TEXAS REGISTER

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This month's front cover artwork:

Artist: *Cindy Armstrong*
11th grade
Tatum High School

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.

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Open Meetings

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

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

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

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas (1-800-735-2989).

OFFICE OF THE ATTORNEY GENERAL

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

Request for Opinions

RQ-0352-JC

The Honorable Cheryll Mabray Llano County Attorney P.O. Box 821 Llano, Texas 78643

Re: Whether a commissioners court is required to order an election limiting the taxing authority of an emergency services district, and related questions (Request No. 0352-JC)

Briefs requested by April 7, 2001

RQ-0353-JC

The Honorable E. Bruce Curry District Attorney, 216 Judicial District 521 Earl Garrett Street Kerrville, Texas 78028

Re: Whether and when a district clerk must provide jury lists to litigants in civil and criminal trials (Request No. 0353-JC)

Briefs requested by April 7, 2001

RQ-0354-JC

Ms. Evelyn M. Lord Chair, Spindletop Centennial Commission Lamar University, John Gray Center Building B, Suite 103, 855 Florida Beaumont, Texas 77705

Re: Whether the Spindletop Centennial Commission continues in existence until the end of 2001 (Request No. 0354-JC)

Briefs requested by April 2, 2001

RQ-0355-JC

The Honorable Ori T. White District Attorney 112th Judicial District P.O. Drawer 160 107 E. 4th Street Fort Stockton, Texas 79735

Re: Whether an industrial development corporation may expend section 4B tax proceeds to fund a nature/birding center or a public park (Request No. 0355-JC)

Briefs requested by April 7, 2001

RQ-0356-JC

The Honorable Russell W. Malm Midland County Attorney 200 West Wall Street, Suite 104 Midland, Texas 79701

Re: Whether a county may pay the employer's share of employment taxes on "state supplementary salary compensation" paid to a county judge under section 46.0031 of the Government Code from the state provided funds, and related questions (Request No. 0356-JC)

Briefs requested by April 13, 2001

RQ-0357-JC

The Honorable Michael P. Fleming Harris County Attorney 1019 Congress, 15th Street Houston, Texas 77002-1700

Re: Whether a county may enter into a lease-purchase agreement for the acquisition of the use of real property, and related questions (Request No. 0357-JC)

Briefs requested by April 12, 2001

RQ-0358-JC

The Honorable J.E. "Buster" Brown Chair, Natural Resources Committee Texas State Senate P.O. Box 12068 Austin, Texas 78711-2068

Re: Effectiveness of property owner's filed statement of exclusion from changed restrictions under the Property Code (Request No. 0358-JC)

Briefs requested by April 13, 2001

RQ-0359-JC

The Honorable Tom Ramsey Chair, County Affairs Texas House of Representatives P.O. Box 2910 Austin, Texas 78768-2910

Re: Creation of a fresh water supply district under chapter 53 of the Water Code (Request No. 0359-JC)

Briefs requested by April 14, 2001

For further information, please call 512 463-2110.

TRD-200101519
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: March 14, 2001

♦ ♦ ♦

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 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 20. COTTON PEST CONTROL
SUBCHAPTER C. STALK DESTRUCTION PROGRAM

4 TAC §20.22

The Department of Agriculture (the department) adopts on an emergency basis, an amendment to §20.22, concerning the authorized cotton destruction dates for Pest Management Zone 9.

The department is acting on behalf of cotton farmers in Zone 9 which includes the counties of: Ward, Reeves, and Pecos. The current cotton destruction deadline for Zone 9 is March 15. The cotton destruction deadline will be extended through April 1, 2001. The department believes that changing the cotton destruction date is both necessary and appropriate. This extension is effective only for the 2000 crop year.

Adverse weather conditions have created a situation compelling an immediate extension of the cotton destruction date for these counties. The unusually wet weather prior to the cotton destruction period has prevented many cotton producers from destroying cotton by the March 15 deadline. A failure to act to further extend the cotton destruction deadline could create a significant economic loss to Texas cotton producers and the state's economy.

The emergency amendment to §20.22(a) will extend the date for cotton stalk destruction through April 1 of 2001 in Zone 9.

The amendment is adopted on an emergency basis under the Texas Agriculture Code, §74.006, which provides the Texas Department of Agriculture with the authority to adopt rules as necessary for the effective enforcement and administration of Chapter 74, Subchapter A; §74.004, which provides the department with the authority to establish regulated areas, dates and appropriate methods of destruction of stalks, other parts, and products of host plants for cotton pests and provides the department with the authority to consider a request for a cotton destruction extension due to adverse weather conditions; and the Government Code, §2001.34, which provides for the adoption of administrative rules on an emergency basis, without notice and comment.

§20.22. Stalk Destruction Requirements.

(a) Deadlines and methods. All cotton plants in a pest management zone shall be destroyed, regardless of the method used, by the stalk destruction dates indicated for the zone. Destruction shall be accomplished by the methods described as follows:
Figure: 4 TAC §20.22(a)

(b)-(c) (No change.)

Filed with the Office of the Secretary of State, on March 9, 2001.

TRD-200101417
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: March 15, 2001
Expiration date: April 2, 2001
For further information, please call: (512) 463-4075

♦ ♦ ♦

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 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

The Railroad Commission of Texas proposes amendments to §3.5, relating to applications to drill, deepen, reenter or plug back; §3.11, relating to inclination and directional surveys; §3.37, relating to statewide spacing rule; §3.38, relating to well densities; the repeal of existing §3.70, relating to Commission forms required to be filed; amendments to §3.78, relating to fees, performance bonds and alternate forms of financial security required to be filed; new §3.80, relating to Commission forms, applications and filing requirements; and amendments to §3.86, relating to horizontal drainhole wells.

The Commission proposes the repeal of §3.70, commonly referred to as Statewide Rule 80, to conform the Texas Administrative Code section number to the Statewide Rule number. Proposed new §3.80 will also conform the title in the Texas Administrative Code with the title adopted by the Commission for this rule. Additionally, the text of proposed new §3.80 contains some substantive changes from the current text of §3.70.

The purpose of the amendments and new rule is to facilitate implementation of the Commission's Electronic Compliance and Approval Process (ECAP). The ECAP system provides operators with the option to file applications for drilling permits electronically. The Commission's current rules contain no provision authorizing electronic filings; the amendments and new rule will provide the necessary regulatory foundation for current Commission procedures relating to electronic filings, including participation in both the ECAP and the Electronic Data Interchange (EDI) systems. Additionally, the amendments and new rule will provide a regulatory framework for the Commission as it expands both the ECAP and EDI programs to meet the needs of the oil and gas industry. The amendments and new rule will also eliminate confusion and assist in the comprehension of general Commission filing requirements and current Commission procedures relating to electronic filings by incorporating the requirements and procedures in a single Commission rule, new §3.80. Additionally, the amendments and new rule will promote administrative efficiency and facilitate implementation of additional phases of ECAP by clarifying application requirements under §3.11, §3.37, §3.38, and §3.86.

The Commission simultaneously proposes the review and readoption of §3.11 in accordance with Texas Government Code, 2001.039. The agency's reasons for adopting this rule continue to exist. The notice of proposed review was filed with the *Texas Register* concurrently with this proposal.

Leslie Savage, Planning and Administration, Oil and Gas Division, has determined that for each year of the first five years that the amendments, repeal, and proposed new §3.80 (to be referred to as Statewide Rule 80) will be in effect there will be minimal fiscal implications for state government. The purpose of the proposed rule amendments and new rule is to facilitate electronic filing and processing of applications and other requests under the ECAP system. The Commission does not anticipate that the amendments and proposed new rule will result in either an increase or decrease in the total number of applications or requests filed, reviewed, and ruled on administratively, although the Commission expects an increase in filings being made through the ECAP system. Currently, the Commission is accepting and processing electronically certain types of drilling permit applications and expects that current staffing will be sufficient to continue to do so. There will be no effect on local government.

Ms. Savage has also determined that for each year of the first five years the proposed amendments, repeal, and new rule will be in effect, the public will benefit from the increased ease and expedited filing of applications to drill an oil or gas well, and other requests associated with oil and gas exploration and production as the Commission develops the necessary capabilities. Any cost of compliance with the proposed new rule and amendments for the small business or micro-business producer will be offset by increased efficiency and cost savings obtained through the use of the ECAP and EDI systems. Further, because participation in both the ECAP and EDI systems is voluntary, the Commission anticipates that there will be no mandatory costs of

compliance for those organizations and individuals that opt not to participate in any electronic filings with the Commission.

Mark Helmueller, Hearings Examiner, Oil and Gas Section, Office of General Counsel, has determined that for each year of the first five years that the repeal, the new rule, and the amendments will be in effect the public benefit will be the implementation of the Commission's ECAP and EDI systems. The new rule and amendments will further effect the public benefit by specifying requirements for plats submitted with applications for drilling permits; outlining Commission requirements for electronic filings; incorporating within a single rule current Commission filing and permit requirements; and clarifying current language to be consistent with both current and future Commission procedures for electronic filings.

Mr. Helmueller has also determined that there is a public benefit in eliminating any potential confusion by conforming the section number with the statewide rule numbers. The Commission anticipates that there will be a net reduction in administrative costs as a result of eliminating improper designations which require administrative correction. The new designation will provide a similar benefit to persons who are required to comply with the new section and amendments.

Comments may be submitted to Mark Helmueller, Hearings Examiner, Oil and Gas Section, Office of General Counsel, Railroad Commission of Texas, P. O. Box 12967, Austin, Texas 78711-2967 or via electronic mail to mark.helmueller@rrc.state.tx.us. Comments will be accepted for 30 days after publication in the *Texas Register* and should refer to the docket number of this rulemaking proceeding: 20-0223059. For further information, call Mr. Helmueller at 512- 463-6802.

16 TAC §§3.5, 3.11, 3.37, 3.38, 3.78, 3.80, 3.86

The Commission proposes amendments to §§3.5, 3.11, 3.37, 3.78, and 3.86, and new §3.80 pursuant to Texas Natural Resources Code, §§81.051 and 81.052, which provide the Commission with jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission.

The Texas Natural Resources Code, §§81.051, 81.052, 85.202(a)(1), 88.011, 91.101(4), and 92.001-92.007, are affected by the proposed new rule and amendments.

Issued in Austin, Texas, on March 6, 2001.

§3.5. Application to Drill, Deepen, Reenter, or Plug Back.

(a) Requirements [~~Permit requirements~~] for spacing, density, and units. An application for a permit to drill, deepen, plug back, or reenter any oil well, gas well, or geothermal resource well shall be made under the provisions of §§3.37, 3.38, 3.39, and/or 3.40 of this title (relating to Statewide Spacing Rule; Well Densities; Proration and Drilling Units: Contiguity of Acreage and Exception Thereto; and Assignment of Acreage to Pooled Development and Proration Units) (Statewide Rules 37, 38, 39, and 40), or as an exception thereto, or under special rules governing any particular oil, gas, or geothermal resource field or as an exception thereto and filed with the commission on a form approved by the commission. An application must be accompanied by any relevant information, form, or certification required by the Railroad Commission or a commission representative necessary to determine compliance with this rule and state law.

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

(1) Application--Request by an organization made either on the prescribed [~~appropriate~~] form or electronically pursuant to procedures for electronic filings adopted by the commission for a permit to drill, deepen, plug back, or reenter any oil well, gas well, or geothermal resource well.

(2) Commission--The Railroad Commission of Texas.

(3) Commission representative--A commission employee authorized to act for the commission. Any authority given to a commission representative is also retained by the commission. Any action taken by the commission representative is subject to review by the commission.

~~[(4) Organization--Any person, firm, partnership, joint stock association, corporation, or other organization, domestic or foreign, operating wholly or partially within this state, acting as principal or agent for another, for the purpose of performing operations within the jurisdiction of the commission.]~~

~~[(5) Outstanding final order--Either a commission order against an organization finding that the organization has committed a violation and all appeals have been exhausted or an agreed order entered into by the commission and an organization relating to an alleged violation, where:]~~

~~[(A) the conditions that constituted the violation or alleged violation have not been corrected;]~~

~~[(B) all administrative, civil, and criminal penalties, if any, relating to the violation or agreed settlement relating to an alleged violation have not been paid; or]~~

~~[(C) all reimbursements of costs and expenses, if any, assessed by the commission relating to the violation or to the alleged violation have not been collected.]~~

~~[(6) Position of ownership or control--A person holds a position of ownership or control in an organization if the person is:]~~

~~[(A) an officer or director of the organization;]~~

~~[(B) a general partner of the organization;]~~

~~[(C) the owner of an organization which is a sole proprietorship;]~~

~~[(D) the owner of more than a 25% ownership interest in the organization; or]~~

~~[(E) the designated trustee of the organization.]~~

~~[(7) Violation--Noncompliance with the Texas Natural Resources Code, Title 3, or a commission rule, order, license, permit, or certificate relating to safety or the prevention or control of pollution.]~~

~~[(c) Organization eligibility to file an application. The commission may not accept an application from an organization, if within the five years preceding the date on which the application is filed:]~~

~~[(1) the applicant organization has any outstanding final orders against it; or]~~

~~[(2) any person holding a position of ownership or control in the applicant organization also has held a position of ownership or control in any organization, including the applicant organization, registered with the commission that has an outstanding final order against it relating to a violation during that period of ownership or control.]~~

~~[(d) Compliance certification.]~~

~~[(1) The commission or a commission representative may require an applicant organization to file a compliance certification. The certification shall include a statement that within the last five years:]~~

[(A) the applicant organization has no outstanding final orders against it; and]

[(B) no person in a position of ownership or control of the applicant organization has held a position of ownership or control in any organization, including the named organization, that has an outstanding final order against it relating to a violation during that period of ownership or control.]

[(2) Failure to file a required certification will delay or prevent approval of the application. Knowingly filing a false certification may be a violation of the Texas Natural Resources Code, §91.143, and may also subject a permit to denial or revocation. A permit that is issued on the basis of a certification statement that is later determined to be incorrect is also subject to revocation.]

[(3) If the certification is signed by an agent of an applicant organization, the certification is binding on the agent and the organization as if signed by a person holding a position of ownership or control in the organization.]

(c) [(e)] Commencement of operations. Operations of drilling, deepening, plugging back, or reentering shall not be commenced until the permit has been granted by the commission and the waiting period, if any, has terminated, or authorization has been granted pursuant to subsection (d) [(f)] of this section.

(d) [(f)] Testing of existing wells in other reservoirs inside the casing. For an existing well, an operator may request authorization to commence operations to deepen inside the casing or plug back prior to the granting of a permit to deepen or plug back.

(1) This authorization shall be requested by submitting a request [filing] with the district office [a letter of intent] to deepen inside the casing or plug back. The request [letter] shall include:

(A) the operator name;

(B) the lease name;

(C) the lease number or gas identification number;

(D) well number;

(E) county;

(F) field name;

(G) a list of all reservoir(s) to be tested;

(H) the casing setting depth and the depth of the deepest reservoir to be tested;

(I) a plat showing the well location; and

(J) a statement as to whether or not the well location would require an exception to §§3.37, 3.38, 3.39, and/or 3.40 of this title (relating to Statewide Spacing Rule; Well Densities; Proration and Drilling Units: Contiguity of Acreage and Exception Thereto; and Assignment of Acreage to Pooled Development and Proration Units) (Statewide Rules 37, 38, 39, and 40) if completed in any of the reservoirs to be tested. If an exception would be required, the request [letter of intent] shall also include a statement that all affected offsets have been given written notice of the intent to test with the opportunity to witness the testing and the offsets shall be identified on the plat.

(2) Operations of deepening inside the casing or plugging back shall not be commenced until the district office has reviewed and approved the request [signed the letter of intent]. Testing pursuant to this authorization shall be completed within 90 days from the date the district office approves the request [signs the letter of intent].

(A) No reservoir tested pursuant to the provisions of this subsection shall be tested for more than 15 days.

(B) If the operator desires to place the well on production, the operator shall shut in the well, with no production being sold, and file a permit application for the tested reservoirs with the appropriate fees. If the permit application for the tested reservoirs requires an exception to §§3.37, 3.38, 3.39, and/or 3.40 of this title (relating to Statewide Spacing Rule; Well Densities; Proration and Drilling Units: Contiguity of Acreage and Exception Thereto; and Assignment of Acreage to Pooled Development and Proration Units) (Statewide Rules 37, 38, 39, and 40), no consideration will be given by the commission to the cost of recompleting and testing the well in determining whether or not to grant the exception.

(C) Within 30 days of completion of testing, the operator must either file an application for a permit to produce a reservoir tested pursuant to this subsection or file an amended completion report in accordance with §3.16 of this title (relating to Log and Completion of Plugging Report) (Statewide Rule 16) with a copy of the request [intent to test] signed by the district office and a statement that a permit to produce a tested reservoir is not being sought, or if the well has been plugged and abandoned, a plugging report including reservoir and perforation data. If a permit is not obtained for the tested reservoirs and/or an allowable is not assigned, the producer shall report all test production in the producer's monthly report filed for the last permitted reservoir in which the well was completed and may request authorization to sell the test production. The test production may be sold after such authorization is granted.

(e) [(g)] Exploratory and specialty wells. An application for any exploratory well or cathodic protection well that penetrates the base of the fresh water strata, fluid injection well, injection water source well, disposal well, brine solution mining well, or underground hydrocarbon storage well shall be made and filed with the commission on a form approved by the commission. Operations for drilling, deepening, plugging back, or reentering shall not be commenced until the permit has been granted by the commission. For an exploratory well, an exception to filing such form prior to commencing operations may be obtained if an application for a core hole test is filed with the commission.

[(h) Exception permits. If an application for a permit presents a question of an exception to the applicable density rule as well as an exception to the spacing rule, the operator seeking a spacing and density exception must obtain such an exception as required under the applicable spacing and density rules.]

(f) [(i)] Drilling permit fee. With each application or materially amended application, the applicant shall submit to the commission a nonrefundable fee as determined by §3.78 of this title (relating to Fees, Performance Bonds, and Alternate Forms of Financial Security Required To Be Filed) (Statewide Rule 78).

(g) Expiration. Any permit to drill, deepen, plug back, or reenter granted by the commission expires no later than two years after the date of original approval.

(h) Plats. An application to drill, deepen, plug back, or reenter shall be accompanied by a neat, accurate plat, with a scale of one inch equals 1,000 feet. The plat for the initial well on the lease, pooled unit, or unitized tract shall show the entire lease, pooled unit, or tract, including all tracts being pooled. If necessary to show the entire lease, the scale may be one inch equals 2,000 feet. Plats for subsequent wells on a lease or pooled unit shall show at least the lease or pooled unit line nearest the proposed location and the nearest survey/section lines. The Division Director or the director's delegate may approve plats with other scales upon request.

(1) The lease shall be outlined on the plat using either a heavy line or crosshatching.

(2) The plat is to include the following:

(A) surface location of the proposed drilling site;

(B) perpendicular lines providing the distance in feet from two nearest non-parallel survey/section lines to the surface location;

(C) perpendicular lines providing the distance in feet from two nearest non-parallel lease lines to the surface location;

(D) a line providing the distance in feet from the surface location to the nearest point on the lease line, pooled unit line, or unitized tract line. If there is an unleased interest in a tract of the pooled unit that is nearer than the pooled unit line, the nearest point on that unleased tract boundary shall be used;

(E) a line providing the distance in feet from the surface location to the nearest oil, gas, or oil and gas well identified by number either applied for, permitted, or completed in the same lease, pooled unit, or unitized tract and in the same field and reservoir;

(F) the geographic location information;

(G) a labeled scale bar; and

(H) northerly direction.

(3) Requirements for plats as provided for in §3.11, §3.37, §3.38, and §3.86 of this title may supplement or replace the plat requirements set out above.

§3.11. Inclination and Directional Surveys Required.

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

(d) Intentional deviation of wells.

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

(3) Applications for deviation.

(A) Applications for wells to be directionally deviated must specify on the application to drill [~~,~~ ~~and~~ ~~on~~ ~~the~~ ~~plat~~ ~~attached,~~] both the surface location of the well and [~~the target area within which~~] the projected bottom hole location of the well [~~is to be made~~]. On the plat, in addition to the plat requirements provided for in §3.5 of this title (relating to Application to Drill, Deepen, Reenter, or Plug Back) (Statewide Rule 5), the following shall be included:

(i) two perpendicular lines providing the distance in feet from the projected bottomhole location, rather than the surface location, to the nearest points on the lease, pooled unit, or unitized tract line. If there is an unleased interest in a tract of the pooled unit or unitized tract that is nearer than the pooled unit or unitized tract line, the nearest point on that unleased tract boundary shall be used;

(ii) a line providing the distance in feet from the projected bottomhole location to the nearest point on the lease line, pooled unit line, or unitized tract line. If there is an unleased interest in a tract of the pooled unit that is nearer than the pooled unit line, the nearest point on that unleased tract boundary shall be used;

(iii) a line providing the distance in feet from the projected bottomhole location, rather than the surface location, to the nearest oil, gas, or oil and gas well, identified by number, applied for, permitted, or completed in the same lease, pooled unit, or unitized tract and in the same field and reservoir; and

(iv) perpendicular lines providing the distance in feet from the two nearest non-parallel survey/section lines to the projected bottomhole location.

(B) If the necessity for directional deviation arises unexpectedly after drilling has begun, the operator shall give written notice by letter or telegram of such necessity to the appropriate district office and to the commission office in Austin, and upon giving such notice, the operator may proceed with the directional deviation. The commission may, at its discretion, accept written notice electronically transmitted. If the operator proceeds with the drilling of a deviated well under such circumstances, he proceeds at his own risk. Before any allowable shall be assigned to such well, a permit for the subsurface location of each completion interval shall be obtained from the commission under the provisions set out in the commission rules. However, should the operator fail to show good and sufficient cause for such deviation, no permit will be granted for the well.

(C) If the necessity for random deviation arises unexpectedly after the drilling has begun, the operator shall give written notice by letter or telegram of such necessity to the appropriate district office and to the commission office in Austin, and, upon giving such notice, the operator may proceed with the random deviation, subject to compliance with the provisions of this section on inclination surveys. The commission may, at its discretion, accept written notice electronically transmitted.

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

§3.37. Statewide Spacing Rule.

(a) Distance requirements.

(1) (No change.)

(2) When an exception to this section is desired, application shall be made by filing the proper fee as provided in §3.78 of this title (relating to Fees, Performance Bonds, and Alternate Forms of Financial Security Required To Be Filed) and the appropriate form according to the instructions on the form, accompanied by a plat as described in subsection (c) of this section. A person acquainted with the facts pertinent to the application shall certify that all facts stated in it are true and within the knowledge of that person [~~and that the accompanying plat is accurately drawn to scale and correctly reflects all pertinent and required data~~].

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

(3) (No change.)

(b) (No change.)

