prior order, or both. The filing and consideration of motions shall be governed by the provisions of this section.

(b) If the party filing the motion desires the motion to be considered by, and any rehearing to be before, the members of the commission, the party shall include in the motion a request for consideration by, and any rehearing to be before, the members of the commission. A party shall submit the motion to either the presiding officer or to the members of the commission, as the case may be, for consideration and appropriate action. A motion which requests action by the presiding officer, and in the alternative, action by the members of the commission, will be deemed a motion for consideration of the presiding officer and treated accordingly. A motion that does not include an express request for consideration by the members of the commission will be deemed to be a request for consideration by a presiding officer, and if the party has filed a timely motion for rehearing to be considered by either the presiding officer or the members of the commission, the party need not file any additional motions for rehearing as a prerequisite for judicial review.

(c) A motion for rehearing, modification of order, or probation must set forth the particular finding of fact, conclusion of law, ruling, or other action which the complaining party asserts was error, such as a violation of a constitutional or statutory provision, lack

of authority, unlawful procedure, lack of substantial evidence, abuse of discretion or other error of law, or other good cause specifically described in the motion. In the absence of specific grounds in the motion, the presiding officer, or the members of the commission, as the case may be, shall presume that the motion should be overruled.

(d) A motion for rehearing, modification of order, or probation must be filed within 20 days after the date the party or the party's attorney of record is notified of the final decision or order. Replies to the motion must be filed with the commission within 30 days after the party or the party's attorney of record is notified of the final decision or order. The presiding officer or the commission itself, as appropriate, shall act on the motion within 45 days after the party or the party's attorney of record is notified of the final decision or order. The presiding officer or the members of the commission, as appropriate, may, by written order, extend the time for filing, replying to, and taking action on a motion, not to exceed 90 days after the date the party or the party's attorney of record is notified of the final decision or order. In the event of an extension of time, a motion is overruled by operation of law on the date fixed by the written order of extension, or in the absence of a fixed date, 90 days after the party or the party's attorney of record is notified of the final decision or order. The presiding officer or the members of the commission, as appropriate, may modify this schedule with the consent of the parties.

(e) Motions for rehearing, modification of order, or probation before the members of the commission will be heard in accordance with this section. Except where the context clearly contemplates a different procedure to be followed before the members of the commission, any hearings before the presiding officer to consider motions will be conducted in the manner required by this section.

(1) The chairperson or the member designated by the chairperson to preside ("the presiding member") shall announce the case. The members shall consider a motion for rehearing prior to considering or acting upon a motion for modification of order or probation. The members shall consider a motion for modification of order prior to considering or acting upon a motion for probation. Upon the request of any party, the presiding member shall conduct a prehearing conference with the parties and their attorneys of record. The presiding member shall announce reasonable time limits for any oral arguments to be presented by the parties. The hearing on the motion shall be limited to a consideration of the grounds set forth in the motion. Testimony by affidavit or documentary evidence such as excerpts of the record before the presiding officer may be offered in support of, or in opposition to, the motion; provided, however, a party offering affidavit testimony or documentary evidence must provide the other party with copies of the affidavits or documents at the time the motion or reply is filed.

(2) In presenting oral arguments, the party filing the motion will have the burden of proof and persuasion and shall open and close. The party responding to the motion may offer rebuttal arguments. Parties may request an opportunity for additional rebuttal subject to the discretion of the presiding member.

(3) After being recognized by the presiding member, the members of the commission may ask questions of the parties. If a party is represented by counsel, the questions must be directed to the party's attorney. Questions must be limited to the grounds asserted for the motion to be granted and to the arguments made by the parties.

(4) Upon the conclusion of oral arguments, questions by the members of the commission, and any discussion by the members of the commission, the presiding member shall call for a vote on the motion. It will not be in order for a member of the commission to make a separate motion or to second a motion filed by a party. The presiding member may vote on the motion. A motion may be granted only if a majority of the members present and voting vote in favor of the motion. In the event of a tie vote, the presiding member shall announce that the motion is overruled. The granting of a motion for rehearing vacates any prior order in the contested case.

(f) A party filing a motion for modification of order or probation shall specify in the motion the modification or such terms and conditions of probation as are desired by the party. A party replying to a motion may also specify a modification or terms and conditions for probation. In addition to the terms and conditions for probation which are set forth in The Real Estate License Act, Article 6573a, Texas Civil Statutes, (the Act) §15B(d), the members of the commission or a commission employee acting as presiding officer may require a licensee:

(1) to comply with the provisions of the Act and the rules of the Texas Real Estate Commission;

(2) to cooperate with the Enforcement Division of the Texas Real Estate Commission in the investigation of any complaints filed during the probation;

(3) to complete courses of education relevant to the matter which is the basis of the probation;

(4) to repay money belonging to another person or to the State of Texas; or

(5) to comply with such other reasonable terms and conditions as the members of the commission or commission employee acting as presiding officer may impose.

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 December 9, 1998.

TRD-9818228
Mark A. Moseley
General Counsel
Texas Real Estate Commission
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For further information, please call: (512) 465–3900

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Chapter 537. Professional Agreements and Standard Contracts

22 TAC §§537.11, 537.26, 537.27

The Texas Real Estate Commission (TREC) adopts amendments to §§537.11, 537.26, and 537.27, concerning standard contract forms, without changes to the proposed text as published in the October 2, 1998, issue of the *Texas Register* (23 TexReg 9906) and will not be republished. These actions replace two forms used by Texas real estate licensees when negotiating a temporary lease under which either the buyer or seller of residential property becomes a tenant.

The amendment to §537.11 adds form TREC Number 15-3, Seller's Temporary Lease, and form TREC Number 16-3, Buyer's Temporary Lease, to the list of forms promulgated by TREC . The amendment to §537.26 adopts by reference the revised Seller's Temporary Lease, which is used in a transaction when a seller occupies the property as a tenant for no more

than 90 days after the closing of the sale. The addendum was modified to clarify that the provisions of the Texas Property Code relating to security devices do not apply to temporary leases of not more than 90 days and to provide a more specific waiver of the landlord-buyer's duty to inspect and repair smoke detectors. Other substantive changes included a new provision requiring the seller-tenant to pay the full amount of the rental at the commencement of the lease, although the form would no longer require advance payment of hold-over rental. The form also has been rewritten to be consistent with the language and style of the current TREC contract forms.

The amendment to §537.27 adopts by reference a revised Buyer's Temporary Lease, which is used in a transaction when a buyer occupies the property as a tenant for no more than 90 days before the closing of the sale. The form was changed to address the non-applicability of the Texas Property Code and provide for a specific waiver of the landlord-seller's duty to inspect and repair smoke detectors, to require the buyer-tenant to pay the anticipated amount of rental at the commencement of the lease, and to eliminate a paragraph relating to the deposit of additional earnest money, which may be addressed in the purchase contract. The form also was rewritten to be consistent with the language and style of the current TREC contract forms.

One commenter suggested that the commission add a beginning date for rental payments and spaces to show the dates for which rent was being prorated. The commission determined not to make the first change since the seller's temporary lease provides for payment of rental to the buyer when the sales proceeds have been paid, and the buyer's lease provides for payment at the time the lease commences. As to the suggestion to provide proration dates, the commission determined that proration is unnecessary for a seller's lease since the seller is in possession at the commencement of the lease and can specify the term of the lease. No change was necessary to the buyer's lease, since it provides for proration from the date of possession to the actual closing date. Another commenter generally opposed adoption of the leases on the ground that they were inadequate, but offered no specific explanation. The commission determined that the proposed forms were adequate for temporary leases of not more than 90 days.

The amendments are adopted under Texas Civil Statutes, Article 6573a, §5(h), which authorize the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties.

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 December 11, 1998.

TRD-9818279
Mark A. Moseley
General Counsel
Texas Real Estate Commission
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For further information, please call: (512) 465–3900

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TITLE 25. HEALTH SERVICES

Part I. Texas Department of Health

Chapter 29. Purchased Health Services

Subchapter L. General Administration

25 TAC §29.1125

On behalf of the State Medicaid Director, the Texas Department of Health (department) adopts an amendment to §29.1125, concerning organ transplant facility approval and designation, without changes to the proposed text as published in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8339), and therefore the section will not be republished.

This amendment clarifies the department's authority to approve and designate all types of organ transplant facilities. To be eligible for reimbursement for organ transplant services, a hospital must meet the requirements included in the Social Security Act, §1138 and be approved and designated by the department as an organ transplant facility.

The department received no comments regarding the proposal of this rule during the comment period.

The amendment is adopted under the Human Resources Code §32.021 and Texas Government Code §531, which provide the Health and Human Services Commission with the authority to adopt rules to administer the state's medical assistance program and is submitted by the department, under its agreement with the Health and Human Services Commission to operate the purchased health services program and as authorized under Chapter 15, §1.07, Acts of the 72nd Legislature, First Called Session (1991).

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 December 8, 1998.

TRD-9818201
Susan K. Steeg
General Counsel
Texas Department of Health
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Proposal publication date: August 14, 1998
For further information, please call: (512) 458-7236

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Subchapter DD. Tuberculosis

25 TAC §29.2901

On behalf of the State Medicaid Director, the Texas Department of Health (department) adopts an amendment to §29.2901 concerning tuberculosis clinic services, without changes to the proposed text as published in the August 21, 1998, issue of the *Texas Register* (23 TexReg 8629), and therefore the section will not be republished.

The section describes benefits and limitations of tuberculosis clinic services available to Medicaid recipients and provider requirements for the delivery of these services. The department has amended the section to ensure consistency with federal

regulations. The section specifies that clinic services must be delivered in an outpatient setting; clarifies physician supervision requirements for the delivery of clinic services; and emphasizes that services must not be provided within skilled nursing facilities (SNF), intermediate care facilities (ICF), or intermediate care facilities for the mentally retarded (ICF-MR).

The following comment was received concerning the proposed amendment. Following the comment is the department's response.

Comment: Concerning §29.2901(b)(1), a commenter stated that many tuberculosis clinics are located in outpatient departments of hospitals and that although many of these clinics are probably operated by hospital districts or medical schools, they are clearly operated for outpatients. The commenter expressed concern that a narrow interpretation of the proposed rule would cause disruption for Medicaid clients who are currently receiving care in these facilities. The commenter suggested adding a clarification to the proposal that states "however, the clinic may be co-located or affiliated with a hospital, as long as the clinic's organization and operation is separate from the hospital and its sole purpose is to provide care to outpatients."

Response: The department acknowledges the concerns of the commenter; however, the proposed rule is based on federal requirements of the Health Care Financing Administration (HCFA) and governs whether federal financial participation (FFP) reimbursement is available to the department for these services. The department requested clarification of this provision from HCFA and received the following response. If the clinic is merely co-located (for example, renting space from a hospital), but remains organizationally, administratively, and financially separate (that is separate boards and staff) from the hospital, the facility would continue to be considered a clinic. No change was made as a result of this comment.

The comment was received from the Coalition for Nurses in Advanced Practice which expressed concerns and suggested changes to the proposed rule.

The amendment is adopted under the Human Resources Code, §32.021 and Government Code §531.021, which provide the Health and Human Services Commission with the authority to adopt rules to administer the state's medical assistance program and is submitted by the Texas Department of Health under its agreement with the Health and Human Services Commission to operate the purchased health services program and as authorized under Chapter 15, §1.07, Acts of the 72nd Legislature, First Called Session (1991).

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 December 8, 1998.

TRD-9818200

Susan K. Steeg

General Counsel

Texas Department of Health

Effective date: December 28, 1998

Proposal publication date: August 21, 1998

For further information, please call: (512) 458-7236

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Chapter 33. Early and Periodic Screening, Diagnosis, and Treatment

On behalf of the State Medicaid Director, the Texas Department of Health (department) adopts an amendment to §33.140 and new §§33.601-33.609, concerning providers of durable medical equipment (DME), outpatient rehabilitation facilities, and private duty nursing services covered by the Early and Periodic Screening, Diagnosis and Treatment Comprehensive Care Program (EPSDT-CCP). Sections 33.140, 33.603, 33.604, 33.606, and 33.608 are adopted with changes to the proposed text as published in the June 19, 1998, *Texas Register* (23 TexReg 6381). Sections 33.601, 33.602, 33.605, 33.607, and 33.609 are adopted without changes and will not be republished.

The amendment to §33.140(5) will help ensure that providers of durable medical equipment supply appropriate equipment and give clients instructions for use of the equipment. This amendment implements Senate Bill 30, 75th Texas Legislature.

The amendment to §33.140(15) ensures consistency with terminology used by the Federal Health Care Financing Administration.

The new sections establish and standardize the department's policies for reimbursement of private duty nursing services. Section 33.601 defines the purpose of this subchapter; §33.602 establishes a definitions section; §33.603 establishes provider participation requirements; §33.604 establishes client eligibility criteria; §33.605 establishes medical necessity criteria for private duty nursing; §33.606 establishes private duty nursing benefits and limitations; §33.607 defines the plan of care; §33.608 describes the circumstances under which authorization for private duty nursing services will be terminated; and §33.609 describes settings where private duty nursing services may be provided.

The department is making the following minor changes to the proposed text due to staff comments received during the comment period to clarify the intent and improve the accuracy of the sections. The details of the changes are described in the following summary.

Change: Concerning §33.140(5)(A)(iii), for which no change was originally proposed, the department has substituted the correct reference to subparagraph (B)(iii) for the erroneous reference to subparagraph (B)(i) in the current rules.

Change: Concerning §33.603(b)(4), the department has corrected the erroneous reference to the Texas Nursing Practice Act.

Change: Concerning §33.604(a)(5), the department added the word "current" for clarity.

Change: Concerning §33.606(a)(2)(B), the department has substituted "should" for "may" to clarify the intended meaning of the section.

Change: Concerning §33.606(a)(2)(B)(iii), the section was intended to refer to a single "client" and has been amended accordingly.

Change: Concerning §33.608, the department amended the section title and the first sentence to clarify its intended meaning.

The following comments were received concerning the proposed rules. Following each comment is the department's response and any resulting change(s).

Comment: Concerning the rules in general, one commenter stated that the rules do not differentiate the functions which are clearly within the authority and scope of practice of the registered professional nurse.

Response: The department acknowledges the exclusive authority and responsibility of the Board of Nurse Examiners for the State of Texas to prescribe and regulate the practice of professional nursing. However, the department will continue to allow families to choose home health agencies or independently enrolled registered nurses or licensed vocational nurses as providers of EPSDT-CCP private duty nursing services until it is informed by the appropriate licensing authority that performance of particular services exceeds the scope of the provider's license. No change was made as a result of this comment.

Comment: Concerning the rules in general, one commenter stated that reimbursement of licensed vocational nurses by the department for providing care without supervision as independent providers under the Texas Medicaid Program may not be in the best interest of the clients receiving this service. The commenter added that with no supervision, limited resources exist for consultation in the home setting.

Response: The department agrees that safe and effective provision of private duty nursing services requires that the client's physician and the nurse providing the nursing services must have access to immediate, open communication. No change was made as a result of this comment.

Comment: Concerning the rules in general, a commenter stated on behalf of a licensed home health agency that the agency's pool of licensed vocational nurses is very skilled, with more than ten years of experience in neonatal intensive care units and/or pediatric intensive care units. The commenter added that licensed vocational nurses are "just as qualified as an RN in caring for medically fragile children provided they have the background needed for skills and assessment."

Response: The department agrees that many nursing situations involving medically complex children can be handled by licensed vocational nurses with appropriate education, supervision, oversight, and additional staff offered by agency staff pools. No change was made as a result of this comment.

Comment: Concerning the rules in general, two commenters supported continued enrollment of independently practicing LVNs.

Response: The department agrees. No change was made as a result of these comments.

Comment: Concerning §33.140(5)(C), one commenter expressed support for the proposed changes.

Response: The department acknowledges the comment. No change was made as a result of the comment.

Comment: Concerning §§33.604-33.609, several commenters expressed support for the additional requirements and clarification.

Response: The department acknowledges the comments. No change was made as a result of these comments.

Comment: Concerning §33.603(c), two commenters stated that the proposed rules encourage independently practicing LVNs to practice outside their licensing boundaries particularly performing initial and ongoing assessments.

Response: The department acknowledges the authority and responsibility of the Texas Board of Vocational Nurse Examiners to regulate licensed vocational nurses. However, the department will continue to allow families to choose independently enrolled licensed vocational nurses as providers of EPSDT-CCP private duty nursing services until it is informed by the appropriate licensing authority that performance of particular services exceeds the scope of the vocational nurse's license. No change was made as a result of this comment.

Comment: Concerning §33.604(a)(5), one commenter objected to the required identification of an alternate care giver for each client because creation of such a formal backup system would impose an undue hardship on families.

Response: The department disagrees. The safety of any client receiving care in the home requires not only identification of a primary care giver, but also an alternate care giver or a plan for obtaining care in an alternate setting if unforseen circumstances occur. No change was made as a result of this comment.

Comment: Concerning §33.604(a)(5), one commenter stated that the state should not "mandate that alternate care givers be available in order for the child to receive private duty nursing."

Response: The department disagrees. The safety of any client receiving care in the home requires not only identification of a primary care giver, but also an alternate care giver or a plan for obtaining care in an alternate setting if unforseen circumstances occur. No change was made as a result of this comment.

Comment: Concerning §33.605, one commenter stated that the proposed rules do not meet the established standard of care for individuals with skilled care needs and that a licensed vocational nurse practicing as an independently enrolled provider would be exceeding the nurse's established scope of practice. The commenter referred the department to the "General Statement on the Scope of Vocational Nurse Practice" from the Texas Board of Vocational Nurse Examiners.

Response: The department acknowledges the authority and responsibility of the Texas Board of Vocational Nurse Examiners to regulate licensed vocational nurses. However, the department will continue to allow families to choose independently enrolled licensed vocational nurses as providers of EPSDT-CCP private duty nursing services until it is informed by the appropriate licensing authority that performance of particular services exceeds the scope of the vocational nurse's license. No change was made as a result of this comment.

Comment: Concerning §33.606(a)(2)(B)(iv), one commenter stated that the section should require that alternate resources must be available in a timely manner and that quality of alternative services must be comparable.

Response: The department believes that the proposed rule already requires that when comparable alternate resources are actually available to the client, the amount of private duty nursing services may be decreased. No change was made as a result of this comment.

Comment: Concerning §33.606(a)(2)(B)(v), one commenter recommended deleting this requirement and addressing the

appropriate number of hours in the individual planning process for each recipient.

Response: The department disagrees. The department authorizes the number of private duty nursing hours based on the individual planning process. However, the department must consider appropriate reductions in private duty nursing hours if the primary care giver subsequently becomes able to meet more of the client's needs. Additional private duty nursing hours may be authorized for training of the primary care giver, and as the training goals are met, hours may be reduced. No change was made as a result of this comment.

Comment: Concerning §33.606(b)(2), one commenter suggested that the second sentence of the section should be amended to state that "Primary care givers remain responsible for a portion of a client's daily care, and private duty nursing is intended to support the primary care giver (family) to care for the client living at home."

Response: The department disagrees. The department authorizes private duty nursing services based on the physician's prescription and a determination of medical necessity of the service for the client. No change was made as a result of this comment.

Comment: Concerning §33.606(b)(3)(C), one commenter recommended that payment for private duty nursing services should be authorized for periods of 12 months.

Response: The department disagrees. The department believes that medically complex clients requiring private duty nursing services should be seen and evaluated by their physicians more than once a year. No changes were made as the result of this comment.

Comment: Concerning §33.606(b)(3)(D), one commenter recommended that information concerning the client's right to appeal and a list or resources/organizations available to help with the appeal process should be added.

Response: The department disagrees. The Health and Human Services Commission has proposed uniform fair hearing rules for all Medicaid-funded services. No change was made as a result of this comment.

Comment: Concerning §33.607, one commenter recommended that clients' plans of care should be "person-centered and family-focused; should offer choice, control, and any of the services individuals with disabilities and their families need; and should represent the best practices in service delivery."

Response: The commenter's recommendations constitute guidelines for the delivery of private duty nursing services, some of which are already included in §33.606 of this title (relating to Private Duty Nursing Benefits and Limitations). However, the plan of care is based on the client's condition and the medical necessity of the services as determined by the client's physician. The medical needs of the individual client remain the program's primary focus. No change was made as a result of this comment.

Comment: Concerning §33.608(3) and §33.608(4), one commenter suggested that the section should include language to "require a process for negotiating with the client and care giver to remedy the concerns with the place of care and to address the compliance issue prior to authorizing termination." In addition, the commenter suggested the need for "an opportunity for a second opinion, independent evaluation, or negotiation (short appeal) when there is a disagreement with the plan, with formal appeal as an option if needed."

Response: The department disagrees. The department expects that issues such as whether the place of service can continue to accommodate the health and safety of the client, or noncompliance by the client or the care giver with the primary physician's plan of care will be resolved by providers, families, and physicians. The department must consider termination of authorization for services when such issues are not resolved. No change was made as a result of this comment.

The comments on the proposed rules received by the department during the comment period were submitted by the Board of Nurse Examiners for the State of Texas, Texas Nurses Association, Advocacy, Inc., Texas Respite Resource Network, Cook Children's Home Health, AllianceCare of Texas, Pediatric Special Care, department staff, and by individuals. The commenters were neither for nor against the rules in their entirety; however, they raised questions, offered comments for clarification purposes, and suggested clarifying language concerning specific provisions in the rules.

Section 33.140 will be effective 20 days after filing with the Texas Register Division, Office of the Secretary of State. Sections 33.601-33.609 will be effective March 31, 1999.

Subchapter E. Medical Phase

25 TAC §33.140

The amendment is adopted under the Human Resources Code, §32.021 and Government Code, §531.021, which provide the Health and Human Services Commission with the authority to adopt rules to administer the state's medical assistance program, as proposed by the Texas Department of Health under its agreement with the Health and Human Services Commission to operate the purchased health services program as authorized under Chapter 15, §1.07, Acts of the 72nd Legislature, First Called Session (1991).

§33.140. Early and Periodic Screening, Diagnosis and Treatment–Comprehensive Care Program Providers (EPSDT-CCP).

Program Providers (EPSDT-CCP) The following are approved EPSDT-CCP provider types and the approved Texas Medical Assistance (Medicaid) Program reimbursement methodology for each provider type.

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

(5) Reimbursement for durable medical equipment.

(A) Direct vendor payments. The department or its designee makes direct vendor payments to providers of durable medical equipment participating in the Medicaid program. Participating providers are reimbursed within the limits of the maximum allowable fee schedule established by the department. The maximum allowable fee schedule for durable medical equipment is based on the lesser of the following:

(i) the billed amount;

(ii) the Medicare fee schedule, as defined in subparagraph (B)(ii) of this paragraph;

(iii) the durable medical equipment acquisition fee, as defined in subparagraph (B)(iii) of this paragraph; or

(iv) (No change.)

(B) (No change.)

(C) Providers of durable medical equipment to EPSDT-CCP recipients must sign the Texas Department of Health (department) Certification and Receipt prior to submitting any claim for payment for durable medical equipment. The durable medical equipment provider must maintain the durable medical equipment Certification and Receipt in the provider's office and must produce it upon request by the department or its designee. The signature of the durable medical equipment provider certifies that:

(i) the recipient has received the equipment as prescribed by the physician;

(ii) the equipment has been properly fitted to the recipient and/or meets the recipient's needs; and

(iii) the recipient, or the parent or guardian of the recipient, has received training and instruction regarding the equipment's proper use and maintenance.

(D) Ventilator service agreements. If the Medicaid client currently owns a ventilator, the department may provide reimbursement for a service agreement, in accordance with the department's policy, and at the lesser of the billed amount or a fee schedule developed by the department.

(6)-(14) (No change.)

(15) Comprehensive outpatient rehabilitation facility. A comprehensive outpatient rehabilitation facility must be enrolled and participating in Medicare. The department or its designee will reimburse comprehensive outpatient rehabilitation facilities according to Medicare reimbursement methodology.

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 December 14, 1998.

TRD-9818292
Susan K. Steeg
General Counsel
Texas Department of Health
Effective date: January 3, 1999
Proposal publication date: June 19, 1998
For further information, please call: (512) 458–7236

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Subchapter K. Private Duty Nursing

25 TAC §§33.601–33.609

The new sections are adopted under the Human Resources Code, §32.021 and Government Code, §531.021, which provide the Health and Human Services Commission with the authority to adopt rules to administer the state's medical assistance program, as proposed by the Texas Department of Health under its agreement with the Health and Human Services Commission to operate the purchased health services program as authorized under Chapter 15, §1.07, Acts of the 72nd Legislature, First Called Session (1991).

§33.603. Provider Participation Requirements.

(a) Home health agencies. To participate in THSteps-CCP, a home health agency must:

(1) comply with provider participation requirements in §29.302(a) of this title (relating to Provider Participation Requirements);

(2) comply with Family Code, Chapter 261, and Human Resources Code, Chapter 48, concerning mandatory reporting of suspected abuse and neglect of children and adults with disabilities; and

(3) maintain written policies and procedures for obtaining consent for medical treatment for clients in the absence of the primary care giver that meet the standards of Family Code, §32.001.

(b) Independently practicing registered nurses. To participate in THSteps-CCP, an independently practicing registered nurse must:

(1) hold a valid license from the Board of Nurse Examiners for the State of Texas to practice as a registered nurse;

(2) be enrolled and approved for participation in the Texas Medicaid Program;

(3) comply with the terms of the Texas Medicaid Provider Agreement;

(4) agree to provide services in compliance with all applicable federal, state, and local laws and regulations, including the Texas Nursing Practice Act;

(5) comply with all state and federal regulations and rules relating to the Texas Medicaid Program;

(6) comply with the requirements of the Texas Medicaid Provider Procedures Manual; including all updates and revisions published bimonthly in the Texas Medicaid Bulletin; and all handbooks, standards, and guidelines published by the department;

(7) comply with accepted professional standards and principles of nursing practice;

(8) provide at least 30 days written notice to clients of his or her intent to voluntarily terminate services, except in situations of a potential threat to the nurse's personal safety; and

(9) comply with subsections (a)(2) and (a)(3) of this section.

(c) Independently practicing licensed vocational nurses. To participate in THSteps-CCP, an independently practicing licensed vocational nurse must:

(1) hold a valid license from the Board of Vocational Nurse Examiners for the State of Texas to practice as a licensed vocational nurse;

(2) be enrolled as a provider in the Texas Medicaid Program;

(3) comply with the terms of the Texas Medicaid Provider Agreement;

(4) agree to provide services in compliance with all applicable federal, state, and local laws and regulations, including the Texas Vocational Nurse Act;

(5) comply with all state and federal regulations and rules relating to the Texas Medicaid Program;

(6) comply with the requirements of the Texas Medicaid Provider Procedures Manual, including all updates and revisions published bimonthly in the Texas Medicaid Bulletin; and all handbooks, standards, and guidelines published by the department;

(7) comply with accepted standards and principles of nursing practice; and

(8) provide at least 30 days written notice to clients of his or her intent to voluntarily terminate services, except in situations of a potential threat to the nurse's personal safety; and

(9) comply with subsections (a)(2) and (a)(3) of this section.

§33.604. Client Eligibility Criteria.

(a) To be eligible for private duty nursing services, a client must:

(1) be under 21 years of age and eligible for THSteps-CCP;

(2) meet medical necessity criteria for private duty nursing;

(3) have a primary physician who:

(A) provides a prescription for private duty nursing services;

(B) establishes a plan of care;

(C) provides a statement that private duty nursing services as defined in this section are medically necessary for the client;

(D) provides a statement that the client's medical condition is sufficiently stable to permit safe delivery of private duty nursing as described in the plan of care;

(E) provides continuing care and medical supervision including but not limited to examination or treatment within 30 days prior to the start of private duty nursing services. For extensions of private duty nursing services, medical care must comply with the American Academy of Pediatrics recommended schedule of visits which are applicable to the client's age, or within six months, which ever is sooner; and

(F) provides specific written, dated orders for clients receiving private duty nursing services.

(4) require care beyond the level of services delivered under §§29.301-29.307 of this title (relating to Medicaid Home Health Services); and

(5) have an identified primary care giver residing in the client's residence and an identified alternate care giver who is or can be trained to provide part of the client's care, or if no alternate care giver is identified, a current plan to enable the client to receive care in an alternate setting or situation if the primary care giver is unable to fulfill his or her role.

(b) The department may waive any client eligibility criteria in subsection (a)(3)(E) of this section upon review of a client's specific circumstances.

§33.606. Private Duty Nursing Benefits and Limitations.

(a) Private duty nursing benefits include the following.

(1) Services. Direct skilled nursing care and care giver training and education intended to:

(A) optimize client health status and outcomes; and

(B) promote family-centered, community-based care as a component of an array of service options by;

(i) preventing prolonged and/or frequent hospitalizations or institutionalization;

(ii) providing cost-effective, quality care in the most appropriate environment; and

(iii) providing training and education of care givers.

(2) Amount and duration.

(A) The amount and duration of private duty nursing services requested will be evaluated based upon review of the following documentation:

(i) frequency of skilled nursing interventions;

(ii) complexity and intensity of the client's care;

(iii) stability and predictability of the client's condition; and

(iv) identified problems and goals.

(B) The amount of private duty nursing should decrease when:

(i) one or more of the client's problems documented in the plan of care are resolved;

(ii) one or more of the goals documented in the plan of care are met;

(iii) there is a reduction in the frequency of skilled nursing interventions, or the complexity and intensity of the client's care;

(iv) alternate resources for comparable care become available; or

(v) the primary care giver becomes able to meet more of the client's needs.

(C) 24-hour private duty nursing will be authorized only:

(i) for limited periods of time with defined end dates when medically necessary and appropriate based on the needs of the client;

(ii) for limited periods of time with defined end dates related to the medical needs of the primary care giver, only when the alternate care giver is not available; and

(iii) in the absence of both the primary care giver and the alternate care giver, if another alternate person is designated who can legally make decisions on behalf of the client and who will reside in the client's home during the time 24-hour private duty nursing will be provided.

(b) Private duty nursing service limitations include the following:

(1) THSteps-CCP will not reimburse for private duty nursing services used for or intended to provide:

(A) respite care;

(B) child care;

(C) activities of daily living for the client;

(D) housekeeping service; or

(E) individualized, comprehensive case management beyond the service coordination required by the Texas Nursing Practice Act, Texas Civil Statutes, Article 4513 et seq.

(2) Private duty nursing shall neither replace parents or guardians as the primary care giver nor provide all the care that a client requires to live at home. Primary care givers remain responsible for a portion of a client's daily care, and private duty nursing is intended to support the care of the client living at home.

(3) Authorization of services.

(A) Authorization is required for payment of services.

(B) Only those services that are determined by the department or its designee to be medically necessary and appropriate will be reimbursed.

(C) No authorization for payment of private duty nursing services may be issued for a single service period exceeding six months. Specific authorizations may be limited to a time period less than the established maximum based on the stability and predictability of the client.

(D) The family will be notified in writing by the department or its designee of a reduction or denial of private duty nursing services.

(E) The provider will be notified in writing by the department or its designee of the authorization, or denial of private duty nursing services.

(F) The provider will notify the primary physician and family upon receipt of the authorization or denial of private duty nursing services.

(G) Authorization requests for private duty nursing services must include the following:

(i) current department authorization form, completed by the primary physician and provider;

(ii) plan of care, recommended, signed and dated by the client's primary physician. The primary physician reviews and revises the plan of care with each authorization, or more frequently as the physician deems necessary; and

(iii) current department form, THSteps-CCP Private Duty Nursing Addendum to Plan of Care.

(H) If inadequate or incomplete information is provided, the provider will be requested to furnish additional documentation to enable the department to make a decision on the request.

(I) For authorization of extensions beyond the initial authorization period or revisions to an existing authorization, the provider must submit requests in writing. Required documentation for extending or revising authorization includes:

(i) current department authorization form;

(ii) plan of care, recommended, signed and dated by the client's primary physician; and

(iii) current department form, THSteps-CCP Private Duty Nursing Addendum to Plan of Care, signed and dated by the client's primary physician.

(J) During the authorization process, providers are required to deliver the requested services from the start of care date. Providers are responsible for a safe transition of services when the authorization decision is a denial or reduction in the private duty nursing services being delivered.

§33.608. Termination of Authorization for Private Duty Nursing Services.

Authorization for private duty nursing will be terminated by the department or its designee when:

(1) the client is no longer eligible for THSteps-CCP;

(2) the client no longer meets the medical necessity criteria for private duty nursing;

(3) the place of service(s) can no longer accommodate the health and safety of the client; or

(4) the client or care giver refuses to comply with the primary physician's plan of care.

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 December 14, 1998.

TRD-9818291
Susan K. Steeg
General Counsel
Texas Department of Health
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Proposal publication date: June 19, 1998
For further information, please call: (512) 458–7236

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Part II. Texas Department of Mental Health and Mental Retardation

Chapter 406. ICF/MR Programs

Subchapter E. Eligibility and Review

25 TAC §§406.201–406.214, 406.216, 406.217

The Texas Department of Mental Health and Mental Retardation (TDMHMR) proposes the repeal of §§406.201-406.214, 406.216, and 406.217 of Chapter 406, Subchapter E, governing eligibility and review, without changes to the proposed text as published in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8340). The adoption of new §§406.201-406.217 of Chapter 406, Subchapter E, concerning the same, which replace the repealed sections, are contemporaneously adopted in this issue of the *Texas Register*.

The repeal accommodates the adoption of new sections governing eligibility and review.

A public hearing was held on September 8, 1998, at which no testimony was offered. Written public comment was received from San Angelo State School, San Angelo; San Antonio State Hospital, San Antonio; and Corpus Christi State School, Corpus Christi. All commenters stated they had no comment.

The new sections are adopted under the Texas Health and Safety Code, §532.015(a), which provides the Texas MHMR Board with broad rulemaking authority; Human Resource Code, §32.021(a), and Government Code, §531.021, which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer federal medical assistance funds and administer the state's medical assistance program; Senate Bill 509 of the 74th Texas Legislature, which clarifies THHSC's authority to delegate the operation of all or part of a Medicaid program to a health and human service agency; and Human Resources Code, §32.012(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to TDMHMR the authority to operate the ICF/MR program.

§406.201. Purpose.