(c) In filing an application for an exception to the distance requirements of this section, in addition to the plat requirements in §3.5 of this title (relating to Application to Drill, Deepen, Reenter, or Plug Back) (Statewide Rule 5), the applicant shall attach to each copy of the form a plat that:

(1) shows to scale the property on which the exception is sought; all other applied for, permitted, and completed oil, gas, or oil and gas wells in the same field and reservoir on said property; and all adjoining surrounding properties and completed wells in the same field and reservoir within the prescribed minimum between-well spacing distance of the applicant's well;

(2) shows the entire lease, pooled unit, or unitized tract indicating the names and offsetting properties of all affected offset operators;

(3) corresponds to the listing required under subsection (a)(2) of this section;

(4) is certified by a person acquainted with the facts pertinent to the application that the plat is accurately drawn to scale and correctly reflects all pertinent and required data.

[(c) In filing the form, as hereinabove provided, applicant shall attach a plat to each copy of the form. The plat shall be drawn preferably to the scale of one inch equaling 1,000 feet; however scales of one inch equaling 500 feet or one inch equaling 2,000 feet will be accepted. On request and approval by the division director or the director's delegate, other scales may be accepted based on unusual circumstances. The plat must accurately show to scale the property on which the exception is sought; all other completed, drilling, or permitted wells in the same field(s) on said property; and all adjoining surrounding properties and completed wells in the same field(s) within the prescribed minimum between-well spacing distance of the applicant's well. The plat must show the entire lease or unit, indicating the names and offsetting properties of all adjacent offset operators and unleased mineral interest owners, and all operators and unleased mineral interest owners of tracts nearer to the well than the prescribed minimum lease-line distance requirement. For exceptionally large leases or units, an applicant, on request and approval by the Division Director or the director's delegate, may file one plat of the entire lease or unit with the initial application only. In subsequent applications for the same lease or unit, such applicant shall reference this plat, and file only that portion of the plat containing the drilling unit and well site that are the subject of the subsequent application.]

(d) - (m) (No change.)

§3.38. Well Densities.

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

(1) (No change.)

(2) Drilling unit--The acreage assigned to a well for drilling purposes [and outlined on the plat submitted with an application to drill].

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

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

(g) Filing [General filing] requirements.

(1) Application. An application for permit to drill shall include the fees required in §3.78 of this title (relating to Fees, Performance Bonds, and Alternate Forms of Financial Security Required To Be Filed) and shall be certified by a [some] person acquainted with the facts, stating that all information in the application is true and complete to the best of that person's knowledge [and that the accompanying plat is accurately drawn to scale and correctly reflects all pertinent and required data].

(2) Plat. When filing an application for an exception to the density requirements of this section, in addition to the plat requirements in §3.5 of this title (relating to Application to Drill, Deepen, Reenter, or Plug Back) (Statewide Rule 5), the applicant shall attach to each copy of the application a plat that:

(A) depicts the lease, pooled unit, or unitized tract, showing thereon the acreage assigned to the drilling unit for the proposed well and the acreage assigned to all current applied for, permitted, or completed oil, gas, or oil and gas wells in the same field or reservoir which are located within the lease, pooled unit, or unitized tract;

(B) on large leases, pooled units, or unitized tracts, if the established density is not exceeded as shown on the face of the application outlines the acreage assigned to the well for which the permit is sought and the immediately adjacent wells on the lease, pooled unit, or unitized tract;

(C) on leases, pooled units, or unitized tracts from which production is secured from more than one field, outlines the acreage assigned to the wells in each field that is the subject of the current application;

(D) corresponds to the listing required under subsection (g)(1)(A) of this section.

(E) is certified by a person acquainted with the facts pertinent to the application that the plat is accurately drawn to scale and correctly reflects all pertinent and required data.

[(2) Plat. The required plat must depict the lease, pooled unit, or unitized tract, showing thereon the acreage assigned to the drilling unit for the proposed well and the acreage assigned to all current applied for, permitted, or completed wells on the lease, pooled unit, or unitized tract. A permit to drill a well for oil, gas, or geothermal resource will not be granted until such plat has been attached to and made a part of such form.]

[(A) On large leases, pooled units, or unitized tracts, if the established density is not exceeded as shown on the fact of the form, a plat will suffice that depicts the acreage assigned to the well for which the permit is sought and to the immediately adjacent wells on the lease, pooled unit, or unitized tract.]

[(B) On plats of leases, pooled units, or unitized tracts from which production is secured from more than one field, the plat shall depict the acreage assigned to the wells in each field that is the subject of the current application.]

(3) Substandard acreage. An application for a permit to drill on a lease, pooled unit, or unitized tract composed of substandard acreage must include a certification in a prescribed form indicating the date the lease, or the drillsite tract of a pooled unit or unitized tract, took its present size and shape.

(4) Surplus acreage. An application for permit to drill on surplus acreage pursuant to subsection (c) of this section must include a certification in a prescribed form indicating the date the lease, pooled unit, or unitized tract took its present size and shape.

(h) - (i) (No change.)

§3.78. Fees, Performance Bonds and Alternate Forms of Financial Security Required To Be Filed.

(a) (No change.)

(b) Filing fees. The following filing fees are required to be paid to the Railroad Commission.

(1) (No change.)

(2) An application for a permit to drill, deepen, plug back, or reenter a well will be considered materially amended if the amendment is made for a purpose other than:

(A) to add omitted required information;

(B) to correct typographical errors; or

(C) to correct clerical errors.

[(2) An application will be considered materially amended if the amendment requires the issuance of a new permit. A materially amended application includes an application in which an additional field or a change in location or field is sought for a previously permitted well. However, if a new application and/or permit becomes necessary because of commission action, the fee may be waived.]

(3) - (12) (No change.)

(c) - (r) (No change.)

§3.80. Commission Forms and Filing Requirements.

(a) Forms. Forms required to be filed at the commission will be those prescribed by the commission. The commission may revise any forms, at its discretion, without having a rulemaking proceeding if the revisions do not result in any substantive changes to the forms. A complete set of all commission forms required to be filed at the commission will be kept by the commission secretary. Notice of any new or amended forms shall be issued by the commission.

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

(1) Commission--The Railroad Commission of Texas.

(2) Position of ownership or control--A person holds a position of ownership or control in an organization if the person is:

(A) an officer or director of the organization;

(B) a general partner of the organization;

(C) the owner of an organization which is a sole proprietorship;

(D) the owner of more than a 25 percent ownership interest in the organization; or

(E) the designated trustee of the organization.

(3) Violation--Non-compliance with a statute, commission rule, order, license, permit, or certificate relating to safety or the prevention or control of pollution.

(4) Electronic filing--An electronic transmission to the commission in the prescribed form and format authorized by the commission.

(5) Organization--Any person, firm, partnership, joint stock association, corporation, or other organization, domestic or foreign, operating wholly or partially within this state, acting as principal or agent for another, for the purpose of performing operations within the jurisdiction of the commission.

(c) Organization eligibility. The commission may not accept an organization report or an application for a permit, or approve a certificate of compliance if:

(1) the organization that submitted the report, application, or certificate violated a statute or commission rule, order, license, certificate, or permit that relates to safety or the prevention or control of pollution; or

(2) any person who holds a position of ownership or control in the organization has, within the five years preceding the date on which the report, application, or certificate is filed, held a position of ownership or control in another organization, and during that period of ownership or control the other organization violated a statute or commission rule, order, license, permit, or certificate that relates to safety or the prevention or control of pollution.

(d) Violations. An organization has committed a violation if there is either a commission order against an organization finding that the organization has committed a violation and all appeals have been exhausted or an agreed order entered into by the commission and an organization relating to an alleged violation, and:

(1) the conditions that constituted the violation or alleged violation have not been corrected;

(2) all administrative, civil and criminal penalties, if any, relating to the violation or agreed settlement relating to an alleged violation have not been paid; or

(3) all reimbursements of costs and expenses, if any, assessed by the commission relating to the violation or to the alleged violation have not been collected.

(e) Requirements for electronic filing under the Electronic Compliance and Approval Process (ECAP). An organization may submit to the commission an electronic filing pursuant to the Electronic Compliance and Approval Process if:

(1) the organization and the commission have executed a Master Electronic Filing Agreement;

(2) the commission has authorized the electronic filing in a prescribed form and format as identified in Supplement 1 to the Master Electronic Filing Agreement;

(3) the organization has filed a Security Administrator Designation with the commission; and

(4) the organization pays all required filing fees.

(f) Requirements for electronic filing under the Electronic Data Interchange (EDI) program. An organization may submit an electronic filing with the commission pursuant to the Electronic Data Interchange program if:

(1) the organization has executed a Master Electronic Filing Certification;

(2) the commission has authorized the electronic filing in a prescribed form and format under the Electronic Data Interchange program; and

(3) the organization and any authorized agent comply with all provisions published by the commission for electronic filings.

(g) Other electronic transmissions. The commission may at its discretion accept written notice electronically transmitted.

§3.86. Horizontal Drainhole Wells.

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

(f) Drilling applications and required reports.

(1) Application. Any intent to develop a new or existing well with horizontal drainholes must be indicated on the application to drill. An application for a permit to drill a horizontal drainhole shall include the fees required by Statewide Rule 78, §3.78 of this title (relating to Fees, Performance Bonds, and Alternate Forms of Financial Security Required To Be Filed), and shall be certified by a person acquainted with the facts, stating that all information in the application is true and complete to the best of that person's knowledge [~~and that the accompanying plat is accurately drawn to scale and correctly reflects all pertinent and required data~~].

(2) Drilling unit plat. The application to drill a horizontal drainhole shall be accompanied by a plat.

(A) In addition to the plat requirements provided for in §3.5 of this title (relating to Application to Drill, Recomplete, or Reenter) (Statewide Rule 5), the plat shall include:

(i) the lease, pooled unit, or unitized tract, showing the acreage assigned to the drilling unit for the proposed well and the acreage assigned to the drilling units for all current applied for, permitted, or completed oil, gas, or oil and gas wells on the lease, pooled unit, or unitized tract;

(ii) the surface location of the proposed horizontal drainhole well, and the proposed path, penetration points, and terminus locations of all drainholes;

(iii) two perpendicular lines from the nearest point on the lease line, pooled unit line, or any unleased interest in a tract of the pooled unit, depicting the distance(s) to:

(I) the penetration point(s); and

(II) the terminus location(s);

(iv) perpendicular lines providing the distance in feet from the two nearest non-parallel survey lines to the terminus location(s);

(v) a line providing the distance in feet from the closest point along the horizontal course(s) of the drainhole(s) to the nearest point on the lease line, pooled unit line, or unitized tract line. If there is an unleased interest in a tract of the pooled unit that is nearer than the pooled unit line, the nearest point on that unleased tract boundary shall be used; and

(vi) lines from the nearest oil, gas, or oil and gas well, applied for, permitted or completed in the same lease or pooled unit and in the same field and reservoir depicting the distance to:

(I) the penetration point(s);

(II) the closest point along the horizontal course(s) of the drainhole(s); and

(III) the terminus location(s).

(B) An amended drilling permit application and plat shall be filed after completion of the horizontal drainhole well if the commission determines that the drainhole as drilled is not reasonable with respect to the drainhole represented on the plat filed with the drilling permit application.

~~[(2) Drilling Unit Plat. The required plat must depict the lease, pooled unit or unitized tract, showing the acreage assigned to the drilling unit for the proposed well and the acreage assigned to the drilling units for all current applied for, permitted or completed wells on the lease, pooled unit or unitized tract, the surface location of the proposed horizontal drainhole well, and the proposed path, penetration point, and terminus of all drainholes. An amended drilling application permit and plat shall be filed after completion of the horizontal drainhole well if the commission determines that the drainhole as drilled is not reasonable with respect to the drainhole represented on the plat filed with the drilling permit application.]~~

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

(g) (No change.)

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

Filed with the Office of the Secretary of State, on March 6, 2001.

TRD-200101329
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 475-1295

♦ ♦ ♦

16 TAC §3.70

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

The Commission proposes the repeal of §3.70 pursuant to Texas Natural Resources Code, §§81.051 and 81.052, which provide the Commission with jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission.

The Texas Natural Resources Code, §§81.051, 81.052, 85.202(a)(1), 88.011, 91.101(4), and 92.001-92.007, are affected by the proposed repeal.

Issued in Austin, Texas, on March 6, 2001.

§3.70. Commission Forms Required to be 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 March 6, 2001.

TRD-200101328
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 475-1295

♦ ♦ ♦

CHAPTER 9. LIQUEFIED PETROLEUM GAS DIVISION

SUBCHAPTER A. GENERAL REQUIREMENTS

16 TAC §§9.2, 9.3, 9.8, 9.10, 9.51 - 9.54

The Railroad Commission of Texas proposes amendments to §§9.2, 9.3, 9.8, 9.10, 9.51, 9.52, 9.53, and new §9.54, relating to Definitions; LP-Gas Report Forms; Application for a New Certificate; Rules Examination; General Requirements for Training and Continuing Education; Training and Continuing Education Courses; Continuing Education Credit for Previous Courses; and Commission-Approved Outside Instructors. The main purpose of the rulemaking is to propose new §9.54 which establishes requirements for individuals who wish to be approved as outside instructors to offer training or continuing education courses approved by the Commission for Commission training or continuing education credit. The Commission has determined that applicants for outside instructors must hold a current Category E certification because this certification authorizes the widest number of LP-gas activities and the Commission believes that outside instructors should be knowledgeable and experienced in LP-gas activities. The outside instructor application includes a $300 registration fee which covers the applicable subject- matter course examinations, the train-the-trainer course, and administrative review of curriculum, credentials, and any other investigation or review that may be necessary.

The proposed new rule was published in the September 29, 2000, issue of the *Texas Register* as part of the Commission's proposed repeals and new sections for 16 TAC Chapter 9. That rulemaking, which was adopted effective February 1, 2001, added requirements for certain applicants for LP-gas

certificates and certain current LP-gas certificate holders to attend training or continuing education, respectively, in order to obtain or maintain those certificates. Proposed new §9.54 was withdrawn from the adoption because changes the Commission wanted to make to the rule were outside the scope of the notice in that rulemaking.

During the original public comment period, the Texas Propane Gas Association (TPGA) suggested that outside instructor applicants also be required to attend the Commission's individual subject matter courses (in addition to the "Train-the-Trainer" course) and to pass the subject-matter examinations with a score of at least 85 percent rather than 75 percent. The Commission agreed with this suggestion and proposes this new version.

TPGA also suggested that outside instructors be required to attend a Commission-taught renewal course whenever a new edition of NFPA 54 or NFPA 58 is adopted by the Commission. The Commission agreed this would be preferable, but due to staff and budget constraints, the Commission cannot offer renewal courses for outside instructors at this time. Currently, the Commission has four instructors to provide the training and continuing education for the approximately 10,000 certified individuals currently in the LP-gas industry in Texas. The Commission has attempted to clarify, in this version of §9.54, the duties of outside instructors to remain knowledgeable about the Commission's requirements.

TPGA had also commented that the $300 application fee for outside instructors be changed to $100. The Commission disagreed with that comment and has retained the $300 fee in this version of the rule. This application fee includes curriculum and qualification review by three Commission employees, plus the Train-the-Trainer course, plus the subject matter examinations for the subject the outside instructor applicant wishes to teach. Therefore, the Commission has determined that this is a reasonable fee at this time.

The Commission also proposes amendments to §§9.2, 9.3, 9.8, 9.10, 9.51, 9.52, and 9.53 to clarify some issues with regard to training and continuing education. In §§9.2, 9.3, and 9.51(g), the title of the Pipeline and LP-Gas Safety Section is being changed to the LP-Gas Safety Section due to a recent reorganization in the Gas Services Division. The amendments to §9.8 add new subsection (b) to address requirements for an employee who wants to pursue a management-level certificate. The examination fee language in §9.10(a)(3)(D) is being corrected to clarify that the examination fee is not included in the Category E or I course fee as stated in §9.51(f)(2)(A). In §9.52, language is being added to subsection (a) to clearly specify that certain new employees must attend at least eight hours of training. The table in §9.52(g) is being revised to clarify the dates of previous and new Commission courses, to clarify the class hours for the Train-the-Trainer course, and to add a new CETP course for large industrial/commercial installations. Reference to the new CETP course is also being added to §9.53(3).

Thomas D. Petru, Director of Training, Alternative Fuels Research and Education Division, has determined that, for each year of the first five years that the sections are proposed to be in effect, there will be no fiscal implications for state or local governments.

Mr. Petru has also determined that, for each year of the first five years the sections are proposed to be in effect, the public benefit anticipated as a result of enforcing the sections as proposed will be more options for individuals in the LP-gas industry to obtain required training and continuing education. The ultimate public benefit is enhanced safety in LP-gas activities.

There is an anticipated economic cost to individuals, small businesses, or micro-businesses required to comply with proposed new §9.54 should they wish to become an outside instructor. This cost includes the $300 registration fee to be paid to the Commission and a $150 renewal fee due once every three years. If an outside instructor revises any previously approved curricula, the outside instructor must pay a $100 review fee as outlined in §9.54(i).

Comments on the proposal may be submitted to Kellie Martinec, Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967. Comments will be accepted for 30 days after publication in the *Texas Register* and should refer to LP-Gas Docket No. 1661. For more information, call Thomas D. Petru at (512) 463-6930.

The new section and amendments are proposed under the Texas Natural Resources Code, §113.051, which authorizes the Commission to adopt rules relating to any and all aspects or phases of the LP-gas industry that will protect or tend to protect the health, welfare, and safety of the general public, and §113.052, which authorizes the Commission to adopt by reference the published codes of nationally recognized societies, including the National Fire Protection Association.

The Texas Natural Resources Code, §§113.051 and 113.052, are affected by the proposed new section and amendments.

Issued in Austin, Texas on March 6, 2001.

§9.2. Definitions.

In addition to the definitions in any adopted NFPA pamphlets, the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

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

(4) Assistant director--The assistant director of the [~~Pipeline and~~] LP-Gas Safety Section who is the Commission's delegate responsible for the enforcement of the LP-Gas Safety Rules and the Texas Natural Resources Code.

(5) - (46) (No change.)

§9.3. LP-Gas Report Forms.

Under the provision of the Texas Natural Resources Code, Chapter 113, the Railroad Commission of Texas has adopted the following forms for use by the [~~Pipeline and~~] LP-Gas Safety Section of the Gas Services Division.

(1) - (37) (No change.)

§9.8. Application for a New Certificate.

(a) An applicant for a new certificate shall:

(1) file with the Commission a properly completed LPG Form 16 and the applicable rules examination fee specified in §9.10 of this title (relating to Rules Examination);

(2) pass the applicable rules examination with a score of at least 75%; and

(3) complete any required training and AFT in §9.51 and §9.52 of this title (relating to General Requirements for Training and Continuing Education; and Training and Continuing Education Courses).

(b) An individual who holds an employee-level certificate who wishes to obtain a management-level certificate shall comply with the requirements of this section, including training and fees.

§9.10. Rules Examination.

(a) An individual who has filed LPG Form 16 and the applicable nonrefundable examination fee may take the rules examination at the Commission's Austin office between the hours of 8:00 a.m. and 2:00 p.m., Monday through Friday, except for state holidays, and at other designated times and locations around the state.

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

(3) Exam fees.

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

(D) Individuals who register and pay for a Category E or I training course as specified in §9.51(e)(2)(A) of this title (relating to General Requirements for Training and Continuing Education) shall pay the charge specified for the applicable examination [~~not be charged a separate rules examination fee unless they wish to retake a rule examination~~].

(b) - (c) (No change.)

§9.51. General Requirements for Training and Continuing Education.

(a) - (f) (No change.)

(g) Retention of records. Individual employees shall be responsible for promptly notifying the AFRED training section of any discrepancies or errors in the training or continuing education records, and shall notify the [~~Pipeline and~~] LP-Gas Safety Section for discrepancies or errors in examination records. In the event of a discrepancy, the Commission's records shall be deemed correct unless the individual has copies of applicable documents which clarify the discrepancy.

§9.52. Training and Continuing Education Courses

(a) Training. Applicants for a new license or certificate listed in this subsection, other than Category E or I management- level individuals and except as stated in paragraph (4) of this subsection, shall attend at least eight hours of training prior to their first certificate renewal deadline of May 31 the following year. Applicants for Category E or I management-level shall attend the course or courses specified for the category [~~comply with the applicable training requirements as shown in Table 1 of this section~~].

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

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

(g) Training and continuing education courses and other information are shown in Table 1 of this subsection. Items on the table marked with an "x" indicate courses that meet training or continuing education requirements for management-level or employee-level certificate holders in that category.
Figure: 16 TAC §9.52(g)

§9.53. Continuing Education Credit for Previous Courses.

An individual who is a current and valid certificate holder as of March 1, 2001, may receive credit toward the first continuing education requirement randomly assigned by the Commission as described in §9.52(b) of this title (relating to Training and Continuing Education Courses) if the individual completed one or more of the following:

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

(3) CETP courses. An individual who has attended a CETP course on or after September 1, 1997, shall receive credit as shown in the table in §9.52(g) if the course applies directly to the LP-gas activities authorized by the individual's certificate. Individuals wishing to receive credit for a CETP course shall submit to the AFRED training section, in writing, the individual's name, address, phone number, valid Social Security number, CETP course date, and a copy of the CETP certificate for an equivalent CETP course as follows:

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

(F) Appliance Installation; [~~or~~]

(G) Appliance Service; or [~~.~~]

(H) Large Industrial/Commercial.

§9.54. Commission-Approved Outside Instructors.

(a) General.

(1) The Commission may approve and award continuing education credit or new employees' training credit for courses offered by an outside instructor provided the outside instructor complies with the requirements of this section.

(2) LP-gas companies may offer courses to their own personnel and to other companies' personnel provided that the LP-gas company and the outside instructor comply with the requirements of this section.

(3) All curriculum and course materials submitted for Commission review by an outside instructor applicant shall be printed or typewritten, organized, and easily readable, and shall remain confidential within the limits of Tex. Gov't Code, Chapter 552 (Public Information Act).

(4) Copies of the Commission's curricula and materials are available from the Commission at a reasonable cost.

(b) Application process. Outside instructor applicants shall submit the following to the Commission:

(1) a non-refundable $300 registration fee for each outside instructor;

(2) a copy of the applicant's Category E current certification card;

(3) for each course the outside instructor applicant intends to teach:

(A) the curriculum for and a description of the course;

(B) the course materials and related supporting information or a statement that the instructor will use the Commission's course materials;

(C) a statement specifying whether the outside instructor seeks approval to certify any AFT described in §9.52 of this title (relating to training and continuing education courses);

(4) proof that the outside instructor applicant has experience, during at least three of the four years prior to the date of filing the application, in both:

(A) conducting LP-gas training or continuing education courses and

(B) performing or supervising LP-gas activities; and

(5) any other information required by this section.