§406.202. Definitions for Level-of-care and Level-of-need Criteria.

§406.203. Eligibility for Level-of-care Determination.

§406.204. Level-of-care Determination and Level-of-need Assignment.

§406.205. ICF/MR I Level-of-care Criteria.

§406.206. ICF/MR V Level-of-care Criteria.

§406.207. ICF/MR VI Level-of-care Criteria.

§406.208. ICF/MR/RC VIII Level-of-care Criteria.

§406.209. Retroactive Level-of-care Determination.

§406.210. Reconsideration of Level-of-Care Determination and Effective Dates.

§406.211. Payment for Absences from the Facility.

§406.212. Discharge and Transfer.

§406.213. Utilization Control.

§406.214. Utilization Review.

§406.216. Preadmission and Admission Process.

§406.217. Continued-stay Review.

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 December 14, 1998.

TRD-9818310

Charles Cooper

Chairman, Texas MHMR Board

Texas Department of Mental Health and Mental Retardation

Effective date: January 4, 1999

Proposal publication date: August 14, 1998

For further information, please call: (512) 206–4516

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25 TAC §§406.201–406.217

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts new §406.201-406.217 of Chapter 406, Subchapter E, governing eligibility and review. Sections 406.201-406.204, 406.207, 406.209-406.212, and 406.214-406.216, are adopted with changes to the proposed text as published in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8341). Sections 406.205, 406.206, 406.208, 406.213, and 406.217 are adopted without changes. The repeals of existing §§406.201-406.217 of Chapter 406, Subchapter E, concerning the same, which the new sections replace, are contemporaneously adopted in this issue of the *Texas Register*.

The new sections describe the requirements and rights for participation in the Intermediate Care Facility for Mentally Retarded (ICF/MR) program, including eligibility requirements; requirements for determining level of care (LOC) and assigning level of need (LON); requirements for payment for absences from a facility; requirements for discharge; and utilization control and utilization review procedures.

Throughout the subchapter minor grammatical changes and clarifying language are added. The title and content of §406.201 are expanded to include the subchapter's applicability. The subchapter's purpose is modified to describe the purpose of the subchapter in more detail. The title of §406.202 is modified to reflect the section's expanded scope. The definitions of "cerebral palsy" and "epilepsy" are deleted as unnecessary. Language is added to the definition of "Inventory for Client and Agency Planning (ICAP) service level" describing where information to obtain a copy of the ICAP assessment instrument is available. Language is added to the definition of "level of need (LON)" clarifying that the rate being referenced is the non-state operated rate. Language is added to the definition of "MR/RC Assessment" clarifying that it includes the LOC determination. The definition of "related condition" in §406.202(12)(A)(ii) is modified to reflect people-first language. The "MR/RC Assessment, Instructions, Related Conditions Eligibility Screening Instrument" (Figure 1: 25 TAC §406.203(1)(B)), which was incomplete as proposed, is complete.

New subsection (c) is added to §406.204 describing the LOC and LON effective dates. Language regarding a provider's responsibility for maintaining documentation supporting the requested LOC and LON are added to §406.204(d) and (e). Language is added to §406.204(f) stating that if the MR/RC Assessment is not submitted within the required time frame, then the LOC effective date will be the date that the MR/RC Assessment is submitted. Section 406.207(1) is modified to reflect people-first language. The title of §406.211 is modified for clarification. The term "annually" in §406.211(a)(2) is replaced with the phrase "per calendar year." In §406.211(d), language stating that a provider may charge an individual's legal representative a bed-hold charge is deleted. The title and text of §406.216 are modified for clarification.

A public hearing was held on September 8, 1998, at which no testimony was offered. Written public comment was received from Advocacy, Inc., Austin; Concept Six, Austin; the Parent Association for the Retarded of Texas (PART), Austin; the parent of a state school resident, Garland; Central Gulf State-Operated Community Services, Richmond; Abilene State School, Abilene; San Angelo State School, San Angelo; San Antonio State Hospital, San Antonio; and Corpus Christi State School, Corpus Christi.

Regarding the definition of "interdisciplinary team (IDT)" in §406.202(6), one commenter asked what is the individual's (or the individual's legal representative on the individual's behalf) role on the IDT. The commenter stated that the individual (or legal representative) should be considered a member of the IDT in order to convey preferences and agreement. The department responds that the definition of IDT does not *exclude* the individual (or legal representative) as a member of the IDT. In fact, federal regulations (42 CFR §483.440(c)(2)) state, "Participation by the client, his or her parent (if the client is a minor), or the client's legal guardian is required unless that participation is unobtainable or inappropriate."

Regarding the definition of "related condition" in §406.202(12)(A)(ii), the same commenter suggested changing the phrase "mentally retarded persons" to "persons with mental retardation." The department concurs and has made the suggested change.

Regarding the second sentence in §406.207(1), the commenter suggested changing the term "handicap" to "disability." The department concurs and has made the suggested change.

Regarding §406.204(a), a commenter stated that TDMHMR indicated in its training that the Texas Department of Human

Services (TDHS) was responsible for notifying TDMHMR by March 31, 1999, of all LOC determinations and LON assignments it made prior to December 31, 1998. The commenter requested that TDMHMR closely monitor the timely and effective completion of level-of-care forms by TDHS. Although the commenter welcomes the transfer of responsibility from TDHS to TDMHMR, the commenter stated that TDMHMR should be prepared to assist providers with specific situations in which clients have lost Medicaid eligibility and payment has been denied due to the transition of a vital function from TDHS to TDMHMR. The department responds that the deadline for TDHS to notify TDMHMR of its LOC determinations and LON assignments is December 31, 1998, not March 31, 1999; therefore, the department does not anticipate delays related to the transition of responsibility.

Regarding the definition of "interdisciplinary team (IDT)" in §406.202(6), two commenters requested that the definition contained in the Texas Health and Safety Code, §591.003(8), be used instead. The department declines to replace the definition because the definition contained in the subchapter is consistent with the federal regulations governing the ICF/MR program.

Regarding the payment criteria for therapeutic and extended therapeutic leave in §406.211(c)(1)(B)(ii), two commenters questioned if the authorization process was being used at state schools. The commenters asked if approval is required before leave can be taken, and whether a physician has to approve every leave. The department responds that the documentation required in this clause is being done in state schools. The department notes that subsection(c)(1) relates to *the provider receiving payment for ICF/MR services* and subparagraph (B) relates to the documentation that is required in order for the provider to receive payment. The requirement in subparagraph(B)(ii) is not authorization for the individual to take leave; it is documentation necessary for the provider to receive payment. The documentation requirement in (B)(ii) can be fulfilled after the individual has returned from leave. The language in (B)(ii) has been modified for clarification.

Regarding the payment criteria for special leave in §406.211(c)(3)(D) and the example of camping as "special leave" in §406.211(a)(5), two commenters asked if *all of the active treatment* specified in the individual program plan (IPP) is provided while on the camping trip. The department responds that the provider is responsible for informing the camp staff of the active treatment objectives in the IPP in order for active treatment to be provided while the individual is camping.

Regarding the payment criteria for unauthorized leave in §406.211(c)(4)(A), two commenters asked why receiving inpatient hospitalization was considered unauthorized leave while camping and attending the Special Olympics are considered special leave. The commenters, stating that being hospitalized is a valid reason for leave, recommended that it be considered special leave. The department responds that the subsection relates to *the ICF/MR provider receiving payment for ICF/MR services*. Although being hospitalized is a valid reason for the individual not to be present in the facility, it is not a reason to request reimbursement for ICF/MR services that were not provided. If an individual were receiving inpatient hospitalization, then Medicaid would pay the hospital for the inpatient treatment provided during the individual's stay in the hospital. Medicaid will not pay the ICF/MR provider for the same period of time. For clarification, the department has changed the term "unauthorized leave" to "non-reimbursable leave."

Regarding bed-hold charging procedures in §406.211(d), two commenters stated that discharging an individual from the ICF/MR while the individual is receiving inpatient hospitalization is wrong. Additionally, the commenters asked if the legal representative could be charged a bed-hold charge if the legal representative is the "guardian of the person" and not the "guardian of the estate." The department responds that Medicaid will reimburse only one 24-hour program at a time. Discharge from the ICF/MR must happen in order for Medicaid to pay the hospital for the individual's inpatient hospitalization, just as discharge from inpatient hospitalization must happen in order for Medicaid to resume paying the ICF/MR provider for the individual's ICF/MR services. Regarding charging the individual's legal representative a bed-hold charge, the department responds by deleting the reference to charging the individual's legal representative. The department notes that ICF/MR providers are not required to charge a bed-hold charge; however, they have the option.

Regarding the written agreement for a bed-hold charge in §406.211(d)(2), two commenters asked if the written agreement being referenced is the approval for each extended or therapeutic leave at state schools. The department responds that §406.211(d) addresses the procedures for charging an individual (or legal representative) for holding a bed while the individual is absent from the ICF/MR on non-reimbursable leave. The subsection is not the approval process for therapeutic or extended therapeutic leave in state schools.

Regarding fair hearings in §406.215, two commenters requested that language be included which addresses the legal representative's right to a fair hearing on behalf of the individual. The department responds that an individual's legal representative does not have the right to a fair hearing on behalf of the individual. However, the individual has the right to have his or her legal representative request a fair hearing on his or her behalf, and to be represented by the legal representative at the fair hearing.

Two commenters stated that since LON, ICAP, and LOC are continually referenced throughout the subchapter, they should be attached. The department responds that the determination and assignment criteria for LON and LOC are described in §406.203(1)(B) (a figure attached to the distributed subchapter), §406.204(d) and (e), §406.205, §406.206, §406.207, and §406.208. The Inventory for Client and Agency Planning (ICAP), which has a copyright, can be obtained by contacting Test Division Permissions, Riverside Publishing Company, 8420 Bryn Mawr, Chicago, IL 60631.

Regarding the "MR/RC Assessment, Instructions, Related Conditions Eligibility Screening Instrument" in §406.203(1)(B), one commenter stated that the figure did not appear complete and asked if a section was missing. The department responds that every other page was inadvertently omitted from the proposal. The complete document is adopted.

Regarding the definition of "MR/RC Assessment" in §406.202(9), one commenter suggested that the definition include language stating the form is also used for the LOC determination. The department concurs and has added language to reflect the commenter's concern.

Regarding the second sentence of the definition of "extended therapeutic leave" in §406.211(a)(2), the commenter requested that the phrase "per calendar year" replace the term "annually" for clarity. The department concurs and has modified the language as requested.

Regarding the admission process in §406.215, the commenter questioned if the section meant that the provider could not admit to receiving funds while on vendor hold or if it meant that a new resident could not physically enter the provider's facility while the provider was on vendor hold. The commenter asked if the provider could bring in a new resident and then actually "admit" in order to receive reimbursement when the vendor hold is released. The department responds that Medicaid will not reimburse a provider for services that were delivered to a new resident during the time the provider was on vendor hold. The provider may bring in a new resident while on vendor hold but may not request Medicaid reimbursement for any services delivered to the new resident during the time the provider was on vendor hold. Language clarifying this position has been added.

Three commenters stated that they had no comment.

The new sections are adopted under the Texas Health and Safety Code, §532.015(a), which provides the Texas MHMR Board with broad rulemaking authority; Human Resource Code, §32.021(a), and Government Code, §531.021, which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer federal medical assistance funds and administer the state's medical assistance program; Senate Bill 509 of the 74th Texas Legislature, which clarifies THHSC's authority to delegate the operation of all or part of a Medicaid program to a health and human service agency; and Human Resources Code, §32.012(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to TDMHMR the authority to operate the ICF/MR program.

§406.201. Purpose and Applicability.

(a) Purpose. The purpose of this subchapter is to describe the requirements and rights for participation in the Intermediate Care Facility for Mentally Retarded (ICF/MR) program, including:

(1) eligibility requirements;

(2) requirements for determining level of care (LOC) and assigning level of need (LON);

(3) requirements for payment for absences from a facility;

(4) requirements for discharge from a facility; and

(5) utilization control and utilization review procedures.

(b) Applicability. This subchapter applies to providers and individuals participating in the ICF/MR program.

§406.202. Definitions.

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

(1) Active treatment - Continuous aggressive, consistent implementation of a program of habilitation, specialized and generic training, treatment, health services, and related services. The program must be directed toward:

(A) the acquisition or maintenance of the behaviors necessary for the individual to function with as much self-determination and independence as possible, and

(B) the prevention or deceleration of regression or loss of current optimal functional status. Active treatment does not include services to maintain generally independent individuals who are able to function with little supervision or in the absence of a continuous active treatment program.

(2) Adaptive behavior level (ABL) - The effectiveness or degree to which the individual meets the standards of personal independence and social responsibility expected of the person's age and cultural group as assessed by a standardized assessment instrument.

(3) Inventory for Client and Agency Planning (ICAP) service level - A designation which identifies the level of services needed by an individual as determined by the ICAP assessment instrument. (For information on how to obtain a copy of the ICAP assessment instrument contact TDMHMR, Office of Medicaid Administration, P.O. Box 12668, Austin, TX 78711-2668.)

(4) Interdisciplinary team (IDT) - Those persons (professionals, paraprofessionals and non-professionals) who possess the knowledge, skills and expertise necessary to accurately identify the comprehensive array of an individual's needs and design a program which is responsive to those needs.

(5) Level of care (LOC) - A determination given to an individual based on data submitted on the MR/RC Assessment.

(6) Level of need (LON) - An assignment given to an individual based on the ICAP service level and selected items on the MR/RC Assessment form which determines the non-state operated rate of reimbursement for that individual.

(7) MR/RC Assessment - A form utilized by TDMHMR for eligibility determination, LOC determination, and LON assignment.

(8) Medical care plan - A plan developed by a physician, in cooperation with licensed nursing personnel, for an individual who requires 24-hour supervision by licensed nurses.

(9) Mental retardation (MR) - Significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and originating during the developmental period.

(10) Related condition (RC)- A severe, chronic disability that:

(A) is attributed to:

(i) cerebral palsy or epilepsy; or

(ii) any other condition, other than mental illness, found to be closely related to mental retardation because the condition results in impairment of general intellectual functioning or adaptive behavior similar to that of persons with mental retardation, and requires treatment or services similar to those required for persons with mental retardation;

(B) is manifested before the person reaches age 22;

(C) is likely to continue indefinitely; and

(D) results in substantial functional limitations in at least three of the following areas of major life activity;

(i) self-care;

(ii) understanding and use of language;

(iii) learning;

(iv) mobility;

(v) self-direction;

(vi) capacity for independent living.

(11) TDHS - The Texas Department of Human Services.

(12) TDMHMR - The Texas Department of Mental Health and Mental Retardation.

(13) Qualified mental retardation professional (QMRP) - A person who meets the criteria set forth in 42 CFR §483.430(a).

§406.203. Eligibility Criteria.

To be eligible for the ICF/MR Program an individual must:

(1) be an individual with:

(A) mental retardation and an IQ of 69 or below as measured by a standardized psychometric instrument; or

(B) a related condition, diagnosed through formal testing and evaluation and meeting all five conditions listed in the "MR/RC Assessment, Instructions, Related Conditions Eligibility Screening Instrument." Assessments of IQ are not required;

(2) be in need of and able to benefit from the active treatment provided in the 24-hour supervised residential setting of an ICF/MR, as evidenced by information submitted to TDMHMR for a LOC determination; and

(3) meet the Medicaid financial eligibility criteria and the LOC determination criteria. The LOC determination is made independently of the financial need determination.

§406.204. LOC Determination and LON Assignment.

(a) TDHS responsibilities. LOC determinations and LON assignments will be performed by TDHS through December 31, 1998. Effective January 1, 1999, LOC determinations and LON assignments will be performed by TDMHMR.

(b) TDMHMR responsibilities. Effective January 1, 1999, ICF/MR providers must electronically submit to TDMHMR information from the MR/RC Assessment form that substantiates a LOC determination and LON assignment.

(c) LOC and LON effective dates.

(1) TDMHMR determines an initial LOC and assigns an initial LON for each individual newly admitted to the ICF/MR program. The initial LOC and LON are effective for 180 calendar days.

(2) Subsequent LOC determinations and LON assignments are effective for 364 calendar days. If an individual transfers to another facility, the admission is not a new admission to the ICF/MR program.

(3) To acquire a renewal of the existing LOC and LON without interrupting services, the provider must submit a request for renewal prior to the expiration date, but no earlier than 45 calendar days prior to the expiration date.

(A) Submission for a renewal of the existing LOC and LON after the expiration date or more than 45 calendar days prior to the expiration date results in a different LOC and LON effective date and a different expiration date.

(B) The earliest effective date is the date of electronic submission of the requested LOC and LON.

(d) LOC determination. The LOC determination is based on the LOC criteria in §406.205 of this title (relating to ICF/MR I LOC Criteria), §406.206 of this title (relating to ICF/MR V LOC Criteria), §406.207 of this title (relating to ICF/MR VI LOC Criteria), and §406.208 of this title (relating to ICF/MR/RC VIII LOC Criteria). The provider is responsible for maintaining documentation in the individual's record to support the requested LOC, including a completed paper copy with all necessary signatures.

(1) The ICF/MR provider must:

(A) submit a MR/RC Assessment which includes current data obtained from standardized evaluations and formal assessments which measure physical, emotional, social, and cognitive factors for review in making a LOC determination; and

(B) retain a copy of the MR/RC Assessment signed by a physician in the individual's record.

(2) The ICF/MR Program has four LOCs: ICF/MR I, ICF/MR V, ICF/MR VI, and ICF-MR/RC VIII. LOC I, V, and VI determinations are based on the individual's intellectual functioning. LOC VIII determinations are based on the following variables regarding the developmental needs of each individual:

(A) adaptive behavior; and

(B) health status.

(3) A single, specific deficit or developmental need does not necessarily indicate a need for active treatment.

(4) If an IQ score cannot be obtained for a person with severe or profound deficits in intellectual functioning, a social composite score obtained on the Vineland Adaptive Behavior Scale or other professionally accepted scale must be submitted. Documentation must be available that an assessment of intelligence with a standardized instrument was attempted.

(5) An individual is not eligible for the ICF/MR Program if the individual:

(A) has been medically diagnosed as having "brain death," which includes no evidence of sensory receptivity or sensory responsiveness on a permanent basis; or

(B) does not respond in any way to his environment, but needs continuous care for medical reasons.

(6) If subsequent to the LOC determination it is discovered that information submitted for a LOC was not correct or has changed, the LOC will be reevaluated.

(7) If an individual's IQ or adaptive behavior level is such that he is eligible for the ICF/MR Program but does not meet the criteria for any one LOC, a special review of his application for a LOC will be conducted.

(8) Based on I.Q or adaptive behavior level, an individual may meet the criteria for two LOCs. In this situation, the LOC that best meets the individual's developmental needs will be requested.

(e) LON assignment. The LON assignment is based on the LON criteria in this section.

(1) The ICF/MR provider must submit the ICAP service level and selected items on the MR/RC Assessment and supporting documentation for review in making a LON assignment. The provider is responsible for maintaining documentation in the individual's record to support the requested LON.

(2) The ICF/MR Program has five LONs: Intermittent (LON 1); Limited (LON 5); Extensive (LON 8); Pervasive (LON 6); and Pervasive Plus (LON 9).

(A) Unless modified in accordance with subparagraph (C) or (D) of this paragraph, LONs 1, 5, 8, and 6 are assigned in accordance with an individual's ICAP service level as follows:

(i) LON 1 is assigned if the individual's ICAP service level equals 7, 8, or 9;

(ii) LON 5 is assigned if the individual's ICAP service level equals 4, 5, or 6;

(iii) LON 8 is assigned if the individual's ICAP service level equals 2 or 3;

(iv) LON 6 is assigned if the individual's ICAP service level equals 1.

(B) Regardless of an individual's ICAP service level score, LON 9 is assigned if the individual exhibits extremely dangerous behavior and the individual's MR/RC Assessment is scored with a 2 in the "Behavior" section of the form. Extremely dangerous behavior:

(i) is life threatening to the individual or others or could cause catastrophic emotional harm to others;

(ii) requires a written behavior plan which is based on on-going written data and targets the extremely dangerous behavior; and

(iii) requires that to manage behavior the individual be supervised by a staff member assigned exclusively to the individual for the entire time the individual is awake. The staff member must have no other duties while assigned to the supervision of this individual.

(C) LON assignments 1, 5, and 8 made in accordance with subparagraph (A) of this paragraph may be modified if an individual has dangerous behavior and the individual's MR/RC Assessment is scored with a 1 in the "Behavior" section of the form. A modification made in accordance with this subparagraph changes the initial LON assignment to the next level (i.e., LON 1 to LON 5; LON 5 to LON 8; and LON 8 to LON 6). Dangerous behavior:

(i) is that which could cause serious physical injury to the individual or others;

(ii) requires a written behavior plan which is based on on-going written data and targets the dangerous behavior; and

(iii) requires intensive staff intervention and extraordinary staff resources to manage the dangerous behavior when it occurs.

(D) LONs 1, 5, and 8 made in accordance with subparagraph (A) of this paragraph may be modified if an individual has extraordinary medical needs which are documented in writing by the IDT and the individual's MR/RC Assessment is scored with a 6 in the "Nursing" section of the form. Extraordinary medical needs require direct nursing services in excess of 180 minutes per week. The provision of nursing services must be documented by a nurse in the individual's medical record including the amount of time spent for treatment.

(3) If the provider determines the information submitted for a LON was not correct or changed, the provider must submit a corrected MR/RC Assessment.

(f) MR/RC Assessment. The provider must submit the MR/RC Assessment within 20 working days of the individual's admission to the ICF/MR. If the MR/RC Assessment is not submitted within the 20-day time frame, then the LOC effective date will be the date the MR/RC Assessment is submitted.

§406.207. ICF/MR VI LOC Criteria.

The individual eligible for the ICF/MR VI Program requires extensive supervision and assistance in the completion of self-help activities. The individual requires a highly structured environment with ongoing supervision. The individual may also have medical needs requiring close supervision and nursing intervention. Training is necessary in basic self-help skills, work skills, care of belongings and home, sensory-motor development, compliance with daily routines and group activities, and socially appropriate behaviors. Maladaptive behaviors often are present and require active programmatic intervention.

(1) Intellectual functioning. The individual functions in the severe to profound range of mental retardation as evidenced by a full scale IQ score of 39 or below obtained by formal assessment. If the individual has a sensory or motor disability in which a specially standardized intelligence test or a certain portion of a standardized intelligence test is appropriate, then that score must be reported as the IQ score for compliance with this criterion. If an IQ score cannot be obtained for a severely or profoundly retarded individual, a social composite score obtained on the Vineland Adaptive Behavior Scale or other professionally accepted scale must be submitted. Documentation must be available that an assessment of intelligence with a standardized intelligence test was attempted.

(2) Adaptive behavior level. The individual exhibits extreme deficits in adaptive behavior with an adaptive behavior level of III or IV noted on the LOC assessment form.

(3) Health status. The individual's health status does not interfere with participation in the active treatment program. The individual may require close daily supervision and nursing intervention. The individual, however, must be able to participate in active treatment outside the bedroom area during waking hours.

§406.209. Retroactive LOC Determination.

Private-pay individuals living in Medicaid-certified facilities who do not receive SSI cash benefits may be eligible for "three-months prior" vendor payments. To ensure that vendor payments begin on the date that an individual's financial resources are exhausted, the potential recipient must have a valid LOC and the ICF/MR provider should maintain his or her records in compliance with the Medicaid Utilization Review (UR) requirements. To be in compliance with UR requirements, potential recipients' records must be maintained and reviewed as follows.

(1) Facility staff must conduct an IDT evaluation before the potential recipient's admission to the Medicaid program. The IDT must make a comprehensive medical, social, and psychological evaluation of the potential recipient 's need for ICF/MR services. If the evaluation indicates the potential recipient 's needs could be met by alternative services, facility staff must document this fact in the potential recipient 's record and must document attempts to locate the services. The provider must comply with 42 CFR §456.370 and §456.371.

(2) The potential recipient must have a current individual program plan. The physician's certification of need for ICF/MR services must be dated no more than 30 days before the date that the facility administrator learned about the potential recipient

's application for Medicaid assistance, or before authorization for vendor payment.

§406.210. Reconsideration of LOC Determination and Effective Dates.

When a facility provides care for an individual for a period of time not covered by a LOC determination, TDMHMR or its agent will reconsider the LOC effective dates if requested to do so by the facility.

(1) Individuals eligible for reconsideration of LOC effective dates must have the following, prior to the submission of a request for reconsideration:

(A) financial eligibility established;

(B) admission to the Medicaid ICF/MR Vendor Payment System on Client Movement form; and

(C) a current LOC determination using the MR/RC Assessment.

(2) Requests for reconsideration are limited to days that are not covered by a valid LOC determination.

(3) Requests for reconsideration for periods of time already denied a LOC determination by TDHS's appeal process are not accepted.

(4) The provider must submit a request within 12 months from the date services were provided without a valid LOC.

(5) TDMHMR or its agent shall notify the provider of the results of the reconsideration within 45 days. The provider may initiate an appeal, when reconsideration is denied, by submitting a request in writing in accordance with Chapter 409, Subchapter B of this title (relating to Adverse Actions).

(6) The provider may neither charge nor take any other recourse against Medicaid recipients, their family members, or their representatives for any claim denied or reduced because of the facility's failure to comply with any rule, regulation, or procedure pertaining to reimbursement.

§406.211. Payment for Absences from the Facility.

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

(1) Day - A 24-hour period extending from midnight to midnight. For counting days of absence from a facility, the first day is the first 24-hour period beginning at midnight after the individual's departure.

(2) Extended therapeutic leave - An individual's absence from a facility for therapeutic purposes for a period of time greater than three days in duration. Leave(s) cannot exceed ten cumulative days per calendar year. Combinations of leave duration are allowable (e.g., leave combinations of 5 days and 5 days; 6 days and 4 days; or 10 consecutive days). One extended therapeutic leave may be combined with one therapeutic leave (3 days) per calendar year.

(3) Legally authorized representative - A legally authorized representative means:

(A) a parent or legal guardian if the individual is a minor, or a legal guardian if the client has been adjudicated incompetent to manage the individual's personal affairs;

(B) an agent of the individual authorized under a durable power of attorney for health care;

(C) an attorney ad litem appointed for the individual; or

(D) a parent, spouse, adult child, or personal representative if the individual is deceased.

(4) Therapeutic leave - An individual's absence from a facility for therapeutic purposes for not more than three consecutive days. The number of therapeutic leaves an individual may utilize is unlimited.

(5) Special leave - An individual's absence from a facility for a special activity (e.g., Special Olympics, camping).

(6) Absence - A period of time which an individual is not present in the residing facility.

(b) Leave. For all types of leave, all the following must be met:

(1) Facility staff must be available, by telephone or at the facility, to individuals during their absence, even if all residents of the facility are absent from the facility.

(2) The individual must stay in the facility overnight before being eligible to take another therapeutic or extended therapeutic leave.

(3) Records must be available when TDMHMR or its authorized agent audits the provider to ensure the provider's documentation of all types of leave and verifies the provider's compliance with the provisions of this section.

(c) Payment criteria. Payment criteria for the types of leave are:

(1) Therapeutic and extended therapeutic leave. A provider may receive payment from TDMHMR or its authorized agent for days during which an individual is on therapeutic or extended therapeutic leave if the following criteria are met:

(A) the individual's individual program plan (IPP) provides for therapeutic and/or extended therapeutic leave; and

(B) the following information is documented on a "Record of Therapeutic Leaves":

(i) the name of the individual taking the leave;

(ii) agreement to the leave by the individual's QMRP and physician, if appropriate;

(iii) the date and time of the individual's departure from the facility; and

(iv) the date and time of the individual's return to the facility.

(2) Extended therapeutic leave. For extended therapeutic leave, the individual, or a member of the individual's family or legally authorized representative, must set forth in writing specific dates for the individual's extended therapeutic leave.

(A) When an extended therapeutic leave begins in one calendar year and extends into the next, it constitutes an extended therapeutic leave for the calendar year in which it began.

(B) If an individual transfers into another facility within the same year he or she has taken all ten days of his or her extended therapeutic leave, then the individual is not eligible for another extended therapeutic leave until the following year.

(3) Special leave. A provider receives payment from TDMHMR or its authorized agent for days during which an individual is on special leave if the following criteria are met:

(A) the need to attend the special activities is documented in the individual's IPP;

(B) sufficient staff are present at the special activity to meet the requirements for direct care staff set forth in 42 CFR §483.430(d);

(C) the provider continues to incur the usual costs for caring for the individual including, but not limited to, the cost of meals, lodging, and staff; and

(D) the provider continues to provide the individual the active treatment program specified in the individual's IPP.

(4) Non-reimbursable leave. A provider may not receive payment from TDMHMR or its authorized agent for days an individual is absent from the facility and:

(A) the individual is receiving inpatient hospitalization;

(B) the individual has made an unauthorized departure from the facility; or

(C) payment during the individual's absence is not authorized as a therapeutic, extended therapeutic, or special leave.

(d) Bed-hold charge procedures. If an individual is absent from a facility for purposes other than therapeutic, extended therapeutic, or special leave, the provider must discharge the individual by submitting a Client Movement Form. Additionally, the provider may choose to offer the individual a bed-hold charge option. A provider may charge an individual a bed-hold charge during an individual's absence, if the following criteria are met:

(1) the provider does not receive payment from TDMHMR or its authorized agent for days the facility charges to hold a bed for a resident;

(2) a written agreement, signed and dated by the facility's administrator, QMRP, or designee and the individual or the individual's legal representative, is executed for each absence;

(3) the provider does not charge an amount which exceeds TDMHMR's rate of reimbursement for the individual's LON at the time of the individual's departure from the facility;

(4) the provider documents amounts charged to hold a bed in an individual's financial record at the time the bed is held; and

(5) the provider complies with §406.253 of this title (relating to Protection of Funds) when it collects a bed-hold charge from an individual's trust fund account.

§406.212. Discharge.

(a) If an individual is discharged from a facility, the facility administrator must complete a Client Movement Form to document the discharge. Within 72 hours of the discharge, the provider must submit the Client Movement Form to TDMHMR or its authorized agent and to the appropriate TDHS Medicaid eligibility worker. The provider must include the individual's post-discharge address, if known, on the Client Movement Form.

(b) If an individual is discharged to another facility, the admitting facility must initiate a LOC assessment if:

(1) more than 30 days have elapsed since the discharge;

(2) the individual's current LOC has expired; or

(3) the admitting facility's LOC is different from the individual's current LOC.

(c) If an individual is discharged from and subsequently readmitted to the same facility, the facility must initiate a LOC assessment if:

(1) more than 30 days have elapsed between the discharge and readmission; or

(2) the individual's current LOC determination has expired.

§406.214. Utilization Review.

(a) Utilization review (UR) plans and procedures must comply with 42 CFR §456.401. The Texas State Plan for Title XIX requires a UR process for ICF/MR providers participating in the Texas Medical Assistance Program.

(b) TDMHMR performs the UR functions for the providers.

(c) TDMHMR is responsible for developing and maintaining LOC and LON criteria to evaluate the necessity for each individual's continued stay. These LOC and LON criteria are specified in §406.204 of this title (relating to LOC Determination and LON Assignment), §406.205 of this title (relating to ICF/MR I LOC Criteria), §406.206 of this title (relating to ICF/MR V LOC Criteria), §406.207 of this title (relating to ICF/MR VI LOC Criteria), and §406.208 of this title (relating to ICF/MR/RC VIII LOC Criteria).

(d) UR plan objectives are to:

(1) promote quality care and training that meet individuals' needs;

(2) determine whether needed services are available and are provided on a continuing basis;

(3) determine that individuals are classified in the correct payment category;

(4) ensure that the services provided are necessary; and

(5) review the individual program plans.

(e) The provider may request a reconsideration of the LON assignment made by TDMHMR or its designee by completing the Reconsideration Notice and sending it to the utilization review section of the TDMHMR Office of Medicaid Administration by certified mail within 10 days of the date notification of the LON assignment. The provider must include with the request additional clinical and supporting documentation. The utilization review section reviews the Reconsideration Notice and notifies the provider in writing within 15 working days of the receipt of the request.

(f) The utilization review section of the TDMHMR office of Medicaid Administration, or its designee, conducts periodic retrospective reviews. Based on such reviews, TDMHMR may recoup or deny payments to a provider. Recoupment is limited to no more than six months prior to the date of notification of denial.

§406.215. Individuals' Right to Fair Hearing.

Any Medicaid eligible individual whose request for eligibility for the ICF/MR Program is denied for any reason, including denial of an LOC determination, or is not acted upon with reasonable promptness, or whose ICF/MR services have been terminated, suspended, or reduced by TDMHMR is entitled to a fair hearing conducted by TDHS. A request for a fair hearing must be submitted to the TDMHMR Office of Medicaid Administration and received within 90 days from the date the notice of denial of eligibility for the ICF/

MR Program or notice of termination, suspension, or reduction of ICF/MR services is mailed.

§406.216. Admission Limitation.

A provider may not admit new residents for whom Medicaid reimbursement will be requested while the provider's payments are on vendor hold.

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 December 14, 1998.

TRD-9818309
Charles Cooper
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: January 4, 1999
Proposal publication date: August 14, 1998
For further information, please call: (512) 206–4516

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Chapter 409. Medicaid Programs

Subchapter F. Case Management Program Requirements

25 TAC §§409.201–409.207

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts the repeals of §§409.201-409.207 of Chapter 409, Subchapter F, concerning case management program requirements, without changes to the text as proposed in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8349). The key subject matter of these sections and related sections in Chapter 409, Subchapter G, concerning case management for persons with severe and persistent mental illness, are addressed in new §§412.451-412.466 of new Chapter 412, Subchapter J, concerning service coordination, which are contemporaneously adopted in this issue of the *Texas Register*.

The repeals are part of a comprehensive reorganization of chapters and subchapters within the department's portion of the Texas Administrative Code in conjunction with the rules review as required by the current Appropriations Act, Article IX, Section 167.

A public hearing was held on September 8, 1998, at which no public testimony was received. Written comments were received from a San Angelo State School and Vernon/Wichita Falls State Hospital. All commenters stated they had no comment.

The sections are repealed under the Texas Health and Safety Code, §532.015(a), which provides the Texas MHMR Board with broad rulemaking authority; Texas Human Resources Code, §32.021(a), and Texas Government Code, §531.021, which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer federal medical assistance funds and administer the state's medical assistance program; Senate Bill 509 of the 74th Texas Legislature, which clarifies THHSC's authority to delegate the operation of all or part of a Medicaid program to a health and human service agency; and Texas Human Resources Code, §32.012(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to TDMHMR the authority to operate the Medicaid case management program.

§409.201. Definitions.

§409.202. Eligible Individuals.

§409.203. Case Management Services.

§409.204. Service Limitations.

§409.205. Provider Qualification.

§409.206. Reimbursement Methodology for Case Management for Individuals with Mental Retardation.

§409.207. Right to 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.

Filed with the Office of the Secretary of State on December 14, 1998.

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Charles Cooper
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
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For further information, please call: (512) 206–4516

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Subchapter G. Case Management for Persons with Severe and Persistent Mental Illness

25 TAC §§409.251–409.255

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts the repeals of §§409.251-409.255 of Chapter 409, Subchapter G, concerning case management for persons with severe and persistent mental illness, without changes to the text as proposed in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8349). The key subject matter of these sections and related sections in Chapter 409, Subchapter F, concerning case management program requirements, are addressed in new §§412.451-412.466 of new Chapter 412, concerning Subchapter J, concerning service coordination, which are contemporaneously adopted in this issue of the *Texas Register*.

The repeals are part of a comprehensive reorganization of chapters and subchapters within the department's portion of the Texas Administrative Code in conjunction with the rules review as required by the current Appropriations Act, Article IX, Section 167.

A public hearing was held on September 8, 1998, at which no public testimony was received. Written comments were received from a San Angelo State School and Vernon/Wichita Falls State Hospital. All commenters stated they had no comment.

The sections are repealed under the Texas Health and Safety Code, §532.015(a), which provides the Texas MHMR Board with broad rulemaking authority; Human Resources Code, §32.021(a), and Government Code, §531.021, which provide the Texas Health and Human Services Commission (THHSC)

with the authority to administer federal medical assistance funds and administer the state's medical assistance program; Senate Bill 509 of the 74th Texas Legislature, which clarifies THHSC's authority to delegate the operation of all or part of a Medicaid program to a health and human service agency; and Human Resources Code, §32.012(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to TDMHMR the authority to operate the Medicaid case management program.

§409.251. Target Population.

§409.252. Case Management Services.

§409.253. Service Limitations.

§409.254. Provider Qualifications.

§409.255. Reimbursement Methodology for Case Management.

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 December 14, 1998.

TRD-9818308

Charles Cooper

Chairman, Texas MHMR Board

Texas Department of Mental Health and Mental Retardation

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For further information, please call: (512) 206–4516

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Chapter 412. Local Authority Responsibilities

Subchapter J. Service Coordination

25 TAC §§412.451–412.466

The Texas Department of Mental Health and Mental Retardation (TDMHMR) adopts new §§412.451–412.466, concerning Service Coordination, which was proposed in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8351). Sections 412.453-412.466 are adopted with changes. Section 412.451 and §412.452 are adopted without changes.

The new subchapter is adopted contemporaneously with the repeal of the subchapters it replaces: Chapter 409, Subchapter F, governing Case Management Program Requirements, and Chapter 409, Subchapter G, governing Case Management for Persons with Severe and Persistent Mental Illness. It is also adopted contemporaneously with the adoption of rules by the Texas Health and Human Services Commission concerning reimbursement methodology for service coordination: the amendment to §355.743 and the repeal of §§355.751-355.753 of 1 TAC Chapter 355, Medicaid Reimbursement Rates, Subchapter F, General Reimbursement Methodology for all Medical Assistance Programs.

The new subchapter describes requirements for service coordination delivered by local authorities for individuals in the adult and child mental health priority populations and the mental retardation priority population who live in the community.

Minor grammatical changes and clarifying language have been added throughout the subchapter. With the exception of §412.460, all statements of "or the LAR on the individual's behalf" have been changed to "*and* the LAR on the individual's behalf" to reflect the LAR's involvement. Definitions for "duration," "frequency," and "intensity" have been added. The definition for "licensed practitioner for the healing arts" has been deleted because the term is no longer used. Language has been added to the definition of "child mental health priority population" to include children with serious emotional, behavioral, or mental disorders who have a serious functional impairment; are at risk of disruption of a preferred living or child care environment; or are enrolled in a school system's special education program because of a serious emotional disturbance. "Guardian" has been added to and "managing conservator" has been deleted from the definition of "LAR (legally authorized representative)." The definition of "mental retardation priority population" has been revised to reflect the language in the strategic plan. The definition of "service coordination" has been revised to include only the defining language.

A new subsection (c) has been added to §412.454 which requires the local authority to ensure that supervisory training is provided to persons supervising the provision of service coordination. A new subsection (d) has been added to §412.454 to clarify that persons providing service coordination must be employed by the local authority. By limiting the provision of service coordination to employees of the local authority, individuals receive service coordination from staff who are consistently trained in the types of community and government-related services available and the local authority is able to monitor those services to ensure that individuals receive what they need. Language is added to §412.455 to clarify that residents of a Medicaid-certified nursing facilities who are eligible for OBRA '87 mandated services for mental illness, mental retardation, or a related condition are eligible for service coordination. Language has been added to §412.456(3) to include persons with a related condition. Regarding Figure 1: 25 TAC §412.456(3), the term "intensity" is either deleted or replaced with the term "level," as appropriate to the context. Language is added to §412.457(e) that allows for telephone contact with a child's parent/guardian if the parent/guardian lives outside the local authority's service area. New language also allows for contact with the child's primary care giver under certain conditions. In §412.460 all statements of "or the LAR on the individual's behalf" have been changed to "*and/or* the LAR on the individual's behalf, *as appropriate*" to allow for the different circumstances in which an LAR would participate in agreement to terminate service coordination. Language has been added to §412.461 to include, as a minimum qualification, a person certified as a physician assistant or a licensed chemical dependency counselor. Language is added to §412.461, relating to minimum qualifications, to allow certain persons who have completed a university or college curriculum in service coordination to provide service coordination. Expanding the minimum qualifications to include a university or college curriculum in service coordination that is approved by TDMHMR allows the local authority greater flexibility in hiring qualified persons with education specific to the provision of service coordination.

A public hearing was held on September 8, 1998, in TDMHMR Central Office, Austin. Testimony was provided by Luann Golden, Dallas County MHMR, Dallas; Maria Garcia, Uniting Parents, Lubbock; and Bruce Macchiaverna, Federal Funds Accounting, Austin.

Written comments were submitted by Abilene Regional MHMR Center, Abilene; Ann Aldous, Lubbock; Sara Basaldua, Lub-

bock; Border Families Are Valued, El Paso; Central Gulf State Operated Community Services, Richmond; Evelyn Cherry, Garland; Concept Six, Austin; Dallas County MHMR, Dallas; El Paso County Community Resource Coordination Group, El Paso; Frances Flores, Lubbock; Uniting Parents, Lubbock; Juanita Keadle, Lubbock; Medicaid Committee of the Community MHMR Centers Executive Directors Consortium, Beaumont; MHMRA of Brazos Valley, Bryan; Parent Association for the Retarded of Texas (PART), Austin; Sherry Robinson, Lubbock; San Angelo State School, San Angelo; Anna Shores, Lubbock; Tarrant County MHMR Services, Ft. Worth; Texas Panhandle MHMR, Amarillo; Texas Respite Resource Network, San Antonio; and Vernon/Wichita Falls State Hospital, Vernon. Commenters were generally supportive of the new subchapter. Several commenters recommended revisions.

A commenter provided public testimony supporting the change in reimbursement methodology. The commenter noted three concerns: First, in moving toward facility-specific rates based on reimbursement methodology, the Time and Financial Instrument has shortcomings. The commenter suggested that it may be more valid to allow centers to place specific case management costs into the "unstudied staff" area and exclude them from the allocation related to personnel time studies. Second, there is no incentive for efficiency in the proposed reimbursement methodology, i.e., a center that is able to perform more economically will come in below targeted costs and be required to pay back funds. There is no mechanism to readjust rates so that they can share in some of the financial gains and efficiencies. Third, there needs to be closer coordination between reimbursement staff and contract staff who deal with targets for case management in contract with community centers. The commenter noted that several centers felt that had the new methodology been implemented prior to the most recent contracting period, the reduced contracted targeted amounts would have severely adversely affected them. Regarding the Time and Financial Instrument process, the department responds that this process is approved by the Health Care Financing Administration for collecting costs associated with providing Medicaid reimbursable services. Regarding the commenter's second issue, the department responds that it disagrees that there are no incentives for efficiency because a center is reimbursed based on a cost methodology derived from the center's actual performance and that rates are readjusted at least annually or as required by law. Additionally, the new case rate reimburses providers for their costs of providing service coordination. Regarding the commenter's third issue, the department responds that the targets for service coordination in the performance contract/memorandum will be revised for consistency with this subchapter.

A commenter noted that service coordination and case management appear identical and wanted an explanation of the distinction, if any, beyond the difference in revenue collection, i.e., monthly case rate versus collection "by procedure." The department responds that there is no distinction between service coordination and case management and that the terms are synonymous in the TDMHMR system.

One commenter stated that the FY 98 performance memorandum included a category "other individual program coordination" which was used for individuals who need some intervention or coordination, but who are not eligible for service coordination. The commenter requested clarification about how these services are captured now that there is only one category for service coordination for community clients. The department responds that the eligibility requirements for receiving service coordination have been revised so that more individuals may be eligible. Regarding categorizing other services, the department responds that other categories exist that capture service needs for individuals who are not eligible for service coordination.

One commenter stated that a previous draft rule distinguished between the use of general revenue and Medicaid administrative claiming funding for staff activities involving intake, referral, and follow up for individuals who do not require ongoing service coordination and coordination activities for individuals whose evaluation reveals that they have a low intensity of need for service coordination. The commenter requested clarification regarding the billing procedures in these instances. The department responds that previous draft rules did not distinguish between the use of funding from general revenue and Medicaid administrative claiming; however, the issue will be addressed in training.

In public testimony, another commenter asked the department to describe the flow of funds to the consumer in the area that is part of the NorthSTAR pilot (Dallas). The commenter suggested that the process will change as a result of funds being shifted to another authority (the BHO). The department responds that funds do not flow to the consumer in the area that is part of the NorthSTAR pilot. NorthSTAR will utilize a specialty provider network that will deliver wrap-around services, such as service coordination and rehabilitation services.

A community center commenter noted that the rules will have a positive impact on the efficiency of the community center's delivery of service coordination. The commenter asked that the department carefully review the fiscal year 1999 performance contract attachments providing program and service definitions for adult mental health, child and adolescent, and mental retardation services, as well as the attachment dealing with coordination as an authority function. The commenter noted that current definitions and expectations with respect to eligibility for services and the frequency of contact as outlined in the 1999 contract are in direct conflict with these rules. The department responds that the service definitions in the performance contract will be amended to reflect the definitions in these rules.

A consortium of community mental health and mental retardation center executives expressed support for the new subchapter with reservations. The commenters noted that the rules are the result of statewide discussion and consensus and accomplish a simpler billing system which is at less risk for errors and audit exceptions resulting in fiscal penalties. The commenters also stated that the rules provide uniform requirements across all three priority population groups, which should result in fewer administrative complexities, and the rules allow providers to discard the current highly prescriptive guidelines for case management. The commenters also stated that in mental health services, the rules provide for a clearer distinction between service coordination and Medicaid-reimbursable rehabilitation services, which is likely to result in more effective utilization of the revenue available through rehabilitation services. The department responds that it appreciates the consortium's support of the rules.

The support of the commenters was conditioned on the several factors: the rules should be implemented no earlier than April 1, 1999; the department should commit staff resources to provide timely responses to questions that will arise as centers redesign their systems and budgets; the department should

include the consortium in statewide planning and technical assistance efforts; and the department should include the consortium in an ongoing evaluation of anticipated outcomes, e.g., more persons will receive service and less documentation will be required. These conditions were based on a number of concerns discussed below.

The consortium noted that changing the programmatic requirements for a core service, i.e., case management, or service coordination, across three major populations, i.e., adult mental health priority population, child mental health priority population, and mental retardation priority population, requires significant readjustment of personnel in the assignment of staff and staff responsibilities. The adjustment has fiscal implications, which, in the context of a new reimbursement methodology, makes forecasting the financial impact on a center challenging. Implementation prior to April 1, 1999, does not provide sufficient time to obtain technical assistance so that the changes minimally affect the financial status of each local authority. The department responds by making the subchapter's effective date April 1, 1999.

The consortium further commented that variables which are unique to each center make a general statewide presentation by department staff inadequate for planning at the local level, e.g., increasing the numbers of persons served and shifting to rehabilitation billable services may not be programmatically or financially feasible for some centers. The department agrees that statewide training may not be sufficient to meet local need and advises the commenters that regional training and individual technical assistance will be made available.

The consortium noted that some centers/local authorities will experience significant revenue reductions as a result of the change in method of finance for service coordination. The outcome may be the reduction of services to persons who are not Medicaid-eligible. The centers are concerned that this could result in a two-tiered service system in which Medical-eligible persons are given priority. This is a concern because in mental health services, those persons form less than 50% of the priority population enrolled in services. The priority population, in the main, whether Medicaid- or non-Medicaid eligible, is indigent as well as having a major severe and persistent mental illness or mental retardation. In order for centers to capture more of their cost for service coordination under the case rate methodology, it may be necessary for there to be diminished access and/or quality of service for non-Medicaid eligible persons. The department responds that, unfortunately, some centers/local authorities will experience revenue reductions; however, more will experience increases in revenue. The department believes that the new case rate methodology would not cause diminished service access or quality.

With regard to the lack of cost data differentiated by adults and children historically available to the department, the consortium noted that more collaboration between centers and the department would be needed to assure that the statewide rate for children's service coordination is established fairly. The department responds that it is planning to implement changes to its cost data collection system to differentiate the costs associated with delivering children's services as opposed to adult services.

With reference to mental retardation services, the consortium expressed concern that centers have few options for recouping those losses and that further careful analysis would be needed to minimize reductions in services to that population. The department responds that careful analysis of the new rate methodology will continue throughout the first year of implementation.

Members of a community resource coordination group and a related advocacy organization, both of which include parents of children with special needs, service providers, state and local agency representatives, and private providers, stated their support of the subchapter's use of parent case managers, but noted that parent case managers should be properly trained, supervised, and screened. The department responds that language in §412.462(a) requires such training. With regard to the supervisory issue, the department has added language to §412.454 which requires the local authority to ensure that persons who provide service coordination are supervised by a person who is trained in accordance with §412.462(a).

Seven parents and grandparents of children with disabilities and an administrator of a parent case management organization provided written comments expressing their strong support for using trained parents as service coordinators. One of the parents additionally provided public testimony about the importance of using trained parents as service coordinators. The commenters based their remarks on firsthand experiences in both receiving and providing case management services as parents of children with disabilities. The commenters were unanimous and enthusiastic in their recognition of excellent support systems that parents as case managers provide parents of children with disabilities. The department responds that it appreciates the commenters' support for including parents in the provision of service coordination.

Regarding the chapter title, Local Authority Responsibilities, one commenter submitted written comments suggesting that the chapter title is a misnomer because in the NorthSTAR service area (Dallas), the local behavioral health authority (LBHA) is designated as the local authority. However, the LBHA is not authorized to provide service coordination. The department has delegated that responsibility to the behavioral health organization (BHO). In public testimony, the commenter requested that special instructions be given to the BHO so that it will be prepared to appropriately address the needs of consumers who currently require targeted case management and who will require service coordination in the future. The department responds that although the chapter title may be misleading as it relates to the NorthSTAR pilot project, service coordination is a local authority responsibility in all other areas of the state. New rules specifically governing the NorthSTAR pilot project will be adopted to address the responsibility of service coordination.

The same commenter requested that definitions be included regarding the differences between targeted case management, which will be called service coordination, and expanded case management. The commenter requested that training requirements for the people who administer those services be included in the subchapter. The department responds that targeted and expanded case management services have been combined and are defined as "service coordination."

With reference to the definition of "family-directed planning" in §412.453(5)(E), which states that family-directed planning must "mirror the way in which families without children with disabilities make plans," two commenters suggested deleting the language because the family would not be making a plan if not for the child's disability and the intent of the plan is to help deal with the disability. The department responds that it is

its philosophy that individuals with disabilities should receive the same considerations as individuals without disabilities. Planning for the future of an individual with disabilities should have the same importance and emphasis as planning for the future of an individual without disabilities.

With reference to §412.453(8)(C),(D), and (F), one commenter stated that the definition of "licensed practitioner of the healing arts" is inconsistent with the definition of the same term in the *Medicaid Reimbursement Provider Manual for Rehabilitative Services for Persons with Mental Illness, August 1996*, which does not include an advanced nurse practitioner or a licensed marriage and family therapist. The commenter asked whether the manual will be updated to reflect these professions. The commenter also noted that the statutory citation relating to subparagraph (F), "a psychologist," differs from the statutory citation found in the manual and questioned if the difference meant that a psychologist did not have to be doctoral level to be considered a "licensed practitioner of the healing arts" for purposes of the service coordination rules. The department responds that the definition of a licensed practitioner of the healing arts has been deleted. Additionally, in §412.456(1), the requirement for clinical evaluation by an LPHA has been deleted.

Concerning the definition of "mental retardation priority population" in §412.453(10), two commenters noted that the definition is correct for the mental retardation population generally, but under Texas law the "priority" population is the population "most in need." The commenters recommended either adding the words "most in need" to the definition or deleting the word "priority" from the term defined. The department responds that the Texas Health and Safety Code, §531.001(f), states that funds "may be spent only to provide services to the priority populations identified in the department's long-range plan." The definition of mental retardation priority population has been revised to reflect the language in the department's current long-range plan (i.e., strategic plan).

Regarding the definition of "person-directed planning" in §412.453(14)(D), two commenters recommended the deletion of language which states that the process must "mirror the way in which people without disabilities make plans," noting that guardians make plans for adult children, which is not the way adults without disabilities make plans. The department responds that its philosophy is that individuals with disabilities should receive the same considerations as individuals without disabilities. Planning for the future of an individual with disabilities should have the same importance and emphasis as planning for the future of an individual without disabilities.

Concerning the definition of "service coordination" in §412.453(18), one commenter supported the inclusion of family-directed planning, the Parent Case Management Program, Partners in Policy Making, and permanency planning. The department responds with appreciation for the support and notes that the elements identified by the commenter are not part of the service coordination definition, but are described in the sections relating to Minimum Qualifications and Staff Training.

Also concerning the definition of "service coordination," two commenters suggested adding "or the desires of the LAR (legally authorized representative) on behalf of the individual" to language in §412.253(16)(B). The commenters noted that the wording repeats what is stated in subparagraph (D). The department responds by adding language to reflect the commenters' concern.

Another commenter questioned how the minimum qualifications for a service coordinator compare to the minimum qualifications for a qualified mental health professional (QMHP). The commenter noted that differences in how these functions are defined may conflict with the department's direction of standardizing requirements across the state for purposes of credentialing. The department responds that the minimum qualifications for the two designations are different because the duties performed are different. The duties of a QMHP are clinical and the duties of a person providing service coordination are not clinical. The department notes that the uniform assessment, as described in §412.456(1) and (2), is conducted by a QMHP. However, service coordination need not be provided by a QMHP. The minimum qualifications for providing service coordination are intentionally broader in order to provide quality service coordination in a cost effective manner.

A commenter questioned whether a single service provider is still able to provide both service coordination and rehabilitation skills training. The department responds that if a person is qualified to provide service coordination and rehabilitation skills training, the person may provide both services.

With regard to §412.454(3), one commenter asked whether the new form, Service Coordination Intensity Evaluation Mental Retardation Services, replaces the current case management form and/or the ICAP form which is currently used for the mental retardation priority population. The department responds that the Service Coordination Intensity Evaluation Mental Retardation Services form does not replace the ICAP form.

Concerning §412.455(1), one commenter requested clarification regarding eligibility for service coordination. The commenter questioned whether the criterion that an individual must "require multiple services and supports from community providers" is intended to include the services provided by the local authority. The commenter also questioned whether service coordination is considered one of the multiple services required to be eligible for service coordination, i.e., that without service coordination, an individual would drop services and likely require more restrictive services such as inpatient treatment. The department responds affirmatively that services provided by the local authority are included as part of the multiple services provided by community providers. Further, service coordination may be considered one of the multiple services required by an individual.

Regarding the same paragraph, another commenter questioned whether "multiple services and supports" includes monitoring of supports, such as medical supports, e.g., a person in an indigent primary health program requires monitoring and assistance in accessing needed medical resources. The commenter questioned the applicability of this activity if such intervention is required only periodically, and noted that examples would be helpful. The department responds that periodic medical services could be considered as one of the multiple services and supports. The department declines to add examples because they might be construed as being the only services that could be considered as multiple services. The department will provide more detailed explanations and discussions during its service coordination training sessions.

Regarding §412.455, one commenter noted that all individuals in the system are required to have a continuity of services

staff person who works with them to develop a treatment plan. The commenter noted that it would be easier for the local authority to track CARE assignments if there was a single service coordination assignment. The commenter suggested that individuals receiving case coordination services who do not meet the eligibility criteria for service coordination could be assigned the lowest level of intensity for service coordination rather than have a separate case coordination assignment. The department responds that the local authority is responsible for ensuring that individualized care plans are developed, monitored, and reviewed for all individuals receiving services, regardless of whether they are receiving service coordination or not. The department responds that the provision of service coordination is restricted to eligible individuals.

With regard to §412.455, one commenter noted a discrepancy between this section, which explains that persons with a related condition as defined in 42 CFR §435.1009 are eligible for service coordination, and §412.456, which states that the local authority will evaluate all eligible individuals, but does not include individuals with a related condition. The commenter also questioned if service coordination for persons with related conditions was to be provided using current programs, i.e., CLASS, ICF/MR VIII, or if service coordination for these individuals would be provided by the local authority. The department acknowledges the discrepancy and adds language to reflect the commenter's concern. Regarding service coordination for persons with a related condition using current programs, the department responds that persons with a related condition who meet the eligibility criteria in §412.455(1)-(3) are eligible for service coordination provided by the local authority.

With reference to §412.455, one commenter asked whether individuals with mental illness and mental retardation who do not meet the eligibility criteria for service coordination would be assigned a staff person who would be responsible for developing, monitoring, and reviewing their IPC and documenting it in their records. The commenter further questioned whether it is predicted that most individuals in the system will be eligible for service coordination. The department responds that the local authority is responsible for ensuring that individualized care plans are developed, monitored, and reviewed for all individuals receiving services, regardless of whether they are receiving service coordination.

Regarding §412.456, one commenter asked if a narrative summary or recommendation is required as part of the Service Coordination Intensity Evaluation and questioned if the decision to make this a requirement would be made locally. The department responds that the decision to require narrative summaries is left up to the local authority. The department notes that the intensity screening form must be completed.

Regarding §412.456, which discusses evaluation for service coordination, a commenter questioned if only the uniform assessment is used to determine eligibility for service coordination or if there is another evaluation by an LPHA that is used to make the determination. The commenter questioned the apparent difference in the way the evaluation is accomplished for adults and children. The department acknowledges the discrepancy and has deleted the requirement for the additional evaluation for the adult mental health population.

With regard to evaluations, a commenter questioned whether a re-evaluation by an LPHA is required following the initial evaluation for eligibility for services. The commenter also asked if it is still appropriate to make service referrals (to services of greater or lesser intensity) based on a uniform assessment by a qualified mental health professional. The department responds that the requirement for the re-evaluation by an LPHA has been deleted. The department notes that the function of the uniform assessment is to determine an eligible individual's intensity of need for a specific service or support.

With reference to §§412.456-412.457, one commenter requested that frequency, duration, and intensity of service be defined and asked for clarification on how to determine intensity of services. The commenter noted that it is difficult to establish frequency because the number of contacts necessary to advocate for services or monitor services varies unexpectedly. The department responds that definitions for the terms frequency, duration, and intensity of service have been added.

Regarding §412.457(d), one commenter stated that the requirement to provide service coordination according to the plan of care is inconsistent with the Medicaid provider manual, which allows for short- term, time-limited case management services to be provided and documented in the progress notes. The department responds that crisis related services, by definition, are short-term, time-limited services and can be provided outside of, or prior to, documentation in the plan of care as stated in §412.457(d).

Regarding §412.457(d), concerning documentation of crisis prevention and management services in the plan of care, the commenter stated that documenting these services in the progress notes is more consistent with individuals' needs. The commenter noted that often after a plan of care is established and a new service is identified, the individual needs to receive the new service before a face-to-face contact with an LPHA can occur. The department responds that a face-to-face contact with an LPHA is not required after a plan of care is established. The commenter may be referring to the proposed requirement in §412.456(1) of a clinical evaluation by a LPHA when evaluating adults in the mental health priority population for specific services and support. The department notes that that requirement has been deleted.

With reference to §412.457(e)(1), which provides requirements for staff to make face-to-face contact with both the persons receiving services and the parents, two commenters suggested adding language acknowledging the need for staff to meet with the guardians of adults also. The department responds that many individuals with guardians do not live with or in close proximity to their guardians. Therefore, it is not cost effective or efficient to require that the guardian of an adult be present at the monthly face-to-face visit.

Concerning §412.457(e)(1) and (2), one commenter supported including face-to-face contacts for all individuals who are receiving service coordination, especially children. The department appreciates the commenter's support.

Also regarding §412.457(e)(2), a commenter stated that the requirement that the face-to-face contact with both parent and child occur in the same month appears to be arbitrary and contrary to the normal flow of service coordination. The commenter stated that the requirement limits family choice about when to see the service coordinator and requested that it be deleted. The department responds that the requirement was included because both visits constitute the same service contact and should occur within days each other.

Regarding §412.459, one commenter supported quarterly monitoring of the effectiveness of services and supports, but stated the term "treatment" is inaccurate because the needs of the individual are not necessarily addressed through treatment protocols. The commenter suggested that the sentence be ended after the word "addressed." The department agrees with the commenter and has deleted the language as requested.

With respect to §412.459(b), one commenter requested clarification concerning who is responsible for monitoring service coordination quarterly, the quality management department or the service coordination supervisor. The department responds that §412.459(a) requires the local authority to establish a quality management process, while §412.459(b) requires the local authority to implement the process by reviewing each individual quarterly. The local authority determines who is responsible for implementation.

Regarding §412.460(1), which states that service coordination will be terminated if the individual (or the LAR on behalf of the individual) agrees that the personal outcomes have been achieved, two commenters suggested deleting the language because it does not provide for the individual to progress to other personal outcomes after achieving the initial outcomes. The department responds by noting that outcomes can be added or revised as necessary and service coordination will not terminate without agreement from the individual (and/or the LAR on behalf of the individual, as appropriate) that the revised or additional outcomes have been met.

Regarding §412.461, which describes the minimum qualifications required of an individual who provides service coordination, one commenter stated that the minimum qualifications in this section are inconsistent with the November 1997 TXMHMR minimum qualifications that state-operated community services are required to follow. The department acknowledges that the documents are inconsistent and notes that TXMHMR's minimum qualification will be revised for consistency with this subchapter.

With reference to §412.461(a)(1), one commenter requested that one year's experience as well as a degree be required for service coordinators. The department responds that although experience is preferred, the decision should be made by the local authority, who has a better understanding of its needs and resources.

Regarding §412.461(a)(1), (a)(2), and (d), one commenter stated that subsection (a)(1) is definitive and specifies acceptable degrees and that subsection (a)(2) explains the acceptable qualifications for non-degreed individuals. However, the commenter noted that subsection (d) disregards the previous sections and provides for inconsistent interpretations. The commenter requested clarification of subsection (d) to answer the following questions: Is the local authority authorized to accept a person with any type of degree? If a person has never worked as a case manager, must that person have a bachelor's degree regardless of whether services are provided in adult mental health, child mental health, or mental retardation populations? Does the person currently have to be working as a case manager? If the person is not currently working as a case manager, does a person's prior case management experience apply regardless of whether the experience was obtained from that facility or another provider? Can this person provide all four types of service coordination? The department responds that subsection (d) is applicable only at the local authority's discretion and applies to only those persons who were authorized by a local authority to provide case management prior to the effective date of this subchapter without regard to a specific degree or the population served. Regarding the commenter's other questions, the person does not have to be currently working as a case manager for a local authority; and the person can provide all four types of service coordination.

Regarding §412.461(a)(2)(A) and (B), one commenter supported the inclusion of parents as service coordinators because many parents have knowledge about services and supports available in their natural environment and are able to assist other parents in locating these services. The commenter noted that often it is easier and more acceptable for families to work with other families rather than with professionals. The department appreciates the support.

Concerning §412.462(a)(1)-(9), one commenter supported all of the areas of required staff training, especially family-directed planning and permanency planning, and requested that service coordinators receive cross training with regard to the services and supports that are available from other state and in community agencies. The department responds that §412.462(8) requires such training.

With reference to §412.462(a), which requires staff training to be completed within 90 days of beginning service coordination duties, two commenters suggested that "within 90 days of the date" be changed to "prior to the person beginning to provide service coordination." The department responds that mandating training *in all areas* before *every* person begins providing services would create an undue hardship on the local authority and would not be in the best interest of individuals needing services. The department notes that the local authority is responsible for providing appropriate and high quality services at all times. The rules mandate when all training in all areas must be *completed*. The local authority decides an appropriate training schedule (which will be completed in 90 days) for each person who provides service coordination. For a person with years of service coordination experience, the local authority may delay training in several areas and provide intense supervision in other areas. For a person with minimal experience, the local authority may provide training in all areas within the first weeks and require close supervision for several months.

Concerning the same section, a commenter urged the department to include language that limits an authority's ability to allow persons to provide unsupervised service coordination until they have been fully trained. The commenter suggested that allowing service coordinators to provide unsupervised service coordination before they are adequately trained would cause contracted service providers to train such service coordinators in order for contracted services providers to ensure that services were not disrupted. The department responds that with the adoption of this rule persons providing service coordination are required to have specified education and/or experience when hired.

Also concerning training, a commenter questioned if training materials are available regarding person-directed planning, family-directed planning, and permanency planning. The department responds training materials regarding these issues are available from TDMHMR, Central Office, Long Term Services and Supports or Children's Services, P.O. Box 12668, Austin, Texas 78711-2668, as well as from other state agencies and organizations.

Regarding §412.463, one commenter asked if the CARE entry for all individuals receiving service coordination is the same as the CARE assignment. The department responds by modifying language to reflect the commenter's concern.

Concerning §412.464, one commenter asked if there is a fair hearing process for individuals who are not Medicaid eligible and are denied service coordination. The department responds that fair hearings are offered only to Medicaid eligible individuals as required by federal regulations. The department notes, however, that local authorities are required to provide notification and an appeal to all individuals whose services are denied, reduced, or terminated, in accordance with §401.464 of this title (relating Notification and Appeal Process).

Concerning §412.465, a commenter noted that the Medicaid Targeted Case Management Services State Plan, the Case Management Services Medicaid Reimbursement Provider Manual, and the Medicaid Targeted Case Management Services Billing and Payment Review Protocol are referenced in the subchapter but not listed in the reference section. The department responds that those documents are not listed because they are neither statutes nor rules under the Texas Administrative Code.

Two commenters stated that they had no comment.

The new sections are adopted under the Texas Health and Safety Code, §532.015(a), which provides the Texas MHMR Board with broad rulemaking authority; Texas Human Resources Code, §32.021(a), and Texas Government Code, §531.021, which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer federal medical assistance funds and administer the state's medical assistance program; Senate Bill 509 of the 74th Texas Legislature, which clarifies THHSC's authority to delegate the operation of all or part of a Medicaid program to a health and human service agency; and Texas Human Resources Code, §32.012(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the Medicaid service coordination program.

§412.453. Definitions.

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

(1) Adult mental health priority population - Those individuals 18 years of age and older who have severe and persistent mental illnesses, such as schizophrenia, major depression, manic depressive disorder, or other severely disabling mental disorders which require crisis resolution or ongoing and long-term support and treatment.

(2) Client Assignment Registration System (CARE) - TDMHMR's centralized, confidential database, which registers and tracks individuals receiving services funded by or through TDMHMR throughout the service delivery system. CARE uses unique, statewide identification numbers to collect, maintain and report descriptive information for each individual served.

(3) Child mental health priority population - Those individuals under the age of 18 years with a diagnosis of mental illness who exhibit serious emotional, behavioral, or mental disorders and who:

(A) have a serious functional impairment;

(B) are at risk of disruption of a preferred living or child care environment; or

(C) are enrolled in a school system's special education program because of a serious emotional disturbance.

(4) Community support services - Services provided in the community that enhance and improve an individual's health, safety, well-being, and quality of life. These services may include clinical services, such as medical, psychological, social, and rehabilitative or other community-based services which are legal, financial, or educational in nature.

(5) Duration - The length of time the contact should last and the length of time service coordination is provided.

(6) Family-directed planning - A process that empowers the family of a minor to direct the development of a plan of supports and services which meet the child and family's personal outcomes. The process:

(A) identifies existing supports and services necessary to achieve the child and family's outcomes;

(B) identifies natural supports available to the child and family and negotiates needed service system supports;

(C) occurs with the support of a group of people chosen by the child and family;

(D) is supportive of the self-determination of the child; and

(E) mirrors the way in which families without children with disabilities make plans.

(7) Frequency - The number of times during a specified period that an individual is contacted by a person providing service coordination.

(8) Individual - A person in the adult mental health, child mental health, or mental retardation priority populations who is seeking or receiving mental health or mental retardation services from a local authority.

(9) Intensity - The type of service coordination contact, i.e., by telephone or in person.

(10) LAR (legally authorized representative) - The parent or guardian of an individual who is a minor or the guardian of the person of an individual who is an adult.

(11) Local authority - An entity to which the Texas MHMR Board delegates its authority and responsibility within a specified region for planning, policy development, coordination, and resource development and allocation and for supervising and ensuring the provision of mental health services to people with mental illness and/or mental retardation services to people with mental retardation in one or more local service areas.