(c) Curriculum standards. The curriculum for each course that an outside instructor applicant intends to teach shall include, where applicable, information that is at least the equivalent of the Commission's course or courses on the same topic or topics, and shall include all applicable current LP-gas regulations for Texas. Courses not offered by

the Commission may be approved if the courses are equal or greater in overall quality to other approved courses.

(d) Commission review. The Commission shall review the application for approval as an outside instructor and, within 14 business days of the filing of the application, shall notify the applicant in writing that the application is approved, denied, or incomplete. If an application is incomplete, the Commission's notice of deficiency shall identify the necessary additional information, including any deficiencies in course materials. The outside instructor applicant shall file the necessary additional information within 30 calendar days of the date of the Commission's notice of deficiency. The outside instructor applicant's failure to file the necessary additional information within the prescribed time period may result in the dismissal of the outside instructor's application and the necessity of the outside instructor applicant again paying the non-refundable $300 registration fee for each subsequent filing of an application.

(e) Additional requirements for approval. Outside instructor applicants whose applications are approved in writing by the Commission shall attend the Commission's Train-the-Trainer Course, the fee for which is included in the $300 registration fee. The Train-the-Trainer Course shall include classroom instruction and the subject-matter examinations for each course for which the applicant seeks approval to conduct. An outside instructor applicant shall pass the subject-matter examination for each course with a score of at least 85 percent and shall attend the subject-matter courses for which the applicant seeks approval to conduct.

(f) Notification of approval. Within 10 business days of the outside instructor applicant's completion of the requirements of this section, the Commission shall notify the applicant in writing that the applicant is approved as an outside instructor and the outside instructor may then begin offering the courses for which the Commission approved the outside instructor.

(g) Term of approval. Commission approval of an outside instructor remains valid for three years unless the Commission revokes the approval pursuant to subsection (l) of this section.

(h) Renewal of approval. To continue offering Commission-approved LP-gas courses, an outside instructor shall renew his or her Commission approval every three years by paying a $150 renewal fee to the Commission. An outside instructor who is renewing his or her approval shall not be required to attend the Train-the-Trainer Course again, provided that the outside instructor has conducted at least one Commission-approved LP-gas course within the 12 months immediately prior to the month in which a renewal would become effective.

(i) Revision of course materials. An outside instructor who substantively revises any course materials previously approved by the Commission shall submit the revisions in writing, along with a $100 review fee to the Commission, and shall not use the materials in a course until the outside instructor has received written Commission approval. The Commission shall review the revised course materials and, within 14 business days, shall notify the outside instructor in writing that the revised course materials are approved or not approved. If the revised course materials are not approved, the Commission's notice shall identify the portion or portions that are not approved and/or shall describe any deficiencies in the revised course materials. The outside instructor shall file any necessary additional information within 30 calendar days of the date of the Commission's notice of disapproval. The outside instructor's failure to file the necessary additional information within the prescribed time period may result in the dismissal of the outside instructor's request for approval of revised course materials and the necessity of again paying the $100 review fee for each subsequent filing of revised course materials.

(j) Continuing requirements. Outside instructors shall:

(1) maintain their Category E certificate in continuous good standing. Any interruption of the required Category E certification may result in the Commission revoking the outside instructor's approval;

(2) adhere to professional standards of conduct in course presentations; and

(3) report to the Commission within three business days of the conclusion of a course the names, social security numbers, and any other information required by the Commission, of the persons completing the course. The report shall be made by electronic mail (e-mail) in an electronic format provided by the Commission. The outside instructor shall ensure that the Commission receives the report by securing written acknowledgment of its receipt by the Commission. This acknowledgement may be by return electronic mail (e-mail).

(k) Disclaimer. Outside instructors are responsible for every aspect of the courses they teach, including the location, schedule, date, time, duration, price, content, material, demeanor and conduct of the outside instructor, and reporting of attendance information. The Commission shall not monitor or supervise the actual course presentations by outside instructors. The Commission is not obligated to gather, maintain, or distribute information about outside instructors' course offerings, other than the names, telephone numbers, and addresses of approved outside instructors and the date on which an outside instructor's approval would expire, absent renewal. The Commission may refuse to issue or renew a certificate for an individual who presents for Commission credit an unapproved course; a course taught by an unapproved outside instructor; or a course taught using unapproved, incomplete, or incorrect materials.

(l) Complaints.

(1) Complaints regarding outside instructors shall be made to the Commission in writing by electronic mail (e-mail), facsimile transmission (fax), or U. S. Postal Service; shall include the printed name, address, telephone number, and, if filed by fax or U.S. Postal Service, the signature of the person complaining; shall state the outside instructor's name, the date, location, and title of the course; and shall set forth the facts that the complainant alleges demonstrate that the outside instructor:

(A) failed to meet or maintain Commission requirements for outside instructor approval;

(B) failed to deliver a course as approved, including failure to follow the approved curriculum, to use the approved course materials, or to deliver the requisite numbers of hours of instruction; or

(C) engaged in other conduct, including the use of language, that created an atmosphere not conducive to learning. Such conduct includes but is not limited to demeaning, derogating, or stereotyping women or men, disabled persons, members of any political, religious, racial, or ethnic group, or a particular individual, organization, or product.

(2) Upon receipt of a complaint and at its discretion, the Commission may gather any additional information necessary or appropriate to making a full and complete analysis of the complaint. The Commission shall deliver a written copy of the analysis and any findings by certified mail to the outside instructor who is the subject of the complaint. The outside instructor may file a written response within 20 calendar days from the date the findings are postmarked.

(3) If the Commission determines that an outside instructor has engaged in conduct prohibited by this section, the Commission may prepare a report that states the facts on which the determination is

based and the recommendation as to the action the Commission intends to take. The Commission may issue a written warning to the outside instructor; decline to approve or renew the outside instructor's approval; or revoke the outside instructor's approval.

(4) The Commission shall mail a copy of the report and recommendation to the outside instructor by certified mail and shall include a statement that the outside instructor has a right to a hearing on the determination contained in the report.

(5) Within 20 calendar days after the date the notice is postmarked, the outside instructor shall file a written response either accepting the determination and recommended action or requesting a hearing on the determination.

(6) If the outside instructor accepts the determination, he or she shall notify the Commission in writing of the acceptance, and the Commission shall take the action indicated in the report.

(7) If an outside instructor requests a hearing or fails to respond timely to the notice given under paragraph (5) of this subsection, the director shall refer the matter to the Office of General Counsel for the setting of a hearing. The Office of General Counsel shall assign an examiner to conduct a hearing, which shall be conducted under the Commission's General Rules of Practice and Procedure, Chapter 1 of this title (relating to Practice and Procedure).

(8) Following hearing, the Commission may enter an order finding that the outside instructor has violated Commission rules or that no violation has occurred; and may make any other finding based on the evidence in the record.

(9) If the outside instructor does not comply with the order of the Commission, and if the enforcement of the Commission's order is not stayed, then the Office of General Counsel may refer the matter to the attorney general for enforcement of the Commission's order.

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

Filed with the Office of the Secretary of State, on March 6, 2001.

TRD-200101347
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 475-1295

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CHAPTER 12. COAL MINING REGULATIONS

The Railroad Commission of Texas proposes amendments to 16 TAC §§12.80, relating to Procedures: Initial Processing, Record Keeping, and Notification Requirements; 12.385, relating to Backfilling and Grading: General Grading Requirements; 12.552, relating to Backfilling and Grading: General Grading Requirements; and 12.651, relating to Coal Processing Plants: Performance Standards. The commission proposes the amendments to maintain consistency with federal regulations and to streamline the effectiveness of commission rules.

The commission proposes to amend §12.80(a)(1) to reduce the number of days, from 60 to 30 days from the date of receipt of petition, within which the commission must notify a petitioner of petition completeness. This amendment is proposed to parallel federal regulation 30 CFR §764.15(a)(1), relating to initial processing, record-keeping, and notification requirements.

The commission proposes to amend §12.80(a) to remove paragraph (3), which states that the commission may reject frivolous petitions for designation or petitions for termination of designations, that no party bears the burden of proof, and that each petition shall be considered and acted upon by the commission. The commission proposes to remove this paragraph to streamline the effectiveness of commission rules and to parallel the federal regulation 30 CFR §764.15(a)(1), relating to initial processing, record-keeping, and notification requirements.

The commission proposes to amend §12.80(a)(4) to add that a petition can be determined to be frivolous if available information shows that either no mineable coal resources exist in the petitioned area or the petitioned area is not or could not be subject to related surface coal mining operations and surface impacts incident to an underground coal mine or an adjoining surface mine. This language is proposed to parallel federal regulations dealing with designation of federal lands as unsuitable for coal mining, 30 CFR §769.140(a)(3)(ii), relating to initial processing, record-keeping, and notification requirements.

The commission proposes nonsubstantive amendments to §§12.80(a)(4) through (a)(7) by redesignating them as §§12.80(a)(3) through (a)(6).

The commission proposes to remove §12.80(b)(2) that states the commission may provide for a hearing or period of written comments on completeness of the petition. This proposal is to streamline the effectiveness of commission rules and to parallel the federal regulation 30 CFR §764.15(a)(1), relating to initial processing, record-keeping, and notification requirements.

The commission proposes a nonsubstantive amendment to §12.80(b)(3) by redesignating it as (b)(2).

The commission proposes to amend §12.385(a) by deleting the provisions that pertain to performance standards for backfilling and grading of previously mined land. This amendment is required by the Office of Surface Mining Reclamation and Enforcement, United States Department of Interior (OSM).

The commission proposes to add new §12.385(e) to include provisions for backfilling and grading of previously mined areas that are substantially identical to the corresponding federal regulation 30 CFR §816.106, relating to backfilling and grading: previously mined areas. This addition is required by OSM.

The commission proposes to amend §12.552(a) by deleting the provisions that pertain to performance standards for backfilling and grading on previously mined land. This amendment is required by OSM.

The commission proposes to add new §12.552(e) to include provisions for backfilling and grading of previously mined areas that are substantially identical to the corresponding federal regulation 30 CFR §817.106, relating to backfilling and grading: previously mined areas. This addition is required by OSM.

The commission proposes to amend §12.651(13) to add reference citations to §§12.224 through 12.338, relating to proper topsoil handling. This amendment is required by OSM.

Melvin Hodgkiss, Director, Surface Mining and Reclamation Division, has determined that, during each year of the first five years the proposed amendments are in effect, there will likely be no fiscal impacts to state government associated with the proposed amendments to regulations concerning the remining of

previously mined lands or proposed amendments to procedures for processing of petitions for designation of lands as unsuitable for mining. The proposed amendments to the latter should have the effect of streamlining the decision process, allowing the commission to issue decisions on petitions in a shorter time period. Mr. Hodgkiss has also determined that, during each year of the first five years the proposed amendments are in effect, there will be no discernable fiscal impacts to local governments as a result of their adoption.

Mr. Hodgkiss has also determined that the public benefit from adoption of the proposed amendments will be increased accuracy in the rules due to addition or correction of internal cites, clarity of descriptions and continued compliance with OSM requirements.

Mr. Hodgkiss has determined that for each year of the first five years the amendments are in effect there will be no increased costs of compliance with the amended rules. These rule amendments are largely housekeeping measures that are anticipated to have virtually no practical effect in Texas, but which will keep the Texas program in compliance with OSM requirements.

The commission has not requested a local employment impact statement pursuant to Texas Government Code, §2001.022(b).

Comments on these proposed amendments should be submitted to Melvin Hodgkiss, Director, Surface Mining and Reclamation Division, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967 or via electronic mail at melvin.hodgkiss@rrc.state.tx.us. Comments will be accepted until 5:00 p.m. on the 30th day after publication in the *Texas Register*. For further information, please call Mr. Hodgkiss at (512) 463-6901.

SUBCHAPTER F. LANDS UNSUITABLE FOR MINING

DIVISION 4. PROCESS FOR DESIGNATING AREAS AS UNSUITABLE FOR SURFACE COAL MINING OPERATIONS

16 TAC §12.80

The commission proposes the amendments under Texas Natural Resources Code §134.013, 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 proposed amendments.

Issued in Austin, Texas, on March 6, 2001.

§12.80. Procedures: Initial Processing, Record Keeping, and Notification Requirements.

(a) Initial processing procedures.

(1) Within 30 [~~60~~] days of receipt of a petition, the Commission shall notify the petitioner by certified mail whether or not the petition is complete under §§12.79(b) or (c) of this title (relating to Procedures: Petitions). Complete, for a designation or termination petition, means that the information required under §§12.79(b) or (c) of this title (relating to Procedures: Petitions) has been provided.

(2) The Commission shall determine whether any identified coal resources exist in the area covered by the petition, without requiring any showing from the petitioner. If the Commission finds there are not any identified coal resources in that area, it shall return the petition to the petitioner with a statement of the findings.

~~[(3) The Commission may reject petitions for designations or terminations of designations which are frivolous. Once the petition requirements for completeness are met, no party shall bear any burden of proof, but each accepted petition shall be considered and acted upon by the Commission pursuant to the procedures of this subchapter (relating to Lands Unsuitable for Mining).]~~

(3) [~~(4)~~] If the Commission determines that the petition is incomplete, frivolous, or that the petitioner does not meet the requirement of §12.79(a) of this title (relating to Procedures: Petitions), it shall return the petition to the petitioner with a written statement of the reasons for the determination and the categories of information needed to make the petition complete. A frivolous petition is one in which the allegations of harm lack serious merit or available information shows that either no mineable coal resources exist in the petitioned area or the petitioned area is not or could not be subject to related surface coal mining operations and surface impacts incident to an underground coal mine or an adjoining surface mine.

(4) [~~(5)~~] When considering a petition for an area which was previously and unsuccessfully proposed for designation, the Commission shall determine if the new petition presents significant new allegations of facts with evidence which tends to establish the allegations. If the petition does not contain such materials, the Commission may choose not to consider the petition and may return the petition to the petitioner, with a statement of its findings and a reference to the record of the previous designation proceedings where the facts were considered.

(5) [~~(6)~~] The Commission shall notify the person who submits a petition of any application for a permit received which includes any area covered by the petition.

(6) [~~(7)~~] The Commission may determine not to process any petition received in so far as it pertains to lands for which an administratively complete permit application has been filed and the first newspaper notice has been published. Based on such a determination, the Commission may issue a decision on a complete and accurate permit application and shall inform the petitioner why the Commission cannot consider the part of the petition pertaining to the proposed permit area.

(b) Public notice and hearing procedures.

(1) Promptly after a petition is received, the Commission shall notify the general public of the receipt of the petition by a newspaper advertisement placed in the locale of the area covered by the petition. The notice shall be published in the county newspaper of the largest circulation in the county, for each county of the petitioned area and in the *Texas Register*. The Commission shall make copies of the petition available to the public and shall provide copies of the petition to other interested governmental agencies, intervenors, persons with an ownership interest of record in the property, and other persons known to the Commission to have an interest in the property. Proper notice to persons with an ownership interest of record in the property shall comply with the requirements of applicable State law.

~~[(2) The Commission may provide for a hearing or a period of written comments on completeness of petitions. If a hearing or comment period on completeness is provided, the Commission shall inform interested governmental agencies, intervenors, persons with an ownership interest of record in the property, and other persons known to the Commission to have an interest in the property of the opportunity to request to participate in such a hearing or provide written comments. Proper notice to persons with an ownership interest of record in the~~

~~property shall be accomplished by placing a postage paid notice, addressed as shown in the public record, in the U.S. Mail. Notice of such a hearing shall be made by a newspaper advertisement placed in the locale of the area covered by the petition. The notice shall be published in the county newspaper of the largest circulation in the county, for each county of the petitioned area and in the *Texas Register*. The Commission shall notify the petitioner of such a hearing by certified mail. On the basis of the Commission's review, as well as consideration of all comments, the Commission shall determine whether the petition is complete.]~~

(2) [~~(3)~~] Promptly after the determination that a petition is complete, the Commission shall request submissions from the general public of relevant information by a newspaper advertisement placed once a week for two consecutive weeks in the locale of the area covered by the petition, in the county newspaper of the largest circulation in the county, for each county of the petitioned area, and in the *Texas Register*.

(c) - (d) No change.

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

Filed with the Office of the Secretary of State, on March 6, 2001.

TRD-200101356
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
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For further information, please call: (512) 475-1295

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SUBCHAPTER K. PERMANENT PROGRAM PERFORMANCE STANDARDS

DIVISION 2. PERMANENT PROGRAM PERFORMANCE STANDARDS - SURFACE MINING ACTIVITIES

16 TAC §12.385

The commission proposes the amendments under Texas Natural Resources Code §134.013, 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 proposed amendments.

Issued in Austin, Texas, on March 6, 2001.

§12.385. Backfilling and Grading: General Grading Requirements.

(a) The final graded slopes shall not exceed in grade either the approximate premining slopes, or any lesser slopes approved by the Commission based on consideration of soil, climate, or other characteristics of the surrounding area. Postmining final graded slopes need not be uniform but shall approximate the general nature of the premining topography. [~~The requirements of this section may be modified by the Commission where the surface mining activities are reaffecting previously mined lands that have not been restored to the standards of §§12.330-12.384, this section, and §§12.386-12.403 of this title (relating to Permanent Program Performance Standards -- Surface Mining Activities) and sufficient spoil is not available to otherwise comply with this section.~~] The person who conducts surface mining activities shall, at a minimum:

(1) - (2) No change.

(b) - (d) No change.

(e) Backfilling and grading of previously mined areas shall be subject to the following requirements:

(1) remining operations on previously mined areas that contain a preexisting highwall shall comply with the requirements of §12.384 of this title (relating to Backfilling and Grading: General Requirements), this section, and §§12.386-12.388 of this title (relating to Backfilling and Grading: Covering Coal and Acid- and Toxic-Forming Materials, to Backfilling and Grading: Thin Overburden, and to Backfilling and Grading: Thick Overburden), except as provided in this subsection; and

(2) the requirements of §12.384(b)(1) requiring the elimination of highwalls shall not apply to remining operations where the volume of all reasonably available spoil is demonstrated in writing to the Commission to be insufficient to completely backfill the reaffected or enlarged highwall. The highwall shall be eliminated to the maximum extent technically practical in accordance with the following criteria:

(A) all spoil generated by the remining operation and any other reasonably available spoil shall be used to backfill the area. Reasonably available spoil in the immediate vicinity of the remining operation shall be included within the permit area;

(B) the backfill shall be graded to a slope which is compatible with the approved postmining land use and which provides adequate drainage and long-term stability;

(C) any highwall remnant shall be stable and not pose a hazard to the public health and safety or to the environment. The operator shall demonstrate, to the satisfaction of the Commission, that the highwall remnant is stable; and

(D) spoil placed on the outslope during previous mining operations shall not be disturbed if such disturbances will cause instability of the remaining spoil or otherwise increase the hazard to the public health and safety or to the environment.

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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Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
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For further information, please call: (512) 475-1295

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DIVISION 3. PERMANENT PROGRAM PERFORMANCE STANDARDS - UNDERGROUND MINING ACTIVITIES

16 TAC §12.552

The commission proposes the amendments under Texas Natural Resources Code §134.013, 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 proposed amendments.

Issued in Austin, Texas, on March 6, 2001.

§12.552. Backfilling and Grading: General Grading Requirements.

(a) The final graded slopes shall not exceed in grade either the approximate premining slopes, or any lesser slopes approved by the Commission based on consideration of soil, climate, or other characteristics of the surrounding area. Postmining final graded slopes need not be uniform but shall approximate the general nature of the premining topography. [~~The requirements of this section may be modified by the Commission where the underground mining activities are reaffecting previously mined lands that have not been restored to the standards of §§12.500-12.551, this section, and §§12.553-12.572 of this title (relating to Permanent Program Performance Standards -- Underground Mining Activities) and sufficient spoil is not available to otherwise comply with this section.~~] The person who conducts underground mining activities shall, at a minimum:

(1) - (2) No change.

(b) - (d) No change.

(e) Backfilling and grading of previously mined areas shall be subject to the following requirements:

(1) remining operations on previously mined areas that contain a preexisting highwall shall comply with the requirements of §12.551 of this title (relating to Backfilling and Grading: General Requirements), this section, and §12.553 of this title (relating to Backfilling and Grading: Covering Coal and Acid- and Toxic-Forming Materials), except as provided in this subsection; and

(2) the requirements of §12.551(b)(1) requiring the elimination of highwalls shall not apply to remining operations where the volume of all reasonably available spoil is demonstrated in writing to the Commission to be insufficient to completely backfill the reaffected or enlarged highwall. The highwall shall be eliminated to the maximum extent technically practical in accordance with the following criteria:

(A) all spoil generated by the remining operation and any other reasonably available spoil shall be used to backfill the area. Reasonably available spoil in the immediate vicinity of the remining operation shall be included within the permit area;

(B) the backfill shall be graded to a slope which is compatible with the approved postmining land use and which provides adequate drainage and long-term stability;

(C) any highwall remnant shall be stable and not pose a hazard to the public health and safety or to the environment. The operator shall demonstrate, to the satisfaction of the Commission, that the highwall remnant is stable; and

(D) spoil placed on the outslope during previous mining operations shall not be disturbed if such disturbances will cause instability of the remaining spoil or otherwise increase the hazard to the public health and safety or to the environment.

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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Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
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For further information, please call: (512) 475-1295

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DIVISION 7. SPECIAL PERMANENT PROGRAM PERFORMANCE STANDARDS-- COAL PROCESSING PLANTS AND SUPPORT FACILITIES NOT LOCATED AT OR NEAR THE MINESITE OR NOT WITHIN THE PERMIT AREA FOR A MINE

16 TAC §12.651

The commission proposes the amendments under Texas Natural Resources Code §134.013, 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 proposed amendments.

Issued in Austin, Texas, on March 6, 2001.

§12.651. Coal Processing Plants: Performance Standards.

Construction, operation, maintenance, modification, reclamation, and removal activities at operations covered by §12.650 of this title (relating to Applicability) and this section shall comply with the following:

(1) - (12) No change.