(12) Mental retardation priority population - Those individuals who:

(A) have mental retardation, as defined in the Texas Health and Safety Code, §591.003(13);

(B) have autism or any other pervasive developmental disorder, as defined in the current edition of the Diagnostic and Statistical Manual (DSM); or

(C) are eligible for OBRA '87 mandated services for mental retardation or a related condition as per specific legislation.

(13) Parent Case Management Program - A program that utilizes experienced, trained parents of individuals with disabilities to provide case management for other families.

(14) Partners in Policy Making - A leadership training program administered by the Texas Planning Council for Developmental Disabilities for self-advocates and parents.

(15) Permanency planning - A philosophy and planning process that focuses on the outcome of family support by facilitating a permanent living arrangement with the primary feature of an enduring and nurturing parental relationship.

(16) Person-directed planning - A process that empowers the individual (and the LAR on the individual's behalf) to direct the development of a plan of supports and services that meet the individual's personal outcomes. The process:

(A) identifies existing supports and services necessary to achieve the individual's outcomes;

(B) identifies natural supports available to the individual and negotiates needed services system supports;

(C) occurs with the support of a group of people chosen by the individual (and the LAR on the individual's behalf); and

(D) mirrors the way in which people without disabilities make plans.

(17) Plan of care - A format for documenting an individual's services and supports that reflect the individual's choices and outcomes (and those of the LAR on the individual's behalf).

(18) Service coordination - Assistance in accessing medical, social, educational, and other appropriate services that will help an individual achieve a quality of life and community participation acceptable to the individual (and LAR on the individual's behalf) as follows:

(A) crisis prevention and management - locating and coordinating services and supports to prevent or manage a crisis;

(B) monitoring - ensuring that the individual receives needed services, evaluating the effectiveness and adequacy of services, and determining if identified outcomes are meeting the individual's needs and desires as indicated by the individual (and the LAR on the individual's behalf);

(C) assessment - identifying the nature of the presenting problem and the service and support needs of the individual; and

(D) service planning and coordination - identifying, arranging, advocating, collaborating with other agencies, and linking for the delivery of outcome-focused services and supports that address the individual's needs and desires as indicated by the individual (and the LAR on the individual's behalf).

§412.454. Organizational Structure.

(a) Local authorities may determine an organizational structure for providing service coordination. Service coordination must be provided by staff who meet the minimum qualifications, as described in §412.461 of this title (relating to Minimum Qualifications).

(b) The local authority must comply with Chapter 408, Subchapter B of this title (relating to Mental Health Community Services Standards) and Chapter 412, Subchapter H of this title (relating to Standards and Quality Assurance for Mental Retardation Community Services and Supports).

(c) The local authority is responsible for ensuring that persons who provide service coordination are supervised by a person who is trained in accordance with §412.462 of this title (relating to Staff Training).

(d) Persons providing service coordination must be employed by the local authority.

§412.455. Eligibility.

To be eligible for service coordination, an individual must be:

(1) in the adult mental health, child mental health, or mental retardation priority populations or be a person with a related condition, as defined in 42 CFR §435.1009, and:

(A) require multiple services and supports from community providers;

(B) be transitioning between community providers or placements; or

(C) if transitioning from an institutional to a noninstitutional provider, be within 30 days prior to discharge or furlough; or

(2) a resident in a Medicaid certified nursing facility and be eligible for OBRA '87 mandated services for mental illness, mental retardation, or a related condition.

§412.456. Evaluation for Service Coordination.

The local authority must evaluate each eligible individual to determine the need for specific services and supports from community providers as well as the frequency, duration, and intensity of the service coordination that the individual will receive.

(1) In evaluating adults in the mental health priority population, the local authority will utilize the uniform assessment for the adult mental health population.

(2) In evaluating children in the mental health priority population, the local authority will utilize the uniform assessment for the child mental health population.

(3) In evaluating individuals in the mental retardation priority population and individuals with a related condition, as defined in 42 CRF §435.1009, the local authority will utilize the Service Coordination Evaluation, Mental Retardation Services.
(Figure 1:25 TAC §412.456(3))

§412.457. Plan of Care.

(a) The local authority must document in the individual's plan of care the results from the evaluation performed in accordance with §412.456 of this title (relating to Evaluation for Service Coordination), including:

(1) the individual's choices and outcomes (and those of the LAR on the individual's behalf);

(2) the specific services and supports to be provided by community providers; and

(3) the frequency, duration, and intensity of service coordination.

(b) Service coordination must be provided in accordance with the individual's plan of care.

(c) If an individual's needs change, the local authority must revise the individual's plan of care, as appropriate, and/or adjust the frequency, duration, and intensity of service coordination in consultation with the individual (and the LAR on the individual's behalf). The local authority must perform a new evaluation in

accordance with §412.456 of this title (relating to Evaluation for Service Coordination), if necessary.

(d) The local authority may provide crisis prevention and management prior to documenting the service in the individual's plan of care.

(e) The local authority must provide a minimum of one face-to-face contact every 90 days to each individual receiving service coordination.

(1) For children, the face-to-face contact must be with both the child and the LAR.

(2) The face-to-face contact with the child and the LAR does not have to occur during the same service coordination contact, but must occur within the same month.

(3) If a child's LAR lives outside the local authority's service area, a telephone contact may replace the face-to-face contact provided the local authority documents in the record its justification for replacing the face-to-face contact with a telephone contact.

(4) If a child resides with a primary care giver who is not a service provider or the child's LAR, the face-to-face contact may occur with the primary care giver provided the LAR has given written permission for such to occur.

§412.458. Caseloads.

Decisions regarding caseload size are made by the local authority based on factors, such as individuals' needs; the frequency, duration, and intensity of contact; and travel time.

§412.459. Quality Management.

(a) The local authority must establish a written quality management process to oversee quality, utilization, and outcome of service coordination.

(b) The local authority must ensure that each individual receiving service coordination is reviewed quarterly to determine the appropriateness and effectiveness of the services and supports provided by all community providers as stated in the plan of care and to ensure that the needs of the individual are being addressed.

§412.460. Termination of Service Coordination.

The local authority will terminate service coordination for an individual if:

(1) the individual (and/or the LAR on the individual's behalf, as appropriate) agrees that the personal outcomes documented in the plan of care have been achieved;

(2) the individual (and/or the LAR on the individual's behalf, as appropriate) agrees that the appropriate natural supports are in place to provide for service coordination;

(3) the individual (and/or the LAR on the individual's behalf, as appropriate) no longer desires service coordination and makes a statement to that effect; or

(4) the individual no longer meets the eligibility criteria for service coordination as set forth in §412.455 of this title (relating to Eligibility).

§412.461. Minimum Qualifications.

(a) Except as provided by subsection (d) of this section, all persons who provide service coordination must have:

(1) a bachelor's or advanced degree from an accredited college or university with a major in a social, behavioral, or human service field including, but not limited to, psychology, social work, medicine, nursing, rehabilitation, counseling, sociology, human development, gerontology, educational psychology, education, and criminal justice;

(2) certification as a licensed chemical dependency counselor or a physician's assistant; or

(3) a high school diploma or GED and have:

(A) two years of paid employed experience as a case manager in a state or federally funded Parent Case Management Program, graduated from Partners in Policy Making, or completed a university or college curriculum in service coordination that is approved by TDMHMR; and

(B) personal experience as an immediate family member of an individual with mental retardation or mental illness.

(b) The local authority, at its discretion, may require additional education and experience for persons who provide service coordination.

(c) A person cannot provide service coordination to a member of his or her family.

(d) At the discretion of the local authority, a person who was authorized by a local authority to provide case management prior to the effective date of this subchapter may provide service coordination without meeting the minimum qualifications as stated in subsection (a) of this section.

§412.462. Staff Training.

(a) The following persons must receive training as described in subsection (b) of this section within the first 90 days of performing their service coordination related duties:

(1) persons who provide service coordination; and

(2) persons who supervise and oversee the provision of service coordination.

(b) Training must include:

(1) appropriate policies, procedures, and standards;

(2) the local authority's performance contract/memorandum requirements regarding service coordination and case management;

(3) plan of care development and implementation;

(4) person-directed planning;

(5) family-directed planning;

(6) permanency planning;

(7) crisis prevention and management, monitoring, assessment, and service planning and coordination;

(8) community support services availability and management; and

(9) advocacy for individuals.

(c) Prior to the local authority submitting a claim for Medicaid reimbursement for service coordination, the local authority must ensure that the person who provided the service coordination has successfully completed competency-based training on:

(1) requirements regarding the provision of case management as set forth in the *Medicaid Targeted Case Management Services State Plan*;

(2) the *Case Management Services Medicaid Reimbursement Provider Manual*; and

(3) the *Medicaid Targeted Case Management Services - Billing and Payment Review Protocol*.

(d) The local authority must document the training provided in accordance with this section in the personnel record of each person providing, supervising, or overseeing service coordination.

§412.463. Documentation of Service Coordination.

(a) The local authority's documentation of each service coordination contact must include:

(1) the date of contact;

(2) the description of the service coordination provided;

(3) the progress or lack of progress in achieving goals or outcomes;

(4) the person with whom the contact occurred; and

(5) the person who provided the contact and that person's professional discipline.

(b) The local authority must identify the appropriate service code in CARE for all individuals receiving service coordination.

(c) The local authority must retain documentation in compliance with federal and state laws, rules, and regulations.

§412.464. Fair Hearings.

(a) Any Medicaid eligible individual whose request for eligibility for service coordination is denied or is not acted upon with reasonable promptness, or whose service coordination has been terminated, suspended, or reduced by TDMHMR is entitled to a fair hearing, conducted by the Texas Department of Human Services. A request for a fair hearing must be submitted to the TDMHMR Office of Medicaid Administration and received within 90 days from the date the notice of denial of eligibility for service coordination or notice of termination, suspension, or reduction of service coordination was mailed.

(b) The local authority must provide Medicaid eligible individuals with notice of their right to request a fair hearing in the form and manner prescribed by TDMHMR.

§412.465. References.

References are made to the following state and federal statutes and Texas Administrative Code:

(1) Texas Health and Safety Code, §591.003(13);

(2) 25 TAC, Chapter 408, Subchapter B, governing Mental Health Community Services Standards;

(3) 25 TAC, Chapter 412, Subchapter H, governing Standards and Quality Assurance for Mental Retardation Community Services and Supports; and

(4) 42 CFR §435.1009.

§412.466. Distribution.

(a) This subchapter shall be distributed to:

(1) members of the Texas MHMR Board;

(2) executive, management, and program staff of Central Office;

(3) executive directors of all local authorities; and

(4) advocates and advocacy organizations.

(b) The executive director of each local authority is responsible for disseminating copies of this subchapter to:

(1) all appropriate staff; and

(2) any individual, family member, employee, or other person desiring a copy.

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 December 14, 1998.

TRD-9818306
Charles Cooper
Chairman, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Effective date: April 1, 1999
Proposal publication date: August 14, 1998
For further information, please call: (512) 206–4516

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 303. Operation of the Rio Grande

Subchapter D. Enforcement Regarding Watermaster Operation

30 TAC §303.32, §303.35

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §303.32 and new §303.35, concerning enforcement actions and field citations by the watermaster. The amendments are adopted without changes to the proposed text as published in the September 11, 1998, issue of the *Texas Register* (23 TexReg 9170) and will not be republished.

EXPLANATION OF ADOPTED RULE

Amendments to §303.32 and new §303.35 represent changes made to the watermaster program as authorized and required in the Texas Water Code §11.0843 through legislation passed by the 75th Texas Legislature in 1997. Under new §303.35, upon witnessing a violation of a rule or order or a water right, the watermaster or the watermaster's deputy, may issue the alleged violator a field citation and provide the alleged violator the option to either pay the penalty amount or request a hearing on the alleged violation. Also, this section establishes penalty amounts corresponding to the types of violations. The rule authorizes watermasters or their deputies to issue field citations to water rights holders who may violate certain and limited regulations. A field citation is an administrative allegation of violation, which may be paid without admitting or denying the alleged violation, or contested. Historically, the violations in these rules were referred to the Office of Attorney General for civil or criminal investigation and litigation. This process was costly to both the state and the alleged violator. The field citation rule herein will result in a savings of much of the costs of litigation while preserving the right of the alleged violator to contest the issue of responsibility. The maximum penalty for a violation under these

rules is $500. The number of water rights holders affected by this rule are limited and the maximum penalty provided is $500.

On March 19, 1998, a draft copy of the rule was mailed to the Rio Grande Watermaster Advisory Committee for review. Commission staff subsequently met with the committee on March 26, 1998, to further discuss the field citation rules and address any concerns about the applicability of the rules in the Rio Grande Watermaster program region. Based on comments from the advisory committee, the initial draft of proposed rules were changed to include only those violations that may occur in this watermaster region and that would warrant a field citation.

The commission has determined that the adopted rule will not effect a local economy. The rule is limited in scope to a small number of very specific violations. The persons affected by this legislation are holders of water rights who violate the law and are a small and defined group. In addition, the rule seeks to punish illegal activity, as mandated by the legislature.

FINAL REGULATORY IMPACT ANALYSIS

The commission has determined that a regulatory impact analysis is not required because the rule is not a major environmental rule and will not have an adverse affect in a material way on the economy, environment or public health and safety of any sector of the state. In addition, this rule is specifically required by law, namely Texas Water Code §11.0843. (Added by Acts 1997, 75th Legislature, Chapter 1010, §3.02, effective September 1, 1997.)

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated §2007.043. The following is a summary of that assessment. The specific purpose of this rule is to make the rules consistent with statutory authority and adopt new requirements relating to watermaster enforcement actions as provided by Senate Bill 1, 75th Legislature, 1997. The rule also provides for issuance of field citations and to establish penalty amounts corresponding to the types of violations. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules. These amended sections will not involve a physical invasion, dedication, or exaction of real property, does not restrict or limit a property right that would otherwise exist, and does not eliminate any economic uses of private real property.

COASTAL MANAGEMENT PROGRAM

The executive director has reviewed the rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program (CMP), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the adopted rule is not subject to the CMP.

COMMENTS

The proposed rule was published in the September 11, 1998, issue of the *Texas Register* (23 TexReg 9170), with a 30-day comment period which closed on October 12, 1998. No comments were received.

STATUTORY AUTHORITY

The amended sections are adopted under the Texas Water Code, §5.103 which provides the commission authority to adopt rules necessary to carry out its powers and duties and under the provisions of the Texas Water Code and §11.0843 which provides the commission with authority to issue field citations and establish penalty amounts corresponding to the types of violations.

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 December 14, 1998.

TRD-9818304
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: January 4, 1999
Proposal publication date: September 11, 1998
For further information, please call: (512) 239–4640

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Chapter 304. Watermaster Operations

30 TAC §304.33, §304.34

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §304.33 and new §304.34, concerning enforcement actions and field citations by the watermaster. The sections are adopted without changes to the proposed text as published in the September 11, 1998, issue of the *Texas Register* (23 TexReg 9261) and will not be republished.

EXPLANATION OF ADOPTED RULE

Amendments to §304.33 and new §304.34 represent changes made to the watermaster program as authorized and required in the Texas Water Code §11.0843 through legislation passed by the 75th Texas Legislature in 1997. Under new §304.34, upon witnessing a violation of a rule or order or a water right, the Watermaster or the Watermaster's deputy, may issue the alleged violator a field citation and provide the alleged violator the option to either pay the penalty amount or request a hearing on the alleged violation. Also, this section establishes penalty amounts corresponding to the types of violations. The rule authorizes watermasters or their deputies to issue field citations to water rights holders who may violate certain and limited regulations. A field citation is an administrative allegation of violation, which may be paid without admitting or denying the alleged violation, or contested. Historically, the violations in these rules were referred to the Office of Attorney General for civil or criminal investigation and litigation. This process was costly to both the State and the alleged violator. The field citation rule herein will result in a savings of much of the costs of litigation while preserving the right of the alleged violator to contest the issue of responsibility. The maximum penalty for a violation under these rules is $500. The number of water rights holders affected by this rule are limited and the maximum penalty provided is $500.

On March 25, 1998, a draft copy of the rule was mailed to the South Texas Watermaster Advisory Committee for review. Commission staff subsequently met with the committee on April 22, 1998, to further discuss the field citation rules and address any concerns about the applicability of the rules in the South Texas Watermaster program region. Based on comments from

the advisory committee, the initial draft of proposed rules were changed to include only those violations that may occur in this Watermaster region and that would warrant a field citation.

The commission has determined that the adopted rules will not effect a local economy. The rule is limited in scope to a small number of very specific violations. The persons affected by this legislation are holders of water rights who violate the law and are a small and defined group. In addition, the rule seeks to punish illegal activity, as mandated by the legislature.

FINAL REGULATORY IMPACT ANALYSIS

The commission has determined that a regulatory impact analysis is not required because the rule is not a major environmental rule and will not have an adverse affect in a material way on the economy, environment or public health and safety of any sector of the state. In addition, this rule is specifically required by law, namely Texas Water Code §11.0843. (Added by Acts 1997, 75th Legislature, Chapter 1010, §3.02, effective September 1, 1997.)

TAKINGS IMPACT ASSESSMENT

The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code Annotated §2007.043. The following is a summary of that assessment. The specific purpose of this rule is to make the rules consistent with statutory authority and adopt new requirements relating to watermaster enforcement actions as provided by Senate Bill 1, 75th Legislature, 1997. The rule also provides for issuance field citations and establish penalty amounts corresponding to the types of violations. Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules. These amended sections will not involve a physical invasion, dedication, or exaction of real property, does not restrict or limit a property right that would otherwise exist, and does not eliminate any economic uses of private real property.

COASTAL MANAGEMENT PROGRAM

The executive director has reviewed the rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Coastal Management Program (CMP), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the proposed rule is not subject to the CMP.

COMMENTS

The proposed rule was published in the September 11, 1998, issue of the *Texas Register* (23 TexReg 9261), with a 30-day comment period which closed on October 12, 1998. No comments were received.

STATUTORY AUTHORITY

The sections are adopted under the Texas Water Code, §5.103 which provides the commission authority to adopt rules necessary to carry out its powers and duties and under the provisions of the Texas Water Code and §11.0843 which provides the commission with authority to issue field citations and establish penalty amounts corresponding to the types of violations.

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 December 14, 1998.

TRD-9818305
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: January 4, 1999
Proposal publication date: September 11, 1998
For further information, please call: (512) 239–4640

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

Part II. Texas Parks and Wildlife Department

Chapter 59. Parks

Subchapter A. Park Entrance and Park User Fees

31 TAC §59.2

The Texas Parks and Wildlife Commission adopts an amendment to §59.2, concerning Park Entrance and Use Fees, without changes to the proposed text as published in the October 2, 1998, issue of the *Texas Register* (23 TexReg 9947).

The amendment is necessary to implement the provisions of Senate Bill 991, enacted by the 75th Texas Legislature (1997), which permitted individuals with physical or mental impairments substantially limiting one or more major life activities to apply for a state parklands passport, and authorized the Parks and Wildlife Commission to establish eligibility requirements and privileges for such persons.

The amendment will function to establish criteria for eligibility and to establish a discounted entrance fee for persons holding a parklands passport under the eligibility provisions set forth in the proposed rule.

The department received one comment in support of adoption of the proposed rule.

The amendment is adopted under Parks and Wildlife Code, §13.018(e), which authorizes the Commission to establish eligibility requirements and privileges available to the holder of a state parklands passport.

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 December 10, 1998.

TRD-9818252
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Effective date: December 30, 1998
Proposal publication date: October 2, 1998
For further information, please call: (512) 389–4775

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Chapter 65. Wildlife

Subchapter R. Deer Antlers

31 TAC §65.401

The Texas Parks and Wildlife Commission adopts the repeal of §65.401, concerning Purchase and Sale of Deer Antlers, without changes to the proposed text as published in the October 2, 1998, issue of the *Texas Register* (23 TexReg 9950).

The repeal is necessary because the passage of House Bill 2542 by the 75th Legislature (1997) eliminated the commission's statutory authority to regulate the sale, purchase, and possession after purchase of deer antlers.

The repeal will function to remove a regulation the department no longer has any authority to enforce.

The department received one comment opposing adoption of the proposed rule. The commenter stated that because the repealed regulation permitted the sale of 'lawfully taken' deer antlers, while Parks and Wildlife Code, §62.021 makes no mention of that term, the department was in effect is allowing persons to buy and sell antlers from unlawfully taken deer. The department disagrees with the commenter, and responds that the legislature has removed the commission's authority to regulate the possession and sale of deer antlers. No changes were made as a result of the comment.

The repeal is adopted under the provisions House Bill 2542, enacted by the 75th Legislature, Regular Session, 1997, which eliminated the commission's authority to regulate the sale, purchase, and possession after purchase of deer antlers.

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 December 10, 1998.

TRD-9818253
Gene McCarty
Chief of Staff
Texas Parks and Wildlife Department
Effective date: December 30, 1998
Proposal publication date: October 2, 1998
For further information, please call: (512) 389–4775

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TITLE 34. PUBLIC FINANCE

Part I. Comptroller of Public Accounts

Chapter 1. Central Administration

Subchapter A. Practice and Procedure

34 TAC §1.33

The Comptroller of Public Accounts adopts an amendment to §1.33, concerning discovery, without changes to the proposed text as published in the October 2, 1998, issue of the *Texas Register* (23 TexReg 9953).

The amendment clarifies the filing procedures for written requests for admission in contested case proceedings before the administrative law judges.

No comments were received regarding adoption of the amendment.

This amendment is adopted under the Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The amendment implements the Tax Code, §111.009 and §111.105.

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 December 14, 1998.

TRD-9818312
Martin Cherry
Chief, General Law
Comptroller of Public Accounts
Effective date: January 3, 1999
Proposal publication date: October 2, 1998
For further information, please call: (512) 463–4062

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Chapter 7. Prepaid Higher Education Tuition Program

The Comptroller of Public Accounts adopts amendments to §§7.42, 7.43, 7.51, and 7.84 concerning the administration of the Prepaid Higher Education Tuition Program, without changes to the proposed text as published in the October 30, 1998, issue of the *Texas Register* (23 TexReg 11092).

These changes are proposed to make existing rules more specific as well as allow the board to establish extended enrollment periods for newborn beneficiaries

Section 7.42 is proposed to be amended to allow the Board to establish an extended enrollment period on an annual basis for the purchase of prepaid tuition contracts for newborn beneficiaries.

Section 7.43 is proposed to be amended to specify the amounts of administrative fees charged by the Board to cover the costs of administering the program.

Section 7.51 is proposed to be amended to clarify the method for converting out-of-plan tuition and required fees payments made to Texas Colleges and universities for prepaid tuition contracts issued under the junior college, junior/senior college, or senior college plan.

Section 7.84 is proposed to be amended to clarify the amount of benefits to be transferred to out- of-state colleges and universities.

No comments were received regarding adoption of the amendments.

Subchapter E. Application, Enrollment, Payment, and Fees

34 TAC §7.42, §7.43

The amendments are adopted under the Education Code, Chapter 54, Subchapter F, §54.618 which authorizes the board

to adopt rules necessary for the implementation of the Prepaid Higher Education Tuition Program.

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

The amended rules implement the Education Code, §§54.618, 54.619, and 54.621.

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 December 14, 1998.

TRD-9818320
Martin Cherry
Chief, General Law
Comptroller of Public Accounts
Effective date: January 3, 1999
Proposal publication date: October 30, 1998
For further information, please call: (512) 463–4062

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Subchapter F. Tuition

34 TAC §7.51

The amendment is adopted under the Education Code, Chapter 54, Subchapter F, §54.618 which authorizes the board to adopt rules necessary for the implementation of the Prepaid Higher Education Tuition Program.

No other code, article, or statute is affected by 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.

Filed with the Office of the Secretary of State on December 14, 1998.

TRD-9818321
Martin Cherry
Chief, General Law
Comptroller of Public Accounts
Effective date: January 3, 1999
Proposal publication date: October 30, 1998
For further information, please call: (512) 463–4062

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Subchapter I. Refunds, Termination

34 TAC §7.84

The amendment is adopted under the Education Code, Chapter 54, Subchapter F, §54.618 which authorizes the board to adopt rules necessary for the implementation of the Prepaid Higher Education Tuition Program.

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

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 December 14, 1998.

TRD-9818322
Martin Cherry
Chief, General Law
Comptroller of Public Accounts
Effective date: January 3, 1999
Proposal publication date: October 30, 1998
For further information, please call: (512) 463–4062

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part XI. Texas Juvenile Probation Commission

Chapter 346. Case Management Standards

Subchapter A. Case Planning and Supervision

37 TAC §§346.1-346.5

The Texas Juvenile Probation Commission adopts new §346.1 through §346.5 concerning case management standards for juvenile justice practitioners without changes to the proposed text as published in the October 16, 1998 issue of the *Texas Register* (23 TexReg 10627) and will not be republished.

The agency adopts these standards to provide uniform procedures for planning and managing probation caseloads.

The adoption of these case management standards will ensure the delivery, quality, and uniformity of probation services throughout the state. TJPC will provide the SJS instrument, training on the instrument, and technical assistance when needed.

The following public comments were received:

Regarding §346.2 Assessment.

Public comment: standard should be changed from "require the Compass be completed for all juveniles who receive a disposition," to "all juveniles who are formally referred to the juvenile probation department."

Agency response: no change recommended because the standard is clear as to what it requires.

Public comment: whenever the adjudication and disposition are bifurcated hearings, the SJS worksheet should be completed subsequent to the adjudication and prior to the disposition.

Agency response: The standard as written does not prohibit departments from administrating the Strategies in Juvenile Supervision (SJS) prior to the disposition hearing; however it is preferred that the assessment be conducted after the disposition hearing because it is an assessment designed to aid in case planning and not for recommending a disposition. It is a requirement to administer the (SJS) prior to developing a case plan. The TJPC agrees with the comment on requiring the (SJS) be administered on all juveniles that are on court ordered probation.

Public comment: change the implementation date to May 1, 1999 and omit 346.2 (2). The justification is that staggering the implementation from January 1, 1999 to September 1, 2000 creates a disparity in supervision and services. Case auditing

and tracking of SJS and another management system would be difficult and confusing.

Agency response: The staggering of the implementation dates for progressive sanctions is to allow sufficient time for all departments to administer the (SJS). By September 1, 2000, all juveniles that are court ordered to probation should have an (SJS) assessment. The standard as written does not prohibit a department from implementing an earlier time line for administering the (SJS). There is no recommended change to the standard. It is recommended to the board to adopt the standard as written.

Regarding 346.3 Case Planning and Review.

Public comment: Case plan should be written within thirty days for all juveniles assigned to court ordered probation. Also, change the implementation date to May 1, 1999. The justification is equal treatment for all juveniles on court-ordered probation.

Agency response: The standard as written accommodates juveniles on progressive sanctions level 2, who can have juveniles placed on court ordered probation up to six months. The standard as written does not prohibit a department from implementing written case plans prior to the time lines set in the standard. There is no recommended change to the standard.

These standards are adopted under §141.042 of the Texas Human Resource Code, which provides the Texas Juvenile Probation Commission with the authority to adopt reasonable rules which provide minimum standards for juvenile boards, including rules establishing case management standards.

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 December 7, 1998.

TRD-9818188

Lisa Capers

Deputy Executive Director and General Counsel

Texas Juvenile Probation Commission

Effective date: December 27, 1998

Proposal publication date: October 16, 1998

For further information, please call: (512) 424-6681

REVIEW OF AGENCY RULES

This Section contains notices of state agency rules review as directed by the 75th Legislature, Regular Session, House Bill 1 (General Appropriations Act) Art. IX, Section 167. 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 VI

The Legislative Advisory Committee of the Texas Credit Union Commission will review and consider Chapter 93, Administrative Proceedings, of Title 7, Part VI of the Texas Administrative Code in preparation for the Credit Union Commission's Rule Review as required by the General Appropriations Act, Article IX, Section 167.

Comments or questions regarding these rules may be submitted in writing to Lynette Pool-Harris, Deputy Commissioner Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699, or electronically to deputy.commissioner@tcud.state.tx.us.

TRD-9818384
Harold E. Feeney
Commissioner
Texas Credit Union Department
Filed: December 16, 1998

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Office of the Governor

Title 1, Part I

Chapter 5. Budget and Planning Office

In accordance with the General Appropriations Act, Article IX, Section 167, 75th Legislature, the Governor's Office of Budget and Planning (Office) submits the following plan of review for the entirety of its rules under Title 1 of the Texas Administrative Code.

Beginning in June 1999, the Office will review Chapter 5.

Review will be completed not later than August 31, 2001.

All comments and/or questions should be directed in writing to Albert Hawkins, Director, Governor's Office of Budget and Planning, P.O. Box 12428, Austin, Texas 78711.

TRD-9818241
Donna Davidson
Assistant General Counsel
Office of the Governor
Filed: December 9, 1998

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Texas Natural Resource Conservation Commission

Title 30, Part I

The Texas Natural Resource Conservation Commission (commission) continues the review of 30 TAC §11.1, concerning Historically Underutilized Business Program. This review was conducted in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997. The proposed review was published in the August 14, 1998, issue of the *Texas Register* (23 TexReg 8507).

Section 167 requires state agencies to review and consider for readoption rules adopted under the Administrative Procedure Act. The reviews must include, at a minimum, an assessment that the reasons for the rule continue to exist. The commission has reviewed the historically underutilized business program (HUB) rule in Chapter 11 and determined that the reasons for this rule continue to exist. The General Appropriations Act (House Bill 1, 75th Legislature, 1997), requires state agencies to adopt General Services Commission (GSC) rules and make a good faith effort to increase purchases and contract awards to HUBs based on those rules to implement the *State of Texas Disparity Study*. However, the commission has identified the need to revise Chapter 11 to adopt more recent GSC rules, 1 TAC §§111.11-111.25, by reference. Specifically, the commission intends to propose as a formal rulemaking at the close of this review changes to §11.1 that adopts by reference the latest GSC rules concerning utilization of HUBs.

The commission adopted §11.2 and §11.3 in the Adopted Rules section in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12404).

The comment period on the review closed on September 14, 1998, and no comments were received.

TRD-9818347
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: December 14, 1998

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Texas State Board of Pharmacy

Title 22, Part XV

Chapter 283. Licensing Requirements for Pharmacists

The Texas State Board of Pharmacy proposes to review Chapter 283 (§§283.1 - 283.11), concerning Licensing Requirements for Pharmacists, pursuant to the Appropriations Act, Section 167. In conjunction with this review, the agency is not proposing any changes to the rule.

Comments on the proposal may be submitted to Gay Dodson, R.Ph, Executive Director, Texas State Board of Pharmacy, 333 Guadalupe Street, Austin, Texas 78701.

TRD-9818243
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: December 10, 1998

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Chapter 291. Pharmacies

The Texas State Board of Pharmacy proposes to review Chapter 291 (§§291.91 - 291.94), concerning Class D (Clinic) Pharmacies, pursuant to the Appropriations Act, Section 167. In conjunction with this review, the agency is proposing amendments to Section 291.93 published elsewhere in this issue of the *Texas Register*.

Comments on the proposal may be submitted to Gay Dodson, R.Ph, Executive Director, Texas State Board of Pharmacy, 333 Guadalupe Street, Austin, Texas 78701.

TRD-9818242
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: December 10, 1998

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Chapter 303. Destruction of Dangerous Drugs and Controlled Substances

The Texas State Board of Pharmacy proposes to review Chapter 303 (§§303.1 - 303.3), concerning Destruction of Dangerous Drugs and Controlled Substances, pursuant to the Appropriations Act, Section 167. In conjunction with this review, the agency is proposing amendments to Sections 303.1 and 303.2 published elsewhere in this issue of the Texas Register.

Comments on the proposal may be submitted to Gay Dodson, R.Ph, Executive Director, Texas State Board of Pharmacy, 333 Guadalupe Street, Austin, Texas 78701.

TRD-9818244
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: December 10, 1998

♦ ♦ ♦

Public Utility Commissoin of Texas

Title 16, Part II

Chapter 23. Substantive Rules

The Public Utility Commission of Texas files this notice of intention to review §23.23 relating to Rate Design pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167). Project Number 17709 has been assigned to the review of this rule section.

As part of this review process, the commission is proposing the repeal of §23.23 and is proposing new §25.234 of this title (relating to Rate Design), §25.235 of this title (relating to Fuel Costs - General), and §25.236 of this title (relating to Recovery of Fuel Costs), §25.237 of this title (relating to Fuel Factors), and §25.238 of this title (relating to Power Cost Recovery Factors (PCRF)) in Chapter 25, Substantive Rules Applicable to Electric Service Providers; and proposing new §26.205 of this title (relating to Rates for Intrastate Access Services) in Chapter 26, Substantive Rules Applicable to Telecommunications Service Providers to replace this section. Project Number 19865 has been established for proposed §§25.234-25.238, and Project Number 19866 has been established for proposed §26.205. The proposed new sections and the proposed repeal may be found in the Proposed Rules section of the *Texas Register*. The commission will accept comments on the Section 167 requirement in the comments filed on the proposed new sections.

Any questions pertaining to this notice of intention to review should be directed to Rhonda Dempsey, Rules Coordinator, Office of Regulatory Affairs, Public Utility Commission of Texas, 1701 N. Congress Avenue, Austin, Texas 78711-3326 or at voice telephone (512) 936-7308.

16 TAC §23.23. Rate Design.

TRD-9818261
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 10, 1998

♦ ♦ ♦

The Public Utility Commission of Texas files this notice of intention to review §23.102 relating to Imputation pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167). Project Number 17709 has been assigned to the review of this rule section.

As part of this review process, the commission is proposing the repeal of §23.102 and is proposing new §26.274 of this title (relating to Imputation) to replace §23.102. The proposed repeal and new rule may be found in the Proposed Rules section of the *Texas Register*. As required by Section 167, the commission will accept comments regarding whether the reason for adopting the rule continues to exist in the comments filed on the proposed new section.

Any questions pertaining to this notice of intention to review should be directed to Rhonda Dempsey, Rules Coordinator, Office of Regulatory Affairs, Public Utility Commission of Texas, 1701 N. Congress Avenue, Austin, Texas 78711-3326 or at voice telephone (512) 936-7308.