(13) reclamation shall include proper topsoil-handling procedures, revegetation, and abandonment, in accordance with §§12.334-12.338 of this title (relating to Topsoil: General Requirements, to Topsoil: Removal, to Topsoil: Storage, to Topsoil: Distribution and to Topsoil: Nutrients and Soil Amendments), §12.354 of this title (relating to Hydrologic Balance: Postmining Rehabilitation of Sedimentation Ponds), §§12.383-12.389 of this title (relating to Contemporaneous Reclamation, to Backfilling and Grading: General Requirements, to Backfilling and Grading: General Grading Requirements, to Backfilling and Grading: Covering Coal and Acid- and Toxic- Forming Materials, to Backfilling and Grading: Thin Overburden, to Backfilling and Grading: Thick Overburden, and to Stabilization of Surface Areas for Surface Mining), §§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) and §§12.397-12.399 of this title (relating to Cessation of Operations: Temporary, to Cessation of Operations: Permanent, and to Postmining Land Use);

(14) - (15) 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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TRD-200101359
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
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For further information, please call: (512) 475-1295

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PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER I. TRANSMISSION AND DISTRIBUTION

DIVISION 2. TRANSMISSION AND DISTRIBUTION APPLICABLE TO ALL ELECTRIC UTILITIES

16 TAC §25.214

The Public Utility Commission of Texas (commission) proposes an amendment to §25.214 relating to Terms and Conditions of Retail Distribution Service Provided by Investor Owned Transmission and Distribution Utilities. The proposed amendment modifies the effective date of the tariff in subsection (d) and is otherwise limited to changes to the pro-forma tariff (Tariff for Retail Delivery Service). Specifically, amendments to section 4.11.1 and section II of Appendix A, Agreement between Company and Competitive Retailer Regarding Terms and Conditions of Delivery of Electric Power and Energy (delivery service agreement form), as adopted by reference with §25.214, are necessary to conform section II of the delivery service agreement form with the language of pro-forma tariff section 4.11.1. Section 25.214, as recently adopted, implements the Public Utility Regulatory Act, Texas Utilities Code Annotated §39.203 (Vernon 1998, Supplement 2001) (PURA), as it relates to the establishment of non-discriminatory terms and conditions of retail distribution service, including the service provided to a retail customer at transmission voltage, provided by a transmission and distribution utility. The rulemaking to effect these amendments will proceed under Project Number 22187.

The proposed amendment to pro-forma tariff section 4.11.1 and Appendix A, section II is available under Project Number 22187 in the commission's Central Records office and at the commission's website.

Parties have raised the issue of how to proceed in the interim period, before this amendment is effected, for purposes of signing pilot project delivery service agreements. Because the commission certainly intended that the delivery service agreement (Appendix A) would reflect the language adopted in the body of the tariff, parties should embody the language and options of section 4.11.1 in their pilot project delivery service agreements.

Evan Farrington, attorney, Policy Development Division, has determined that for each year of the first five-year period the proposed amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Farrington has also determined that for each year of the first five years the proposed amendment is in effect the public benefit anticipated as a result of enforcing the section will be increased competition in the sale of electric power to retail customers. Furthermore, there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. There may be economic costs to persons who are required to comply with the proposed section as originally adopted; however, the proposed amendment will not affect these costs. These costs are likely to vary from business to business, and are difficult to ascertain. It is believed that the benefits accruing from implementation of the proposed section will outweigh these costs.

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

The commission seeks comments on the proposed amendments from interested persons. Comments should be organized in a manner consistent with the organization of the proposed amendment.

Comments on the proposed amendment (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 14 days after publication. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed amendments. The commission will consider the costs and benefits in deciding whether to adopt these amendments. All comments should refer to Project Number 22187.

Unless specifically requested as detailed in Texas Government Code §2001.029, commission staff does not plan to conduct a public hearing on this rulemaking.

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2001) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. The commission also proposes this amendment pursuant to PURA §39.203, which grants the commission authority to establish reasonable and comparable terms and conditions for open access on distribution facilities for all retail electric utilities offering customer choice, and comparable rates for open access for all retail electric utilities offering customer choice.

Cross Reference to Statutes: PURA §14.002 and §39.203.

§25.214. Terms and Conditions of Retail Delivery Service Provided by Investor Owned Transmission and Distribution Utilities.

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

(d) Pro-forma Retail Delivery Tariff. The commission adopts by reference the form "Tariff for Retail Delivery Service," effective date of March 7, 2001[~~December 13, 2000~~]. This form is available in the commission's Central Records division and on the commission's website at www.puc.state.tx.us.

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

Filed with the Office of the Secretary of State, on March 9, 2001.

TRD-200101418
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 936-7308

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS
SUBCHAPTER BB. COMMISSIONER'S RULES ON REPORTING REQUIREMENTS

19 TAC §61.1025

The Texas Education Agency (TEA) proposes new §61.1025, concerning Public Education Information Management System (PEIMS) data standards. The proposed new section provides standards that specify data collection and submission procedures for school districts and charter schools. Texas Education Code (TEC), §42.006, authorizes the commissioner of education, in reviewing and revising the PEIMS, to develop rules to ensure that the PEIMS meets the requirements specified in TEC, §42.006(c)(1)-(3).

The proposed new section establishes the standards by which school districts and charter schools are to submit required information. The proposed new section specifies that the standards are published annually in an official TEA publication. The official publication is the *PEIMS Data Standards*. A preliminary version of the *PEIMS Data Standards* publication applicable to the next school year is published on the TEA website each December. One copy of the final version is mailed to each district and published on the TEA website each March. If necessary, an addendum to the *PEIMS Data Standards* is mailed to each district and published on the TEA website each August/September. The proposed new section also delineates the procedures for adding, deleting, or modifying data elements. Given the statewide application of the PEIMS data standards and the existence of sufficient statutory authority for the commissioner of education to adopt rules related to PEIMS, legal counsel with the TEA has recommended the adoption of the new section as part of the *Texas Administrative Code*.

Ed Flathouse, associate commissioner for finance and support systems, 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 sections.

Mr. Flathouse and Criss Cloudt, associate commissioner for accountability reporting 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 the increased knowledge by the public of the existence of standards that specify data collection and submission procedures for the school districts and charter schools. 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 to Criss Cloudt, Accountability Reporting and Research, 1701 North Congress Avenue, Austin, Texas 78701, (512) 463-9701. Comments may also be submitted electronically to *rules@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 the proposal has been published in the *Texas Register*.

The new section is proposed under the Texas Education Code (TEC), §42.006, which authorizes the commissioner of education, in reviewing and revising the Public Education Information Management System (PEIMS), to develop rules to ensure that the PEIMS meets the requirements specified in TEC, §42.006(c)(1)-(3).

The new section implements the Texas Education Code, §42.006.

§61.1025. Public Education Information Management System (PEIMS) Data Standards.

(a) Standards. The Public Education Information Management System (PEIMS) data standards, established by the commissioner of education under Texas Education Code (TEC), §42.006, shall be used by school districts and charter schools to submit information required for the legislature and the Texas Education Agency (TEA) to perform their legally authorized functions. The PEIMS data standards shall be annually published in an official TEA publication. This publication shall be widely disseminated and include:

(1) a description of the PEIMS data reporting requirements;

(2) descriptions of data elements and the codes used to report them;

(3) detailed responsibilities of school districts, education service centers, and the TEA in connection with the data submission process, including each deadline for submission and resubmission; and

(4) descriptions of the data submission requirements, including submission record layout specifications and data edit specifications.

(b) Review process. The Policy Committee on Public Education Information (PCPEI) is a commissioner's policy advisory group that provides an oversight role for addressing policy issues related to PEIMS data collection. PCPEI membership is composed of representatives of school districts, education service centers, state government, and educational associations. The Information Task Force (ITF), a subcommittee of PCPEI consisting of technical experts, representatives from user groups, and TEA staff, provides timely and impartial review of requested changes or addition to PEIMS. The procedure for adding, deleting, or modifying data elements described in paragraphs (1)-(5) of this subsection provides consistency in updates to the PEIMS data standards. The commissioner may approve changes to the PEIMS data standards outside this process if necessary to expedite implementation of data collection.

(1) Prepare proposal. A written proposal is prepared to add, delete, or modify a PEIMS data element. The proposal provides justification for the data collection, determination of data availability, and definitions of critical attributes and required analyses of requested data elements.

(2) Conduct research. Survey a sampling of districts to update and refine cost estimates, assess district burden, and determine any benefits from a pilot of the data collection.

(3) Solicit feedback. The ITF and other appropriate agency committees review proposals and make formal, written recommendations to the PCPEI. The PCPEI reviews proposals and committee recommendations and makes recommendations to the commissioner for approval, modification, or rejection of the proposed changes.

(4) Collect data. The PEIMS data standards and edit software made available to districts online are updated annually, implementing changes to data submissions requirements.

(5) Reevaluate data requirements. All PEIMS data elements are reviewed by ITF and PCPEI on a three-year cycle as part of an ongoing sunset process. The sunset process is designed to ensure that the PEIMS data standards meet the requirements specified in TEC, §42.006(c)(1)-(3).

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

Filed with the Office of the Secretary of State, on March 12, 2001.

TRD-200101449
Criss Cloudt
Associate Commissioner, Accountability Reporting and Research
Texas Education Agency
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 463-9701

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TITLE 22. EXAMINING BOARDS

PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 283. LICENSING REQUIREMENTS FOR PHARMACISTS

22 TAC §283.5, §283.6

The Texas State Board of Pharmacy proposes amendments to §283.5, concerning Pharmacist-Intern Duties, and §283.6, concerning Preceptor Requirements. The amendments, if adopted, will: (1) clarify the supervision requirements for pharmacist-interns when engaged in functions associated with the preparation and delivery of prescription or medication drug orders; and (2) allow a pharmacist in an approved pharmacy residency to become a preceptor after completing six months of their residency.

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 to streamline and improve the training of pharmacist-interns. There is no fiscal impact anticipated for small or large businesses or to other entities who are required to comply with this section.

Comments on the proposal may be submitted to Steve Morse, R.Ph., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Box 21, Austin, Texas, 78701-3942, FAX (512) 305-8082. Comments must be received by noon, May 17, 2001.

The amendments are proposed under sections 551.002, 554.051, and 554.002 of the Texas Pharmacy Act (Chapters 551-566, Texas Occupations Code). The Board interprets section 551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets section 554.051 as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets section 554.002 as authorizing the Board to adopt and enforce standards for practical training, including internship.

§283.5. Pharmacist-Intern Duties.

(a) A pharmacist-intern participating in a board-approved internship program may perform any duty of a pharmacist provided he or she is under the [~~direct~~] supervision of:

(1) a pharmacist licensed by the board and approved as a preceptor by the board; or

(2) a pharmacist licensed in a state other than Texas when working in a federal facility and serving as an instructor for a Texas college-based internship program.

(b) When working in a Texas college of pharmacy internship program, supervision of a pharmacist-intern shall be:

(1) direct supervision when the pharmacist-intern is engaged in functions associated with the preparation and delivery of prescription or medication drug orders; and

(2) general supervision when the pharmacist-intern is engaged in functions not associated with the preparation and delivery of prescription or medication drug orders.

(c) [~~(b)~~] When not under the [~~direct~~] supervision of a preceptor pharmacist, a pharmacist-intern may function as a pharmacy technician and perform all of the duties of a certified pharmacy technician provided the pharmacist- intern:

(1) is under the direct supervision of a pharmacist;

(2) has completed the pharmacy's on-site technician training program;

(3) has completed a pharmacist training program in the preparation of sterile pharmaceuticals if the pharmacist-intern is compounding sterile pharmaceuticals; and

(4) is not counted as a pharmacy technician in the ratio of pharmacists to pharmacy technicians. The ratio of pharmacists to pharmacist-interns shall be 1:1 when performing pharmacy technician duties.

(d) [~~(c)~~] A pharmacist-intern may not:

(1) present or identify himself/herself as a pharmacist;

(2) sign or initial any document which is required to be signed or initialed by a pharmacist unless a preceptor cosigns the document; or

(3) independently supervise pharmacy technicians.

§283.6. Preceptor Requirements.

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

(c) For certification as a preceptor a pharmacist must:

(1) [~~after September 1, 1997,~~] have at least:

(A) one year of experience in the type of internship practice setting; or

(B) six months of residency training if the pharmacy resident is in a program accredited by the American Society of Health System Pharmacists.

[~~(2) after September 1, 1998:~~]

(2) [~~(A)~~] have completed 3 hours of preceptor training developed by a Texas college of pharmacy and provided by an ACPE approved provider within the previous 3 years;

(3) [~~(B)~~] complete 3 hours of preceptor training developed by a Texas college of pharmacy and provided by an ACPE approved provider every 3 years; and

(4) [~~(3)~~] meet the requirements of subsection (f) of this section.

(d)-(f) (No change.)

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

Filed with the Office of the Secretary of State, on March 9, 2001.

TRD-200101422
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 305-8028

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

22 TAC §§291.33, 291.34, 291.36

The Texas State Board of Pharmacy proposes amendments to §291.33, concerning Operational Standards, §291.34, concerning Records, and §291.36, concerning Class A Pharmacies Compounding Sterile Pharmaceuticals. The amendments, if adopted, will: (1) permit an automated prescription checking device under certain conditions; and (2) clarify a pharmacist's responsibility when presented with prescriptions issued pursuant to internet- based or telephonic consultations without a valid patient-practitioner relationship.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five- year period the rule is in effect, there will be no fiscal implications for state 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: (1) to permit the more efficient use of automation in pharmacies; and (2) to provide a safer drug ordering and dispensing process. There is no fiscal impact anticipated for small or large businesses or to other entities who are required to comply with this section.

Comments on the proposal may be submitted to Steve Morse, R.Ph., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Box 21, Austin, Texas, 78701-3942, FAX (512) 305-8082. Comments must be received by noon, May 17, 2001.

The amendments are proposed under sections 551.002, 554.051, and 554.005 of the Texas Pharmacy Act (Chapters 551-566, Texas Occupations Code). The Board interprets section 551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets section 554.051 as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets section 554.005 as authorizing the Board to regulate the delivery or distribution of prescription drugs as they relate to the practice of pharmacy.

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

§291.33. Operational Standards.

(a)-(i) (No change.)

(j) Automated devices and systems.

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

(4) Automated checking device.

(A) For the purpose of this subsection, an automated checking device is a fully automated device which confirms, after dispensing but prior to delivery to the patient, that the correct drug and strength has been labeled with the correct label for the correct patient.

(B) For the purpose of §291.32(b)(2) of this subchapter (relating to Personnel), the final check of a dispensed prescription shall be considered accomplished using an automated checking device provided:

(i) a check of the final product is conducted by a pharmacist prior to delivery to the patient or the following checks are performed by a pharmacist:

(I) the prepackaged drug used to fill the order is checked by a pharmacist who verifies that the drug is labeled and packaged accurately; and

(II) a pharmacist checks the accuracy of each original or new prescription drug order.

(ii) the prescription is dispensed, labeled, and made ready for delivery to the patient in compliance with Class A (Community) Pharmacy rules; and

(iii) prior to delivery to the patient:

(I) the automated checking device confirms that the correct drug and strength has been labeled with the correct label for the correct patient; and

(II) a pharmacist performs all other duties required to ensure that the prescription has been dispensed safely and accurately as prescribed.

(C) If the final check is accomplished as specified in subparagraph (B) of this paragraph, the following additional requirements must be met.

(i) The pharmacy has conducted initial testing of the automated checking device and has a continuous quality assurance program which documents that the automated checking device accurately confirms that the correct drug and strength has been labeled with the correct label for the correct patient.

(ii) The pharmacy documents and maintains:

(I) the name(s), initials, or identification code(s) of each pharmacist responsible for the checks outlined in (B)(i) of this paragraph; and

(II) the name(s) initials, or identification code(s) and specific activity(ies) of each pharmacist or pharmacy technician who perform any other portion of the dispensing process.

(iii) The pharmacy establishes mechanisms and procedures to test the accuracy of the automated checking device at least monthly.

§291.34. Records.

(a) (No change.)

(b) Prescriptions.

(1) Professional responsibility.

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

(B) Prior to dispensing a prescription, pharmacists shall determine, in the exercise of sound professional judgment, that a prescription was issued under a valid patient-practitioner relationship and that the prescribed drug is considered necessary for the treatment or prevention of illness. A pharmacist shall not dispense any prescription drug if the pharmacist knows or should have known that the prescription was issued on the basis of an Internet-based or telephonic consultation without a valid patient-practitioner relationship. A valid relationship requires, at a minimum, that the practitioner has:

(i) verified that the person requesting the medication is in fact who the person claims to be;

(ii) established a diagnosis through the use of accepted medical practices such as patient history, mental status exam, physical examination, and appropriate diagnostic and laboratory testing;

(iii) discussed with the patient the diagnosis and the evidence for it, the risks and benefits of various treatment options; and

(iv) insured availability of the practitioner or coverage for the patient for appropriate follow-up care.

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

(2)-(9) (No change.)

(c)-(k) (No change.)

§291.36. Class A Pharmacies Compounding Sterile Pharmaceuticals.

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

(e) Records.

(1) (No change.)

(2) Prescriptions.

(A) Professional responsibility.

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

(ii) Prior to dispensing a prescription, pharmacists shall determine, in the exercise of sound professional judgment, that a prescription was issued under a valid patient-practitioner relationship and that the prescribed drug is considered necessary for the treatment or prevention of illness. A pharmacist shall not dispense any prescription drug if the pharmacist knows or should have known that the prescription was issued on the basis of an Internet-based or telephonic consultation without a valid patient-practitioner relationship. A valid relationship requires, at a minimum, that the practitioner has:

(I) verified that the person requesting the medication is in fact who the person claims to be;

(II) established a diagnosis through the use of accepted medical practices such as patient history, mental status exam, physical examination, and appropriate diagnostic and laboratory testing;

(III) discussed with the patient the diagnosis and the evidence for it, the risks and benefits of various treatment options; and

(IV) insured availability of the practitioner or coverage for the patient for appropriate follow-up care.

(iii) Clause (ii) of this subparagraph does not prohibit a pharmacist from dispensing a prescription when a valid patient-practitioner relationship is not present in an emergency situation (e.g. a practitioner taking call for the patient's regular practitioner).

(B)-(J) (No change.)

(3)-(11) (No change.)

(f) (No change.)

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

Filed with the Office of the Secretary of State, on March 9, 2001.

TRD-200101423
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 305-8028

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SUBCHAPTER D. INSTITUTIONAL PHARMACY (CLASS C)

22 TAC §291.74

The Texas State Board of Pharmacy proposes amendments to §291.74, concerning Operational Standards. The amendments, if adopted, will permit an automated medication order checking device under certain conditions.

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 to permit the more efficient use of automation in pharmacies. There is no fiscal impact anticipated for small or large businesses or to other entities who are required to comply with this section.

Comments on the proposal may be submitted to Steve Morse, R.Ph., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Box 21, Austin, Texas, 78701-3942, FAX (512) 305-8082. Comments must be received by noon, May 17, 2001.

The amendments are proposed under sections 551.002, 554.051, and 554.005 of the Texas Pharmacy Act (Chapters

551-566, Texas Occupations Code). The Board interprets section 551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets section 554.051 as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets section 554.005 as authorizing the Board to regulate the delivery or distribution of prescription drugs as they relate to the practice of pharmacy.

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

§291.74. Operational Standards.

(a)-(i) (No change.)

(j) Automated devices and systems.

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

(4) Automated checking device.

(A) For the purpose of this subsection, an automated checking device is a fully automated device which confirms, after a drug is prepared for distribution but prior to delivery to the patient, that the correct drug and strength has been labeled with the correct label for the correct patient.

(B) For the purpose of §291.73(e)(2)(A)(ii) of this subchapter (relating to Personnel), the final check of a drug prepared pursuant to a medication order shall be considered accomplished using an automated checking device provided:

(i) a check of the final product is conducted by a pharmacist prior to delivery to the patient or the following checks are performed by a pharmacist:

(I) the prepackaged drug used to fill the order is checked by a pharmacist who verifies that the drug is labeled and packaged accurately; and

(II) a pharmacist checks the accuracy of each original or new medication order.

(ii) the medication order is prepared, labeled, and made ready for delivery to the patient in compliance with Class C (Institutional) Pharmacy rules; and

(iii) prior to delivery to the patient:

(I) the automated checking device confirms that the correct drug and strength has been labeled with the correct label for the correct patient; and

(II) a pharmacist performs all other duties required to ensure that the medication order has been prepared safely and accurately as prescribed.

(C) If the final check is accomplished as specified in subparagraph (B) of this paragraph, the following additional requirements must be met.

(i) The pharmacy has conducted initial testing of the automated checking device and has a continuous quality assurance program which documents that the automated checking device accurately confirms that the correct drug and strength has been labeled with the correct label for the correct patient.

(ii) The pharmacy documents and maintains:

(I) the name(s), initials, or identification code(s) of each pharmacist responsible for the checks outlined in subparagraph (B)(i) of this paragraph; and

(II) the name(s), initials, or identification code(s) and specific activity(ies) of each pharmacist or pharmacy technician who performs any other portion of the medication order preparation process.

(iii) The pharmacy establishes mechanisms and procedures to test the accuracy of the automated checking device at least monthly.

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

Filed with the Office of the Secretary of State, on March 9, 2001.

TRD-200101424
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 305-8028

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SUBCHAPTER E. CLINICAL PHARMACY (CLASS D)

22 TAC §291.93

The Texas State Board of Pharmacy proposes amendments to §291.93, concerning Operational Standards. The amendments, if adopted, make corrections to references concerning the pharmacy license period which has changed from one to two years.

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 significant fiscal impact 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 to clarify the petition requirements contained in the Clinic Pharmacy rules. There is no fiscal impact anticipated for small or large businesses or to other entities who are required to comply with this section.

Comments on the proposal may be submitted to Steve Morse, R.Ph., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Box 21, Austin, Texas, 78701-3942, FAX (512) 305-8082. Comments must be received by noon, May 17, 2001.

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

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

§291.93. Operational Standards.

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

(e) Drugs and devices.

(1) Formulary.

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

(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) (No change.)

(ii) Such petition shall be resubmitted every two years [~~annually~~] in conjunction with the application for renewal of the pharmacy license.

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

(iii)-(iv) (No change.)

(2)-(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)-(B) (No change.)

(C) Such petition shall be resubmitted every two years [~~annually~~] in conjunction with the application for renewal of the pharmacy license.

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

Filed with the Office of the Secretary of State, on March 9, 2001.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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For further information, please call: (512) 305-8028

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CHAPTER 295. PHARMACIES

22 TAC §295.8

The Texas State Board of Pharmacy proposes amendments to §295.8, concerning Continuing Education Requirements. The amendments, if adopted, allow continuing education credit for pharmacists who attend Board meetings.

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 significant fiscal impact 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 to increase pharmacists understanding of the legal requirements for the profession and of consequences if the requirements are not met. There is no fiscal impact anticipated for small or large businesses or to other entities who are required to comply with this section.

Comments on the proposal may be submitted to Steve Morse, R.Ph., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Box 21, Austin, Texas, 78701-3942, FAX (512) 305-8082. Comments must be received by noon, May 17, 2001.

The amendments are proposed under sections 551.002, 554.051 and 559.052 of the Texas Pharmacy Act (Chapters 551-566, Texas Occupations Code). The Board interprets section 551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets section 554.051 as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets section 559.052 as authorizing the agency to approve pharmacy continuing education programs.

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

§295.8. Continuing Education Requirements.

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

(e) Approved Programs.

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

(4) Attendance at Texas State Board of Pharmacy Board Meetings shall be recognized for continuing education credit as follows.

(A) Pharmacists shall receive credit for three contact hours (0.3 CEUs) towards their continuing education requirement for attending a full board meeting in its entirety.

(B) A maximum of six contact hours (0.6 CEUs) are allowed for attendance at a board meeting within a pharmacist's biennial license period.

(C) Proof of attendance for a complete board meeting shall be a certificate issued by the Texas State Board of Pharmacy.

(5) [~~(4)~~] 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 March 9, 2001.

TRD-200101426
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 305-8028

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22 TAC §295.12

The Texas State Board of Pharmacy proposes new §295.12 concerning Pharmacist's Certification Programs. The new rule, if adopted, implements S.B. 730 (Acts of the 76thLegislature) which gave the Board of Pharmacy the authority to determine

and issue standards for recognition and approval of pharmacist certification programs.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five- year period the new rule is in effect, there will be fiscal implications for the state as a result of enforcing or administering the rule. There are no anticipated fiscal implications for local government. The fiscal implications for the state are based on the cost to the Texas State Board of Pharmacy of enforcing or administering this new rule and concurrently submitted amendments to §295.13, concerning Drug Therapy Management by a Pharmacist under Written Protocol of a Physician, and §295.15, concerning Administration of Immunizations or Vaccinations by a Pharmacist under Written Protocol of a Physician. Costs for the first year of the program will include setup costs as well as costs to administer the program. The estimated cost to the Texas State Board of Pharmacy for the next five years will be: FY2002 - $22,603; FY2003 - $2,336; FY2004 - $2,448; FY2005 - $2,560; and FY2006 - $2,688.

Ms. Dodson has determined that, for each year of the first five-year period the new rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to improve the provision of pharmaceutical care as pharmacist use the skills acquired to become certified. There is no fiscal impact anticipated for small or large businesses or to other entities who are required to comply with this section.

A public hearing on this proposal will be held at 9 a.m. on May 22, 2001, at 333 Guadalupe Street, Suite 2-225, Austin, Texas. Written comments on the proposal may be submitted to Steve Morse, R.Ph., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Box 21, Austin, Texas, 78701-3942, FAX (512) 305-8082. Written comments must be received by noon, May 17, 2001.

The new rule is proposed under sections 551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551-566, Texas Occupations Code) and S.B. 730 (Acts of the 76th Legislature) which amended the Texas Pharmacy Act. The Board interprets section 551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets section 554.051 as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets amendments to the Texas Pharmacy Act by S.B. 730 as authorizing the Board to establish standards for the recognition an approval of pharmacist certification programs.

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

§295.12. Pharmacist's Certification Programs.

(a) Purpose. The purpose of this section is to provide standards for the recognition and approval of pharmacist certification programs as authorized by Acts 1999, 76th Legislature, Chapter 1518, §2.

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

(1) ACPE -- The American Council on Pharmaceutical Education.

(2) Act -- The Texas Pharmacy Act, Chapter 551-566, Occupations Code, as amended.

(3) Approved Provider of Pharmacist Certificate Programs -- An individual, institution, organization, association, corporation, or agency that is approved by the board and recognized by ACPE in accordance with its policy and procedures, as having:

(A) met criteria indicative of the ability to provide quality continuing education programs; and

(B) met the ACPE "Standards and Quality Assurance Procedures for ACPE-Approved Providers of Continuing Pharmaceutical Education Offering Certificate Programs in Pharmacy."

(4) Board -- The Texas State Board of Pharmacy.

(5) B.S. in Pharmacy -- A Bachelor of Science Degree in Pharmacy.

(6) Confidential record -- A health-related record, including a patient medication record, prescription drug order, or medication order, that:

(A) contains information that identifies an individual; and

(B) is maintained by a pharmacy or pharmacist.

(7) Disease State Management (DSM) -- The provision of disease specific pharmaceutical care beyond the dispensing of medications including:

(A) identifying and assessing a patient's current health status, health-related needs and problems, and desired therapeutic outcomes;

(B) developing, implementing, and evaluating a patient care plan that assures the appropriateness of the patient's medication(s), dosing regimens, dosage forms, routes of administration, and delivery systems;

(C) communicating appropriate information to the patient and/or caregiver and other health care professionals regarding prescription or non-prescription medications and/or medical devices, disease states or medical conditions, and the maintenance of health and wellness.

(D) monitoring and documenting the patient's progress toward identified endpoints and outcomes of the pharmaceutical care plan and intervening when appropriate.

(8) Disease State Management (DSM) Exam -- A Disease State Management Examination offered by the National Association of Boards of Pharmacy.

(9) Drug therapy management -- The performance of specific acts by pharmacists as authorized by a physician through written protocol. Drug therapy management does not include the selection of drug products not prescribed by the physician, unless the drug product is named in the physician initiated protocol or the physician initiated record of deviation from a standing protocol. Drug therapy management may include the following:

(A) collecting and reviewing patient drug use histories;

(B) ordering or performing routine drug therapy related patient assessment procedures including temperature, pulse, and respiration;

(C) ordering drug therapy related laboratory tests;

(D) implementing or modifying drug therapy following diagnosis, initial patient assessment, and ordering of drug therapy by a physician as detailed in the protocol; or

(E) any other drug therapy related act delegated by a physician.

(10) Pharm. D. -- A Doctor of Pharmacy Degree.

(c) Board Certified Pharmacists.

(1) Recognized Certifications. The Texas State Board of Pharmacy shall recognize the following certifications:

(A) Board Certified Pharmacist Clinician;

(B) Board Certified in Diabetes;

(C) Board Certified in Asthma;

(D) Board Certified in Hyperlipidemia;

(E) Board Certified in Anticoagulation;

(F) Board Certified Pharmacist to Administer Immunizations and Vaccines; and

(G) the following national certifications:

(i) Any certification granted by the Board of Pharmaceutical Specialities including, but not limited to, the following:

(I) Nuclear Pharmacy;

(II) Nutrition Support Pharmacy;

(III) Psychiatric Pharmacy;

(IV) Oncology Pharmacy; and

(V) Pharmacotherapy.

(ii) Any certification granted by the American Society of Consultant Pharmacists including, but not limited to, certification in Geriatric Pharmacy.

(iii) American Academy of Pain Management Certification in Pain Management.

(H) Any additional certifications approved by the board and published in the minutes of the board.

(2) Identification as Board Certified. Texas pharmacists may not identify themselves as board certified unless they have completed the requirements for certification specified in this section, §295.13 (titled Drug Therapy Management by a Pharmacist under Written Protocol of a Physician) or §295.15 of this chapter (titled Administration of Immunizations or Vaccinations by a Pharmacist under Written Protocol of a Physician).

(3) Acknowledgment of Board Certification. The board will maintain a list of certifications earned by a pharmacist and issue a letter to the pharmacist recognizing the certification upon receipt of the documentation showing the pharmacist has:

(A) completed the required educational/experience for the certification; and/or

(B) passed the required national examination for the certification.

(4) Length of Certification, Recertification, and Continuing Education Requirements.

(A) Length of Certification.

(i) Board recognized certifications listed in subsection(c)(1)(B) - (F) and (H) shall remain in effect for seven years.

(ii) Board recognized certifications which are based on a national certification shall run concurrent with the term of the national certification.

(B) Recertification.

(i) Board recognized certifications listed in subsection(c)(1)(B) - (F) and (H). At the end of the seventh year, the certified pharmacist shall apply for re-certification by presenting one of the following to the Texas State Board of Pharmacy.

(I) Documentation of current, active practice in disease state or drug therapy management. The documentation may include at least three current pharmaceutical care plans or SOAP notes, last entry to be within 90 days of the date of renewal; or

(II) A brief, 1-page document signed by a physician whose patients the pharmacist provided disease state or drug therapy management, assessing the pharmacist's knowledge and skills to perform disease state or drug therapy management with patients in the area(s) certified; or

(III) A signed statement from a pharmacist mentor who has personally reviewed the pharmacist's practice within the previous 90 days.

(ii) Board recognized certifications based on a national certification. Pharmacists who hold national certifications shall comply with the requirements for recertification set by the national certifying organization and notify the Board of the completion of the re-certification process.

(C) Continuing Education Requirements. Board Certified pharmacists shall annually obtain six hours of ACPE accredited continuing professional education within the area of certification every two years in conjunction with renewal of a pharmacist license. These hours may count towards the continuing education requirements to renew a license.

(d) Requirements to become a Board Certified Pharmacist Clinician. To be recognized as a Board Certified Pharmacist Clinician, the following is applicable:

(1) Educational requirements. To qualify to be designated as a Board Certified Pharmacist Clinician, a pharmacist must meet one of the following educational requirements:

(A) Pharm. D. degree or a clinical practice Master's degree in pharmacy; or

(B) B.S. in Pharmacy plus a pharmacy residency emphasizing primary care; or

(C) B.S. in Pharmacy and two years of disease state management or drug therapy management experience.

(2) Examination requirements. To be designated as a Board Certified Pharmacist Clinician, a pharmacist who meets the educational requirements specified in paragraph (1) of this subsection, must also pass one of the following national certification examinations.

(A) Board of Pharmaceutical Specialities Pharmacotherapy Certification Examination; or

(B) American Society of Consultant Pharmacists Geriatric Pharmacy Certification Examination.

(e) Requirements to become Board Certified for Management. The following are applicable for a board recognized Management certification.

(1) Prerequisite Course Work.

(A) A pharmacist who does not possess any of the degree/experience requirements specified in subparagraph (B) of this paragraph must complete a basic course in patient-specific activities that meets the requirements specified in subsection (f) of this section.

(B) If a pharmacist possesses any of the following degree/experience requirements, no additional course work is required.

(i) Pharm. D. degree or a clinical practice Master's degree in pharmacy; or

(ii) B.S. in Pharmacy plus a pharmacy residency emphasizing primary care; or

(iii) B.S. in Pharmacy and two years of disease state management or drug therapy management experience.

(2) Course Work. A pharmacist must meet either of the following educational requirements:

(A) If a pharmacist possesses any of the following degree/experience requirements, no additional course work is required.

(i) Pharm. D. degree or a clinical practice Master's degree in pharmacy; or

(ii) B.S. in Pharmacy plus a pharmacy residency emphasizing primary care; or

(iii) B.S. in Pharmacy and two years of disease state management or drug therapy management experience.

(B) A pharmacist who does not possess the educational/experience requirements specified in subparagraph (A) of this paragraph must complete the following courses offered by an approved provider:

(i) the prerequisite basic course specified in paragraph (1) of this subsection; and

(ii) a course in the disease state that meets the requirements specified in subsection (f) of this section.

(3) Examination requirements. Upon completion of the required course work, a pharmacist must take and pass the DSM Examination for the applicable disease state.

(4) Pain Management. To be recognized as a Board Certified Pharmacist in Pain Management, a pharmacist must meet the following course work and examination requirements.

(A) Course Work. A pharmacist must meet either of the following degree/experience requirements.

(i) If a pharmacist possesses any of the following degree/experience requirements, no additional course work is required.

(I) Pharm. D. degree or a clinical practice Master's degree in pharmacy; or

(II) B.S. in Pharmacy plus a pharmacy residency emphasizing primary care; or

(III) B.S. in Pharmacy and two years of disease state management or drug therapy management experience.

(ii) A pharmacist who does not possess the educational/experience requirements specified in clause (i) of this subparagraph must complete:

(I) the prerequisite basic course specified in paragraph (1) of this subsection; and

(II) a course in Pain Management that meets the requirements specified in subsection (f) of this section.

(B) Examination requirements. A pharmacist who meets the course work requirements must be certified by the American Academy of Pain Management.

(f) Required Content for Certification Programs.

(1) General Requirement.

(A) Each unit of instruction in a certification program should generally require a minimum of 15 contact hours of teaching and learning, not including patient-care experiences.

(B) Patient-care experiences shall include, as a minimum, 30 individual patients with the relevant disease(s) included within the unit.

(C) Certificate programs for administration of immunizations are not required to meet the requirements in this paragraph but shall meet the requirements of §295.15 of this chapter (titled Administration of Immunizations or Vaccinations by a Pharmacist under Written Protocol of a Physician).

(2) Required Content for Course in Patient-Specific Activities. The course should provide a minimum of 45 hours of instruction and experiential training and be designed to meet the following competencies.

(A) The pharmacist shall identify and assess the patient's current health status, health-related needs and problems, and desired therapeutic outcomes.

(B) The pharmacist shall develop, implement, and evaluate a patient care plan that assures the appropriateness of the patient's medication(s), dosing regimens, dosage forms, routes of administration, and delivery systems.

(C) The pharmacist shall communicate appropriate information to the patient and/or caregiver and other health care professionals regarding prescription or non-prescription medications and/or medical devices, disease states or medical conditions, and the maintenance of health and wellness.

(D) The pharmacist shall monitor and document the patient's progress toward identified endpoints and outcomes of the pharmaceutical care plan and intervene when appropriate.

(3) Disease-Specific Courses. Certification courses in a disease state shall provide a minimum of 15 hours of instruction and experiential training and be designed to meet the competency statements established by the National Institute for Standards in Pharmacist Credentialing.

(4) Pain Management The course should provide a minimum of 15 hours of instruction and experiential training in the following content areas.

(A) Acute Pain (Trauma; Post Surgical; Acute Distress);

(B) Chronic Pain (Nociceptive; Neuropathic);

(C) Malignant Pain; and

(D) Headaches and Head Pain;

(5) Immunization and Vaccinations. The pharmacists shall meet the requirements of §295.15 of this chapter (titled Administration of Immunizations or Vaccinations by a Pharmacist under Written Protocol of a Physician).

(g) Drug Therapy Management.

(1) Beginning January 1, 2003, only Board Certified Pharmacist may perform drug therapy management under written protocol of a physician in accordance with §295.13 of this chapter (titled drug therapy management by a pharmacist under written protocol of a physician).

(A) A Board Certified Pharmacist Clinician may engage in drug therapy management under written protocol of a physician for any disease.

(B) A pharmacist that has any other board certification may engage in drug therapy management under written protocol of a physician for patients with that primary disease.

(2) Pharmacist who have provided notification to the board of his/her engaging in drug therapy management as required under §295.13(c) of this chapter (titled drug therapy management by a pharmacist under written protocol of a physician) by February 6, 2001, shall not be required to comply with the provisions of paragraph (1) of this subsection and may continue engaging in drug therapy management without certification.

(h) Records.

(1) Board certified pharmacists who engage in drug therapy management shall maintain records as specified in §295.13 of this chapter (titled drug therapy management by a pharmacist under written protocol of a physician).

(2) Pharmacists certified to administer immunizations or vaccinations shall maintain records as specified in §295.15 of this chapter (titled administration of immunizations or vaccinations by a pharmacist under written protocol of a physician).

(3) Pharmacists certified for disease state management of a specific disease state shall maintain records as follows

(A) Maintenance of records.

(i) Every record, required to be made under this section shall be kept by the pharmacist. Such records shall be available for two years from the date of such record, for inspecting and copying by the board or its representative and to other authorized local, state, or federal law enforcement or regulatory agencies. The records and all related files shall be available within 72 hours.

(ii) Records may be maintained in an alternative data retention system, such as a data processing system or direct imaging system provided:

(I) the records maintained in the alternative system contain all of the information required on the manual record; and

(II) the data processing system is capable of producing a hard copy of the record upon request of the board, its representative, or other authorized local, state, or federal law enforcement or regulatory agencies.

(B) Patient Care Plan. A pharmacist shall maintain a patient care plan for each patient which contains, at a minimum, the following information:

(i) patient's name and patient's demographic information;

(ii) patient's current prescription and non-prescription medication therapy;

(iii) patient's current health status, health-related needs and problems;

(iv) goals and desired therapeutic outcomes;

(v) recommended pharmacologic or non-pharmacologic self-care plans

(vi) patient education goals;

(vii) follow-up schedule; and

(viii) pharmacist's progress notes.

(C) Continuity of Care. In order to maintain continuity of care, a pharmacist who ceases practice or moves a practice location shall provide for the transfer of the patient's records to another pharmacist on request of the patient.

(4) Confidentiality.

(A) A pharmacist shall provide adequate security to prevent indiscriminate or unauthorized access to confidential records. If confidential health information is not transmitted directly between a pharmacy and a physician, but is transmitted through a data communication device, the confidential health information may not be accessed or maintained by the operator of the data communication device unless specifically authorized to obtain confidential information by this subsection.

(B) A confidential record is privileged and a pharmacist may release a confidential record only to:

(i) the patient or the patient's agent;

(ii) a practitioner or another pharmacist if, in the pharmacist's professional judgment, the release is necessary to protect the patient's health and well-being;

(iii) the board or to a person or another state or federal agency authorized by law to receive the confidential record;

(iv) a law enforcement agency engaged in investigation of a suspected violation of Chapter 481 or 483, Health and Safety Code, or the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. Section 801 et seq.);

(v) a person employed by a state agency that licenses a practitioner, if the person is performing the person's official duties; or

(vi) an insurance carrier or other third party payor authorized by the patient to receive the information.

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

Filed with the Office of the Secretary of State, on March 9, 2001.

TRD-200101427
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 305-8028

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22 TAC §295.13, §295.15

The Texas State Board of Pharmacy proposes amendments to §295.13, concerning Drug Therapy Management by a Pharmacist under Written Protocol of a Physician, and §295.15, concerning Administration of Immunizations or Vaccinations by a Pharmacist under Written Protocol of a Physician. The amendments, if adopted, implements S.B. 730 (Acts of the 76th Legislature) which gave the Board of Pharmacy the authority to determine and issue standards for recognition and approval of pharmacist certification programs.

Gay Dodson, R.Ph., Executive Director/Secretary, has determined that, for the first five- year period the new rule is in effect, there will be fiscal implications for the state as a

result of enforcing or administering the rule. There are no anticipated fiscal implications for local government. The fiscal implications for the state are based on the cost to the Texas State Board of Pharmacy of enforcing or administering these rules and concurrently submitted new rule §295.12, concerning Pharmacist's Certification Programs. Costs for the first year of the program will include setup costs as well as costs to administer the program. The estimated cost to the Texas State Board of Pharmacy for the next five years will be: FY2002 - $22,603; FY2003 - $2,336; FY2004 - $2,448; FY2005 - $2,560; and FY2006 - $2,688.

Ms. Dodson has determined that, for each year of the first five-year period the new rule will be in effect, the public benefit anticipated as a result of enforcing the rule will be to improve the provision of pharmaceutical care as pharmacist use the skills acquired to become certified. There is no fiscal impact anticipated for small or large businesses or to other entities who are required to comply with this section.

A public hearing on this proposal will be held at 9 a.m. on May 22, 2001, at 333 Guadalupe Street, Suite 2-225, Austin, Texas. Written comments on the proposal may be submitted to Steve Morse, R.Ph., Director of Professional Services, Texas State Board of Pharmacy, 333 Guadalupe Street, Suite 3-600, Box 21, Austin, Texas, 78701-3942, FAX (512) 305-8082. Written Comments must be received by noon, May 17, 2001.

The new rule is proposed under sections 551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551-566, Texas Occupations Code) and S.B. 730 (Acts of the 76th Legislature) which amended the Texas Pharmacy Act. The Board interprets section 551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets section 554.051 as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Board interprets amendments to the Texas Pharmacy Act by S.B. 730 as authorizing the Board to establish standards for the recognition an approval of pharmacist certification programs.

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

§295.13. Drug Therapy Management by a Pharmacist under Written Protocol of a Physician.

(a) Purpose. The purpose of this section is to provide standards for the maintenance of records of a pharmacist engaged in the provision of drug therapy management as authorized in Chapter 157 of the Medical Practice Act and Section 554.005 of the Act. [~~§3.061 of the Medical Practice Act and §17(x) of the Act.~~]

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

(1) Act -- The Texas Pharmacy Act, Chapter 551-566, Occupations Code, [~~Texas Civil Statutes, Article 4542a-1,~~] as amended.

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

(5) Medical Practice Act -- The Texas Medical Practice Act, Subtitle B, Occupations Code, as amended. [~~Texas Civil Statutes, Article 4495b, as amended.~~]

(6) (No change.)

(c) Notification.

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

(3) January 1, 2003. Beginning January 1, 2003, the provisions of paragraphs (1) and (2) of this subsection become invalid and pharmacists who wish to engage in drug therapy management must comply with the provisions of §295.12 relating to pharmacist certification programs. Only Board Certified Pharmacists may perform drug therapy management under written protocol of a physician.

(A) A Board Certified Pharmacist Clinician may engage in drug therapy management under written protocol of a physician for any disease.

(B) A pharmacist that has any other board certification may engage in drug therapy management under written protocol of a physician for patients with that primary disease.

(C) Pharmacists who have not become Board Certified by January 1, 2003, must cease engaging in drug therapy management.

(4) Pharmacist who have provided notification to the board of his/her engaging in drug therapy management as required under paragraph (1) of this subsection by February 6, 2001, shall not be required to comply with the provisions of paragraph (3) of this subsection and may continue engaging in drug therapy management without certification.

(d) Supervision. Physician supervision shall be as specified in the Medical Practice Act, Chapter 157 [~~§3.061~~] and shall be considered adequate if the delegating physician:

(1)-(6) (No change.)

(e) (No change.)

(f) Confidentiality.

(1) (No change.)

(2) A confidential record is privileged and a pharmacist may release a confidential record only to: [~~Confidential records are privileged and may be released only to:~~]

(A) the patient or the patient's agent;

(B) a practitioner or another pharmacist if, in the pharmacist's professional judgment, the release is necessary to protect the patient's health and well-being;

(C) the board or to a person or another state or federal agency authorized by law to receive the confidential record;

(D) a law enforcement agency engaged in investigation of a suspected violation of Chapter 481 or 483, Health and Safety Code, or the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. Section 801 et seq.);

(E) a person employed by a state agency that licenses a practitioner, if the person is performing the person's official duties; or

(F) an insurance carrier or other third party payor authorized by the patient to receive the information.

~~[(A) the patient or the patient's agent;]~~

~~[(B) practitioners and other pharmacists when, in the pharmacist's professional judgment, such release is necessary to protect the patient's health and well-being;]~~

~~[(C) other persons, the board, or other state or federal agencies authorized by law to receive such information;]~~

~~[(D) a law enforcement agency engaged in investigation of suspected violations of the Controlled Substances Act or the Dangerous Drug Act;]~~

[(E) a person employed by any state agency which licenses a practitioner as defined in the Act if such person is engaged in the performance of the person's official duties; or]

[(F) an insurance carrier or other third party payer authorized by a patient to receive such information.]

(3) This section shall not affect or alter the provisions relating to the confidentiality of the physician-patient communication as specified in the Medical Practice Act, Chapter 159. [§5.08.]

(g) Construction and Interpretation.