16 TAC §23.102. Imputation.

TRD-9818301
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 14, 1998

♦ ♦ ♦

The Public Utility Commission of Texas files this notice of intention to review §23.103 relating to IntraLATA Equal Access pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167 (Section 167). Project Number 17709 has been assigned to the review of this rule section.

As part of this review process, the commission is proposing the repeal of §23.103 and is proposing new §26.275 of this title (relating to IntraLATA Equal Access) to replace §23.103. The proposed repeal and new rule may be found in the Proposed Rules section of the *Texas Register*. As required by Section 167, the commission will accept comments regarding whether the reason for adopting the rule continues to exist in the comments filed on the proposed new section.

Any questions pertaining to this notice of intention to review should be directed to Rhonda Dempsey, Rules Coordinator, Office of Regulatory Affairs, Public Utility Commission of Texas, 1701 N. Congress Avenue, Austin, Texas 78711-3326 or at voice telephone (512) 936-7308.

16 TAC §23.103. IntraLATA Equal Access.

TRD-9818302
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 14, 1998

♦ ♦ ♦

Texas Savings and Loan Department

Title 7, Part IV

The Finance Commission of Texas files this notice of intention to review Texas Administrative Code, Title 7, Chapter 75 (§§75.1-75.127), relating to Applications, pursuant to the Appropriations Act of 1997, HB 1, Article IX, Section 167. The commission will accept comments for 20 days following the publication of this notice in the *Texas Register* as to whether the reasons for adopting this chapter continues to exist. Final consideration of the rules review of this chapter is scheduled for the commission's meeting on February 19, 1999.

The Texas Savings and Loan Department, which administers these rules, believes that the reasons for adopting the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to James L. Pledger, Commissioner, Texas Savings and Loan Department, 2601 North Lamar, Suite 201, Austin, Texas 78705, or by e-mail to TSLD@mail.capnet.state.tx.us. Any proposed changes to rules as a result of the review will be published in the Proposed Rules Section of the *Texas Register* and will be open for an additional 20 day public comment period prior to final adoption or repeal by the commission.

TRD-9818353
James L. Pledger
Commissioner
Texas Savings and Loan Department
Filed: December 15, 1998

♦ ♦ ♦

Texas Workers' Compensation Commission

Title 28, Part II

The Texas Workers' Compensation Commission files this notice of intention to review the rules contained in Chapter 109 concerning Workers' Compensation Coverage for State Agency Employees and Chapter 114 concerning Self-Insurance. This review is pursuant to the General Appropriations Act, Article IX, Section 167, 75th Legislature.

The agency's reason for adopting the rules contained in these chapters continues to exist and it proposes to readopt these rules.

Comments regarding the Section 167 requirement as to whether the reason for adopting these rules continues to exist must be received by 5:00 p.m. on January 25, 1999, and submitted to Donna Davila, Office of General Counsel, Mailstop #4-D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH 35, Austin, Texas 78704-7491.

§109.1 State Agencies: General Provisions.

§114.1 Purpose.

§114.2 Definitions.

§114.3 Initial Application Form and Financial Information Requirements.

§114.4 Security Requirements.

§114.5 Excess Insurance Requirements.

§114.6 Safety Program Requirements.

§114.7 Certification Process.

§114.8 Refusal to Certify an Employer.

§114.9 Required Initial Safety Program Inspection.

§114.10 Claims Contractor Requirements.

§114.11 Audit and Inspection Program.

§114.12 Required Annual Reports.

§114.13 Required Notices to the Director.

§114.14 Impaired Employer.

§114.15 Revocation of Certificate of Authority to Self-Insure.

TRD-9818293
Susan M. Cory
General Counsel
Texas Workers' Compensation Commission
Filed: December 14, 1998

♦ ♦ ♦

Adopted Rule Reviews

Texas Department of Banking

Title 7, Part II

The Finance Commission of Texas (commission) has completed the review of Texas Administrative Code, Title 7, Chapter 12, Subchapter A (§§12.1-12.11), relating to legal lending limits, as noticed in the October 9, 1998, issue of the *Texas Register* (23 TexReg 10503). No comments were received regarding the substance of these rules or whether the reason for adopting these rules continues to exist.

The commission readopts these sections, pursuant to the requirements of the Appropriations Act of 1997, HB 1, Article IX, Section 167, and finds that the reason for adopting these rules continues to exist. The rules were substantially rewritten and revised effective March 1, 1996, to be in accordance with the recently enacted Texas Banking Act and recently revised federal regulations on this same topic that govern national bank competitors of state banks.

TRD-9818290
Everette D. Jobe
Certifying Official
State Finance Commission
Filed: December 11, 1998

♦ ♦ ♦

Texas Cancer Council

Title 25, Part XI

Pursuant to the requirements of 1997 Tex.Gen. Approp. Act, Art. IX, 167, the Council has reviewed all of its rules, which are contained in Ch. 701, 702, and 703 of title 25 Texas Administrative Code. No comments were received to the "Proposed Notice of Intent to Review," which was published in the June 12, 1998 issue of the *Texas Register*, (23 TexReg 6293).

The Council finds the reasons for adopting the following rules continue to exist. The Council re-adopts the following rules: §§701.2, 701.3, 701.4, 701.5, 701.6, 701.7, 701.8, 702.1, 702.2, 702.3, 702.4, 703.1, 703.2, 703.3, 703.4, 703.5, 703.6, 703.7, 703.8, 703.9, 703.10, 703.11, 703.12, 703.13, and 703.14.

The Council finds that the reasons for adopting the following two rules no longer exist, and the Council proposes their repeal. The proposed repeal will appear in the "Proposed Rules" section of the *Texas Register*. The rules the Board proposes to repeal are §701.1 and §701.9.

The Council finds that the reasons for adopting the following rules continue to exist, but that they should be re-adopted with changes. The proposed changes to the rules will appear in the "Proposed Rules" section of the Texas Register. The Council re-adopts but proposes changes to the following rules: §§701.2, 701.4 701.5, 701.6, 701.7, 701.8, 702.1, 702.3, 703.4, 703.7, 703.9, 703.10, and 703.13.

Justification for the following rules is to make known to the public the policies and procedures the Council will follow to implement the Texas Cancer Plan.

§701.2 Texas Cancer Plan

The purpose of this rule is to adopt by reference the Texas Cancer Plan and to inform the public as to how to obtain this document. It also explains that the document will be periodically revised and updated, and will incorporate public review and comment. This rule is necessary and appropriate to ensure the public has full access to the Texas Cancer Plan.

§701.3 Officers

The purpose of this rule is to describe the duties of the three officers of the Texas Cancer Council. Each officer's duties are described in terms of presiding at meetings, order of succession, the process by which a Vice Chair and Secretary is elected, and the process by which vacancies are filled. This rule is needed to ensure that Council meetings and functions are carried out in an organized manner. The duties described in this rule are similar to those identified in other state agency governing boards.

§701.4 Committees

This rule describes the composition, powers, and duties of the Executive Committee. Specifically, it describes the process of appointing standing and ad hoc committees, and how such committees relate to and report to the Council. This rule is needed to clarify the Executive Committee's responsibilities in acting for the full Council, subject to approval by the full Council at its next meeting. This rule allows the Executive Committee to act on the Council's behalf when needed such as situations including but not limited to the following: when it is not possible or practical to call a full Council meeting to handle certain time-sensitive issues.

§701.5 Executive Director

This rule specifies that the recruitment, selection, and hiring of the Executive Director is performed by the Executive Committee. It also describes the duties of the Executive Director. This description clarifies the role and responsibilities of the Executive Director in operating the agency on behalf of the Council.

§701.6 Meetings

This rule describes regular meetings, special meetings, open meetings, and executive sessions that may be held by the Council. It clarifies the circumstances under which executive sessions may be held, how they differ from the procedures of an open meeting, and how the public may access information regarding such a meeting. The rule further describes procedural aspects of Council meetings, including meeting notices, agendas, quorums, representation from the Texas Board of Human Services, and the Texas Board of Health, rules of order, minutes, public participation, dissents, and public statements. In clarifying the procedures that govern a Council meeting, this rule assists the Council in carrying out its public duties.

§701.7 Actions Requiring Council Approval

This rule describes the actions which require Council approval, including adoption of administrative procedures and policies, adoption of the operating budget, approval or cancellation of grants and contracts, submission of the legislative appropriations request, and when required by law or requested by the Executive Director or the Council. This rule assists the Council in carrying out its duties, and clarifies the circumstances under which Council action is needed.

§701.8 Charges for Copies of Public Records

This rule specifies that charges for copies of public records will follow the guidelines of the General Services Commission, and allows the Council to waive such charges. This rule informs the public that a cost may be associated with any public records, and allows the Council to waive these charges if there is a public benefit.

Justification for the following rules is to make known to the public and establish guidelines for the relationship between the Council and private organizations or donors as required by Tex. Gov't Code Ann. ˘2255.001 (Vernon 1998).

§702.1 Authority and Purpose

This rule cites the statute that requires the Council to adopt rules governing the relationship between the agency and private donors.

§702.2 Donations

This rule describes where donations to the Council will be deposited and how they will be used. It also clarifies that a donor is not authorized to use Council property. This rule ensures proper use of donated funds and limits a donor's access to Council property.

§702.3 Standards of Conduct

This rule describes standards of conduct for Council members and employees. It limits Council members and employees from accepting gifts, favors, services, employment, or compensations. It describes potential conflicts of interest, and guides Council members and employees in avoiding such situations.

§702.4 Special Events

This rule describes special events, which the Council may sponsor. By defining such elements as the purpose of these events, uses of donations, disbursement of remaining funds, oversight of special events, and the relationship between Council staff and the Austin Community Foundation, this rule guides the Council in the proper procedures to follow in sponsoring special events. These procedures were determined to appropriately limit the use of funds to only events which further the goals of the Texas Cancer Plan.

Justification for the following rules is to inform the public and Council about procedures and requirements concerning the submission, approval and cancellation of grants related to the implementation of the Texas Cancer Plan.

§703.1 Preamble

This rule allows the Council to contract with public or private persons to implement the Texas Cancer Plan. This rule is necessary to allow the Council to carry out its duties in awarding grants to entities involved in cancer prevention and control.

§703.2 Philosophy

This rule describes the manner in which the Council intends to further implementation of the Texas Cancer Plan.

§703.3 Scope The purpose of this rule is to identify the priorities for funding a variety of programs based on the Texas Cancer Plan. Described in this rule is how and to whom the Council may disburse funding. State agencies and non-state or private organizations are all eligible for Council grants. While all entities may be asked to submit a proposal, state agencies are not required to submit a Request for Application. This method enables partnering state agencies to work together to accomplish Texas Cancer Plan goals for the public benefit.

§703.4 Application Requirements

The purpose of this rule is to describe the format and the content of applications submitted to the Council. This rule explains the proper format and clarifies the considerations and exceptions that are followed when submitting applications. This rule is necessary to assist the Council in carrying out its duties and maintain a consistent approach to accepting proposals.

§703.5 Project Proposal Submission

This rule describes the guidelines the Council utilizes for the submission of project proposals. This ensures greater consistency and objectivity in proposal review.

§703.6 Review Process

The purpose of this rule is to describe the process which the Council follows when reviewing proposals. Explained are the steps followed by staff and the submission of proposals to groups and special committees for their review. These steps ensure a fair, impartial and objective review of each proposal, and ensures that proposals are linked to the goals of the Texas Cancer Plan.

§703.7 Project Approval

This rule describes the process which Council staff follow when approving projects. Included in this rule are steps identifying the process to be followed after a project has been approved for funding. The rule describes the contractors agreement, provisions, assurances on abiding by the terms of the contract, applicability of Uniform Grants Management Standards, allocation of costs for personnel and equipment, and awards to state and local governmental agencies. This rule is necessary to ensure that the requirements concerning the submission, approval and cancellation of grants are followed and are consistent among grantees.

§703.8 Publicity and Publications

This rule describes the actions which Council follows to determine copyright and licensing issues. This rule assists the Council in determining decisions relating to publishing and ownership of materials created with Council funds.

§703.9 Audits

This rule describes audits of contractors in accordance with the requirements of the Uniform Grant Management Standards.

§703.10 Funding Restrictions

The purpose of this rule is to describe the funding restrictions placed on projects. It describes the disallowable costs and project income, and states that the Council does not pay indirect costs. This rule is necessary to describe appropriate funding restrictions and helps ensure the grantees will charge to grants the allowable costs.

§703.11 Continuation Funding

Discussed in the rule is the eligibility for continuation funding with the Council. The rule describes the considerations of program accomplishments, past project contracts and alternative funding. The criteria for eligibility were chosen because they link project activities to the goals of the Texas Cancer Plan.

§703.12 Amendment of Contract

The purpose of this rule is to guide staff through the transferring of funds among line items and the process of amending a contract. Also described in this rule is the Executive Director's procedure for the authorization of a contract amendment. This rule is necessary to provide guidance to the Council on appropriate amendments of contracts.

§703.13 Termination of Contract

This rule describes the Council powers when managing the termination process. This rule applies to contractors and describes expiration, notification, and reconsideration of contracts. The rule is necessary to ensure that contractual obligations are met and discusses sanctions for failure to meet contract terms.

§703.14 Confidentiality of Records

This rule describes confidentiality of records and the guidelines that contractors must follow. This rule is necessary to ensure that these guidelines regarding confidentially are adopted, and that confidentiality is protected. Contractors often are exposed to confidential information about patients and clients. State and federal laws require that certain health information be kept confidential. These rules apply those confidentiality provisions to the contractors.

These rules are re-adopted under the authority of Tex. Health & Safety Code Ann., §§102.002 and 102.009 which provide the Texas Cancer Council with the authority to develop and implement the Texas Cancer Plan, and §102.010 (b) which directs the Council to adopt rules governing the submission and approval of grant requests and the cancellation of grants.

TRD-9818328
Mickey L. Jacobs, M.S.H.P.
Executive Director
Texas Cancer Council
Filed: December 14, 1998

♦ ♦ ♦

Texas Department of Licensing and Regulation

Title 16, Part IV

The Texas Department of Licensing and Regulation (Department) readopts, without changes, 16 TAC Chapter 68, Architectural Barriers: §§68.1, 68.10, 68.20, 68.21, 68.30-68.33, 68.60-68.66, 68.70-68.72, 68.80, 68.90, 68.92, 68.93, and 68.100 in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997. The proposed rule review was published in the October 23, 1998, issue of the *Texas Register* (23 TexReg 10924).

The comment period on the proposal and review closed November 23, 1998. No comments were received regarding readoption of this chapter.

Rider 167 requires state agencies to review and consider for readoption rules adopted under the Administrative Procedures Act. The review must include, at a minimum, an assessment that the reason for the rules continues to exist. The Department has reviewed the rules in Chapter 68 and determined that the rules are still essential in effectuating the provisions of Texas Revised Civil Statutes Annotated Article 9102 (Vernon 1997) which gives the Department the authority to promulgate and enforce a code of rules and take all action required to assure compliance with the intent and purpose of the Article.

TRD-9818318
Rachelle A. Martin
Executive Director
Texas Department of Licensing and Regulation
Filed: December 14, 1998

♦ ♦ ♦

The Texas Department of Licensing and Regulation (Department) readopts 16 TAC Chapter 70, Industrialized Housing and Buildings: §§70.1, 70.10, 70.20-70.23, 70.30, 70.40, 70.50-70.51, 70.60-70.65, 70.70-70.78, 70.80, 70.90-70.92, 70.100-70.103, and 70.120 in accordance with the General Appropriations Act, Article IX, §167, 75th Legislature, 1997. The proposed rule review was published in the October 23, 1998, issue of the *Texas Register* (23 TexReg 10924).

The comment period on the proposal and review closed November 23, 1998. No comments were received regarding readoption of this chapter.

Rider 167 requires state agencies to review and consider for readoption rules adopted under the Administrative Procedures Act. The review must include, at a minimum, an assessment that the reason for the rules continues to exist. The Department has reviewed the rules in Chapter 70 and determined that the rules are still essential in effectuating the provisions of Texas Revised Civil Statutes Annotated Article 5221f-1 (Vernon 1989) which gives the Department the authority to promulgate and enforce a code of rules and take all action required to assure compliance with the intent and purpose of the Article.

The Department concurrently adopts amendments to §70.80 in the Adopted Rules section of this issue of the Texas Register. The amendment decreases the fees for a manufacturer's registration and an industrialized builder's registration. No comments were received regarding adoption of this section.

TRD-9818319
Rachelle A. Martin
Executive Director
Texas Department of Licensing and Regulation
Filed: December 14, 1998

♦ ♦ ♦

Board of Nurse Examiners

Title 22, Part XI

Chapter 215. Nurse Education

The Board of Nurse Examiners adopts the review of Chapter 215, Nurse Education in accordance with the Appropriations Act, Section 167, published in the October 9, 1998, issue of the *Texas Register* (23 TexReg 10244). The BNE finds that the reason for adopting Chapter 215 continues to exist.

The BNE received no comment related to the repeal of the existing chapter and one comment related to the adoption of the new chapter. The comments and Board response can be found under the adopted new 215.

TRD-9818248
Kathy Thomas, MN, RN
Executive Director
Board of Nurse Examiners
Filed: December 10, 1998

♦ ♦ ♦

Texas State Board of Pharmacy

Title 22, Part XV

Chapter 281. General Provisions

The Texas State Board of Pharmacy adopts the review of Chapter 281. General Provisions, pursuant to the Appropriations Act, Section 167. The proposed review was published in the September 25, 1998, issue of the *Texas Register* (23 Tex Reg 9801).

The agency finds that the reason for adopting the rule continues to exist.

No comments were received regarding adoption of the review.

As a part of the review, the agency proposed and adopted the repeal of §§281.1-281.21, 281.23-281.56, 281.58-281.63, 281.67-281.75, 281.79-281.80 and simultaneously proposed and adopted new §§281.1-281.16, 281.21- 281.56, and 281.71-281.76 concerning administrative practice and procedure. A complete revision of Chapter 281 is necessary, due in part to the newly adopted State Office of Administrative Hearings rules and to efforts to streamline administrative procedures. The adopted repeal and simultaneous adoption of new rules is published elsewhere in this issue of the *Texas Register*.

TRD-9818247
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: December 10, 1998

♦ ♦ ♦

Chapter 301. Fraud, Deceit, and Misrepresentation in the Practice of Pharmacy

The Texas State Board of Pharmacy adopts the review of Chapter 301 (§301.1), concerning Fraud, Deceit, and Misrepresentation in the Practice of Pharmacy, pursuant to the Appropriations Act, Section 167. The proposed rule was published in the September 25, 1998, issue of the *Texas Register* (23 TexReg 9801).

The agency finds that the reason for adopting the rule continues to exist.

No comments were received regarding adoption of the review. No changes were made to the rules as a result of the review.

TRD-9818246
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: December 10, 1998

♦ ♦ ♦

Chapter 311. Code of Conduct

The Texas State Board of Pharmacy adopts the review of Chapter 311 (§§311.1-311.2), concerning Code of Conduct, pursuant to the Appropriations Act, Section 167. The proposed review was published in the September 25, 1998, issue of the *Texas Register* (23 Tex Reg 9801).

The agency finds that the reason for adopting the rule continues to exist.

No comments were received regarding adoption of the review. No changes were made to the rules as a result of the review.

TRD-9818245
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: December 10, 1998

♦ ♦ ♦

Texas Real Estate Commission

Title 22, Part XXIII

Chapter 533. Practice and Procedure

The Texas Real Estate Commission adopts the review of Chapter 533, Practice and Procedure, in accordance with the Appropriations Act of 1997, HB 1, Article IX, Section 167.

In conjunction with this review, the agency adopts the repeal of 22 TAC §§533.1-533.30 and new 22 TAC §§533.31-533.39 so as to provide more concise procedural rules. The adopted repeal and new sections are published in this issue of the *Texas Register*. The agency has determined that with these changes, the reasons for adopting the chapter continue to exist.

No comments were received on the proposed repeal or new sections.

TRD-9818226
Mark A. Moseley
General Counsel
Texas Real Estate Commission
Filed: December 9, 1998

♦ ♦ ♦

TABLES & GRAPHICS

Graphic material from the emergency, proposed, and adopted sections is published separately in this tables and graphics section. Graphic material is arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic material is 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. Multiple graphics in a rule are designated as “Figure 1” followed by the TAC citation, “Figure 2” followed by the TAC citation.

SERVICE COORDINATION EVALUATION
MENTAL RETARDATION SERVICES

NAME _____

CASE#: _____ PHONE #: _____

ADDRESS _____
Street address *City* *State* *Zip Code*

INSTRUCTIONS: All children and adults in the TDMHMR mental retardation priority population must be evaluated upon admission to mental retardation services and annually thereafter until discharged from services.

DETERMINING UNMET OUTCOMES: Rate each unmet outcome as identified by the individual and/or legally authorized representative according to the following scale:

5 = Life threatening or significantly impacts the physical or emotional health and/or safety of the individual (the individual may not desire a change, but the screener has noticed an area that raises great concern and should be monitored in case the issue becomes life threatening).
4 = High involvement desired/needed to achieve outcomes
3 = Moderate involvement desired/needed to achieve outcomes
2 = Minimal involvement desired/needed to achieve outcomes
1 = No involvement desired; outcomes met

Rating	Outcomes
____	LIVING ENVIRONMENT: For example, desires a change in living environment, desires increased access to community resources, desires assistance in modifying living environment to meet health, safety or physical needs. Explain: _____

____ FINANCIAL SECURITY: For example, desires sufficient income to meet needs, desires sufficient insurance to increase security, desires sufficient skills for managing financial resources, desires increased access to finances. Explain: _____

_____

_____

_____

_____

_____.

____ PHYSICAL / EMOTIONAL / BEHAVIORAL HEALTH CONSIDERATIONS: For example, desires increased access to health care services; desires assistance with specific medical/physical needs or conditions; desires assistance with decreasing use of substances, self-injurious, aggressive or assaultive behavior, stealing or destroying property, wandering or running away. Explain: _____

_____

_____

_____

_____

_____.

____ DAILY LIVING SKILLS: For example, desires assistance to perform basic living skills, such as cooking, laundry, household management, grooming and hygiene care, toileting, recognizing safety signs, reading, writing, and communication. Explain: _____

_____

_____

_____

_____

_____.

____ WORK/SCHOOL: For example, desires vocational training/employment, requests assistance in changing employment, requests assistance with work or school-related issues, desires volunteer work, desires assistance in transitioning from school to vocational training/ employment. Explain: _____

_____

_____

_____

_____

_____.

_____ RELATIONSHIPS: For example, desires friends, intimate relationships and/or natural supports networks; desires assistance with identified significant other/family stressors. Explain: _____

_____

_____

_____

_____

_____.

_____ SOCIAL INCLUSIONS: For example, desires to participate in the life of the community, to interact with other members of the community, and perform different social roles. Explain: _____

_____

_____

_____

_____

_____.

_____ RIGHTS/LEGAL STATUS: For example, desires assistance in understanding and exercising his/her rights; desires assistance in civil, criminal, competency, and guardianship issues; requests assistance in freedom from abuse/neglect issues. Explain: _____

_____

_____

_____

_____

_____.

_____ OTHER DESIRED OUTCOMES: Explain: _____

_____

_____

_____

_____

_____.

Figure 1:25 TAC §412.456(3)

DETERMINING LEVEL OF SERVICE COORDINATION
(check one)

_____ High Need for Service Coordination:

Has at least one unmet outcome with a Rating of 5 or 4

_____ Moderate Need for Service Coordination:

Has no unmet outcomes with a Rating of 5 or 4 AND has at least one unmet outcome with a Rating of 3

_____ Low Need for Service Coordination:

Has no unmet outcomes with a Rating of 5,4, or 3 AND has at least one unmet outcome with a Rating of 2

_____ No Service Coordination Desired:

Has no unmet outcomes with a Rating of 5, 4, 3, or 2.

_____ _____
Signature/Title of Screener Date

ASSIGNMENT STATUS:

_____ Person is assigned to service coordination at recommended level.

_____ _____
Name of Person to Provide Service Coordination Date of Assignment

I,_____, state that I have knowledge of the facts set forth herein and that these facts are true and correct, to the best of my knowledge and belief. I further state that, to my knowledge and belief, the project for which application is now being made will not in any way violate any law, rule, ordinance, or decree of the duly authorized governmental entity having jurisdiction. I further state that I am the applicant or am authorized to act for the city/county/applicant.

_____

(Signature)

_____

(Type Name and Title)

_____

(Date)

Notary public's certificate:

Subscribed and sworn to before me, by the said _____, this _____ day of _____ 19__, to certify which witness my hand and seal of office.

_____

Notary Public in and for _____

County, Texas.

My commission expires on _____.

Corporation A plans to build a $50 million plant in a qualified reinvestment zone in Enterprise County on land Corporation A has owned for three years. The plant will be completed in 1998. Corporation A and Enterprise County enter into a three year 50% tax abatement agreement on June 30, 1996. The years abated will be ad valorem years 1997, 1998, and 1999. Corporation A and Enterprise School District do not enter into an abatement agreement. Appraisal values are issued by Enterprise County in May of the year prior to the ad valorem year. Corporation A typically pays its property taxes in December. Application for refund must be filed before August 1, 1998.

REFUND AVAILABLE

	1996	1997	1998	1999
1. Total appraised value of property subject to the abatement agreement	$1 million	$26 million	$51 million	$55 million
2. Base year appraised value of property subject to the abatement agreement	NA	$1 million	$1 million	$1 million
3. Value after base year deduction	NA	$25 million	$50 million	$54 million
4. Abatement agreement value that would not have been subject to school district property tax had you been in an abatement agreement [*Multiply #3 by % abatement (50%)*]		$12.5 million	$25 million	$27 million
5. School tax rate	$1.00 / $100	$1.02 / $100	$1.04 / $100	$1.06 / $100
6. Potential refund amount based on 50% abatement agreement*	N/A	$130,000	$260,000	$286,200
7. Amount of property tax paid to the school district	$10,000	$265,200	$530,400	$583,000
8. State taxes paid in a calendar year	N/A	$300,000	$500,000	$600,000

* Corporation A's refund is limited to 50% of the school taxes paid minus the amount of school taxes paid on base year value in calendar year.

The initial base comparison year is 1996 (the base comparison year must begin on or after January 1, 1996). Since the valuation on January 1, 1997, is greater than the valuation at the 1996 base year by more than $4 million, and Corporation A meets all other statutory requirements, Corporation A qualifies for a refund of state taxes paid.

Refunds for property tax years 1997-1999 would also be available if Corporation A had qualified based on a payroll increase of $3 million between the date the agreement was entered into and the date the refund application was filed.

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, changes in interest rate and applications to install remote service units, and consultant proposal requests and awards.

To aid agencies in communicating information quickly and effectively, other information of general interest to the public is published as space allows.

Texas Commission on Alcohol and Drug Abuse

Notice of Intent to Fund

Under the authority of the Texas Health and Safety Code, Title 6, Subtitle B, Chapter 461, the Texas Commission on Alcohol and Drug Abuse (TCADA) is seeking proposals from organizations to provide comprehensive community-based prevention and intervention services as well as treatment services for medically-indigent individuals. In addition, TCADA seeks to implement a balanced array of services as outlined in the Continuum of Care Model of the 1998 Statewide Service Delivery Plan. The plan and the rules are available on TCADA's website at http://www.tcada.state.tx.us. To request a hard copy of the plan or rules, please call the Services Procurement Department at (800) 832-9623, extension 6786 or (512) 349-6786.

The goals of this quarterly developmental process are to: advance toward the goal established in the 1999 Comprehensive Services RFP of equalizing the funding allocation between substance abuse prevention and intervention and substance abuse treatment. Substance abuse prevention and/or intervention funds are therefore reserved for Health and Human Services Commission (HHSC) Regions 2, 3, 4, 5, 9, and 11; develop community coalitions in all areas of the state to reduce substance abuse among youth throughout all HHSC regions; implement Human Immuno-deficiency Virus (HIV) Early Intervention programs in HHSC Regions 2 and 9 where no TCADA-funded early intervention services currently exist; enhance or expand existing TCADA funded HIV outreach programs; coordinate and adapt existing substance abuse and mental health services in order to build expertise in effective and efficient methods of engagement, assessment and treatment of youth and adults with co-occurring substance abuse and mental illness disorders; to foster or establish meaningful coalitions between public substance abuse and mental health systems; and to create a Dual Diagnosis Community Resource Coordination Group to staff those individuals with multiple needs who are not being adequately addressed by the enhanced systems; and remedy major identified gaps in the availability of community-based youth and specialized female treatment services in HHSC Regions 2, 4, 5, 9, and 11. The specific services requested are: region 2a - youth or specialized female treatment; region 4c - specialized female treatment; regions 5a and 5b - youth or specialized female treatment; region 9a - youth treatment; and region 11c and/or 11d - specialized female treatment.

Available Services and Funds for Competition: there are approximately $13,240,000 through this quarterly developmental process. The amount of funding is subject to change. Federal categorical programs are exempt from competition.

Contract Period: The initial contract period of proposals selected through this quarterly developmental process will be February 1, 1999 through August 31, 1999.

Application Process and Criteria: Application kits are available on TCADA's website at http://www.tcada.state.tx.us. TCADA's application criteria for funding will be listed in the application kits. To request a hard copy of any application kit, call the Services Procurement Department at (800) 832-9623, extension 6786 or (512) 349-6786. Applicants interested in applying for funding should mail an application to: Texas Commission on Alcohol and Drug Abuse, Services Procurement Department, PO Box 80529, Austin, Texas 78708-0529 or deliver an application to TCADA, Services Procurement Department, 9001 North IH-35, Suite 105, Austin, Texas 78753. Application criteria for funding will be listed in the application kits. Faxed documents will not be accepted. If there are any questions please contact the Services Procurement Department at (800) 832-9623, extension 6786 or (512) 349-6786.

Due Date: TCADA must receive the applications by 5:00 p.m. on January 20, 1999.

TRD-9818402
Mark S. Smock
Deputy for Finance and Administration
Texas Commission on Alcohol and Drug Abuse
Filed: December 16, 1998

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Request for Proposals

This is an amended request for proposals. The original request for proposals was published in the November 13, 1998, issue of the *Texas Register* (23 TexReg 11715).

Under the authority of the Texas Health and Safety Code, Title 6, Subtitle B, Chapter 461, the Texas Commission on Alcohol and Drug Abuse (TCADA) is seeking proposals to provide comprehensive community-based services for adults and youth in Health and Human Services Commission (HHSC) Regions 4, 5 and 9. Proposals

from network management organizations must at a minimum include treatment services and may include prevention and intervention services. Proposals will also be accepted from prevention/intervention service providers that are not associated with a network management organization.

The goals of the Request for Proposals (RFP) are to fulfill the goal established in the 1998 Statewide Service Delivery Plan of improving the organization, management and delivery of services through the implementation of service networks; implementation of a balanced array of services as outlined in the Continuum of Care Model of the 1998 Statewide Service Delivery Plan; and implementation of a case rate reimbursement methodology, if rates can be calculated and verified with input from potential applicants.

The intent of this RFP is to leverage the state's current investment to create service networks that best meet community needs through cooperatively delivered services.

Available services and funds for competition: There are approximately $15.3 million through this RFP: $6.6 million in Region 4, $5.2 million in Region 5 and $3.5 million in Region 9. The amount of funding is subject to change. Federal categorical programs are exempt from competition.

Applicants interested in managing a service network should submit a letter of intent. Organizations interested in providing services and being part of a network, but not interested in managing a service network should not submit a letter of intent. However, organizations that seek to provide prevention/intervention services that are independent from a network management organization should submit a letter of intent.

For those organizations interested in providing services, but not interested in managing a service network or submitting an independent proposal for prevention/intervention services, a list of applicants that successfully submit a letter of intent to manage a service network will be posted on TCADA's website at http://www.tcada.state.tx.us.

Array of services available for competition in Regions 4, 5 and 9: authorize payment and care, coordinate and monitor care, outreach and access responsibilities, treatment adult services, treatment youth services, treatment female services, treatment youth female services, treatment methadone services, treatment dual diagnosis services, Prevention Resource Centers, youth prevention models, youth primary prevention services, youth prevention/intervention services, infant prevention program, human immuno-deficiency virus early intervention services, human immuno-deficiency virus outreach services, statewide core council services and adult primary prevention.

The Statewide Service Delivery Plan is available on TCADA's website at http://www.tcada.state.tx.us. To request a hard copy of the plan or rules, please call the Resource Procurement Department at (800) 832-9623, extension 6786 or (512) 349-6786. Refer to TCADA's rules for funded providers (40 TAC Chapter 144) for a description of TCADA services.

Contract period: The initial contract period of proposals selected through the competitive RFP process will be September 1, 1999 through August 31, 2000. The payment mechanism may include financial assistance, unit cost reimbursement and/or case rate reimbursement.

Eligible Applicants: Applicants must be public or incorporated private non-profit or for-profit organizations. To be eligible to compete through the fiscal year 2000 comprehensive services RFP, all potential applicants must initially submit the following documents for review:

A letter of intent that includes the proposed services and location of the proposed services including county or counties to be served.

If the applicant is legally incorporated, the following documents must also be submitted for review:

Documentation of the applicant's legal standing: Incorporated private non-profit or for-profit applicants submit a copy of: State of Texas certificate of incorporation stamped with a Texas state seal; State of Texas signed and dated articles of incorporation and amendments; Doing Business As (DBA) Certificate, if appropriate; signed and dated bylaws and amendments; and a current list of board members and offices of the organization's governing body. Public applicants submit a copy of: enabling legislation, e.g. constitution, statute, or charter; signed and dated bylaws and amendments; and a current list of board members and offices of the organization's governing body.

Documentation of financial ability: Applicants that have undergone an audit must submit a copy of the following documents for review before being considered for funding under this RFP: applicant's most recent audited basic financial statements; notes to the financial statements; report(s) issued by the auditor on internal controls; any management letters issued by the auditor in conjunction with the audit; and management's response to the management letter.

Applicants that have not been audited must submit a copy of unaudited financial statements with a note indicating that the statements have not been audited. Acceptable documents include: operating statements such as statements of support, revenue and expenses and changes in fund balances; balance sheet or a statement of financial position which discloses assets and liabilities; statement of cash flow; statement of functional expenses showing line item income and expense details by program or support function; and notes to financial statements listing basis of accounting and fiscal year.

An applicant will be ineligible to compete for funding through the RFP if the submitted audit reports going concern issues, material noncompliance or material weakness that are not satisfactorily addressed in the management response.

If the applicant is not legally incorporated, a statement to that effect must be submitted in the letter of intent; however, the applicant will be required to be legally incorporated by the RFP due date.

Failure to reply to the Notice of Intent by the due date will result in disqualification from consideration for the competitive RFP process for fiscal year 2000 funding.

Applicants meeting the submission requirements will be notified of their eligibility to compete through the RFP process and mailed a copy of the RFP. Applicants submitting letters of intent to apply for funding, but ineligible to compete through the RFP process will be informed of their ineligibility within 45 days of the letter's submittal.

Submission and contact: Applicants interested in applying to serve as the network management organization or as direct prevention/intervention service providers should mail a letter of intent to TCADA, Resource Procurement Division, P.O. Box 80529, Austin, Texas 78708-0529 or deliver a letter of intent to TCADA, Resource Procurement Division, 9001 North IH-35, Suite 105, Austin, Texas 78753. Faxed documents will not be accepted. If there are any questions please contact the Resource Procurement Division at (800) 832-9623, extension 6786 or (512) 349-6786. Note: Applicants that applied through the original Notice of Intent (CSN2000 RFP) and do not wish to make additional changes need not reapply.

Due date: TCADA must receive the letter of intent and all fiscal and legal documents by 5:00 p.m. on January 11, 1999.

Application criteria: TCADA's application criteria for funding will be listed in the RFP.

TRD-9818401
Mark S. Smock
Deputy for Finance and Administration
Texas Commission on Alcohol and Drug Abuse
Filed: December 16, 1998

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Office of the Attorney General

Texas Solid Waste Disposal Act Enforcement Settlement Notice

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Solid Waste Disposal Act. Before the State may settle a judicial enforcement action under the Solid Waste Disposal Act, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act.

Case Title and Court: In re: DSS International, Inc., Case Number 96-48082-H3-11, Chapter 11, in the United States Bankruptcy Court for the Southern District of Texas, Houston, Division; Harris County, Texas et. al v. DSS International, Inc., et al., Adversary Number 96-4824, in the United States Bankruptcy Court for the Southern District of Texas, Houston Division

Nature of Defendant's Operations: DSS operated a silver recovery facility in Baytown, Texas. Remediation of site contamination is the subject of this litigation and proposed settlement.

Proposed Agreed Judgment: The settlement provides that in exchange for a release fro the bankruptcy trustee and other plaintiffs, Arnold Johnson will pay $180,000.00 to the Bankruptcy estate to be used for site remediation and payments of fines or costs to Harris County and the State of Texas. Additionally, after remediation is complete, Johnson may purchase the DSS site for $80,000.00 to used to pay other bankruptcy claims.

For a complete description of the proposed settlement, the complete proposed Motion for Approval of Compromise should be reviewed. Requests for copies of the motion, and written comments on the proposed settlement should be directed to Leela R. Fireside, Assistant Attorney General, Office of the Texas Attorney General, P. O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0052. Written comments must be received within 30 days of publication of this notice to be considered.

TRD-9818395
Sarah Shirley
Assistant Attorney General
Office of the Attorney General
Filed: December 16, 1998

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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. Requests for federal consistency review were received for the following projects(s) during the period of December 9, 1998, through December 15, 1998:

FEDERAL AGENCY ACTIONS:

Applicant: Wal-Mart Stores, Inc.; Location: The project is located at 27650 Tomball Parkway in Tomball, Harris County, Texas; Project Number: 98-0565-F1; Description of Proposed Action: The applicant proposes to expand an existing Wal-Mart store and associated parking area. Approximately 103,160 square feet will be added to the existing building. The existing parking area will be increased in size by approximately 120,000 square feet. To allow for the expansion of the store and parking area, it is necessary to fill an approximate 2-acre detention pond located south of the store. The detention pond, created as mitigation for impacts to approximately 1 acre of isolated wetlands, was authorized by Department of the Army Permit Number SWG-92-26-009 in June of 1992. In addition, approximately 0.16 acre of isolated wetlands will be temporarily impacted due to the relocation of two pipelines. The pipelines will be relocated just inside the east property line, behind the store. They will cross approximately 470 feet of existing wetlands. Once the pipelines are relocated, the site will be returned to as near pre-project contour and elevation as possible; Type of Application: U.S.A.C.E. permit application #21530 under §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: Willacy County Navigation District; Location: The project is located in the Port Mansfield Small Craft Basin, East Port Drive, Port Mansfield, Willacy County, Texas; Project Number: 98-0566-F1; Description of Proposed Action: The applicant proposes to construct a bulkhead and discharge fill material into the Port Mansfield Small Craft Basin. The bulkhead will be approximately 810 linear feet long and will be constructed approximately 14.5 feet waterward of the existing shoreline. Approximately 3,500 cubic yards of clean fill material will be placed behind the proposed bulkhead. Approximately 11,745 square feet (0.27 acres) of open water habitat will be filled by the project. No wetlands or seagrasses will be impacted by the project. The Willacy County Navigation District plans to develop the 1.3-acre (70-foot by 810-foot) site into 18 lots for leasing for building construction.; Type of Application: U.S.A.C.E. permit application #21514 under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403), and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

FEDERAL AGENCY ACTIVITIES:

Applicant: U.S. Army Corps of Engineers; Project Number: 98-0564-F2; Description of Proposed Activity: Interested parties are hereby notified that, in accordance with Title 33 CFR 325.2(e)(1), published in the Federal Register on November 13, 1986, the U.S. Army Corps of Engineers (USACE), Fort Worth, Albuquerque, Galveston, and Tulsa Districts, have adopted a Letter of Permission (LOP) procedure for authorizing the work described herein in the State of Texas. The purpose of this procedure is to expedite Section 404 authorization for the activities described below when they would not pose substantial adverse individual or cumulative impacts on the aquatic environment.

Work that may be authorized by Letter of Permission (LOP) using this procedure includes any activity at a U.S. Army Corps of Engineers (USACE), Bureau of Reclamation, state river authority, regional water district, city, county, or utility reservoir, including, but not limited to, bank stabilization, beach nourishment, property protection, and

sediment removal. Work authorized by LOP may also include any projects conducted, sponsored, or funded, in whole or in part, by the USACE, U.S. Fish and Wildlife Service (FWS), U.S. Environmental Protection Agency (EPA), Natural Resources Conservation Service (NRCS), Texas Parks and Wildlife Department (TPWD), Texas Natural Resources Conservation Commission (TNRCC), or the Texas Water Development Board. Activities associated with such programs as the Water Resources Development Act of 1986, as amended, §1135 Project Modifications for Improvement of Environment, Partners for Wildlife, the North American Waterfowl Management Plan, and the Wetlands Reserve Program and activities at National Wildlife Refuges, State Wildlife Management Areas, and State parks are eligible for authorization under this procedure.

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 for the applications listed above may be obtained from Ms. Janet Fatheree, Council Secretary, Coastal Coordination Council, 1700 North Congress Avenue, Room 617, Austin, Texas 78701-1495, or janet.fatheree@glo.state.tx.us. Persons are encouraged to submit written comments as soon as possible within 30 days of publication of this notice. Comments should be sent to Ms. Fatheree at the above address or by fax at 512/475-0680.

TRD-9818383
Garry Mauro
Chairman
Coastal Coordination Council
Filed: December 16, 1998

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Comptroller of Public Accounts

Correction of Error

The Comptroller of Public Accounts proposed amendments to §5.140. The rule appeared in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12244).

On page 12246, §5.140(g)(3), the certification paragraph was included in error.

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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 Articles 1D.003 and 1D.009, Title 79, Revised Civil Statutes of Texas, as amended (Articles 5069-1D.003 and 1D.009, Vernon's Texas Civil Statutes).

The weekly ceiling as prescribed by Articles 1D.003 and 1D.009 for the period of 12/21/98 - 12/27/98 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by Articles 1D.003 and 1D.009 for the period of 12/21/98 - 12/27/98 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-9818354
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: December 15, 1998

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State Council of Competitive Government

Correction of Error

The State Council of Competitive Government proposed amendments to 1 TAC §§401.1–401.4. The rules appeared in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12023).

Due to error by the State Council of Competitive Government, the last name of the Director for the State Council of Competitive Government was not indicated in the comments paragraph. The comment paragraph should read as follows.

"Comments on the proposed sections may be submitted to Michelle Gee, Director, State Council of Competitive Government, 1711 San Jacinto, Room 201–E, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposed sections in the *Texas Register.*

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Texas Credit Union Department

Notice of Final Action Taken

In accordance with the provisions of 7 TAC Section 91.103, the Texas Credit Union Department provides notice of the final action taken on the following application(s):

Application(s) to Expand Field of Membership Approved

First Educators Credit Union, Houston, Texas - See *Texas Register* issue dated September 25, 1998.

United Heritage Credit Union, Austin, Texas - See *Texas Register* issue dated September 25, 1998.

Koch-Glitsch Credit Union, Dallas, Texas - See *Texas Register* issue dated September 25, 1998.

First Educators Credit Union, Houston, Texas - See *Texas Register* issue dated September 25, 1998.

Application(s) for a Merger or Consolidation

P & SF Local #389 Credit Union and IBEW Local 681 Credit Union - See *Texas Register* issue dated April 10, 1998.

Fraternal Credit Union of El Paso, El Paso, Texas merging with West Texas Credit Union, El Paso, Texas in accordance with the provisions of Section 122.153(c) of the Texas Finance Code.

Application(s) for Incorporation

Allied Credit Union, Houston, Texas - See *Texas Register* issue dated October 2, 1998.

TRD-9818385
Harold E. Feeney
Commissioner
Texas Credit Union Department
Filed: December 16, 1998

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Texas Department of Criminal Justice

Notice of Contract Award

The Texas Department of Criminal Justice forwards this notice of Contract Award for cost and technical proposals published in the May 15, 1998, issue of the *Texas Register*. The contracts are for general construction covering two geographically defined areas, North Zone and South Zone. The contracts have a base period of three full years with two one-year option periods.

The contract has been awarded to PI Construction Corporation for an amount of $25 million and also to Brown and Root Services Corporation for an amount of $25 million.

TRD-9818394
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Filed: December 16, 1998

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Interagency Council on Early Childhood Intervention

Requests for Proposal

Notice of Invitation. The Interagency Council on Early Childhood Intervention (ECI) announces a Request for Proposal (RFP) for funding comprehensive early childhood intervention services in the following counties for the period from September 1, 1999 through August 31, 2000: Delta, Denton (partial county), Hopkins, Kaufman, Lamar, Rockwall, and Wise. The scope of work includes a comprehensive array of services to children with developmental delays and their families. All applicants must comply with all program requirements under V.T.C.A., Human Resources Code, Chapter 73 and 25 Texas Administrative Code, Chapter 621.

Contact Person. The RFP is available to all interested parties upon written request to Roland Greer, Interagency Council on Early Childhood Intervention, 4900 North Lamar Boulevard, Austin, Texas 78751-2399. A copy may also be obtained by calling (512) 424-6825 or by visiting the ECI administrative office at the address listed in this notice. Questions should be directed to Roland Greer at (512) 424-6825.

Closing Date. All proposals to be considered for funding must be received in the ECI administrative office by 5:00 p.m. on March 31, 1999 or be postmarked by March 30, 1999. ECI reserves the right to reject all applications if necessary.

Selection Criteria. Proposals will be evaluated based on the following "Best Value" criteria: past performance, quality of services, cost, ability to maximize local and federal income, ability to comply with state and federal program requirements, availability to deliver required services, and service area configuration. Review teams will make recommendations to the ECI Board for approval or denial of proposals received.

TRD-9818372
Donna Samuelson
Deputy Executive Director
Interagency Council on Early Childhood Intervention
Filed: December 15, 1998

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Notice of Invitation. The Interagency Council on Early Childhood Intervention (ECI) announces a Request for Proposal (RFP) for funding comprehensive early childhood intervention services in the following counties for the period from September 1, 1999 through August 31, 2000: Aransas, Bee, Brooks, Duval, Kenedy, Kleberg, Live Oak, and San Patricio. The scope of work includes a comprehensive array of services to children with developmental delays and their families. All applicants must comply with all program requirements under V.T.C.A., Human Resources Code, Chapter 73 and 25 Texas Administrative Code, Chapter 621.

Contact Person. The RFP is available to all interested parties upon written request to Roland Greer, Interagency Council on Early Childhood Intervention, 4900 North Lamar Boulevard, Austin, Texas 78751-2399. A copy may also be obtained by calling (512) 424-6825 or by visiting the ECI administrative office at the address listed in this notice. Questions should be directed to Roland Greer at (512) 424-6825.

Closing Date. All proposals to be considered for funding must be received in the ECI administrative office by 5:00 p.m. on March 31, 1999 or be postmarked by March 30, 1999. ECI reserves the right to reject all applications if necessary.

Selection Criteria. Proposals will be evaluated based on the following "Best Value" criteria: past performance, quality of services, cost, ability to maximize local and federal income, ability to comply with state and federal program requirements, availability to deliver required services, and service area configuration. Review teams will make recommendations to the ECI Board for approval or denial of proposals received.

TRD-9818373
Donna Samuelson
Deputy Executive Director
Interagency Council on Early Childhood Intervention
Filed: December 15, 1998

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Notice of Invitation. The Interagency Council on Early Childhood Intervention (ECI) announces a Request for Proposal (RFP) for funding comprehensive early childhood intervention services in the following counties for the period from September 1, 1999 through August 31, 2000: Austin, Colorado, Fort Bend (partial county), Harris (partial county), Matagorda, and Waller (partial county). The scope of work includes a comprehensive array of services to children with developmental delays and their families. All applicants must comply with all program requirements under V.T.C.A., Human Resources Code, Chapter 73 and 25 Texas Administrative Code, Chapter 621.

Contact Person. The RFP is available to all interested parties upon written request to Roland Greer, Interagency Council on Early Childhood Intervention, 4900 North Lamar Boulevard, Austin, Texas 78751-2399. A copy may also be obtained by calling (512) 424-6825 or by visiting the ECI administrative office at the address listed in this notice. Questions should be directed to Roland Greer at (512) 424-6825.

Closing Date. All proposals to be considered for funding must be received in the ECI administrative office by 5:00 p.m. on March 31, 1999 or be postmarked by March 30, 1999. ECI reserves the right to reject all applications if necessary.

Selection Criteria. Proposals will be evaluated based on the following "Best Value" criteria: past performance, quality of services, cost, ability to maximize local and federal income, ability to comply with state and federal program requirements, availability to deliver

required services, and service area configuration. Review teams will make recommendations to the ECI Board for approval or denial of proposals received.

TRD-9818374
Donna Samuelson
Deputy Executive Director
Interagency Council on Early Childhood Intervention
Filed: December 15, 1998

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Texas Education Agency

Notice of Voluntary Assessment of Private School Students with the Texas Assessment of Academic Skills (TAAS) and Texas End-of Course Tests

In accordance with the Texas Education Code (TEC), §39.033, the Texas Education Agency (TEA) will make available for administration to private and home schools the Texas Assessment of Academic Skills (TAAS) tests for Grades 3-8 and the exit-level and the Texas end-of-course examinations for Algebra I, English II, Biology, and U.S. History at a per-student cost that does not exceed the cost of administering the same test to a Texas public school student.

Each private and home school choosing to participate in this assessment will be required to sign an agreement with TEA in which it agrees to maintain security and confidentiality of the test instruments, test all eligible students at a particular grade level, follow all procedures specified in the applicable test administration materials, provide to the commissioner of education the information listed in the TEC, §39.051(b), and reimburse TEA for the cost of the assessment.

Private and home schools interested in participating in the spring 1999 assessment may obtain a copy of the agreement packet by contacting National Computer Systems, 2201 Donley Drive, Austin, Texas 78758, (512) 835- 4833. All required components of the agreement must be returned no later than January 15, 1999.

Additional information may be obtained from Linda Brase, National Computer Systems, 2201 Donley Drive, Austin, Texas 78758, (512) 835-4833.

TRD-9818397
Criss Cloudt
Associate Commissioner, Policy Planning an Research
Texas Education Agency
Filed: December 16, 1998

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Texas Department of Health

Correction of Error

The Texas Department of Health submitted proposed rules for 25 TAC, Chapter 289, Radiation Control, new §289.301, published in the October 2, 1998 issue of the *Texas Register* (23 TexReg 9936).

Due to error by the Texas Department of Health, on page 9938, §289.301(d)(47), the definition of "Optical density ($D\tau$)" 2nd Sentence, should state "$D\lambda$=-log10$\tau\lambda$, where $\tau\lambda$ is transmittance." "instead of "$D\lambda$=-log10 $\tau\lambda$, where 10$\tau\lambda$ is transmittance."

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Notice of Request for Proposals

Notice of Request for Proposals (RFP) for a Study to Provide Identification of the Best Practice Outreach Models for Texas Health Steps (THSteps); a Study to Provide Identification of the Best Practice Outreach Models for the Children's Health Insurance Program (CHIP) Phase I; and to Propose Three Options for a Marketing Name and Logo for CHIP Phase II

INTRODUCTION: The Texas Department of Health (department) requests proposals for a THSteps Outreach effort efficacy study, a CHIP outreach study, and for three options for a CHIP marketing name and log. Proposals will be reviewed and the contract awarded on a competitive basis.

ELIGIBLE APPLICANTS: Public and private agencies, organizations, boards, educational institutions, and individuals are eligible to apply. Current THSteps outreach contractors may not submit an application.

AVAILABLE FUNDS: Approximately $250,000 in state and federal funds is expected to be available to fund one project with a 12-month budget. The specific dollar amount will depend upon the merit and scope of the proposed project. Maximum funding categories are: $100,000 (THSteps Outreach Efforts Efficacy Study); $100,000.00 (CHIP Phase I Study); and $50,000 (Proposal of Three Options for CHIP Phase II Marketing Name and Logo).

DEADLINE: Proposals prepared according to the instructions in the Request for Proposals (RFP) must be received by Janet Kres, THSteps Central Office, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3199, on or before February 12, 1999, 5:00 p.m. central standard time. No facsimiles or electronic documents or devices will be accepted.

EVALUATION AND AWARD CRITERIA: Each proposal will be screened for minimum eligibility and completeness. Proposals which are deemed ineligible or incomplete will not be reviewed. Proposals which arrive after the deadline will not be reviewed. Proposals will be evaluated based upon the following criteria:

(1) demonstration of applicant's plan to complete efficacy studies (e.g., work plan, definition of objectives, design approach, data collection methods, reporting of results);

(2) administration (e.g., budget, personnel);

(3) prior experience in performing statewide efficacy studies;

(4) demonstration of applicant's plan to propose three options for a marketing name and logo for the Children's Health Insurance Plan (e.g., work plan); and

(5) bonus points will be assigned for proposed enhancements which are above and beyond the minium stated requirements.

FOR A COPY OF THE RFP: The RFP will be available for release on December 28, 1999. To request a copy of the RFP, contact Janet Kres, THSteps, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, Telephone: (512) 458-7111, Extension 2863, Fax: (512) 458-7256.

TRD-9818333
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: December 14, 1998

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Notice of Request for Proposals for Emergency Medical Services (EMS) Local Projects Grant Program

PURPOSE. The Emergency Medical Services (EMS) Local Projects Grant program was established in 1990 for the purpose of improving EMS throughout Texas by providing money and technical assistance to eligible organizations. This program is administered by the Bureau of Emergency Management (Bureau) of the Texas Department of Health (department). The program provides reimbursement for approved costs incurred for a specific project completed during a specified contract period September 1, 1999 - August 31, 2000.

DESCRIPTION. The department is accepting proposals for local EMS projects to increase the availability and quality of emergency prehospital health care. Applicable projects are those which, upon completion, will demonstrate a positive impact on the delivery of emergency prehospital health care in the area in which it was implemented. Types of projects that are acceptable for funding include: EMS certification training; specialty training related to prehospital health management; EMS equipment; computers for data collection; prevention projects; continuing education programs; ambulances; and system development programs. Funding for this program is contingent upon an appropriation by the 76th Texas State Legislature.

Contracts will be developed between the department and successful applicants. The contract will be for 12 months and will detail items such as budget, reporting requirements, department general provisions, and any other specifics that might apply to the award. All registered, licensed, or certified organizations as determined by the Bureau (e.g., EMS providers and first responder groups) must maintain the appropriate credentials throughout the specified contract period. The grant provides reimbursement for an approved project and associated costs that are reasonable and necessary and are incurred after the award is made and during the stated contract period only. Reimbursement may be withheld and a request for return of funds may occur if any of the stated requirements of this grant are not met. The Chief of the Bureau of Financial Services, or department's designee, is the only individual who may legally commit the department to expenditure of public funds. No costs chargeable to the proposed contract may be reimbursed before receipt of a fully executed contract. For EMS certification projects, proof of successful certifications must be submitted within 45 days following the end of the contract period. In addition, it will be the responsibility of the grant recipient to maintain a record of all costs and activities related to the administration of the project. Projects must start on or after September 1, 1999, and be completed prior to August 31, 2000.

The average award in 1998-1999 was approximately $8,826 with a range of $426 to $50,107. The maximum grant for a new ambulance will be $35,000.

Matching funds may come from sources such as local funds, private donations, other state grants, federal grants, or private foundations. "Soft" or "in-kind" matching funds are not acceptable. Matching funds will be required for the following:

Any individual equipment item with a useful life of more than one year and a cost greater than $1,000 (including shipping costs) requires 50% matching funds, with the following exceptions.

(1) Fax machines, cameras, video recorders/players, computers, and printers. These items require a 50% match if the individual cost exceeds $500 and the useful life is greater than one year.

(2) Medical laboratory equipment (defined as microscopes, oscilloscopes, centrifuges, balances, and incubators) will require a 50% match if the unit cost exceeds $500.

Any project that involves advanced life support (ALS) will require the signature of a medical director on the application page. Advanced life support projects include, but are not limited to, items such as the purchase of monitor/defibrillator/pacer units, automated external defibrillators, and ALS training.

Any project involving the hosting of an initial certification course or a continuing education course will require that the applicant has discussed the potential course with the EMS staff at the local Public Health Region office, prior to submitting the proposal.

Any project involving the purchase of computers and computer related items, including accessories and software, must be thoroughly described within the proposal. An appropriate description would be "300 MHZ Pentium Processor, 64 MG RAM, 6.0 GB hard drive, 56K modem, 24X CD ROM." A similar description of make and model for the printer, monitor, and any software is also essential.

The program only provides reimbursement for approved costs associated with the implementation of the approved project. Projects will be funded until the funds are exhausted or preset limits are reached. Examples of costs that are not applicable for funding include items such as salaries, fringe benefits, indirect costs, disposable supplies, and day to day operating expenses (for example, fuel, insurance, loan payments, rent, and so forth). In addition, land purchases or building funds do not qualify as applicable projects under this program.

In cases where a project is not completed, or the full allocation of funding is not used, the department may redistribute funds at its discretion. The department reserves the right to fund a project at any level it feels appropriate, according to the availability of funds and justification for need as presented in the proposal. Any costs incurred prior to September 1, 1999, will not be eligible for reimbursement.

ELIGIBLE APPLICANTS. Proposals will be accepted from not-for-profit organizations directly or those indirectly responsible for providing or impacting emergency prehospital health care (for example, EMS providers, registered first responder organizations, EMS training programs, local governments and other organizations impacting emergency prehospital health care). Registered first responder organizations are those which have the proper Bureau first responder paperwork, based on 25 Texas Administrative Code, §157.21, First Responder Organization Registry, on file and entered into the department's network as active no later than September 1, 1999. Failure to comply with this requirement of the grant constitutes grounds for revocation of any award made as part of the Local Projects Grant Program.

CONTACT. Information concerning the Request for Proposals (RFP) may be obtained from Terri Vernon, Local Projects, Bureau of Emergency Management, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, Telephone (512) 834-6700, Fax (512) 834-6611.

LIMITATIONS. The department reserves the right to reject any or all applications and is not liable for any costs incurred by the applicant in the development, submission, or review of the application. Any costs incurred in the preparation of the application shall be borne by the applicant and are not allowable in the RFP.

The department reserves the right to alter, amend, or modify any provisions of this RFP, or to withdraw this RFP, at any time prior to the award of a contract pursuant thereto, if it is in the best interest of the department or the State of Texas to do so. The decision of the department will be administratively final in this regard.

DEADLINES. The application, all other forms included in the grant information packet and the completed proposal must be returned to the department by April 5, 1999. The original and two copies of the completed application, forms and proposal should be submitted

by mail to Gene Weatherall, Chief, Attention: Local Projects Grant Program, Bureau of Emergency Management, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3199.

The application and proposal may be faxed to (512) 834-6611, no later than 5:00 p.m., April 5, 1999. Any proposal that is faxed will still require the original and one copy to be mailed to the address above, and must be postmarked prior to the stated deadline. Once the original application, proposal and required copies are received, a confirmation notice of receipt will be sent (usually within three weeks).

Only those proposals and copies that are postmarked on or before April 5, 1999, will be reviewed. Applications may be mailed, hand delivered, or faxed. If delivered by hand, the proposal must be taken to the Exchange Building, Second Floor, Bureau of Emergency Management, 8407 Wall Street, Suite S220, Austin, Texas, no later than the specified deadline.

EVALUATION AND SELECTION. Proposals will be reviewed and scored based on the information provided by the applicant. Eligibility criteria includes, but is not limited to: proposal received or postmarked by April 5, 1999; all signatures included; original documents provided; Medical Director's signature for ALS projects; project can be completed by August 31, 2000; agency is non-profit; applicant has not made any purchase prior to September 1, 1999; proposal does not exceed ten pages, including attachments; proposal is typed or computer generated (not applied to application page); and proposal offers matching funds if required. Evaluation criteria includes, but is not limited to: level of registration (provider or first responder, EMS education agency, or other support agency); percentage of volunteer staff; use of EMS instructors for proposals for prevention programs or EMS training; history of prior Local Projects Grant; Regional Advisory Council participation (letter of endorsement recommended); number of agencies benefitting from proposal; length of time in operation; proposal upgrades level of service (Basic Life Support (BLS) to Advanced Life Support (ALS) or Mobile Intensive Care Unit (MICU), ALS to MICU; letters of support; average transport distance; detail included in project budget; detail included in project timeline; type of county (frontier, rural, or urban); call volume; highest level of service available in county; method of project evaluation; current, pending, or past investigations or disciplinary action.

Proposals will be reviewed to ensure that all budget items requested are applicable and appropriate, that matching funds are available, and that implementation of the proposed project is possible. Tentative approval will be given by the Chief of the Bureau of Emergency Management and the Associate Commissioner for Health Care Quality and Standards. Final approval will be given by the Commissioner of Health or the Commissioner's appointed agent. All projects not funded will remain active until the end of the funding cycle for consideration in the event funding becomes available.

INFORMATION STATEMENT. The department strongly supports the concepts of cooperative applications between multiple providers and/or first responder programs, and applications that clearly demonstrate and document regional projects involving multiple service organizations. Though not a prerequisite for this grant, the department encourages all applicants to pursue such cooperative agreements. Additionally, preference will be given to proposals that are most economical (for example, refurbished ambulances will be given preference over new ambulances). For additional information contact Gene Weatherall, EMS Local Projects Grant Program, 1100 West 49th Street, Austin, Texas 78756, (512) 834-6700.

TRD-9818398

Susan K. Steeg
General Counsel
Texas Department of Health
Filed: December 16, 1998

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Texas Health and Human Services Commission

Payment Rates for Nursing Facilities

Proposal. As single state agency for the state Medicaid program, the Health and Human Services Commission announces the proposal of new payment rates for the nursing facilities program operated by the Texas Department of Human Services. Payment rates were proposed December 4, 1998, to be effective January 1, 1999. Public comment was accepted at a public hearing held on December 18, 1998.

The proposed rates for the calendar year commencing January 1, 1999, are as follows:

NURSING FACILITY

Rates By TILE (Texas Index for Level of Effort) Class

201 $130.43

202 $116.57

203 $110.40

204 $92.62

205 $86.15

206 $87.10

207 $79.30

208 $76.67

209 $71.66

210 $62.68

211 $60.48

Supplemental Payments for

Ventilator-Dependent Residents

Continuous $69.73

Less than Continuous $27.89

Pediatric Tracheostomy $41.84

Notice of the adoption of final nursing facility rates will be published in a future edition of the *Texas Register*.

Methodology and justification. The proposed rates were determined in compliance with the rate setting methodology codified at 1 T.A.C. Chapter 355, Subchapter C (relating to Reimbursement Methodology for Nursing Facilities), §355.307.

TRD-9818405
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Filed: December 16, 1998

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Request for Information

The Texas Health and Human Services Commission (HHSC), Children's Health Insurance Program (CHIP), Medicaid Division, an-

nounces the release of a non-binding Request for Information (RFI) regarding the availability of automated data systems and accompanying business processes which can be used to determine and administer CHIP client eligibility and cost-sharing requirements.

HHSC is interested in information from prospective Qualified Information Systems Vendors regarding the availability of an eligibility system and accompanying business processes that (1) use client-server based and rules based technology, (2) are accessible via the Internet for purposes of application through direct data entry, and (3) are operational initially as a free-standing system and processes and ultimately in relation to the Texas Integrated Enrollment and Services (TIES) automated system, either through complete system and process integration into TIES or through a data transfer interface with TIES.

Beginning December 23, 1998, the electronic text of the Request for Information as well as additional background information are available for downloading via the Internet at **www.hhsc.state.tx.us.** An electronic copy of the RFI may be obtained from the Electronic State Business Daily at **www.marketplace.state.tx.us.** A hard copy version of the RFI is available for pick-up at the Texas Health and Human Services Commission, 4th Floor, 4900 North Lamar Boulevard, Austin, Texas. Responses to the RFI are due no later than 5:00 p.m., January 25, 1999.

TRD-9818404
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Filed: December 16, 1998

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Request for Offers

The Texas Health and Human Services Commission (HHSC) announces the issuance of a Request for Offers (RFO) for automated data processing related services consisting of policy integration and documentation assistance pursuant to Chapter 2157, Texas Government Code. The 75th Texas Legislature enacted House Bill No. 2777 which in pertinent part directs HHSC to develop and implement a plan for the integration of services and functions relating to eligibility determination and service delivery by state health and human services agencies, the Texas Workforce Commission, and other agencies. HHSC is authorized under the statute to contract appropriate professional and technical assistance to develop or implement the plan. The project, known as the Texas Integrated Enrollment and Services (TIES) Project, is managed by HHSC in cooperation with agencies whose programs are within the scope of TIES. HHSC invites offers from experienced and qualified individuals or organizations to provide expert assistance to TIES project staff with the development of a documented and integrated set of business rules that govern the eligibility determination process for programs within the scope of TIES and to provide other related services associated with the integration of policy for the project.

The RFO is available in electronic format beginning December 22, 1998, from the Electronic State Business Daily, which may be accessed via the Internet at www.marketplace.state.tx.us. The RFO is also available through the HHSC web site at www.hhsc.state.tx.us.

In accordance with the requirements of H.B. 2777, HHSC will hold a public hearing and vendor forum to receive comments and questions regarding the RFO on January 5, 1999, at 10:00 a.m., Central Time, in Room 1410 of the Brown-Heatly State Office Building, 4900 North Lamar Boulevard, Austin, Texas.

Contact: Questions regarding the RFO should be submitted in writing and addressed to Ruthie Ford, TIES Policy Integration Team Leader, Texas Health and Human Services Commission, 1812 Centre Creek Drive, Suite 100, Austin, Texas 78754-5132.

Closing Date: All offers submitted in response to the RFO must be sealed and clearly marked "TIES Policy Integration and Documentation Assistance" and received at HHSC, TIES Project, 1812 Centre Creek Drive, Suite 100, Austin, Texas 78754-5132, no later than 1:00 p.m., Central Time, on Monday, January 25, 1999. Responses to the RFO that are received after this time cannot be accepted and will not be considered.

Selection procedure: HHSC's goal is to procure services from the most qualified vendor who provides the best value to the state for the requested services. Proposals will be reviewed by HHSC and an interagency review panel appointed by HHSC. The selection team may meet with or schedule oral presentations from vendors whose proposals meet the project qualifications requirements. The determination of the most qualified vendor that provides the best value services for the state will be at the sole discretion of HHSC.

TRD-9818403
Marina S. Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Filed: December 16, 1998

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Texas Department of Housing and Community Affairs

Request for Proposal

TO PROVIDE LEGAL TECHNICAL ASSISTANCE TO BENEFICIARIES OF THE CONTRACT FOR DEED CONSUMER EDUCATION PROGRAM IN HIDALGO COUNTY

The Texas Department of Housing and Community Affairs (TDHCA) is accepting proposals for a one year contract with an entity or individual to provide legal assistance to the beneficiaries of the contract for deed consumer education program. The beneficiaries of the legal technical assistance will be colonia residents in Hidalgo County, located in the Rio Grande Valley of the Texas-Mexico border.

The entity or individual will provide education and/or legal assistance on contract for deed to colonia residents in Hidalgo County during a Contract for Deed Consumer Education workshop(s) provided by a TDHCA designated trainer or educator.

The successful candidate will provide legal technical assistance and/or contract for deed consumer education outlined in the curriculum, including but not limited to: Contract For Deed; Negative Aspects of the Contract For Deed; Determination & Notice of Applicability; Spanish Language Requirement; Seller's Disclosure of Condition of the Property; Seller's Disclosure of Financial Terms; Contract Terms Prohibited; Annual Accounting Statement; Buyer's Right to Cancel Contract Without Cause; Forfeiture and Acceleration or Notice of Rescission; Notice of Forfeiture and Acceleration or Rescission; Equity Protection: Sale of Property, Placement of Lien for Utility Service; The Buyer's Right to Pledge Interest In Property On Contracts Entered Into Before September 1, 1995; Recording Requirements; and Title Transfer.

Interested parties should have real estate experience with contract for deed transactions, experience working with colonia residents and geographical knowledge of colonias in Hidalgo County.