(1) As specified in the Medical Practice Act, Chapter 157, [§3.061(e),] this section does not restrict the use of a pre-established health care program or restrict a physician from authorizing the provision of patient care by use of a pre-established health care program if the patient is institutionalized and the care is to be delivered in a licensed hospital with an organized medical staff that has authorized standing delegation orders, standing medical orders, or protocols.

(2) As specified in the Medical Practice Act, Chapter 157, [§3.061(d),] this section may not be construed to limit, expand, or change any provision of law concerning or relating to therapeutic drug substitution or administration of medication, including the Act, Section 554.004 [§17(a)(5).]

§295.15. Administration of Immunizations or Vaccinations by a Pharmacist under Written Protocol of a Physician.

(a) Purpose. The purpose of this section is to provide standards for pharmacists engaged in the administration of immunizations or vaccinations as authorized in Chapter 554 of the Act. [§§17(a), (y), (z), and (aa) of the Act.]

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

(1) (No change.)

(2) Act -- The Texas Pharmacy Act, Chapter 551-566, Occupations Code, [Texas Civil Statutes, Article 4542a-1,] as amended.

(3)-(9) (No change.)

(10) Medical Practice Act -- The Texas Medical Practice Act, Subtitle B, Occupations Code, as amended. [Texas Civil Statutes, Article 4495b, as amended.]

(11)-(13) (No change.)

(c) Pharmacist certification requirements. Pharmacists [Pharmacist] who enter into a written protocol with a physician to administer immunizations or vaccinations shall:

(1) complete [be certified to administer immunizations and vaccinations by the completion of] a course provided by an ACPE approved provider which:

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

(2) maintain documentation of:

(A) (No change.)

(B) 3 hours of continuing education every 2 years beginning January 1, 2001, which are designed to maintain competency in the disease states, drugs, and administration of immunizations or vaccinations. Effective January 1, 2001, complete the continuing education requirements specified in §295.12 of this chapter (titled Pharmacist Certification Programs); and

(C) (No change.)

(3) by January 1, 2002, apply to the board for recognition as board certified to administer immunizations under written protocol of a physician as specified in §295.12 of this title relating to pharmacists certification requirements.

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

(i) Confidentiality.

(1) (No change.)

(2) A confidential record is privileged and a pharmacist may release a confidential record only to: [Confidential records are privileged and may be released only to:]

(A) the patient or the patient's agent;

(B) a practitioner or another pharmacist if, in the pharmacist's professional judgment, the release is necessary to protect the patient's health and well-being;

(C) the board or to a person or another state or federal agency authorized by law to receive the confidential record;

(D) a law enforcement agency engaged in investigation of a suspected violation of Chapter 481 or 483, Health and Safety Code, or the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. Section 801 et seq.);

(E) a person employed by a state agency that licenses a practitioner, if the person is performing the person's official duties; or

(F) an insurance carrier or other third party payor authorized by the patient to receive the information.

[(A) the patient or the patient's agent;]

[(B) practitioners and other pharmacists when, in the pharmacist's professional judgment, such release is necessary to protect the patient's health and well-being;]

[(C) other persons, the board, or other state or federal agencies authorized by law to receive such information;]

[(D) a law enforcement agency engaged in investigation of suspected violations of the Controlled Substances Act or the Dangerous Drug Act;]

[(E) a person employed by any state agency which licenses a practitioner as defined in the Act if such person is engaged in the performance of the person's official duties; or]

[(F) an insurance carrier or other third party payer authorized by a patient to receive such information.]

(3) This section shall not affect or alter the provisions relating to the confidentiality of the physician-patient communication as specified in the Medical Practice Act, Chapter 159. [§5.08.]

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

Filed with the Office of the Secretary of State, on March 9, 2001.

TRD-200101428
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 305-8028

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PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 470. ADMINISTRATIVE PROCEDURE

22 TAC §470.2, §470.8

The Texas State Board of Examiners of Psychologists proposes amendment to §470.2, concerning Definitions and §470.8, concerning Informal Disposition of Complaints and Applications Disputes. The amendments are being proposed in order to eliminate the Application Dispute Committee and to replace it with the Application Committee.

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

Ms. Lee 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 to make the rules easier for the general public and licensees to follow and understand. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rules as proposed.

Comments on the proposals may be submitted to Brian Creath, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701, (512) 305-7700.

The amendments are proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed amendments do not affect other statutes, articles, or codes.

§470.2. Definitions.

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

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

~~[(6) Applications Dispute Committee - Committee appointed by the Chair to conduct informal settlement conferences concerning application and licensing disputes and to make recommendations to the Board for its review.]~~

(6) [~~(7)~~] Authorized representative - An attorney authorized to practice law in the State of Texas or, if authorized by applicable law, a person designated by a party to represent the party.

(7) [~~(8)~~] Board - The nine-member Texas State Board of Examiners of Psychologists.

(8) [~~(9)~~] Board member - one of the members of the Board, appointed pursuant to the Act, §501.051, and qualified under the Act, §501.051, §501.052 and §501.053.

(9) [~~(10)~~] Chair - The chairperson of the Board.

(10) [~~(11)~~] Complainant - A party bringing a complaint under the Act.

(11) [~~(12)~~] Complaint - An action over which the Board has jurisdiction filed against any individual who violates the Act and/or Rules of the Board.

(12) [~~(13)~~] Contested case - A proceeding, including, but not restricted to licensing and disciplinary action in which the legal rights, duties, or privileges of a party are to be determined by the Board after an opportunity for an adjudicative hearing.

(13) [~~(14)~~] Disciplinary Review Panel - Committee appointed by the Chair to conduct informal settlement conferences concerning disciplinary actions and to make recommendations to the Board.

(14) [~~(15)~~] Executive Director - The executive director of the Board designated in accordance with the Act, §501.101.

(15) [~~(16)~~] License - The whole or part of any agency permit, approval, registration, or similar form of permission required by law.

(16) [~~(17)~~] Licensee - Any individual or person to whom the agency has issued any permit, certificate, approved registration, or similar form of permission required by law.

(17) [~~(18)~~] Licensing - The agency process respecting the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license.

(18) [~~(19)~~] Official act - Any act performed by the Board pursuant to a duty, right or responsibility imposed or granted by law.

(19) [~~(20)~~] Party - Each person or agency named or admitted to participate as a party before the Board or the State Office of Administrative Hearings.

(20) [~~(21)~~] Person - Any individual, representative, corporation, or other entity, including any public or non-profit corporation, or any agency or instrumentality of federal, state, or local government.

(21) [~~(22)~~] Pleading - A written document submitted by a party, a person seeking to participate in a case as a party, which requests procedural or substantive relief, makes claims, alleges facts, makes legal argument, or otherwise addresses matters involved by the case.

(22) [~~(23)~~] Presiding officer - The chair, the acting chair of the Board, or a duly authorized administrative law judge while acting with respect to a hearing.

(23) [~~(24)~~] Respondent - An individual over whom the Board has jurisdiction and against whom a complaint is filed.

(24) [~~(25)~~] Rule - Any agency statement of general applicability that implements, or prescribes law or policy by defining general standards of conduct, rights, or obligations of persons, or describes the procedure or practice requirements that prescribe the manner in which public business before an agency may be initiated, scheduled, or conducted, or interprets or clarifies law or agency policy, whether with or in the absence of an explicit grant of power to the agency to make rules. The term includes the amendment or repeal of a prior rule but does not include statements concerning only the internal management or organization of the agency and not affecting private rights or procedures. This definition includes regulations.

(25) [~~(26)~~] State Office of Administrative Hearings (SOAH) - The agency to which contested cases are referred by the Texas State Board of Examiners of Psychologists.

(26) [~~(27)~~] Texas Open Records Act - Texas Government Code, Chapter 552.

§470.8. Informal Disposition of Complaints [and Applications Disputes].

(a) (No change.)

[(b) Applications Disputes.]

[(1) After an appeal has been properly requested in accordance with §463.30 of this title (relating to Time Period for Appealing a Decision), the matter shall be referred to the Applications Dispute Committee. The applicant shall be offered an opportunity to attend an informal conference and show compliance with all Board licensing requirements, in accordance with §2001.054 of the Administrative Procedure Act.]

[(2) The Applicant shall be notified in writing and by certified mail of the time, place and location of the informal settlement conference. If the applicant declines to attend or fails to appear, the matter may be handled by the Committee as a default disposition.]

[(3) Informal conferences shall be conducted by the Chair of the Application Dispute Committee. The conference shall also be attended by the designated representative, legal counsel of the agency or an attorney employed by the office of the attorney general, and other representative(s) of the agency as the executive director and legal counsel may deem necessary for proper conduct of the conference. The applicant and/or the applicant's authorized representative(s) may attend the informal conference and shall be provided an opportunity to be heard and to present witnesses, affidavits, letters, reports, and any information deemed relevant for the Board's consideration in the matter.]

[(4) Informal conferences shall not be deemed meetings of the Board and no formal record of the proceedings at such conferences shall be made or maintained. Any informal record of conferences shall be made by mechanical or electronic means at the discretion of the committee chair.]

[(5) At the conclusion of the settlement conference, the applications dispute Committee shall make whatever proposals and/or recommendations that it deems appropriate to the Board for its review. At the conclusion of its review, the Board or reaffirm its decision to disapprove the application. Should the applicant dispute the Board's final determination, the matter may be referred to SOAH for a formal hearing.]

[(6) Applicants wishing to appeal the Board's final determination must indicate, in writing, that they wish to have the dispute referred to SOAH for a formal hearing. So that the matter may be timely scheduled for hearing, the notice must be submitted to the Board no later than 60 days from the date the Board reaffirmed its decision to disapprove the application for licensure.]

(b) [(c)] Confidentiality of Informal Settlement Conferences. The Panel may take any and all steps necessary to ensure the confidentiality of the informal settlement conference in accordance with §501.205 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 March 6, 2001.

TRD-200101320
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 305-7700

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

CHAPTER 343. OIL AND HAZARDOUS SUBSTANCES

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §343.1, §343.2

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

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of Chapter 343, Oil and Hazardous Substances, §343.1, Definitions, and §343.2, Permit Exemption for Emergency Cleanup Activities. As published in the Rules Review section of this issue of the *Texas Register*, the commission is also proposing the review of this chapter in accordance with the requirements of Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999. The commission has made a preliminary assessment under its review of the rules in Chapter 343 that the reason for the rules no longer continue to exist, inasmuch as the rules have been superseded by rules in Chapter 327.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED REPEALS

Chapter 343 was adopted by the Texas Department of Water Resources (predecessor agency of the commission) with an effective date of February 17, 1978, to implement the Texas Oil and Hazardous Substances Spill Prevention and Control Act of 1977. In 1983, the 68th Legislature amended the provisions of the Texas Oil and Hazardous Substances Spill Prevention and Control Act of 1977 and redesignated the act as the Texas Hazardous Substances Spill Prevention and Control Act. No changes were made to Chapter 343 as a result of the amended act. However, Chapter 327, Spill Prevention and Control, was later adopted to implement the Texas Hazardous Substances Spill Prevention and Control Act and it included the rules in Chapter 343, updated to conform with the amended act, thus rendering Chapter 343 obsolete.

SECTION BY SECTION DISCUSSION

Chapter 343 consists of only two sections. Section 343.1 provides a definition of hazardous substances. Section 343.2 provides permit exemptions for emergency cleanup activities as a means of establishing immediate and necessary control, containment, removal, and disposal of oil or hazardous substances spills or discharges within coastal lands or waters in the state. The section applies to such spills or discharges where delay necessitated by obtaining commission authorization would seriously impair efforts to prevent the imminent or substantial endangerment to health or the environment. The exemptions apply if the cleanup activities are conducted under the supervision of the executive director or his designated representative. The section requires that the executive director file a report with the

commission within 60 days of completion of the disposal activities. The commission is then required to hold a public hearing to determine if the disposal has created or will cause an adverse effect on the waters in the state or an impairment of the health, welfare, and physical property of the people in the state.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined that for the first five-year period the proposed repeals are in effect, there will be no significant fiscal implications for units of state and local government as a result of the proposed repeals. The proposal would repeal Chapter 343, Oil and Hazardous Substances, which has been superseded by updated rules in Chapter 327, Spill Prevention and Control.

The commission has reviewed the continued need for Chapter 343 and has determined that the provisions within this chapter are no longer used or required. These provisions were originally adopted to provide for the expedited response to oil or hazardous substance spills or discharges occurring within coastal lands or waters within Texas through implementation of certain provisions in the Texas Oil and Hazardous Substances Spill Prevention and Control Act. However, that act was superseded by the Texas Hazardous Substances Spill Prevention and Control Act, which is implemented by updated provisions within Chapter 327.

Facilities that were affected by Chapter 343 rules included ships, tanker trucks, pipelines, chemical plants, and refineries that caused spills into coastal lands and waters. The commission anticipates no significant fiscal implications to units of state and local government due to the proposed repeal of Chapter 343.

PUBLIC BENEFIT AND COSTS

Mr. Davis also has determined that for each year of the first five years the proposed repeals are in effect, the public benefit anticipated from the proposed repeals would be the elimination of unused rules contained in Chapter 343, and continued environmental protection through the enforcement of the more current Chapter 327 rules.

The proposal would repeal Chapter 343, which provided for the expedited response to oil or hazardous substance spills or discharges occurring within coastal lands or waters within Texas. Facilities that were affected by Chapter 343 rules included ships, tanker trucks, pipelines, chemical plants, and refineries that caused spills into coastal lands and waters. The commission anticipates no significant fiscal implications to individuals and businesses due to the proposed repeal of Chapter 343.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse economic effects are anticipated to any small or micro-businesses as a result of implementing the proposed repeals because the elimination of obsolete and unused rules is an administrative action that has no fiscal impact to any small or micro-businesses. There are no known small or micro-businesses that would be adversely affected by the proposed repeals.

The proposal would repeal Chapter 343, which provided for the expedited response to oil or hazardous substance spills or discharges occurring within coastal lands or waters within Texas. Facilities that were affected by Chapter 343 rules included ships, tanker trucks, pipelines, chemical plants, and refineries that caused spills into coastal lands and waters. The commission anticipates no significant fiscal implications to small or micro-businesses due to the proposed repeal of Chapter 343.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed 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 statute. "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposal does not meet the definition of "major environmental rule" because the rulemaking is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. Instead, the rulemaking is intended to repeal Chapter 343 which consists of obsolete and unused rules which have been superseded by other rules adopted by the commission in Chapter 327.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this proposed repeal of rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of this rulemaking is to repeal Chapter 343 which consists of obsolete and unused rules which have been superseded by other rules adopted by the commission in Chapter 327. The repeal of these rules will not burden private real property which is the subject of the rules because these rules are obsolete and are not being used by the commission since they have been superseded by other rules.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the rulemaking and found that the rules proposed for repeal are neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP) nor do they affect any action or authorization identified in the Coastal Coordination Act Implementation Rules, §505.11.

This proposed rulemaking concerns only the repeal of obsolete and unused rules of the commission. Therefore, the rulemaking is not subject to the CMP.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2001-011-343-WS. Comments must be received by 5:00 p.m., April 23, 2001. For further information or questions concerning this proposal, please contact Hector Mendieta, Policy and Regulations Division, (512) 239-6694.

STATUTORY AUTHORITY

The repeals are proposed under the Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under the TWC, and §5.103, which provides the commission with the authority to adopt any rules necessary to carry out the powers and the duties under the provisions of the TWC and other laws of this state. The repeals are proposed as a result of a rule review done in accordance with the requirements of Texas Government Code, §2001.039; and the General

Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999, which require state agencies to review and consider for readoption each of their rules every four years.

No other codes, rules, or statutes will be affected by this proposal.

§343.1. Definitions.

§343.2. Permit Exemption for Emergency Cleanup Activities.

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

Filed with the Office of the Secretary of State, on March 9, 2001.

TRD-200101445
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: April 23, 2001
For further information, please call: (512) 239-4712

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 3. PROPERTY ACCOUNTABILITY

31 TAC §3.1

The Texas General Land Office proposes new Chapter 3, relating to Property Accountability and a new §3.1, relating to Restrictions on Assignment of Vehicles.

House Bill 3125, 76th Legislature, 1999 required the General Services Commission and the Council on Competitive Government to develop a plan for improving the administration and operation of the state's vehicles. This plan was recently adopted. The bill further requires each state agency to adopt rules, consistent with the plan, relating to the assignment and use of the agency's vehicles. Section 3.1 is necessary to comply with House Bill 3125.

Larry Soward, Chief Clerk, has determined that for the first five-year period the new section is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new section. There are no anticipated economic costs for persons required to comply with the section as proposed. There will be no significant impact on local economies or overall employment as a result of enforcing or administering the new section.

Mr. Soward has also determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing or administering the new section will be insuring efficient use of state resources for solely legitimate business purposes. There will be no effect on small businesses.

Written comments on the proposed new section may be submitted to Melinda Tracy, Texas Register Liaison, General Land Office of Texas P.O. Box 12873, Austin, Texas 78711-2873. The deadline for receipt of comments is 5:00 p.m. on April 23, 2001.

The new chapter and section are proposed under Natural Resources Code §31.051 which provides the Commissioner of the General Land Office with the authority to establish rules for the conduct of the work of the General Land Office, and more specifically, Government Code, §2171.1045, which requires the GLO to adopt rules relating to the assignment and use of GLO's vehicles.

No statutes, articles, or codes are affected by the proposed new chapter or section.

§3.1. Restrictions on Assignment of Vehicles.

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

(1) GLO--The General Land Office of Texas.

(2) Commissioner--The Commissioner of the General Land Office of Texas or the Commissioner's designee not below the level of division director.

(b) Motor pool. Each GLO vehicle, with the exception of a vehicle assigned to a field employee, will be assigned to the GLO's motor pool and be available for checkout.

(c) Regular vehicle assignment. The GLO may assign a vehicle to an individual administrative or executive employee on a regular or everyday basis only if the Commissioner makes a documented finding that the assignment is critical to the needs and mission of the department.

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

Filed with the Office of the Secretary of State, on March 12, 2001.

TRD-200101467
Larry Soward
Chief Clerk
General Land Office
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 305-9129

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 13. CONTROLLED SUBSTANCES

The Texas Department of Public Safety proposes the repeal of Chapter 13, Subchapters A-H, §§13.1, 13.2, 13.11-13.29, 13.41-13.47, 13.61-13.67, 13.81-13.87, 13.101-13.113, 13.131-13.149, and 13.161-13.174, concerning Controlled Substances. Due to substantial changes having been made in federal law, federal rules, and Texas law, including House Bill 1070, passed during the 75th Texas Legislature, 1997, these rules as they currently exist are outdated. Therefore, these sections are being repealed with the simultaneous filing of new sections which will be organized in a more logical manner and include standardization of descriptions of time periods and adoption of federal regulations and other state rules by cross reference.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeals are in effect there will

be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five year period the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be current and updated rules. There is no anticipated adverse economic effect on individuals, small businesses, or micro-businesses.

Comments on the proposal may be submitted to David Boatright, Attorney - Criminal Law Enforcement Division, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0400, (512) 424-2646.

SUBCHAPTER A. GENERAL PROVISIONS

37 TAC §13.1, §13.2

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

The repeals are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.006(4), which provides that the director of the department shall adopt rules, subject to commission approval, considered necessary for the control of the department; and Health and Safety Code, §481.003(a).

Texas Government Code, §411.004(3) and §411.006(4), and Health and Safety Code, §481.003(a) are affected by this repeal.

§13.1. General Information.

§13.2. Other State or Federal Laws.

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

Filed with the Office of the Secretary of State, on March 8, 2001.

TRD-200101386
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 424-2135

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SUBCHAPTER B. REGISTRATION

37 TAC §§13.11 - 13.29

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

The repeals are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.006(4), which provides that the director of the department shall adopt rules, subject to commission approval, considered necessary for the control of the department; and Health and Safety Code, §481.003(a).

Texas Government Code, §411.004(3) and §411.006(4), and Health and Safety Code, §481.003(a) are affected by this repeal.

§13.11. Persons Required to Register.
§13.12. Registration Requirements.
§13.13. Consent Form.
§13.14. Separate Registration for Separate Location.
§13.15. Persons Exempt from Registration.
§13.16. Application Requirements.
§13.17. Acceptance for Filing; Defective Applications.
§13.18. Additional Information.
§13.19. Amendment to and Withdrawal of Applications.
§13.20. Certificate of Registration; Denial of Registration.
§13.21. Expiration Date.
§13.22. Fee.
§13.23. Persons Exempt from Payment Fee.
§13.24. Administrative Review - Generally.
§13.25. Grounds for Revocation and Suspension.
§13.26. Modification in Registration.
§13.27. Transfer of Registration.
§13.28. Termination of Registration.
§13.29. Agent or Designated Agent.

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

Filed with the Office of the Secretary of State, on March 8, 2001.

TRD-200101388
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 424-2135

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SUBCHAPTER C. SECURITY

37 TAC §§13.41 - 13.47

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

The repeals are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.006(4), which provides that the director of the department shall adopt rules, subject to commission approval, considered necessary for the control of the department; and Health and Safety Code, §481.003(a).

Texas Government Code, §411.004(3) and §411.006(4), and Health and Safety Code, §481.003(a) are affected by this repeal.

§13.41. Security Controls, General.
§13.42. Minimum Security Requirements for Pharmacies.
§13.43. Minimum Security Controls for All Other Registrants.
§13.44. Minimum Security Requirements for Triplicate Prescription Forms.
§13.45. Minimum Security Controls for Drug Treatment Centers.
§13.46. Other Security Controls.
§13.47. Inspections.

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

Filed with the Office of the Secretary of State, on March 8, 2001.

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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 424-2135

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SUBCHAPTER D. RECORDKEEPING

37 TAC §§13.61 - 13.67

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

The repeals are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.006(4), which provides that the director of the department shall adopt rules, subject to commission approval, considered necessary for the control of the department; and Health and Safety Code, §481.003(a).

Texas Government Code, §411.004(3) and §411.006(4), and Health and Safety Code, §481.003(a) are affected by this repeal.

§13.61. Records for Receiving and Disposing of Controlled Substances.

§13.62. Inventories.

§13.63. Order Forms (DEA Form 222C).

§13.64. Records of Pharmacies.

§13.65. Records of Hospital Pharmacies.

§13.66. Written and Oral Prescriptions.

§13.67. Labeling Requirements of Controlled Substances.

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

Filed with the Office of the Secretary of State, on March 8, 2001.

TRD-200101392
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 424-2135

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SUBCHAPTER E. PEYOTE

37 TAC §§13.81 - 13.87

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

The repeals are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.006(4), which provides that the director of the department shall adopt rules, subject to commission approval, considered necessary for the control of the department; and Health and Safety Code, §481.003(a).

Texas Government Code, §411.004(3) and §411.006(4), and Health and Safety Code, §481.003(a) are affected by this repeal.