Proposals must be received at TDHCA headquarters no later than 5 p.m. on Monday, January 11th, 1999. Please call Juan Palacios or Ann Garcia 1-800-462-4251 at TDHCA, the Office of Colonia Initiatives for more information.

TRD-9818230
Daisy A. Stiner
Acting Executive Director
Texas Department of Housing and Community Affairs
Filed: December 9, 1998

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Texas Department of Insurance

Correction of Error

The Texas Department of Insurance proposed amendments to §§3.8001, 3.8002, 3.8004, 3.8005, 3.8007, 3.8019, and 3.8022–3.8030. The rules appeared in the December 4, 1998 issue of the *Texas Register* (23 TexReg 12173).

On page 12177, §3.8027(2)(B)(ii)(III), subclause (III) was published as part of subclause (II), instead of a separate subclause.

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Insurer Services

The following applications have been filed with the Texas Department of Insurance and are under consideration:

Application to change the name of FORTRESS INSURANCE COMPANY OF AMERICA to PROFESSIONAL LIABILITY INSURANCE COMPANY OF AMERICA assumed name in Texas of MEDICAL LIABILITY INSURANCE COMPANY OF AMERICA, a foreign property & casualty company. The home office is in New York, New York.

Application to amend a previously filed name change submitted by AMERICAN SURETY LIFE INSURANCE COMPANY to TEXAS BURIAL LIFE INSURANCE COMPANY. A domestic life company. The home office was erroneously listed as San Antonio, Texas, but the home office is in Richardson, Texas.

Correction to a previously filed name change application for HEALTH CARE SERVICE CORP., A MUTUAL LEGAL RESERVE COMPANY, a foreign mutual life company. This should have read HEALTH CARE SERVICE CORP., A MUTUAL LEGAL RESERVE COMPANY, a foreign mutual life company has filed an application to use the assumed name in Texas of BLUE CROSS AND BLUE SHIELD OF TEXAS, A DIVISION OF HEALTH CARE SERVICE CORPORATION.

Application for admission to Texas by DIRECTORS LIFE ASSURANCE COMPANY, a foreign life company. The home office is Oklahoma City, Oklahoma.

Application to change the name of SKANDIA U.S. INSURANCE COMPANY to PENNSYLVANIA CASUALTY COMPANY, a foreign property & casualty company. The home office is in Topeka, Kansas.

Application to change the name of COMMUNITY NATIONAL ASSURANCE COMPANY to PHOENIX NATIONAL INSURANCE COMPANY, a foreign life company. The home office is in Cincinnati, Ohio.

Any objections must be filed within 20 days after this notice was filed with the Texas Department of Insurance, addressed to the attention of Kathy Wilcox, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-9818400
Bernice Ross
Deputy Chief Clerk
Texas Department of Insurance
Filed: December 16, 1998

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The following applications have been filed with the Texas Department of Insurance and are under consideration:

Application to change the name of SEGUROS MONTERREY AETNA, S.A. to SEGUROS MONTERREY AETNA, S.A. GRUPO FINANCIERO BANCOMER, a Mexican casualty company. The home office is located in Mexico City, Mexico.

Application for admission in the State of Texas for KEMPER INDEPENDENCE INSURANCE COMPANY, a foreign property and casualty company. The home office is located in Long Grove, Illinois.

Application for admission in the State of Texas for KEMPER AUTO & HOME INSURANCE COMPANY, a foreign property and casualty company. The home office is located in Long Grove, Illinois.

Application for incorporation in Texas for U.S. RENAL-TEXAS, INC., a domestic HMO. The home office is located in Dallas, Texas.

Application for incorporation in Texas for COOK CHILDREN'S HEALTH PLAN, a domestic HMO. The home office is located in Fort Worth, Texas.

Any objections must be filed within 20 days after this notice was filed with the Texas Department of Insurance, addressed to the attention of Kathy Wilcox, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-9818311
Bernice Ross
Deputy Chief Clerk
Texas Department of Insurance
Filed: December 14, 1998

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Third Party Administrators

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for incorporation in Texas of Professional Vision Care, P.C., a domestic third party administrator. The home office is San Antonio, Texas.

Any objections must be filed within 20 days after this notice was filed with the Secretary of State, addressed to the attention of Charles M. Waits, MC 107-5A, 333 Guadalupe, Austin, Texas 78714-9104.

TRD-9818334
Bernice Ross
Deputy Chief Clerk
Texas Department of Insurance
Filed: December 14, 1998

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The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for incorporation in Texas of Horizon Benefit Services, a domestic third party administrator. The home office is Fort Worth, Texas.

Application for admission to Texas of Bunch and Associates, Inc., a foreign third party administrator. The home office is Lakeland, Florida.

Any objections must be filed within 20 days after this notice was filed with the Secretary of State, addressed to the attention of Charles M. Waits, MC 107-5A, 333 Guadalupe, Austin, Texas 78714-9104.

TRD-9818399
Bernice Ross
Deputy Chief Clerk
Texas Department of Insurance
Filed: December 16, 1998

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Texas Natural Resource Conservation Commission

Correction of Error

The Texas Natural Resource Conservation Commission proposed amendments to §11.2 and §11.3. The rules appeared in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12404).

In the preamble, under the heading of "EXPLANATION OF ADOPTED RULES," fourth paragraph, the last sentence states that revisions were incorporated which were adopted at the commission's November 19, 1998, open meeting. The meeting date should have been November 18, 1998.

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Notice of Application To Appropriate Public Waters of the State of Texas

The following notices of application for permits to appropriate Public Waters of the State of Texas were issued during the period November 18, 1998, through December 8, 1998.

Application No. 5616; PROTESTANT EPISCOPAL CHURCH COUNCIL OF THE DIOCESE OF TEXAS, Route 1, Box 426, Navasota, Texas 77868, applicant, seeks a permit to construct and maintain a dam and reservoir for in-place recreational use, with a surface area of 67.4 acres and an impoundment not to exceed 730.3 acre-feet of water at its normal operating level. The proposed reservoir will be on an unnamed tributary of Beason Creek, tributary of the Brazos River, Brazos River Basin, approximately 17 miles south of Anderson, Grimes County, Texas.

Application No. 19-2019C; BLUE WING CLUB, 112 East Pecan Street, Suite 900, San Antonio, Texas 78205, applicant, seeks to amend Certificate of Adjudication No. 19-2019, as amended. The certificate currently: (1) states that the first 241 acre-feet of water authorized per year from the San Antonio River, San Antonio River Basin, may be diverted during the months of March through September only when the flow of the San Antonio River at the diversion point equals or exceeds 50 cubic feet per second (cfs). There is no flow restriction for the diversion of this 241 acre-feet per year portion of the water right during other months; and (2) states that the remaining 759 acre-feet of water authorized per year may be diverted during the months of March through June only when the flow of the river at the diversion point equals or exceeds 67 cfs and during other months only when the flow of the river at the diversion point equals or exceeds 46 cfs. Applicant seeks to amend the certificate to reduce flow restrictions for diversion of the first 241 acre-feet during the months of March through September to 10 cfs and to reduce the flow restrictions for the remaining 759 acre-feet to 10 cfs for all months.

Application No. 5619, THE CITY OF STEPHENVILLE, 298 West Washington, Stephenville, Texas 76401, applicant, seeks a permit pursuant to §11.121, Texas Water Code, and Texas Natural Resource Conservation Commission Rules 30 TAC §§295.1, et. seq. to construct and maintain two dams and reservoirs in a municipal park for in-place recreational use. Each reservoir will have a surface area of .5 acre and a normal operating capacity of 2 acre-feet. The proposed reservoirs will be on the North Bosque River, tributary of the Bosque River, tributary of the Brazos River, Brazos River Basin in Erath County, Texas, within the city limits of Stephenville, Texas.

Application for an extension of time to commence and complete construction of a dam and reservoir for Water Use Permit No. 5272, THE CITY OF GILMER, P.O. Box 760, Gilmer, Texas 75644. Water Use Permit No. 5272 was issued to the City of Gilmer on May 29, 1990 and included authorization to construct and maintain a dam and reservoir on Kelsey Creek, tributary of Little Cypress Creek, tributary of Big Cypress Creek, Cypress Basin, approximately 3 miles northwest of Gilmer, Upshur County, Texas. Construction of the dam and reservoir commenced on May 22, 1995 and current authorization requires that construction of the dam and reservoir be completed by May 29, 1998. The new proposed date for completion of construction is May 29, 2000. The applicant has indicated that they are requesting this time extension to allow for delays resulting from relocation of Farm-to-Market Road 825 by the Texas Department of Transportation and construction of a new FM 825 bridge to span the reservoir. The construction of the new bridge forced the reservoir construction contractor to suspend construction of the dam and reservoir until after the bridge was completed. The City has indicated that construction of the dam authorized in Permit No. 5272 is approximately 87% complete.

The Executive Director may approve the applications unless a written hearing request is filed in the Chief Clerk's Office of the TNRCC within 30 days after newspaper publication of the notice of application. To request a hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the applicant and the application number; (3) the statement "I/we request a public hearing;" (4) a brief description of how you would be adversely affected by the granting of the application in a way not common to the general public; and (5) the location of your property relative to the applicant's operations.

If a hearing request is filed, the Executive Director will not approve the application and will forward the application and hearing request to the TNRCC Commissioners for their consideration at a scheduled Commission meeting. If a hearing is held, it will be a legal proceeding similar to civil trials in state district court.

Requests for a public hearing must be submitted in writing to the Chief Clerk's Office, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087. Individual members of the public who wish to inquire about the information contained in this notice, or to inquire about other agency permit applications or permitting processes, should call the TNRCC Office of Public Assistance, Toll Free, at 1-800-687-4040.

TRD-9818356
Ladonna Castanuela
Chief Clerk
Texas Natural Resource Conservation Commission

Filed: December 15, 1998

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Notice of Availability/Invitation to Comment

The Texas Natural Resource Conservation Commission (TNRCC) announces the availability of the Draft 1997/98 Update to the Water Quality Management Plan for the State of Texas.

The Water Quality Management Plan (WQMP) is developed and promulgated pursuant to the requirements of Section 208 the federal Clean Water Act (CWA). The law requires area-wide water quality management planning in areas having significant water quality problems which can only be addressed on an area-wide basis. The governor of each state is authorized to designate such planning areas and representative organizations within them to develop area-wide waste treatment management plans. There are seven designated areas in Texas. A regional council is the designated planning agency in each of these areas. The water quality agencies for these seven areas are: the Lower Rio Grande Valley Development Council, the Coastal Bend Council of Governments, the Houston- Galveston Area Council, the South East Texas Regional Planning Commission, the Central Texas Council of Governments, the North Central Texas Council of Governments, and the Ark-Tex Council of Governments. The portion of the state outside these designated areas is known as the non- designated area. The TNRCC is the water quality agency for the non-designated area, which is divided into 23 separate planning areas, primarily along major river basin boundaries.

The 1997/98 WQMP Update includes all domestic wastewater permits issued April 1, 1998, through August 31, 1998. The Update also includes projected effluent limits of indicated domestic dischargers useful for water quality management planning in future permit actions. Inclusion of these projected effluent limits in the 1997/98 WQMP Update will allow wastewater permitees the opportunity to seek Texas Pollutant Discharge Elimination System (TPDES) wastewater permits issued by the TNRCC.

A copy of the 1997/98 Update may be viewed on the TNRCC's web page at *http://www.tnrcc.state.tx.us/water/quality/index.html*, at the TNRCC Central Office at 12015 N. Interstate 35, Building A, Library, or at TNRCC Regional Offices as listed.

TNRCC Regional Office Locations

Region 1
3918 Canyon Dr.
Amarillo, TX 79109-4966
806/353-9251

Region 2
4630 50th St., Ste. 600
Lubbock, TX 79414-3509
806/796-7092

Region 3
209 S. Danville, Ste. B210
Abilene, TX 79605-1451
915/698-9674

Region 4
1101 E. Arkansas Ln.
Arlington, TX 76010-6499
817/469-6750

Region 5
2916 Teague Dr.
Tyler, TX 75701-3756
903/535-5100

Region 6
7500 Viscount Blvd., Ste.147
El Paso, TX 79925-5633
915/778-9634

Region 7
3300 North A St., Bldg 4, Ste 107
Midland, TX 79705-5421
915/570-1359

Region 8
301 W. Beauregard Ave, Ste. 202
San Angelo, TX 76903-6326
915/655-9479

Region 9
6801 Sanger Ave., Ste. 2500
Waco, TX 76710-7807
254/751-0335

Region 10
3870 Eastex Fwy., Ste. 110
Beaumont, TX 77703-1892
409/898-3838

Region 11
1921 Cedar Bend, Ste. 150
Austin, TX 78758-5336
512/339-2929

Region 12
5425 Polk Ave., Ste. H
Houston, TX 77023-1486
713/767-3500

Region 13
140 Heimer Rd., Ste 360
San Antonio, TX 78232-5042
210/490-3096

Region 14
6300 Ocean Dr., Ste. 1200
Corpus Christi, TX 78412-5503
512/980-3100

Region 15
134 E. Van Buren, Ste. 301
Harlingen, TX 78550-6807
956/425-6010

A public hearing will be held on Tuesday, February 9, 1999, at 10:00 a.m., at the Texas Natural Resource Conservation Commission offices, 12015 N. Interstate 35, Austin, Texas, Building F, Room 2210.

Comments on the Draft 1997/98 Update to the Water Quality Management Plan shall be provided in written form and sent to Suzanne Vargas, Texas Natural Resource Conservation Commission, Water Quality Division, MC 150, P.O. Box 13087, Austin, Texas 78711-3087, 512/239-4619. Comments may be faxed to 512/239-5687, but must be followed up with the submission and receipt of the written comments within three working days of when they were faxed. Written comments must be received by 5:00 p.m., February 9, 1999. For further information contact Suzanne Vargas, Texas Natural Resource Conservation Commission, Water Quality Division, MC-150, 512/239-4619, e-mail svargas@tnrcc.state.tx.us.

TRD-9818396
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission

Filed: December 16, 1998

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Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) Staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) pursuant to Texas Water Code (the Code), §7.075, which requires that the TNRCC 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 of 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 **January 24, 1999**. Section 7.075 also requires that the TNRCC promptly consider any written comments received and that the TNRCC 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 of the proposed AOs is available for public inspection at both the TNRCC'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 these AOs should be sent to the enforcement coordinator designated for each AO at the TNRCC's Central Office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 24, 1999**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The TNRCC 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 TNRCC in **writing**.

(1)COMPANY: Abe's Mart; DOCKET NUMBER: 98-0945-PST-E; IDENTIFIER: Petroleum Storage Tank Facility Identification Number 0034586; LOCATION: Galveston, Galveston County, Texas; TYPE OF FACILITY: convenience store and gasoline station; RULE VIOLATED: 30 TAC §115.245(2), by failing to perform an annual pressure decay test within the preceding 12 months; PENALTY: $800; ENFORCEMENT COORDINATOR: Thomas Jecha, (512) 239-2576; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2)COMPANY: Avalon Water Supply & Sewer Service Corporation; DOCKET NUMBER: 98- 0209-MWD-E; IDENTIFIER: Enforcement Identification Number 8161; LOCATION: Avalon, Ellis County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(2) and the Code, §26.121, by failing to renew permit; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Merrilee Gerberding, (512) 239-4490; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(3)COMPANY: B. C. Utilities Corporation dba Lakeside Manor; DOCKET NUMBER: 98- 0690-PWS-E; IDENTIFIER: Public Water Supply Number 1010174; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: public water system; RULE VIOLATED: 30 TAC §290.120(f)(1)(B) and (h)(3), by failing to submit to the commission water quality parameters reports and a corrosion control study within 24 months of exceeding the secondary contaminant limits for lead; and 30 TAC §290.51 and the THSC, §341.041, by failing to pay the public health service fee; PENALTY: $750; ENFORCEMENT COORDINATOR: Subhash Jain, (512) 239-5867; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(4)COMPANY: Celanese Limited; DOCKET NUMBER: 98-0780-IHW-E; IDENTIFIER: Solid Waste Facility Identification Number 30134; LOCATION: Bay City, Matagorda County, Texas; TYPE OF FACILITY: chemical plant; RULE VIOLATED: 30 TAC §335.221(a)(8), (11), and (13), 40 Code of Federal Regulations (CFR) §266.103(a)(4)(ii), and §266.103(c)(1)(vii) and (g), by failing to specify the status of boiler units, establish a limit on the maximum combustion temperature, and establish the minimum combustion temperature; PENALTY: $1,512; ENFORCEMENT COORDINATOR: Thomas Jecha, (512) 239-2576; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(5)COMPANY: City of Brownsville; DOCKET NUMBER: 98-0840-MSW-E; IDENTIFIER: Municipal Solid Waste Facility Identification Number 1273; LOCATION: Brownsville, Cameron County, Texas; TYPE OF FACILITY: landfill; RULE VIOLATED: 30 TAC §330.51(b)(4)(C), §330.301, and 40 CFR §258.11, by failing floodplain location restriction demonstration; 30 TAC §330.302 and 40 CFR §258.12, by failing wetlands location restriction demonstration; and 30 TAC §330.242(a), by failing monitor well construction specifications; PENALTY: $12,500; ENFORCEMENT COORDINATOR: J. Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(6)COMPANY: Continental Airlines Incorporated; DOCKET NUMBER: 98-0876-IHW-E; IDENTIFIER: Solid Waste Facility Identification Number 69722; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: air transportation; RULE VIOLATED: 30 TAC §335.62 and 40 CFR §262.11, by failing to conduct a hazardous waste determination on a mixture of used oil and jet fuel, waste paint and paint debris, aircraft and gasoline fuel filters, off-specification resin waste, waste x-ray film, lead sheets, and paint-gun cleaner; 30 TAC §335.6(c), by failing to update the facility's Notice of Registration regarding a changed Standard Industrial Classification code, addition and removal of certain non-hazardous waste codes and United States Environmental Protection Agency hazardous waste classification numbers, and addition of waste streams and solid waste management units; 30 TAC §335.10(b)(17), (18), and (22), by failing to include necessary information which correctly identified the waste in a shipment of three drums of soil contaminated with hazardous waste; 30 TAC §335.9(a)(1)(G) and (2), by failing to keep records of the locations of 13 satellite accumulation areas and by failing to submit an annual waste summary by the deadline for the year 1997; 30 TAC §335.2(b) and 40 CFR §270.1, by causing and allowing disposal of a shipment of class one waste at an unauthorized facility; 30 TAC §335.431(c)(1) and 40 CFR §268.7(a)(1), by failing to provide written notification that one shipment of hazardous waste was restricted from land disposal; 30 TAC §335.69(a)(4), 40 CFR §;265.16, 265.37(a)(1) and (4), and 265.51, by failing to provide adequate personnel training, make complete arrangements with local authorities, and have a contingency plan for the facility; 30 TAC §335.69(a) and 40 CFR §262.34(a), by storing three 55-gallon drums of hazardous waste for greater than 90 days without a permit; 30 TAC §335.474, by failing to develop a source reduction and waste minimization plan; 30 TAC §335.69(a)(1)(A), (2), (3), and (4), 40 CFR §;262.34(a)(2) and (3), 265.35, and 265.173(a), by failing to maintain adequate aisle space between hazardous waste drums, mark the beginning accumulation date on two drums of hazardous waste, mark two drums and a one-gallon container containing hazardous waste with the words "Hazardous Waste," and keep six drums closed while not in use in hazardous waste storage areas; and 30 TAC §335.69(d)(1) and (2), 40 CFR §262.34(c)(1)(i), and §265.173(a), by failing to label and keep hazardous waste containers closed when not in use in satellite accumulation areas; PENALTY: $18,800; ENFORCEMENT COORDINATOR: Thomas Greimel, (512) 239-5690; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(7)COMPANY: Dayco Products, Inc.; DOCKET NUMBER: 98-0990-AIR-E; IDENTIFIER: Account Number EE-2069-Q; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: rubber-plastic hose and belting plant; RULE VIOLATED: 30 TAC §116.110(a) and the Act, §382.085(b) and §382.0518(a), by failing to obtain an air quality permit; PENALTY: $1,600; ENFORCEMENT COORDINATOR: Victor Ayala, (915) 783-6640; REGIONAL OFFICE: 7500 Viscount Boulevard, Suite 147, El Paso, Texas 79925-5633, (915) 778-9634.

(8)COMPANY: The Dow Chemical Company; DOCKET NUMBER: 98-0658-AIR-E; IDENTIFIER: Account Numbers BL-0082-R and BL-0023-K; LOCATION: Freeport, Brazoria County, Texas; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC

§101.20(2), §116.115(a), Permit Number 19041, 40 CFR §61.65(a), and the Act, §382.085(b), by releasing vinyl chloride to the atmosphere on two occasions; PENALTY: $9,375; ENFORCEMENT COORDINATOR: Bob McElyea, (713) 767-3753; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(9)COMPANY: The Dow Chemical Company; DOCKET NUMBER: 98-0861-AIR-E; IDENTIFIER: Account Number BL-0082-R; LOCATION: Freeport, Brazoria County, Texas; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §116.116(a) and the Act, §382.085(b), by failing to represent in the permit applications and permit amendment applications for Permit Numbers 18107 and 22829 significant emissions of epichlorohydrin; PENALTY: $17,500; ENFORCEMENT COORDINATOR: Matthew Kolodney, (713) 767-3752; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(10)COMPANY: Georgetown Healthcare System, Inc.; DOCKET NUMBER: 98-0591-EAQ-E; IDENTIFIER: Enforcement Identification Number 12553; LOCATION: Georgetown, Williamson County, Texas; TYPE OF FACILITY: healthcare; RULE VIOLATED: 30 TAC §213.5(b)(4)(C) and the Code, §26.121, by allowing an unauthorized discharge of contaminated stormwater runoff from the site; and 30 TAC §213.4(j), by failing to notify the TNRCC Austin regional office in writing and obtain approval prior to the modification of the approved water pollution abatement plan; PENALTY: $6,300; ENFORCEMENT COORDINATOR: Merrilee Gerberding, (512) 239-4490; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(11)COMPANY: Alton Immel dba Immel's Auto Outlet of Kerrville; DOCKET NUMBER: 98-0926-AIR-E; IDENTIFIER: Account Number KF-0070-O; LOCATION: Kerrville, Kerr County, Texas; TYPE OF FACILITY: used car dealership; RULE VIOLATED: 30 TAC §114.20(c)(1) and (2) and the Act, §382.085(b), by offering for sale to the public a vehicle with missing and inoperable emission control devices; PENALTY: $800; ENFORCEMENT COORDINATOR: David D. Turner, (210) 403-4032; REGIONAL OFFICE: 140 Heimer Road, Suite 360, San Antonio, Texas 78232-5042, (210) 490-3096.

(12)COMPANY: Al Hartung dba Langrebe Motors; DOCKET NUMBER: 98-0925-AIR-E; IDENTIFIER: Account Number KF-0069-W; LOCATION: Kerrville, Kerr County, Texas; TYPE OF FACILITY: used car dealership; RULE VIOLATED: 30 TAC §114.20(c)(1) and the Act, §382.085(b), by offering for sale to the public a vehicle with a missing emission control device; PENALTY: $300; ENFORCEMENT COORDINATOR: David D. Turner, (210) 403-4032; REGIONAL OFFICE: 140 Heimer Road, Suite 360, San Antonio, Texas 78232-5042, (210) 490-3096.

(13)COMPANY: Montgomery County; DOCKET NUMBER: 98-0399-MWD-E; IDENTIFIER: Permit Number 13687-001; LOCATION: Conroe, Montgomery County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: Permit Number 13687-001 and the Code, §26.121, by failing to comply with the daily average ammonia nitrogen permit limit of 0.03 pounds per day; PENALTY: $7,500; ENFORCEMENT COORDINATOR: Karen Berryman, (512) 239-2172; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(14)COMPANY: Muniservice Corporation; DOCKET NUMBER: 98-0586-MWD-E; IDENTIFIER: Enforcement Identification Number 12558; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §325.7, for failing to employ an operator holding a valid certificate of competency; PENALTY: $6,250; ENFORCEMENT COORDINATOR: Karen Berryman, (512) 239-2172; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(15)COMPANY: North Texas Municipal Water District; DOCKET NUMBER: 98-0797- MSW-E; IDENTIFIER: Municipal Solid Waste Facility Identification Number 44-A; LOCATION: Sachse, Collin County, Texas; TYPE OF FACILITY: permitted municipal solid waste landfill; RULE VIOLATED: 30 TAC §330.133(a) and (f), by failing to maintain adequate daily cover for waste at the active face of the landfill and by failing to repair the areas of erosion; 30 TAC §330.55(b)(1)(C), by allowing the discharge of sediment from the drainage ditch; the Code, §26.121(a), by failing to control waste migration and leachate seepage into the drainage ditch; and 30 TAC §330.111, by failing to provide a charged fire extinguisher at the diesel fuel dispenser; PENALTY: $23,125; ENFORCEMENT COORDINATOR: Seyed M. Miri, P.E., (512) 239-6793; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(16)COMPANY: Phillips 66 Company; DOCKET NUMBER: 98-0902-PST-E; IDENTIFIER: Petroluem Storage Tank Facility Identification Number 0010883; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: retail gasoline sales; RULE VIOLATED: 30 TAC §334.50(b)(2)(A)(i)(III), by failing to test a line leak detector at least once per year for performance and operational reliability; 30 TAC §334.51(b)(2)(C), by failing to provide proper documentation to demonstrate the existence of overfill prevention equipment for underground storage tank (UST) systems; and 30 TAC §334.7(d)(3), by failing to provide amended registration for any change or additional information regarding USTs; PENALTY: $21,672; ENFORCEMENT COORDINATOR: Rebecca Cervantes, (915) 778-9634; REGIONAL OFFICE: 7500 Viscount Boulevard, Suite 147, El Paso, Texas 79925-5633, (915) 778-9634.

(17)COMPANY: Rhodia, Inc.; DOCKET NUMBER: 98-0805-AIR-E; IDENTIFIER: Account Number WI-0020-M; LOCATION: Vernon, Wilbarger County, Texas; TYPE OF FACILITY: guar bean processing plant; RULE VIOLATED: 30 TAC §122.130(b), §122.121, and the Act, §382.085(b) and §382.054, by failing to submit the initial federal operating permit application by February 2, 1998 and by operating affected emission units without a federal operating permit having been issued; PENALTY: $8,000; ENFORCEMENT COORDINATOR: Connie Basel, (915) 698-9674; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(18)COMPANY: Texas Liquors, Inc.; DOCKET NUMBER: 98-0653-PST-E; IDENTIFIER: Petroleum Storage Tank Facility Identification Number 0021670; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.246(5) and the Act, §382.085(b), by failing to maintain records of testing conducted at the motor vehicle fuel dispensing facility; and 30 TAC §334.7(d)(3) and the Code, §26.0346, by failing to amend registration for any change or additional information regarding STs; PENALTY: $2,625; ENFORCEMENT COORDINATOR: Gayle Zapalac, (512) 239-1136; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(19)COMPANY: Tom J. Moore Cattle Company, Inc.; DOCKET NUMBER: 98-0069-AGR-E; IDENTIFIER: Enforcement Identification Number 12052; LOCATION: Washington, Washington County, Texas; TYPE OF FACILITY: animal feeding operation; RULE VIOLATED: 30 TAC §321.33 and the Code, §26.121, by failing to obtain a permit and by failing to prevent unauthorized discharges of rainfall runoff from the facility; and 30 TAC §321.35, by failing to provide waste control facilities; PENALTY: $12,400; ENFORCEMENT CO-

ORDINATOR: Laurie Eaves, (512) 239-4495; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(20)COMPANY: Raul Valles; DOCKET NUMBER: 98-0479-MLM-E; IDENTIFIER: Enforcement Identification Number 12243; LOCATION: San Elizario, El Paso County, Texas; TYPE OF FACILITY: recycling yard; RULE VIOLATED: 30 TAC §111.201 and the THSC, §382.085(b), by allowing unauthorized outdoor burning of insulated wire and electrical components; the Code, §26.121, by allowing the discharge of hazardous waste as evidenced by samples taken of soil and waste deposited on the ground; and 30 TAC §330.5(a), by allowing the collection and disposal of municipal solid waste on the property; PENALTY: $0; ENFORCEMENT COORDINATOR: Adele Noel, (512) 239-1045; REGIONAL OFFICE: 7500 Viscount Boulevard, Suite 147, El Paso, Texas 79925-5633, (915) 778-9634.

(21)COMPANY: Vessel Repair, Inc.; DOCKET NUMBER: 98-0472-MLM-E; IDENTIFIER: Solid Waste Registration Identification Number 75285; LOCATION: Port Arthur, Jefferson County, Texas; TYPE OF FACILITY: industrial ship repair; RULE VIOLATED: 30 TAC §335.4 and the Code, §26.121, by failing to respond to an unauthorized discharge; 30 TAC §335.5, by failing to perform a deed recordation for the on-site disposal of spent nonhazardous sandblasting waste; 30 TAC §335.6(c), by failing to provide written notice to the TNRCC of changes to the Notice of Registration; 30 TAC §335.9(a)(1), by failing to keep records of all hazardous waste and industrial solid waste activities; 30 TAC §335.69(a)(2) and (3), by failing to place the accumulation date on and properly label three containers of spent solvent; 30 TAC §335.112, by failing to perform weekly inspections of the container storage area; 30 TAC §335.474, by failing to provide a source reduction and waste minimization plan; 30 TAC §335.62, by failing to complete a hazardous waste determination; and 30 TAC §111.201, by conducting unauthorized burning of office garbage; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Gilbert Angelle, (512) 239-4489; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(22)COMPANY: Ms. Frances Reid dba Woodcrest Mobile Home Park; DOCKET NUMBER: 98-0059-MWD-E; IDENTIFIER: Enforcement Identification Number 8391; LOCATION: Tyler, Smith County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(2) and the Code, §26.121, by failing to submit a permit renewal application and by allowing an unauthorized discharge of wastewater; 30 TAC §305.503, by failing to pay waste treatment inspection fees; and 30 TAC §320.21, by failing to pay water quality assessment fees; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Karen Berryman, (512) 239-2172; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

TRD-9818345
Paul Sarahan
Director, Legal Division
Texas Natural Resource Conservation Commission
Filed: December 14, 1998

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North Texas Workforce Development Board

Request for Information

North Texas Workforce Development Board seeks grant recipient// fiscal agent to be responsible for establishing fiscal controls and accounting procedures necessary to guarantee proper disbursal and accounting of more than three million in federal and state funds received by the Board. Proposing entity must meet certification requirements of Texas Workforce Commission. RFI packet available by written request from Mona Williams Statser, Executive Director, North Texas Workforce Development Board, 4309 Jacksboro Highway, Suite 106, Wichita Falls, Texas 76302 or by fax (940) 322-2683. Deadline for proposals is 4:00 p.m., Friday, January 15, 1999.

TRD-9818348
Mona Williams Statser
Executive Director
North Texas Workforce Development Board
Filed: December 14, 1998

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Texas Parks and Wildlife Department

Executive Order

Executive Director Order 98-02

The Executive Director of the Parks and Wildlife Department finds that the Department's obligations to uphold the requirements of the Texas Antiquities Code requires that all lands under the control of the Department be managed under consistent and uniform procedures.

Accordingly, the Executive Director hereby ORDERS that managers of Department lands shall not authorize the use of metal detectors within the boundaries of Department lands except for the purposes and under the conditions stated herein.

Metal detector use may be authorized by individual managers to conduct scientific investigations in accordance with state law, maintenance or construction activities on behalf of the Department, or other uses, which are consistent with leases or easements on Department lands.

Metal detector use may be authorized by individual managers to search for lost personal property provided that, (a) such authorization is in response to a written request from a person who is attempting to recover lost property and the request (1) is signed by the requestor, dated, (2) contains a description of the lost property, (3) contains a description of the circumstances under which the property was believed to have become lost, and (4) contains an executed agreement by the requestor that all property found which does not fit the description of the specified lost property will be turned over to Department staff. (b) Any authorization issued pursuant to this ORDER shall (1) specify the specific boundaries of the area to be searched, (2) specify and name the individuals conducting the search, (3) specify the times and dates, during which search activities are authorized, (4) specify the means and methods for the search including a description of the tools to be used and the extent of any soil disturbance to be permitted, (5) require all search participants to check in and out with facility staff each day, and (6)require that the terms of the authorization be acknowledged and accepted in writing by the requestor.

This Order is issued pursuant to Chapter 11 of the Parks and Wildlife Code and is effective immediately.

Signed this 2nd day of November 1998.

Andrew Sansom

Executive Director

TRD-9818251
Gene McCarty
Chief of Staff

Texas Parks and Wildlife Department
Filed: December 10, 1998

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Public Utility Commission of Texas

Applications to Introduce New or Modified Rates or Terms Pursuant to P.U.C. Substantive Rule §23.25

Notice is given to the public of an application filed with the Public Utility Commission of Texas on December 4, 1998, to introduce new or modified rates or terms pursuant to P.U.C. Substantive Rule §23.25, *Procedures Applicable to Chapter 58-Electing Incumbent Local Exchange Companies (ILECs)*.

Tariff Title and Number: Southwestern Bell Telephone Company Notification to Revise the Access Service Tariff to Include Audit Guidelines Pursuant to P.U.C. Substantive Rule §23.25. Tariff Control Number 20191.

The Application: Southwestern Bell Telephone Company (SWBT) is revising its Access Service Tariff to include audit guidelines for access customers. These audit guidelines set forth procedures for initiating audits of access customers' reported Percent Interstate Usage, including all interexchange carriers. These guidelines will be utilized by a SWBT approved list of independent accounting firms.

Persons who wish to intervene in this proceeding should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 by December 30, 1998. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9818268
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 10, 1998

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Notice is given to the public of an application filed with the Public Utility Commission of Texas on December 7, 1998 to introduce new or modified rates or terms pursuant to P.U.C. Substantive Rule §23.25, *Procedures Applicable to Chapter 58-Electing Incumbent Local Exchange Companies (ILECs)*.

Tariff Title and Number: Southwestern Bell Telephone Company Notification to Introduce a New Service Package for Business Customers Called BizSaver E Pursuant to P.U.C. Substantive Rule §23.25. Tariff Control Number 20197.