§13.81. Persons Required To Register.
§13.82. Requirements for Selling Peyote to Authorized Individuals.
§13.83. Requirements for Reporting Peyote Sales.
§13.84. Security Requirements.
§13.85. Requirements for Certification.
§13.86. Requirements for Recognition as Native American Church.
§13.87. Requirements for Purchase of Peyote.

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

Filed with the Office of the Secretary of State, on March 8, 2001.

TRD-200101394
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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SUBCHAPTER F. TRIPLICATE PRESCRIPTIONS

37 TAC §§13.101-13.113

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

The repeals are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.006(4), which provides that the director of the department shall adopt rules, subject to commission approval, considered necessary for the control of the department; and Health and Safety Code, §481.003(a).

Texas Government Code, §411.004(3) and §411.006(4), and Health and Safety Code, §481.003(a) are affected by this repeal.

§13.101. Persons Who May Order Triplicate Prescriptions.
§13.102. Purpose of Issuing Triplicate Prescription.
§13.103. Emergency Dispensing of Schedule II Controlled Substances.
§13.104. Use of Triplicate Prescription Forms.
§13.105. Utilization of Triplicate Prescription Forms by Practitioners, Other Than Veterinarians, for Small Amounts of Controlled Substances.
§13.106. Exceptions to Use of Triplicate Prescription Forms.
§13.107. Use of Triplicate Prescription by Methadone Clinics.
§13.108. Pharmacist Responsibilities.

§13.109. Questionable Prescriptions.

§13.110. Security Requirements for Triplicate Prescription Form.

§13.111. Disposition of Unused Triplicate Prescription Forms.

§13.112. Source of Supply for Triplicate Prescription Forms.

§13.113. Purpose for True Name, Current Address, and Age Requirements.

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

Filed with the Office of the Secretary of State, on March 8, 2001.

TRD-200101396
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 424-2135

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SUBCHAPTER G. PRECURSOR AND LABORATORY APPARATUS

37 TAC §§13.131-13.149

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

The repeals are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.006(4), which provides that the director of the department shall adopt rules, subject to commission approval, considered necessary for the control of the department; and Health and Safety Code, §481.003(a).

Texas Government Code, §411.004(3) and §411.006(4), and Health and Safety Code, §481.003(a) are affected by this repeal.

§13.131. General Information.

§13.132. Applicability.

§13.133. Persons Required To Obtain a Permit.

§13.134. Persons Exempt from the Permit Requirements.

§13.135. Requirements for Issuance of a Permit.

§13.136. Letter of Authorization from a Purchaser.

§13.137. Distribution Requirements and Letter of Waiver.

§13.138. Reporting Sales or Distributions.

§13.139. Instructions for Completing the NAR-22 Form.

§13.140. Reporting Discrepancy, Loss, or Theft.

§13.141. Reporting Receipt of a Precursor or Apparatus without a Permit.

§13.142. Regulated Chemical Precursors and Laboratory Apparatus.

§13.143. Out-of-State Business Activities.

§13.144. Recordkeeping Requirements for Distributors.

§13.145. Inventory Requirements of Distributors.

§13.146. Audits and Inspections of Distributors.

§13.147. Revocation, Denial, or Modification of a Permit.

§13.148. Permit Holder Required To Update Information.

§13.149. Additions or Deletions.

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

Filed with the Office of the Secretary of State, on March 8, 2001.

TRD-200101398
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 424-2135

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SUBCHAPTER H. SUMMARY FORFEITURE AND DESTRUCTION OF CONTROLLED SUBSTANCES PROPERTY, PLANTS, AND OTHER MISCELLANEOUS ITEMS

37 TAC §§13.161 - 13.174

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

The repeals are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.006(4), which provides that the director of the department shall adopt rules, subject to commission approval, considered necessary for the control of the department; and Health and Safety Code, §481.003(a).

Texas Government Code, §411.004(3) and §411.006(4), and Health and Safety Code, §481.003(a) are affected by this repeal.

§13.161. Definitions

§13.162. Summary Forfeiture.

§13.163. Item To Be Destroyed Should Be Legally Worthless as Criminal Evidence.

§13.164. Sources of Destruction Authority for Controlled Substance Property or Plants.

§13.165. Sources of Destruction Authority for Other Items.

§13.166. Court Order of Destruction.

§13.167. Destruction Standard Operating Procedure (SOP) for a Laboratory or Agency - Security Control.

§13.168. Manner of Destruction - Security Control.

§13.169. Two-Witness Rule - Security Control.

§13.170. Destruction Inventory - Security Control.

§13.171. Witness Responsibility - Security Control.

§13.172. Laboratory Retesting for Possible Tampering - Security Control.

§13.173. Destruction Documentation - Security Control.

§13.174. Maintenance, Inspection, and Transmittal of Destruction Documentation - Security Control.

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

Filed with the Office of the Secretary of State, on March 8, 2001.

TRD-200101400

Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 424-2135

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CHAPTER 13. CONTROLLED SUBSTANCES

The Texas Department of Public Safety proposes new Chapter 13, Subchapters A-M, §§13.1-13.11, 13.21-13.33, 13.41-13.58, 13.71-13.86, 13.101-13.115, 13.131-13.137, 13.151-13.165, 13.181-13.187, 13.201-13.209, 13.221-13.224, 13.231-13.237, 13.251-13.254, and 13.271-13.278, concerning Controlled Substances. These new sections are proposed simultaneously with the repeal of current Chapter 13, Subchapters A-H, §§13.1, 13.2, 13.11-13.29, 13.41-13.47, 13.61-13.67, 13.81-13.87, 13.101-13.113, 13.131-13.149, and 13.161-13.174.

The drug rules as they exist were written in the 1970's and have been amended many times since, usually issue by issue. Since that time there have been many changes to related federal law, federal rules, and Texas law, including House Bill 1070, 75th Texas Legislature, 1997. Amendments to these rules are necessary to integrate those changes.

The previous Chapter 13 is proposed to be repealed in its entirety and to be replaced (in its entirety) with a new Chapter 13. The new Chapter 13 is organized to simplify and shorten it and place its material in a more logical order. Changes include standardization of descriptions of time periods and adoption of federal regulations and other state rules by cross reference. Using this technique, the person (physician, pharmacist, chemical distributor) will only have to comply with one set of rules regarding any issue, for example, record keeping and security.

Subchapter A: General Provisions. This subchapter collects all of the definitions of general relevance to the entire chapter as a drafting convenience. It contains several miscellaneous provisions, including cross-references to other state or other federal laws, rules or regulations, alternative schedule nomenclature, the forms for transmitting or communicating information and the telephone numbers and addresses of the various Department of Public Safety (DPS) units involved in the administration of this chapter.

Subchapter B: Registration. This subchapter clarifies the activities and the schedules for which controlled substance registration must be obtained. It reorganizes Subchapter B in the old Chapter 13 and repeats much of it without substantive change. The new subchapter explains in more detail the status of "expiration" versus "termination" of a registration.

Subchapter C: Peyote. This subchapter collects issues from subchapters throughout old Chapter 13, primarily in Subchapter E, and repeats them without substantive change. There is a new §13.47 governing the possession and display of identification and access information, when a person is hunting, harvesting, cutting, collecting, transporting, or in possession of peyote. Also, there is a new §13.48 governing source information describing where the peyote came from.

Subchapter D: Official Prescriptions. This subchapter repeats much of the old Subchapter F, and parts of the old Subchapters C and D, regarding triplicate prescriptions without substantive change except to track the statutory change from the "Triplicate Prescription Program" to the "Official Prescription Program." There are new provisions governing electronic and non-electronic reporting and the deletion or return of a particular Schedule II substance with regard to the Official Prescription Program.

Subchapter E: Precursors And Apparatus. This subchapter repeats much of the old Subchapter G regarding precursors and apparatus without substantive change. §13.115 adds red phosphorus and hypophosphoric acid to the list of chemical precursors regulated under the section. This addition is based on the fact that these chemicals do jeopardize public health and welfare, and that they are proliferating and being used in clandestine laboratories in the illicit manufacture of controlled substances, particularly methamphetamine.

Subchapter F: Applications. This subchapter collects many of the provisions regarding applications that were contained in various subchapters, primarily B (Controlled Substances Registrations), E (Peyote Distributors) and G (Precursor Permits) in the old rules and repeats them without substantive change. This subchapter does clarify that incomplete, insufficient, or otherwise less than fully effective signatures may be rejected on an application.

Subchapter G: Forfeiture And Destruction. This subchapter repeats much of the old Subchapter E regarding forfeiture and destruction without substantive change.

Subchapter H: Security. This subchapter collects many of the assorted security provisions that were found throughout the old Chapter 13, primarily Subchapter C, and repeats them without substantive change.

Subchapter I: Record Keeping. This subchapter collects many of the assorted record keeping provisions that were found throughout the old Chapter 13 and repeats them without substantive change.

Subchapter J: Inventory. This subchapter collects many of the assorted inventory provisions that were found throughout the old Chapter 13, primarily Subchapters D (Record Keeping), E (Peyote) and G (Precursor and Laboratory Apparatus), and repeats them without substantive change.

Subchapter K: Inspection. This subchapter collects many of the assorted inspection provisions that were found throughout the old Chapter 13 and repeats them without substantive change.

Subchapter L: Reporting Discrepancy, Loss, Theft or Diversion. This subchapter collects many of the assorted reporting discrepancy, loss, theft and diversion provisions that were found throughout the old Chapter 13 and repeats them without substantive change.

Subchapter M: Denial, Revocation And Related Disciplinary Action. This subchapter collects many of the assorted denial, revocation, and related disciplinary action provisions that were found throughout the old Chapter 13 and repeats them without substantive change. This subchapter clarifies the applicability of the APA (The Administrative Procedure Act, Texas Government Code, Chapter 2001) to certain disciplinary action proceedings and not to others. The subchapter governs the denial, revocation, suspension, probation, reprimand, voluntary surrender, or cancellation of a controlled substance registration or a chemical precursor and apparatus permit.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the rules are in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be to provide improved reorganization of the Controlled Substances and Precursor/Apparatus Rules and Regulations sections that will create an easier access of certain sections that are needed for reference or referral of specific subjects. There is no anticipated adverse economic effect on individuals, small businesses or micro-businesses.

Comments on the proposal may be submitted to David Boatright, Attorney - Criminal Law Enforcement Division, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0400, (512) 424-2646.

SUBCHAPTER A. GENERAL PROVISIONS

37 TAC §§13.1 - 13.11

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.006(4), which provides that the director of the department shall adopt rules, subject to commission approval, considered necessary for the control of the department; and Health and Safety Code, §481.003(a).

Texas Government Code, §411.004(3) and §411.006(4), and Health and Safety Code, §481.003(a) are affected by this proposal.

§13.1. Chapter Definitions.

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

(1) Act - The Texas Controlled Substances Act (Texas Health and Safety Code, Chapter 481).

(2) Administer, abuse unit, adulterant or dilutant, agent, controlled premises, controlled substance, controlled substance analogue, deliver, delivery, designated agent, director, dispense, distribute, distributor, drug, drug paraphernalia, Federal Drug Enforcement Administration, hospital, institutional practitioner, lawful possession, manufacture, marihuana, medication order, narcotic drug, official prescription form, opiate, patient, person, pharmacist, pharmacist-in-charge, pharmacy, possession, practitioner, prescribe, prescription, principal place of business, and registrant - Have the meanings assigned those terms by the Act, §481.002.

(3) CSR - Controlled Substances Registration.

(4) Day - means a calendar day unless the context clearly indicates another meaning such as a business day.

(5) Department or DPS - The Texas Department of Public Safety.

(6) Drug Enforcement Administration or DEA - The Federal Drug Enforcement Administration.

(7) Inhalant paraphernalia - An item or other material defined as such by Texas Health and Safety Code, §484.001 or §485.001.

(8) Laboratory apparatus - An item subject to Subchapter E of this chapter (relating to Precursors and Apparatus).

(9) Licensed vocational nurse or LVN - An individual recognized as a licensed vocational nurse by the Texas Board of Vocational Nurse Examiners.

(10) Long-term care facility or LTCF - An establishment licensed as such by the Texas Department of Human Services.

(11) Narcotic controlled substance - A narcotic drug or other controlled substance that contains opium or an opiate derivative.

(12) Non-narcotic controlled substance - A controlled substance that does not contain opium or an opiate derivative.

(13) PCLAS - The Precursor Chemical/Laboratory Apparatus Section.

(14) Physician assistant - An individual licensed as such by the Texas State Board of Physician Assistant Examiners.

(15) Precursor chemical - A substance subject to Subchapter E of this chapter (relating to Precursors and Apparatus).

(16) Readily retrievable record - A record created and maintained by an automatic data processing or mechanized record keeping system so that a particular type of record can be separated from all other records in a reasonable time. The term includes a record created and maintained by annotation of each material item with an asterisk, redline, or some other manner visually identifiable apart from all other items appearing on the required record.

(17) Record - A notification, order form, statement, invoice, prescription, inventory information, or other document for the acquisition or disposal of a controlled substance, precursor, or apparatus in any manner by a registrant or permit holder under a record keeping or inventory requirement of federal law, the Act, or this chapter.

(18) Registered nurse - An individual recognized as such by the Texas Board of Nurse Examiners.

(19) Schedule II - A list of narcotic and non-narcotic controlled substances found in the most current version of Schedule II as established or altered by the commissioner of health under the Act, Subchapter B, and published in the Texas Register.

(20) Triplicate prescription form - A type of official prescription form.

§13.2. Other State or Federal Laws, Rules, or Regulations.

(a) Construed. This chapter may not be construed as authorizing or allowing a person to act in violation of another state or federal law, rule, or regulation. Compliance with this chapter may not be construed as compliance with another state or federal law, rule, or regulation unless expressly provided by the law, rule, or regulation.

(b) Strictest standard. If a practitioner or other person whose conduct is covered by this chapter must comply with a standard contained within a state health regulatory agency rule, this chapter, or a federal regulation, the person must comply with the strictest standard.

(c) Cross-reference. By adopting an administrative rule or regulation of another state or federal agency by a cross-reference to that rule or regulation, the director does not surrender any authority or responsibility to make, administer, or enforce a DPS drug rule. If this chapter references a federal regulation or a rule adopted by another state agency, the director may enforce the regulation or rule:

(1) as a DPS drug rule that has been adopted by the director under the authority of the Act, §481.003; and

(2) as if a reference to:

(A) the DEA administrator or other federal or state official is a reference to the director;

(B) DEA or other agency is a reference to DPS;

(C) a DEA or other agency form is a reference to the analogous DPS form; and

(D) a licensed practical nurse is a reference to a licensed vocational nurse.

§13.3. Alternative Schedule Nomenclature.

The director may reference a schedule for a controlled substance by:

(1) its statutory Roman numeral designation; or

(2) an analogous Arabic number designation.

§13.4. Notification, Information, and Electronic Transmission.

(a) Notification. If this chapter requires a person to notify or advise the director of new or changed information, the person must notify the director through the appropriate DPS unit indicated in this chapter. If this chapter describes the director followed by a parenthetical reference to a section, service, or other unit of the department, the communication will be made to the director through the referenced section, service, or unit.

(b) Information. The director may furnish information about this chapter to a person who has made a personal, telephonic, or written request to the director through the appropriate service or section.

(c) Forms. The director may:

(1) provide internet access to a form used under this chapter; or

(2) accept an internet application under this chapter.

(d) Signature or ID. The director may accept an electronically transmitted signature or other similar identification code under this chapter.

§13.5. Acceptance of Non-standard Communication.

The director may accept an oral, telephonic, electronic, or other non-standard communication as sufficient to meet a reporting or notification requirement of this chapter if:

(1) the oral, telephonic, electronic, or other communication is repeated in an original writing within seven days after the initial electronic report or notification; or

(2) an expressly named representative of the director waives the written report or notification otherwise required to confirm the communication.

§13.6. Waiver Rescission.

The director may rescind a waiver issued under this chapter if the reason for the waiver no longer exists.

§13.7. Telephone Number and Address - Narcotics Service.

To inquire about information and administrative matters with, transmit to, or otherwise contact the Narcotics Service, in general:

(1) the telephone number is: (512) 424-2150;

(2) the fax number is: (512) 424-7166;

(3) the Post Office Box mailing address is: Narcotics Service MSC 0430, Texas Department of Public Safety, PO Box 4087, Austin, Texas 78773-0430; and

(4) the physical mailing address is: Narcotics Service MSC 0430, Texas Department of Public Safety, 5805 N. Lamar Blvd., Austin, Texas 78752-4422.

§13.8. Telephone Number and Address - Controlled Substances Registration Section.

To inquire about information and administrative matters with, transmit to, or otherwise contact the Controlled Substances Registration (CSR) Section:

(1) the telephone number is: (512) 424-2188;

(2) the fax number is: (512) 424-5799;

(3) the Post Office Box mailing address is: Controlled Substances Registration Section MSC 0438, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0438;

(4) the fee or payment address is: Controlled Substances Registration Section MSC 0438, Texas Department of Public Safety, P.O. Box 15999, Austin, Texas 78761-5999;

(5) the physical mailing address is: Controlled Substances Registration Section MSC 0438, Texas Department of Public Safety, 5805 N. Lamar Blvd., Austin, Texas 78752-4422; and

(6) the e-mail address is through the department's web page at "www.txdps.state.tx.us" or directly through "tp-pcsr@txdps.state.tx.us."

§13.9. Telephone Number and Address - Texas Prescription Program.

To inquire about information and administrative matters with, transmit to, or otherwise contact the Texas Prescription Program:

(1) the telephone number is: (512) 424-2189;

(2) the fax number is: (512) 424-5799;

(3) the Post Office Box mailing address is: Texas Prescription Program MSC 0439, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0439;

(4) the fee or payment address is: Texas Prescription Program MSC 0439, Texas Department of Public Safety, P.O. Box 15999, Austin, Texas 78761-5999;

(5) the physical mailing address is: Texas Prescription Program MSC 0439, Texas Department of Public Safety, 5805 N. Lamar Blvd., Austin, Texas 78752-4422; and

(6) the e-mail address is through the department's web page at "www.txdps.state.tx.us" or directly through "tp-pcsr@txdps.state.tx.us."

§13.10. Telephone Number and Address - Precursor Chemical/Laboratory Apparatus Section.

To inquire about information and administrative matters with, transmit to, or otherwise contact the Precursor Chemical/Laboratory Apparatus Section (PCLAS):

(1) the telephone number is: (512) 424-2481 or (512) 424-2482;

(2) the fax number is: (512) 424-5757;

(3) the Post Office Box mailing address is: Precursor Chemical/Laboratory Apparatus Section MSC 0433, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0433;

(4) the physical mailing address is: Precursor Chemical/Laboratory Apparatus Section MSC 0433, Texas Department of Public Safety, 5805 N. Lamar Blvd., Austin, Texas 78752-4422; and

(5) the e-mail address is through the department's web page at "www.txdps.state.tx.us" or directly through "precursor.chemical @txdps.state.tx.us."

§13.11. Telephone Number and Address - Crime Laboratory Service.

To inquire about information and administrative matters with, transmit to, or otherwise contact the Crime Laboratory Service:

(1) the telephone number is: (512) 424-2105;

(2) the fax number is: (512) 424-2869;

(3) the Post Office Box mailing address is: Crime Laboratory Service MSC 0460, Texas Department of Public Safety, P.O. Box 4143, Austin, Texas 78765-0460; and

(4) the physical mailing address is: Crime Laboratory Service MSC 0460, Texas Department of Public Safety, 5805 N. Lamar Blvd., Austin, Texas 78752-4422.

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

Filed with the Office of the Secretary of State, on March 8, 2001.

TRD-200101387
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 424-2135

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SUBCHAPTER B. REGISTRATION

37 TAC §§13.21 - 13.33

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.006(4), which provides that the director of the department shall adopt rules, subject to commission approval, considered necessary for the control of the department; and Health and Safety Code, §481.003(a).

Texas Government Code, §411.004(3) and §411.006(4), and Health and Safety Code, §481.003(a) are affected by this proposal.

§13.21. Who Must Register.

(a) Required by Act. A person, who is required by the Act to register in order to manufacture, distribute, prescribe, possess, analyze, dispense, or conduct research with a controlled substance, must obtain an annual registration from the director (CSR Section).

(b) Generally. Only a person actually engaged in an activity covered by the registration provisions of the Act must obtain a registration. A related or affiliated person who is not engaged in a covered activity is not required to register.

(c) Activities. The director may register a person for one or more of the following categories of business activity:

(1) practitioner;

(2) pharmacy;

(3) hospital;

(4) manufacturer;

(5) researcher;

(6) teaching institution;

(7) distributor;

(8) analyst or analytical lab; or

(9) peyote distributor.

(d) Schedules. The director may register a person for one or more of the following schedules:

(1) Schedule I;

(2) Schedule II (narcotic);

(3) Schedule II (non-narcotic);

(4) Schedule III (narcotic);

(5) Schedule III (non-narcotic);

(6) Schedule IV; or

(7) Schedule V.

(e) Lawful possession. A registrant may lawfully possess a controlled substance to the extent authorized by the registration.

(f) An applicant may apply for registration as a manufacturer, researcher, teaching institution, distributor, analyst, or analytical laboratory only after obtaining the appropriate registration from DEA.

§13.22. Registration for Certain Activities.

(a) Schedule I. A person who is seeking registration to conduct research with a Schedule I controlled substance must comply with the Act, §481.065(b) and submit a research protocol to the director for approval. Under this subsection, the person may submit a duplicate of a protocol submitted to DEA for the same research authority. Once submitted, the protocol becomes a part of the application for all purposes. If approved by the director, the person may conduct research only:

(1) in the manner expressly detailed in the protocol; and

(2) using a controlled substance expressly specified in the protocol.

(b) Without DEA registration. If the director determines registration is appropriate to minimize a risk of diversion or abuse of a controlled substance, the director may register a person who:

(1) has not applied for registration with DEA; or

(2) is not a registrant with DEA.

§13.23. Separate Registration for Separate Location.

An applicant must make a separate application and obtain a separate registration for each principal place of business or professional practice as required by the Act, §481.061(c) and the Code of Federal Regulations, Title 21, Chapter II, §1301.12.

§13.24. Exemption from Registration.

A person is exempt from registration, need not register, and may lawfully possess a controlled substance under the Act if the person is:

(1) exempted from registration under the Act, §481.062;

(2) excepted from the Act, Subchapter C, under the Act, §481.0621; or

(3) exempted from federal registration under the Code of Federal Regulations, Title 21, Chapter II, §§1301.22 - 1301.25.

§13.25. Application.

(a) Required. A person required to register under this subchapter must comply with this subchapter and Subchapter F of this chapter (relating to Applications).

(b) Form. An applicant must make:

(1) a new or original application on DPS Form NAR-77; and

(2) a renewal application on DPS Form NAR-78.