The Application: Southwestern Bell Telephone Company (SWBT) is introducing a new optional service package for business customers called BizSaver E. BizSaver E consists of Call Waiting, Caller ID Name and Number and either Call Waiting ID or Call Waiting ID Options. SWBT's application also includes revisions which remove installation charges for business customers who purchase any BizSaver package or The WORKS. SWBT request an effective date of January 4, 1999.

Persons who wish to intervene in this proceeding should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 by December 31, 1998. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9818264
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 10, 1998

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Notice is given to the public of an application filed with the Public Utility Commission of Texas on December 8, 1998, to introduce new or modified rates or terms pursuant to P.U.C. Substantive Rule §23.25, *Procedures Applicable to Chapter 58-Electing Incumbent Local Exchange Companies (ILECs)*.

Tariff Title and Number: Southwestern Bell Telephone Company Notification to Institute Promotional Rates for Customers in Texas Who Subscribe to One or More of Several Different Discretionary Services Between January 4, 1999 through February 28, 1999, Pursuant to P.U.C. Substantive Rule §23.25. Tariff Control Number 20201.

The Application: Southwestern Bell Telephone Company (SWBT) is instituting promotional rates for residential customers in Texas, who subscribe to one or more of several different discretionary services between January 4, 1999 and February 28, 1999. The discretionary services being promoted for residential customers are THE WORKS, Call Forwarding-Busy Line/Don't Answer, Customer Alerting Enablement, Caller ID-Name and Number, Anonymous Call Rejection, Call Waiting ID, and Call Waiting ID Options. The discretionary service being promoted for business customers is Caller ID-Name and Number. During the promotional period, customers newly subscribing to any of the services will receive a waiver of the service's installation charge and a credit equal to one month of the service's recurring rate. There are no retention requirements associated with this offer.

Persons who wish to intervene in this proceeding should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 by December 31, 1998. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9818265
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 10, 1998

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Notice is given to the public of an application filed with the Public Utility Commission of Texas on December 8, 1998, to introduce new or modified rates or terms pursuant to P.U.C. Substantive Rule §23.25, *Procedures Applicable to Chapter 58-Electing Incumbent Local Exchange Companies (ILECs)*.

Tariff Title and Number: Application of GTE Southwest, Inc. to Revise Tariff, Choice PAC Service Offering to Include Call Forwarding-Variable As An Eligible Feature, Pursuant to P.U.C. Substantive Rule §23.25. Tariff Control Number 20202.

The Application: GTE filed an application to revise the ChoicePAC Service offering to include Call Forwarding-Variable as an eligible feature. ChoicePAC is a package of discretionary features offered to business customers today that provide a 30% monthly discount from the individual tariff rate for each feature if three or more features are

selected. Choice PAC packaging is available to business individual line customers only.

Persons who wish to intervene in this proceeding should contact the Public Utility Commission of Texas, by mail at PO Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 by January 4, 1999. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9818266
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 10, 1998

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Notice is given to the public of an application filed with the Public Utility Commission of Texas on December 10, 1998, to introduce new or modified rates or terms pursuant to P.U.C. Substantive Rule §23.25, *Procedures Applicable to Chapter 58-Electing Incumbent Local Exchange Companies (ILECs)*.

Tariff Title and Number: Application of GTE Southwest, Inc. to Waive First Month Recurring Charge for Discretionary Service, Call Waiting Feature Pursuant to P.U.C. Substantive Rule §23.25. Tariff Control Number 20213.

The Application: GTE Southwest, Inc. filed an application proposing to waive the first month recurring charge of $1.80 for residential customers ordering the Custom Calling Services Call Waiting feature during the period from January 11, 1999 through April 10, 1999.

Persons who wish to intervene in this proceeding should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 by January 7, 1999. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9818365
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 15, 1998

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Notice is given to the public of an application filed with the Public Utility Commission of Texas on December 10, 1998, to introduce new or modified rates or terms pursuant to P.U.C. Substantive Rule §23.25, *Procedures Applicable to Chapter 58-Electing Incumbent Local Exchange Companies (ILECs)*.

Tariff Title and Number: Application of Contel of Texas, Inc. to Waive First Month Recurring Charge for Discretionary Service, Call Waiting Feature Pursuant to P.U.C. Substantive Rule §23.25. Tariff Control Number 20214.

The Application: Contel of Texas, Inc. filed an application proposing to waive the first month recurring charge of $2.50 for residential customers ordering the Custom Calling Services Call Waiting feature during the period from January 11, 1999 through April 10, 1999.

Persons who wish to intervene in this proceeding should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 by January 7, 1999. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9818366
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 15, 1998

♦ ♦ ♦

Notice is given to the public of an application filed with the Public Utility Commission of Texas on December 10, 1998, to introduce new or modified rates or terms pursuant to P.U.C. Substantive Rule §23.25,*Procedures Applicable to Chapter 58-Electing Incumbent Local Exchange Companies (ILECs)*.

Tariff Title and Number: Application of GTE Southwest, Inc. to Introduce a New Discretionary Service, Enhanced Call Forwarding Pursuant to P.U.C. Substantive Rule §23.25. Tariff Control Number 20215.

The Application: GTE Southwest, Inc. filed an application to introduce a new discretionary service called Enhanced Call Forwarding. This new service is an optional Custom Calling feature, is Advanced Intelligent Network based, and is to be offered to business individual line and CentraNet customers. The service allows the customer to forward calls from any touch call phone via a toll-free number.

Persons who wish to intervene in this proceeding should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 by January 5, 1999. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9818367
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 15, 1998

♦ ♦ ♦

Notice is given to the public of an application filed with the Public Utility Commission of Texas on December 10, 1998, to introduce new or modified rates or terms pursuant to P.U.C. Substantive Rule §23.25, *Procedures Applicable to Chapter 58-Electing Incumbent Local Exchange Companies (ILECs)*.

Tariff Title and Number: Southwestern Bell Telephone Company Notification to Institute Promotional Rates for Business Customers in Texas Who Subscribe to Integrated Pathway Service Between January 4, 1999 and April 3, 1999 Pursuant to P.U.C. Substantive Rule §23.25. Tariff Control Number 20217.

The Application: Southwestern Bell Telephone Company (SWBT) is instituting promotional rates for business customers in Texas who subscribe to Integrated Pathway Service between January 11, 1999 and April 10, 1999. During the 90-day promotion period, customers willing to commit to a three-year term plan for 12 or more Integrated Voice Access Lines are eligible for reduced rates throughout the contract period, as well as a one-time $500 credit.

Persons who wish to intervene in this proceeding should contact the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 by January 7, 1999. Hearing

and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9818368
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 15, 1998

♦ ♦ ♦

Notices of Applications for Amendment to Service Provider Certificate of Operating Authority

On December 10, 1998, NTS Communications, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60044. Applicant intends to remove the resale-only restriction and expand its geographic area to include the entire state of Texas.

The Application: Application of NTS Communications, Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 20212.

Persons with questions about this docket, or who wish to intervene or otherwise participate in these proceedings should make appropriate filings or comments to the commission at the Public Utility Commission of Texas, at PO Box 13326, Austin, Texas 78711-3326 no later than December 30, 1998. You may contact the commission's Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 20212.

TRD-9818338
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 14, 1998

♦ ♦ ♦

On December 11, 1998, CapRock Communications Corp. filed an application with the Public Utility Commission of Texas (PUC) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Numbers 60077 and 60078. Applicant intends to: (1) transfer its IWL Communications, Inc. certificate to IWL Holdings Corp.; (2) change the name on the IWL certificate to CapRock Communications Corp.; (3) expand the geographic scope to include the entire state; (4) change the corporate name to CapRock Communications Corp.; and (5) relinquish SPCOA Certificate Number 60077.

The Application: Application of CapRock Communications Corp. for an Amendment to its Service Provider Certificates of Operating Authority, Docket Number 20227.

Persons with questions about this docket, or who wish to intervene or otherwise participate in these proceedings should make appropriate filings or comments to the commission at the Public Utility Commission of Texas, at PO Box 13326, Austin, Texas 78711-3326 no later than December 30, 1998. You may contact the PUC Office of Customer Protection at (512) 936- 7120. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 20227.

TRD-9818370
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 15, 1998

♦ ♦ ♦

Notice of Application for Annual Margin Rebate Rider

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application for approval of an annual margin rebate rider, pursuant to the Public Utility Regulatory Act, Texas Utilities Code Annotated §§32.101(b) and 161.051 et seq. (Vernon 1998).

Docket Style and Number: Application of Brazos Electric Power Cooperative, Inc., for Approval of Annual Margin Rebate Rider. Docket Number 20194.

The Application: Brazos Electric Power Cooperative, Inc., a generating and transmission cooperative, requests the commission grant interim and final approval of its annual margin rebate rider. Brazos Electric Power Cooperative, Inc., asserts that approval of the application will allow Brazos to return to its customers excess revenues.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact, not later than December 21, 1998, the Public Utility Commission of Texas, PO Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-9818262
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 10, 1998

♦ ♦ ♦

Notice of Application for Approval of Certain Depreciation Rates Filed Pursuant to P.U.C. Substantive Rule §23.61(H)

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on December 9, 1998, for approval of certain depreciation rates pursuant to P.U.C. Substantive Rule §23.61(h).

Docket Title and Number: Application of Big Bend Telephone Company, Inc. for an Increase in Certain Depreciation Rates Pursuant to P.U.C. Substantive Rule §23.61(h). Docket Number 20218.

The Application: Big Bend Telephone Company, Inc. (Big Bend) requests approval to increase certain deprecation rates to receive full capital recovery of the following accounts: company communications equipment, general purpose personal computers, microwave subscriber radios, metallic aerial cable, metallic underground cable, metallic buried cable, paired copper underground cable, intrabuilding underground fiber cable, intrabuilding buried metallic cable. Big Bend provides service in the Texas counties of Brewster, Crockett, Jeff Davis, Pecos, Presidio, Reeves, Terrell, and Val Verde. Big Bend proposes an effective date of January 1, 1998, for these increased rates.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, at PO Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 on or before January 11, 1999. Hearing

and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9818369
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 15, 1998

♦ ♦ ♦

Notice of Application for Demand-Side Management Standard Performance Contract

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application for approval of a demand-side management standard performance contract pilot program, pursuant to the Public Utility Regulatory Act, Texas Utilities Code Annotated §34.104 and §34.151 (Vernon 1998).

Docket Style and Number: Petition of Central Power and Light Company for Approval of a DSM Standard Performance Contract Pilot Program. Docket Number 20143.

The Application: Central Power and Light Company requests the commission approve its demand-side management standard performance contract. Central Power and Light Company is not seeking recovery of costs associated with its standard performance contract program.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact, not later than February 1, 1999, the Public Utility Commission of Texas, PO Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936- 7120. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-9818371
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 15, 1998

♦ ♦ ♦

Notices of Applications for Revenue Neutrality Pursuant to P.U.C. Substantive Rule §23.136

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on April 20, 1998, pursuant to P.U.C. Substantive Rule §23.136 for approval of revenue neutral recovery of its current High Cost Assistance Fund (HCAF) from the new State Universal Service Fund.

Project Number: Application of Lufkin-Conroe Telephone Exchange, Inc. for Universal Service Support Pursuant to P.U.C. Substantive Rule §23.136. Docket Number 19187.

The Application: Lufkin-Conroe Telephone Exchange, Inc. seeks revenue neutral recovery of its current High Cost Assistance Funding in the amount of $787,248, from the new state universal Service Fund. Lufkin-Conroe Telephone Exchange, Inc. is eligible to seek continuation of existing high cost support assistance as provided under §56.025 of the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001 - 63.063 (Vernon 1998) (PURA). On August 11, 1998, the application was abated pending final action by the Public Utility Commission of Texas regarding the implementation of the Texas Universal Service Fund or repeal of P.U.C. Substantive Rule §23.53, whichever should first occur. On December 1, 1998, the commission adopted changes to the Universal Service Fund with implementation of the Texas Universal Service Fund effective January 1, 1999. On December 11, 1998, the application was unabated.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at PO Box 13326, Austin, Texas, 78711-3326, or call the Public Utility Commission Office of Customer Protection at (512) 936-7120 on or before December 30, 1998. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All comments should reference Project Number 19187.

TRD-9818357
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 15, 1998

♦ ♦ ♦

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on April 20, 1998, pursuant to P.U.C. Substantive Rule §23.136 for approval of revenue neutral recovery of its current High Cost Assistance Fund (HCAF) from the new State Universal Service Fund.

Project Number: Application of Century Telephone of Port Aransas, Inc. for Implementation of Universal Service Support in Replacement of High Cost Assistance Funding Pursuant to P.U.C. Substantive Rule §23.136. Docket Number 19188.

The Application: Century Telephone of Port Aransas, Inc. seeks revenue neutral recovery of its current High Cost Assistance Funding in the amount of $170,615, from the new state universal Service Fund. Century Telephone of Port Aransas, Inc. is eligible to seek continuation of existing high cost support assistance as provided under §56.025 of the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001 - 63.063 (Vernon 1998) (PURA). On June 5, 1998, the application was abated pending final action by the Public Utility Commission of Texas regarding the implementation of the Texas Universal Service Fund or repeal of P.U.C. Substantive Rule §23.53, whichever should first occur. On December 1, 1998, the commission adopted changes to the Universal Service Fund with implementation of the Texas Universal Service Fund effective January 1, 1999. On December 11, 1998, the application was unabated.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at PO Box 13326, Austin, Texas, 78711-3326, or call the Public Utility Commission Office of Customer Protection at (512) 936-7120 on or before December 30, 1998. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All comments should reference Project Number 19188.

TRD-9818358
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 15, 1998

♦ ♦ ♦

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on April 20, 1998, pursuant to P.U.C. Substantive Rule §23.136 for approval of revenue neutral recovery of its current High Cost Assistance Fund (HCAF) from the new State Universal Service Fund.

Project Number: Application of Fort Bend Telephone Company for Implementation of universal Service Support in Replacement of High Cost Assistance Funding Pursuant to P.U.C. Substantive Rule §23.136. Docket Number 19189.

The Application: Fort Bend Telephone Company seeks revenue neutral recovery of its current High Cost Assistance Funding in the amount of $619,937, from the new state Universal Service Fund. Fort Bend Telephone Company is eligible to seek continuation of existing high cost support assistance as provided under §56.025 of the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001 - 63.063 (Vernon 1998) (PURA). On June 5, 1998, the application was abated pending final action by the Public Utility Commission of Texas regarding the implementation of the Texas Universal Service Fund or repeal of P.U.C. Substantive Rule §23.53, whichever should first occur. On December 1, 1998, the commission adopted changes to the Universal Service Fund with implementation of the Texas Universal Service Fund effective January 1, 1999. On December 11, 1998, the application was unabated.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at PO Box 13326, Austin, Texas, 78711-3326, or call the Public Utility Commission Office of Customer Protection at (512) 936-7120 on or before December 30, 1998. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All comments should reference Project Number 19189.

TRD-9818359
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 15, 1998

♦ ♦ ♦

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on April 20, 1998, pursuant to P.U.C. Substantive Rule §23.136 for approval of revenue neutral recovery of its current High Cost Assistance Fund (HCAF) from the new State Universal Service Fund.

Project Number: Application of Century Telephone of San Marcos, Inc. for Implementation of Universal Service Support in Replacement of High Cost Assistance Funding Pursuant to P.U.C. Substantive Rule §23.136. Docket Number 19190.

The Application: Century Telephone of San Marcos, Inc. seeks revenue neutral recovery of its current High Cost Assistance Funding in the amount of $791,222, from the new state universal Service Fund. Century Telephone of San Marcos, Inc. is eligible to seek continuation of existing high cost support assistance as provided under §56.025 of the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001 - 63.063 (Vernon 1998) (PURA). On June 5, 1998, the application was abated pending final action by the Public Utility Commission of Texas regarding the implementation of the Texas Universal Service Fund or repeal of P.U.C. Substantive Rule §23.53, whichever should first occur. On December 1, 1998, the commission adopted changes to the Universal Service Fund with implementation of the Texas Universal Service Fund effective January 1, 1999. On December 11, 1998, the application was unabated.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at PO Box 13326, Austin, Texas, 78711-3326, or call the Public Utility Commission Office of Customer Protection at (512) 936-7120 on or before December 30, 1998. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All comments should reference Project Number 19190.

TRD-9818360
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 15, 1998

♦ ♦ ♦

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on April 20, 1998, pursuant to P.U.C. Substantive Rule §23.136 for approval of revenue neutral recovery of its current High Cost Assistance Fund (HCAF) from the new State Universal Service Fund.

Project Number: Application of Kerrville Telephone Company for Implementation of niversal Service Support in Replacement of High Cost Assistance Funding Pursuant to P.U.C. Substantive Rule §23.136. Docket Number 19191.

The Application: Kerrville Telephone Company seeks revenue neutral recovery of its current High Cost Assistance Funding in the amount of $493,606, from the new state Universal Service Fund. Kerrville Telephone Company is eligible to seek continuation of existing high cost support assistance as provided under §56.025 of the Public Utility Regulatory Act, Texas tilities Code Annotated §§11.001 - 63.063 (Vernon 1998) (PURA). On June 5, 1998, the application was abated pending final action by the Public Utility Commission of Texas regarding the implementation of the Texas Universal Service Fund or repeal of P.U.C. Substantive Rule §23.53, whichever should first occur. On December 1, 1998, the commission adopted changes to the Universal Service Fund with implementation of the Texas Universal Service Fund effective January 1, 1999. On December 11, 1998, the application was unabated.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at PO Box 13326, Austin, Texas, 78711-3326, or call the Public tility Commission Office of Customer Protection at (512) 936-7120 on or before December 30, 1998. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All comments should reference Project Number 19191.

TRD-9818361
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 15, 1998

♦ ♦ ♦

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on April 20, 1998, pursuant to P.U.C. Substantive Rule §23.136 for approval of revenue neutral recovery of its current High Cost Assistance Fund (HCAF) from the new State Universal Service Fund.

Project Number: Application of Sugar Land Telephone Company for Implementation of niversal Service Support in Replacement of High Cost Assistance Funding Pursuant to P.U.C. Substantive Rule §23.136. Docket Number 19193.

The Application: Sugar Land Telephone Company seeks revenue neutral recovery of its current High Cost Assistance Funding in the amount of $1,139,891 from the new state Universal Service Fund. Sugar Land Telephone Company is eligible to seek continuation of existing high cost support assistance as provided under §56.025 of the

Public Utility Regulatory Act, Texas tilities Code Annotated §§11.001 - 63.063 (Vernon 1998) (PURA). On June 5, 1998, the application was abated pending final action by the Public Utility Commission of Texas regarding the implementation of the Texas Universal Service Fund or repeal of P.U.C. Substantive Rule §23.53, whichever should first occur. On December 1, 1998, the commission adopted changes to the Universal Service Fund with implementation of the Texas Universal Service Fund effective January 1, 1999. On December 11, 1998, the application was unabated.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at PO Box 13326, Austin, Texas, 78711-3326, or call the Public tility Commission Office of Customer Protection at (512) 936-7120 on or before December 30, 1998. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All comments should reference Project Number 19193.

TRD-9818362
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 15, 1998

♦ ♦ ♦

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on April 27, 1998, pursuant to P.U.C. Substantive Rule §23.136 for approval of revenue neutral recovery of its current High Cost Assistance Fund (HCAF) from the new State Universal Service Fund.

Project Number: Application of Muenster Telephone Company for Implementation of niversal Service Support in Replacement of High Cost Assistance Funding Pursuant to P.U.C. Substantive Rule §23.136. Docket Number 19234.

The Application: Muenster Telephone Company seeks revenue neutral recovery of its current High Cost Assistance Funding in the amount of $93,674, from the new state Universal Service Fund. Muenster Telephone Company is eligible to seek continuation of existing high cost support assistance as provided under §56.025 of the Public Utility Regulatory Act, Texas tilities Code Annotated §11.001 - 63.063 (Vernon 1998) (PURA). On June 5, 1998, the application was abated pending final action by the Public Utility Commission of Texas regarding the implementation of the Texas Universal Service Fund or repeal of P.U.C. Substantive Rule §23.53, whichever should first occur. On December 1, 1998, the commission adopted changes to the Universal Service Fund with implementation of the Texas Universal Service Fund effective January 1, 1999. On December 11, 1998, the application was unabated.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at PO Box 13326, Austin, Texas, 78711-3326, or call the Public tility Commission Office of Customer Protection at (512) 936-7120 on or before December 30, 1998. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All comments should reference Project Number 19234.

TRD-9818363
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 15, 1998

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Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on July 29, 1998, pursuant to P.U.C. Substantive Rule §23.136 for approval of revenue neutral recovery of its current High Cost Assistance Fund (HCAF) from the new State Universal Service Fund.

Project Number: Application of Big Bend Telephone Company for Implementation of universal Service Support in Replacement of High Cost Assistance Funding Pursuant to P.U.C. Substantive Rule §23.136. Docket Number 19668.

The Application: Big Bend Telephone Company seeks revenue neutral recovery of its current High Cost Assistance Funding in the amount of $1,583,817, from the new state Universal Service Fund. Big Bend Telephone Company is eligible to seek continuation of existing high cost support assistance as provided under §56.025 of the Public Utility Regulatory Act, Texas Utilities Code Annotated §11.001 - 63.063 (Vernon 1998) (PURA). On August 11, 1998, the application was abated pending final action by the Public Utility Commission of Texas regarding the implementation of the Texas Universal Service Fund or repeal of P.U.C. Substantive Rule §23.53, whichever should first occur. On December 1, 1998, the commission adopted changes to the Universal Service Fund with implementation of the Texas Universal Service Fund effective January 1, 1999. On December 11, 1998, the application was unabated.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at PO Box 13326, Austin, Texas, 78711-3326, or call the Public Utility Commission Office of Customer Protection at (512) 936-7120 on or before December 30, 1998. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All comments should reference Project Number 19668.

TRD-9818364
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 15, 1998

♦ ♦ ♦

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on October 16, 1998, pursuant to P.U.C. Substantive Rule §23.136 for approval of revenue neutral recovery of its current High Cost Assistance Fund (HCAF) from the new State Universal Service Fund.

Project Number: Application of Cap Rock Telephone Cooperative, Inc. for Implementation of Universal Service Support in Replacement of High Cost Assistance Funding Pursuant to P.U.C. Substantive Rule §23.136. Project Number 20005.

The Application: Cap Rock Telephone Cooperative, Inc. seeks revenue neutral recovery of its current HCAF from the new State Universal Service Fund. Cap Rock Telephone Cooperative, Inc. is eligible to seek continuation of existing high cost support assistance as provided under §56.025 of the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001-63.063 (Vernon 1998) (PURA).

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at PO Box 13326, Austin, Texas, 78711-3326, or call the Public Utility Commission Office of Customer Protection at (512) 936-7120 on or before December 30, 1998. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All comments should reference Project Number 20005.

TRD-9818335

Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 14, 1998

♦ ♦ ♦

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on October 16, 1998, pursuant to P.U.C. Substantive Rule §23.136 for approval of revenue neutral recovery of its current High Cost Assistance Fund (HCAF) from the new State Universal Service Fund.

Project Number: Application of Livingston Telephone Company for Implementation of universal Service Support in Replacement of High Cost Assistance Funding Pursuant to P.U.C. Substantive Rule §23.136. Project Number 20006.

The Application: Livingston Telephone Company seeks revenue neutral recovery of its current HCAF from the new State Universal Service Fund. Livingston Telephone Company is eligible to seek continuation of existing high cost support assistance as provide under §56.025 of the Public Utility Regulatory Act, Texas Utilities Code Annotated §11.001 - 63.063 (Vernon 1998) (PURA).

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at PO Box 13326, Austin, Texas, 78711-3326, or call the Public Utility Commission Office of Customer Protection at (512) 936-7120 on or before December 30, 1998. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All comments should reference Project Number 20006.

TRD-9818336
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 14, 1998

♦ ♦ ♦

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on November 17, 1998, pursuant to P.U.C. Substantive Rule §23.136 for approval of revenue neutral recovery of its current High Cost Assistance Fund (HCAF) from the new State Universal Service Fund.

Project Number: Application of North Texas Telephone Company for Implementation of universal Service Support in Replacement of High Cost Assistance Funding Pursuant to P.U.C. Substantive Rule §23.136. Project Number 20108.

The Application: North Texas Telephone Company seeks revenue neutral recovery of its current HCAF from the new State Universal Service Fund. North Texas Telephone Company is eligible to seek continuation of existing high cost support assistance as provided under §56.025 of the Public Utility Regulatory Act, Texas Utilities Code Annotated §§11.001 - 63.063 (Vernon 1998) (PURA).

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at PO Box 13326, Austin, Texas, 78711-3326, or call the Public Utility Commission Office of Customer Protection at (512) 936-7120 on or before December 30, 1998. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All comments should reference Project Number 20108.

TRD-9818337
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 14, 1998

♦ ♦ ♦

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 December 8, 1998, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.154-54.159 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of SandStream Communications and Entertainment for a Service Provider Certificate of Operating Authority, Docket Number 20199 before the Public Utility Commission of Texas.

Applicant intends to provide local exchange service, basic local telecommunications service, switched access, and enhanced calling features, focusing on residential, small and medium-sized business customers.

Applicant's requested SPCOA geographic area includes the regions currently served by the following incumbent local exchange companies (ILECs) and hereby incorporates the boundaries of these ILECs as the boundary of its proposed service area: Southwestern Bell Telephone Company, GTE Southwest, Inc., Central Telephone Company of Texas, and United Telephone Company of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, at PO Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120 no later than December 30. 1998. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9818263
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 10, 1998

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Notices of Intent to File Pursuant to P.U.C. Substantive Rule §23.27

Notice is given to the public of the intent to file with the Public Utility Commission of Texas of an application pursuant to P.U.C. Substantive Rule §23.27 to file a customer-specific contract to provide private CML 9-1-1 Digital Recorder to Denco Area 9-1-1 District located in Denton, Texas.

Tariff Title and Number: GTE Southwest, Inc. Notice of Intent to File a Customer-Specific Contract to Provide CML 9-1-1 Digital Recorder to Denco Area 9-1-1 District Pursuant to P.U.C. Substantive Rule §23.27. Tariff Control Number 20203.

The Application: GTE-Southwest, Inc. intends to file an application on or around December 18, 1998 to offer CML 9-1-1 Digital Recorder service to Denco located in Denton, Texas. The CML 9-1-1 Digital Recorder/Announcer is a four channel unit with six lines and six messages. It is used in conjunction with a CML ESC-1000 Enhanced 9-1-1 System. The ESC-1000 Enhanced 9-1-1 System bridges the gap between traditional 9-1-1 systems and flexible networks that large

tandem switches allow the telephone company to configure. GTE proposes to offer this service in the Denton, Texas exchange.

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 call the commission's Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9818267
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 10, 1998

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Notice is given to the public of the intent to file with the Public Utility Commission of Texas an application pursuant to P.U.C. Substantive Rule §23.27 for a new PLEXAR-Custom service for Shell Oil Company in Houston, Texas.

Tariff Title and Number: Southwestern Bell Telephone Company's (SWBT) Notice of Intent to File an Application for a New PLEXAR-Custom Service for Shell Oil Company in Houston, Texas Pursuant to P.U.C. Substantive Rule §23.27. Tariff Control Number 20229.

The Application: Southwestern Bell Telephone Company is requesting approval for a new PLEXAR-Custom service for Shell Oil Company in Houston , Texas. PLEXAR-Custom service is a central office-based PBX-type serving arrangement designed to meet the specific needs of customers who have communication system requirements of 75 or more station lines. The designated exchange for this service is the Houston exchange, and the geographic market for this specific PLEXAR-Custom service is the Houston LATA.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, by mail at PO Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512)936-7120. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-9818379
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 15, 1998

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Public Notices of Amendment to Interconnection Agreement

On December 4, 1998, Southwestern Bell Telephone Company and American Local Telecommunications, L.L.C. doing business as ALT Communications, L.L.C., collectively referred to as applicants, filed a joint application for approval of an 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 §§11.001-63.063 (Vernon 1998) (PURA). The joint application has been designated Docket Number 20192. 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 13 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 20192. 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 January 5, 1999, 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 project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 20192.

TRD-9818294
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 14, 1998

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On December 8, 1998, Southwestern Bell Telephone Company and Level 3 Communications, L.L.C., collectively referred to as applicants, filed a joint application for approval of an 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 §§11.001-63.063 (Vernon 1998) (PURA). The joint application has been designated Docket Number 20204. 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 13 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 20204. 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 January 7, 1999, 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 project or who wish to comment on the joint application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 20204.

TRD-9818296

Rhonda Dempsey

Rules Coordinator

Public Utility Commission of Texas

Filed: December 14, 1998

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Public Notice of Interconnection Agreement

On December 3, 1998, Fort Bend Telephone Company and PrimeCo Personal Communications, L.P., collectively referred to as applicants, filed a joint application for approval of an interconnection agreement under 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 §§11.001-63.063 (Vernon 1998) (PURA). The joint application has been designated Docket Number 20185. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The FTA authorizes the commission to review and approve any interconnection agreement adopted by negotiation of the parties. Pursuant to FTA §252(e)(2) the commission may reject any agreement if it finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or that implementation of the agreement, or any portion thereof, is not consistent with the public interest, convenience, and necessity. Additionally, under FTA §252(e)(3), the commission may establish or enforce other requirements of state law in its review of the agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. The commission must act to approve the agreement within 90 days after it is submitted by the parties. The parties have requested expedited review of this application.

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 13 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 20185. 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 January 11, 1999, 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 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 docket or who wish to comment on the application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 20185.

TRD-9818295

Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: December 14, 1998

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State Securities Board

Correction of Error

The State Securities Board proposed amendments to 7 §§101.1, 101.2, 101.3, and 101.5. The rules appeared in the December 4, 1998 issue of the *Texas Register* (23 TexReg 12031).

On page 12032, §101.5(c), all of the text of subsection (c) should be strike through.

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Telecommunications Infrastructure Fund Board

Request for Offer to Develop TIFBase Date Warehouse

The Telecommunications Infrastructure Fund Board (TIFB) announces a Request for Offers to develop a Data Warehouse for supporting the implementation of House Bill 2128. The successful vendor must have been designated as a Qualified Information Systems Vendor (QISV) by the General Services Commission (GSC) and the services being offered must be listed in the vendor's QISV catalogue on file with the GSC.

The Request for Offer is due January 6, 1999 at 3:00 p.m.

Copies of the Request for Offer may be obtained by sending a letter to the TIFB at 1000 Red River, Suite E208, Austin, Texas 78701-2698, by accessing the Texas Marketplace at http://www.marketplace.state.tx.us, or by calling TIFB at (512) 344-4300 or 1-888-533-8432.

TRD-9818346
Rhonda Hill
Financial Officer
Telecommunications Infrastructure Fund Board
Filed: December 14, 1998

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Texas Department of Transportation

Correction of Error

The Texas Department of Transportation adopted amendments to §105.4 and §105.32. The rules appeared in the December 4, 1998, issue of the *Texas Register* (23 TexReg 12300).

Due to Motor Vehicle Board staff error, on page 12300, changes to §105.32(a)(2), allowing 15 days instead of 6 days to correct an offending advertisement, were not inserted. The section should read, "that the licensee committed a subsequent violation of the same advertising provision within the period beginning 15 days and ending 12 months after the licensees has received the notice required by paragraph (1) of this subsection."

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Public Notice

Pursuant to Transportation Code, §21.111, and Title 43, Texas Administrative Code, §30.209, the Texas Department of Transportation will conduct a public hearing to receive comments from interested parties concerning proposed approval of: construction services at Mineola/Quitman Airport, McGregor Municipal Airport, Taylor Municipal Airport, Clark Field Municipal Airport at Stephenville, Garner Field at Uvalde, Haskell Municipal Airport, Fisher County Airport at Rotan/Roby, and Winters Municipal Airport; terminal buildings at Cherokee County Airport at Jacksonville, Decatur Municipal Airport, Edinburg International Airport, Georgetown Municipal Airport, Gillespie County Airport at Fredericksburg, Kimble County Airport at Junction, Lockhart Municipal Airport, Phil L. Hudson Airport at Mesquite, and Orange County Airport; cancellation of Livingston Municipal Airport project. In addition, the Texas Department of Transportation will conduct a public hearing to receive comments from interested parties concerning proposed approval of a "Small Market Air Service Needs Assessment" for the following airports: Abilene Regional Airport, Alpine-Casparis Municipal Airport, Brownwood Regional Airport, Corpus Christi International Airport, Del Rio International Airport, Galveston Municipal Airport, Georgetown Municipal Airport, Laredo International Airport, Gregg County Airport in Longview, Lubbock International Airport, Angelina County Airport in Lufkin, Killeen Municipal Airport, McAllen Miller International Airport, Midland International Airport, A.L. Mangham Jr. Regional Airport in Nacogdoches, New Braunfels Municipal Airport, Mathis Field in San Angelo, Sugar Land Municipal Airport, Draughon-Miller Central Texas Regional Airport in Temple, Texarkana Regional-Webb Field, Tyler Pounds Field, Victoria Regional Airport, Waco Regional Airport, and Wichita Falls Municipal Airport.

The public hearing will be held at 9:00 a.m. on Monday, January 11, 1999, at 150 East Riverside, South Tower, 5th Floor Conference Room, Austin, Texas 78704. Any interested person may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views, and same or similar comments, through a representative member where possible. Persons with disabilities who have special communication or accommodation needs and who plan to attend the hearing and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact Eloise Lundgren, Director, Public Information Office, 125 E. 11th Street, Austin, Texas 78701-2483, (512) 463-8588 at least two working days prior to the hearing so that appropriate arrangements can be made.

For additional information please contact Suetta Murray, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4504.

TRD-9818393
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Filed: December 16,1998

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Texas Water Development Board

Correction of Error

The Texas Water Development Board, proposed amendments to §§353.51, 353.52, 353.55–353.58, and 353.60. The rules appeared in the December 4, 1998 issue of the *Texas Register* (23 TexReg 12197).

Section 353.52 was amended to add ",or the board's representative designated pursuant to §353.9 of this title (relating to Delegation of Responsibility)." The new language is included in the publication but is not entirely underlined to indicate new language. Likewise, subsection (b) was added to §353.83. The language is shown in the publication but is not underlined to indicate that it is new language.

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