(c) Rejection. An applicant, who seeks to renew a registration, may correct a rejected or defective application and resubmit it for filing

at any time before termination under §13.30 of this title (relating to Termination).

§13.26. Certificate.

(a) Issuance. The director will issue a certificate of registration to an applicant who qualifies for registration or renewal under the applicable provisions of the Act, Subchapter C, and this subchapter.

(b) NAR-79. The director will issue the certificate on DPS Form NAR-79, containing:

(1) the registrant's name and address;

(2) the registration number;

(3) the business activity authorized by the registration;

(4) each schedule the registrant is authorized to handle;

(5) a "fee paid" or "exempt" notation;

(6) a "duplicate" notation, if the certificate is a duplicate;

(7) the certificate's issue date; and

(8) the certificate's expiration date.

(c) Display. The registrant must:

(1) display the certificate at the physical location of the registrant's principal place of business; or

(2) maintain the certificate so the registrant may promptly retrieve and display it at any time upon proper demand.

§13.27. Fee.

(a) Amount. To apply for an original or renewal registration to manufacture, distribute, prescribe, possess, analyze, dispense, or conduct research with a controlled substance, the applicant must pay a non-refundable registration fee of $25.

(b) Submission. An applicant must submit the fee with the original or renewal application to the director (CSR Section).

(c) Acceptable manner. The applicant must make payment in the form of a check or money order, payable to the "Texas Department of Public Safety," or another form of payment authorized by a general rule or policy of the department.

(d) Prohibited manner. The director will not accept a fee payment in the form of:

(1) stamps;

(2) foreign currency;

(3) a check or money order, payable in foreign currency; or

(4) a third-party endorsed check.

(e) Multiple or additional fees. The director:

(1) may charge multiple fees for registrations to one person at each different location and for each different business activity; and

(2) will not charge an additional fee for each different schedule processed on a single registration application.

§13.28. Fee Exemption.

(a) Requirements. The director may exempt a person from payment of a state fee for registration or renewal, if the person's superior certifies on the DPS Form NAR-77 or NAR-78 that the person is exempted from payment of a fee under the Code of Federal Regulations, Title 21, Chapter II, §1301.21.

(b) Effect. Exemption from payment of a registration or renewal fee:

(1) authorizes the registrant, where applicable, to acquire, possess, or handle a controlled substance only at the exempt location; and

(2) does not relieve the registrant of another requirement or duty prescribed by law.

§13.29. Expiration.

(a) Annual. Except as provided by subsection (c) of this section, an original certificate of registration expires after one year from the month of issuance indicated on the original certificate.

(b) Effect of modification or renewal. Except as provided by subsection (c) of this section, a modification in registration or an early renewal does not affect a current or future date of expiration.

(c) Extension. The director may extend the expiration date of a registration for a period of less than 12 additional months, if the director determines the extension is necessary to evenly allocate the expiration dates of all certificates.

(d) Effect of expiration. After expiration, the former registration provides the registrant with no authority to manufacture, distribute, prescribe, possess, analyze, dispense, or conduct research with a controlled substance.

(e) Grace period. After expiration under this section, a former registrant may apply for a new registration. During a six-month grace period after expiration and before termination under §13.30(a)(1) of this title (relating to Termination), the director (CSR Section) may reserve the original registration number in the name of the original applicant.

§13.30. Termination.

(a) When. A registration terminates:

(1) at the end of a grace period of six months allowed by the director after expiration under this subchapter;

(2) when DEA accepts a voluntary surrender, or denies, suspends, or revokes a federal controlled substance registration; or

(3) when the person dies, ceases legal existence, or discontinues business or professional practice.

(b) New registration required. After termination, a former registrant must apply for a new registration and may be issued a different registration number.

(c) Effect of termination. After termination, the former registration provides the registrant with no authority to manufacture, distribute, prescribe, possess, analyze, dispense, or conduct research with a controlled substance.

(d) Discontinued activity. On the day a registrant discontinues business or professional practice, the registrant or a representative of the registrant must notify the director (CSR Section) by close of business. The director may immediately terminate the registration of a person reported to the director under this subsection.

§13.31. Security, Record Keeping, Inventory, Inspection, and Reporting Discrepancy, Loss, Theft, or Diversion.

A registrant must comply with the applicable provisions of:

(1) Subchapter H of this chapter (relating to Security);

(2) Subchapter I of this chapter (relating to Record Keeping);

(3) Subchapter J of this chapter (relating to Inventory);

(4) Subchapter K of this chapter (relating to Inspection); and

(5) Subchapter L of this chapter (relating to Reporting Discrepancy, Loss, Theft, or Diversion).

§13.32. Communication with Director (CSR Section).

If a person is required or allowed by this subchapter to make a notification, report, or other written, telephonic, or personal communication to the director, the person must make the communication to the director through the CSR Section at the address indicated in §13.8 of this title (relating to Telephone Number and Address - Controlled Substances Registration Section).

§13.33. Miscellaneous.

(a) Confidentiality. A person lawfully authorized under this chapter to conduct research in the use and effects of a controlled substance may, under the Act, §481.068, withhold from the director the name and other identifying characteristics of an individual who is the subject of the research.

(b) Transfer. A registrant may not transfer or assign to another person a registration certificate or an authority conferred by the registration.

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

Filed with the Office of the Secretary of State, on March 8, 2001.

TRD-200101389
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 424-2135

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SUBCHAPTER C. PEYOTE

37 TAC §§13.41 - 13.58

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.006(4), which provides that the director of the department shall adopt rules, subject to commission approval, considered necessary for the control of the department; and Health and Safety Code, §481.003(a).

Texas Government Code, §411.004(3) and §411.006(4), and Health and Safety Code, §481.003(a) are affected by this proposal.

§13.41. Subchapter Definitions.

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

(1) AIRFA - The American Indian Religious Freedom Act.

(2) Distributor - A peyote distributor registered by the director under this subchapter and Subchapter B of this chapter (relating to Registration).

(3) Identification information - A unique number appearing on the individual's:

(A) driver license or personal identification certificate and assigned to the individual by the department or by an analogous agency in another state; or

(B) social security card, military identification card, passport, visa, work permit, or other identification card and assigned to an individual by an agency of the United States.

(4) Indian - An individual with not less than 25% Indian blood who is:

(A) an enrolled member of a tribe recognized under federal law; and

(B) a certified member of a declared Native American Church.

(5) Landowner - includes an agent of the landowner.

§13.42. Peyote Distributor Registration.

(a) Who must register. A person who delivers peyote must make application for a controlled substances registration under the Act and obtain an annual registration from the director (CSR Section).

(b) Effect of registration. A distributor seeking to deliver or receive peyote under this subchapter may obtain a peyote distributor registration that authorizes the distributor to:

(1) deliver peyote to another distributor;

(2) receive peyote from another distributor;

(3) receive peyote from an employee of the distributor; or

(4) deliver peyote to an Indian for use only in a bona fide religious ceremony of the church.

(c) Activity authorized. Incidental to lawful distribution under this subchapter, a distributor may hunt, harvest, cut, collect, transport, or possess peyote.

(d) Activity not authorized. A distributor registration does not authorize the distributor to:

(1) manufacture or cultivate peyote;

(2) ingest or use peyote;

(3) deliver to an individual who is a member of a federally recognized Indian tribe under AIRFA, unless the individual is also an Indian as the term is defined in this subchapter; or

(4) import or export peyote.

§13.43. Application.

(a) Requirements. The director may register and issue a certificate of registration to a distributor only if the applicant:

(1) meets the general requirements for a controlled substances registration under Subchapter B of this chapter (relating to Registration);

(2) is registered with DEA;

(3) has made a complete application to the director (CSR Section) for registration as a distributor on DPS Form NAR-95 and complied with this section and Subchapter F of this chapter (relating to Applications);

(4) has paid the required registration fee; and

(5) forwards with the application for registration a letter from the local chief of police, sheriff, or county judge in the jurisdiction where the applicant's principal place of peyote business is located stating the applicant is of good moral character.

(b) Fee. The fee for registration as a distributor is the same amount as the fee collected for a controlled substances registration under §13.27 of this title (relating to Fee).

§13.44. Certificate and ID Card.

(a) Issuance. If the director approves an application for registration, the director will issue to the applicant:

(1) a certificate of registration, DPS Form NAR-96; and

(2) a peyote distributor identification card, DPS Form NAR-96A.

(b) Return. If the director suspends, revokes, denies, cancels, or accepts voluntary surrender of a distributor's certificate of registration, the distributor must return the following to the director (CSR Section) within seven days:

(1) the peyote distributor certificate of registration;

(2) the peyote distributor identification card;

(3) each peyote employee identification card;

(4) each source log;

(5) each unused or voided sale of peyote receipt, DPS Form NAR-96C; and

(6) each completed receipt or other document relating to the purchase, acquisition, or sale of peyote not already submitted to the director.

(c) Expiration. The director will issue a certificate of registration and a peyote distributor identification card to expire in the same manner as a controlled substances registration under §13.29 of this title (relating to Expiration).

(d) Display. The distributor must display the certificate of registration at all times in a conspicuous place at the address appearing on the certificate.

§13.45. Employee Information.

(a) Identification. A distributor must furnish to the director (CSR Section) the name and identification information of each current employee who will:

(1) handle or possess peyote in the course and scope of employment; and

(2) use that employment status to avoid potential criminal liability for handling or possessing peyote.

(b) Current employee. A distributor or applicant must provide to the director (CSR Section) on an application for original or renewal of registration a list of the name and other identification information of an individual who is:

(1) currently employed by the distributor; or

(2) reasonably known to the distributor as likely to be employed during the term of the registration sought by the applicant.

(c) New employee. If a new employee's name and other identification information has not already been indicated on a distributor's current application for registration, then, before the employee is allowed to work handling or possessing peyote, the distributor must:

(1) advise the director (CSR Section) of the change; and

(2) receive a peyote employee identification card, DPS Form NAR-96B.

(d) Name format. The distributor must report an employee's name to the director (CSR Section) in the format required by this subsection. The director will use the same name format on documents issued by the director. The standard format, including name order, is:

(1) given or first name;

(2) additional middle names, if any;

(3) mother's family name; and

(4) father's family name.

§13.46. Employee Identification Card.

(a) Form. After notification by a distributor, the director will furnish the distributor a peyote employee identification card, DPS Form NAR-96B. The distributor may give notice under this subsection for an employee already named in the application or a new employee named at a later date.

(b) Use of ID card. The peyote employee identification card certifies the individual named is:

(1) an employee of the distributor;

(2) authorized to hunt, harvest, cut, collect, transport, or possess peyote in the course and scope of employment; and

(3) authorized to deliver peyote, but only directly to the distributor who employs the individual.

(c) Retrieval and return. When an employee ceases employment with a distributor, the distributor must take reasonable steps to:

(1) by close of business, retrieve the employee identification card from the employee; and

(2) within seven days:

(A) return the card to the director (CSR Section) for cancellation; or

(B) notify the director (CSR Section) of the reason the card was not retrieved or returned, including the reasonable steps taken by the distributor while attempting to do so.

§13.47. Possession and Display of Identification and Access Information.

(a) Possession. At all times an employee is hunting, harvesting, cutting, collecting, transporting, or in possession of peyote, the employee must possess a peyote employee identification card.

(b) Demand of official. When a distributor or employee is hunting, harvesting, cutting, collecting, transporting, or in possession of peyote, the individual must:

(1) possess a current, valid distributor or employee identification card; and

(2) display the card upon demand to the director or a member of the department, a peace officer, or a federal official.

(c) Demand of landowner. If the distributor or employee is hunting, harvesting, cutting, collecting, transporting, or in possession of peyote on land belonging to someone other than the distributor or employee, the distributor or employee must display the card upon demand to the landowner.

(d) Supporting documentation. If an individual is required to display an identification card under this section, the individual must also possess and display a license, card, or other documentation to support identification information contained on the distributor or employee identification card and:

(1) documentation sufficient to show lawful access to the land where the peyote was harvested or cut; or

(2) a reasonably complete verbal declaration of the individual's lawful access to the land, including the name and location of the person granting the access.

(e) Manner of compliance. An individual may comply with subsection (d)(1) of this section by presenting:

(1) an original or copy of an ownership document, lease agreement, or other document showing the individual's lawful access to the land in question; or

(2) a completed form issued by the director to record this information.

§13.48. Source Information.

(a) Notification of director. A distributor must notify the director (CSR Section) of the name of the owner and the physical address or other sufficient description of all land to which the distributor has legal access for harvesting peyote. The notification must be made at the time of registration and within seven days of a change in the information required by this section.

(b) Ensure lawful access. A distributor may not deliver peyote to another distributor or an Indian unless the distributor takes reasonable steps to ensure the peyote was harvested or cut in Texas by the distributor or an employee of the distributor on land to which the distributor has a legal right of entry. The director will deem a distributor has taken reasonable steps under this subsection if the distributor:

(1) makes express verbal inquiry about the source of all peyote supplied to the distributor by an employee or another distributor;

(2) obtains from the employee or other distributor a verbal or written statement certifying the source of all peyote supplied to the distributor; and

(3) maintains the certification in a log of the source of all peyote.

(c) Statement of lawful access. A distributor must:

(1) ensure the employee or other distributor, who supplies peyote to the distributor in a single transaction, completes or causes to be completed a written statement certifying under subsection (d) of this section the source of the peyote involved in the transaction; and

(2) maintain the source log as a record of acquisition under this subchapter.

(d) Source log. A source log under this section must include:

(1) a reasonably accurate description of the quantity of peyote supplied in the transaction;

(2) a reasonably accurate description of the physical property where each quantity of peyote was harvested or cut;

(3) the name of the individual who asserts authority to give permission on behalf of the landowner for peyote to be harvested or cut;

(4) the name of the harvester;

(5) the date each quantity of peyote was harvested or cut; and

(6) the signature of the distributor.

§13.49. Purchase or Harvest.

(a) Requirements, generally. An Indian may purchase peyote in person from a distributor in this state if the Indian follows one of the methods described by §13.50 of this title (relating to Sale in Person) or §13.51 of this title (relating to Mail Order Sale). The director encourages but does not require use of the standard method.

(b) Harvesting by Indian. A landowner may not allow an Indian to harvest peyote on the land of another person unless the Indian furnishes to the landowner a letter, permit, or identification sufficient to comply with either subsections (c) or (g) of §13.50 of this title (relating to Sale in Person).

§13.50. Sale in Person.

(a) Requirements, generally. A distributor may not supply or sell peyote to a person unless the person is:

(1) another registered peyote distributor;

(2) a governmental entity or a person registered with the director in a capacity to lawfully receive the peyote; or

(3) an Indian who complies with this subchapter.

(b) The distributor delivering peyote to an Indian must follow one of the methods described by this section or §13.51 of this title (relating to Mail Order Sale). The director encourages but does not require use of the standard method.

(c) Standard method. A distributor may deliver peyote to an Indian member of the Native American Church if the purchasing Indian furnishes to the distributor a photo identification card, that includes reasonably accurate identification information, and an authorization letter or travel permit. The identification card and the letter or permit must collectively contain the full name, including Indian name, tribe, degree of Indian blood (not less than 25%), date of birth, agency enrolled with, and census number or enrollment number of the purchasing or harvesting Indian.

(d) Required contents. An authorization letter or travel permit, that is used in the standard method, must:

(1) be printed on official stationery of the Native American Church; and

(2) contain the following:

(A) the full name and either a cross-reference to the identification card number or some other reasonably accurate identification of the purchasing or harvesting Indian;

(B) the date of issuance and expiration for the letter or permit; and

(C) the signature of the president, vice president, or other designated custodian of the state or local organization of the Native American Church who personally issued the letter or permit to the purchasing or harvesting Indian.

(e) Recommended contents. The director encourages but does not require that an authorization letter or travel permit, that is used in the standard method, contain the following:

(1) the estimated or probable dates, routes, and mode of travel, that may include a detailed description of a vehicle and its occupants;

(2) the estimated location of purchase (or harvest); and

(3) the estimated amount of peyote to be purchased (or harvested).

(f) Timely transmission. A church representative should timely mail or cause to be mailed or otherwise transmit electronically to the director (CSR Section) a letter or permit described by subsections (d) and (e) of this section. The director will deem a letter or permit to be timely mailed if it is on file with the director before anyone attempts to purchase or harvest peyote under its authority. If the CSR Section receives the letter or permit before the distributor delivers the peyote, the director may then respond knowledgeably to an inquiry made about the legitimacy of the peyote purchase, harvest, possession,

or transportation even if some of the prospective information reported under subsection (e) of this section may have changed.

(g) Alternative method. In lieu of the standard method documentation required by this section, a distributor may deliver peyote to an Indian member of the Native American Church if the purchasing Indian furnishes a photo identification card, that includes reasonably accurate identification information, and:

(1) a birth certificate or other document showing the purchasing or harvesting Indian's full name, including Indian name, tribe, degree of Indian blood (not less than 25%), date of birth, agency enrolled with, and census number or enrollment number; and

(2) a letter signed by the president, vice president, or other designated custodian of the state or local organization of the Native American Church certifying:

(A) the purchasing or harvesting Indian is a member in good standing of the state or local organization of the Native American Church; and

(B) the peyote to be purchased or harvested will be used only for a bona fide religious ceremony.

(h) Transmission. If a church contemplates using the alternative method, a church representative should mail the documentation described by subsection (g) of this section to the director (CSR Section). If the director (CSR Section) receives the documentation before the distributor delivers the peyote, the director may then respond knowledgeably to an inquiry made about the legitimacy of the peyote purchase, harvest, possession, or transportation.

(i) A church may request a copy of a sample authorization letter, certificate of authorization, or travel permit from the director.

§13.51. Mail Order Sale.

(a) Requirements. In the case of a mail order sale, the distributor must:

(1) notify the director (CSR Section) in writing of each peyote mailing;

(2) obtain the information required by paragraph (3) of this subsection in writing on appropriate church stationery, including a copy of the recipient's authorization letter or travel permit from a church;

(3) prepare a sales receipt as required by §13.52 of this title (relating to Sales Receipt), except:

(A) the distributor must clearly mark the sales receipt to indicate a mail order transaction;

(B) the recipient's signature need not appear on the original receipt;

(C) the recipient's signature must appear on the original documentation certifying eligibility to lawfully receive peyote as an Indian;

(D) the original documentation certifying eligibility must include the mailing address at which the Indian will receive the peyote; and

(E) the distributor must include the second copy (Copy 2) of the receipt on or within the mailed package containing the peyote; and

(4) mail to the director the original sales receipt (Copy 1) and a copy of its associated documentation at the same time the distributor mails the peyote, not waiting for the due date of the next quarterly report.

(b) Recommendations. The director encourages but does not require that a distributor not mail the peyote until after the director receives the written notification. If the director (CSR Section) receives the distributor's receipt and its associated documentation before the distributor mails the peyote, the director (CSR Section) may then respond knowledgeably to an inquiry made about the legitimacy of the peyote shipment.

(c) Manner required. A distributor must mail an order for peyote only by using:

(1) the distributor's principal place of business as the return address; and

(2) the United States Postal Service, certified mail, return receipt requested; or

(3) another parcel distribution system that minimizes the risk of diversion by:

(A) restricting delivery to the individual placing the order; or

(B) adequately identifying the individual to whom delivery was made.

(d) Manner prohibited. A distributor may not mail an order for peyote to:

(1) a person other than the Indian placing the order at the address indicated for the Indian in the associated documentation; or

(2) a third party.

§13.52. Sales Receipt.

(a) Requirements, generally. A distributor must furnish the original sales receipt (Copy 1) to the director on DPS Form NAR-96C.

(b) Contents. Each sales receipt must contain the following:

(1) the distributor's name;

(2) the distributor's registration number;

(3) the date of sale;

(4) the name, address, and blood quantum of the purchasing Indian;

(5) the purchasing Indian's church affiliation;

(6) the purchasing Indian's church membership, certificate of authorization, or permit number and its expiration date;

(7) the quantity purchased, expressed as either the number of buttons or the weight in pounds and ounces;

(8) the total cost of sale; and

(9) except in the case of a mail order sale, the purchasing Indian's signature.

(c) Multiple copies. A distributor must:

(1) submit the original copy (Copy 1) of the receipt to the director with the quarterly report;

(2) furnish the second copy (Copy 2) of the receipt to the purchasing Indian at the time of the purchase; and

(3) retain the third copy (Copy 3) in the distributor's permanent files.

§13.53. Quarterly Report.

(a) When made. A distributor must furnish a quarterly report to the director of each purchase, acquisition, or sale made by the distributor during the previous quarter. A distributor must submit a quarterly report even if no purchase, acquisition, or sale occurred during the quarter.

(b) Contents. The report must include a tabulation of total purchases, acquisitions, and sales of peyote, tabulated by price and by number of buttons or weight. Along with the report, the distributor must provide to the director (CSR Section) a copy of all:

(1) certificates, logs, or other documents showing each act of purchase or acquisition of peyote by the distributor; and

(2) receipts issued for sale of peyote, DPS Form NAR-96C, except those mail order sale receipts already forwarded to the director.

(c) Manner of report. The distributor must:

(1) furnish the report to the director (CSR Section); and

(2) submit the report on or before the last business day of:

(A) April (for purchases, acquisitions, or sales during the first quarter of the year, including the preceding months of January, February, and March);

(B) July (for purchases, acquisitions, or sales during the second quarter of the year, including the preceding months of April, May, and June);

(C) October (for purchases, acquisitions, or sales during the third quarter of the year, including the preceding months of July, August, and September); and

(D) January (for purchases, acquisitions, or sales during the fourth quarter of the previous year, including the preceding months of October, November, and December).

§13.54. Declaration as Native American Church.

While the director does not require an entity to seek recognition or registration as a church, an entity, that seeks to declare itself to the director under this subchapter as a Native American Church, must submit and update the following information to the director (CSR Section):

(1) the state charter; and

(2) its president, vice president, and other designated custodian or current officer, including the full name, Indian name, tribe, degree of Indian blood, date of birth, agency enrolled with, census number or enrollment number, address, and telephone number of each officer.

§13.55. Landowner Activity.

(a) Unaffected. Nothing in this subchapter affects the ability of a landowner to:

(1) file a criminal trespass, criminal mischief, theft, or other appropriate criminal charge or to seek other criminal or civil remedy; or

(2) burn or clear land for purposes unrelated to harvesting, cutting, collecting, or possessing peyote.

(b) Prohibited. Unless registered as a distributor or reported to the director as a current employee of a distributor, a landowner may not sell, harvest, cut, collect, transport, or possess peyote. A landowner does not possess peyote in violation of the Act or this subchapter if the peyote is unharvested and growing in its natural state.

(c) Allowed. Under this subchapter, a landowner may:

(1) charge a fee to anyone, including an Indian, for the use of or entry onto land;

(2) allow a distributor or employee of a distributor to enter land to harvest peyote;

(3) deliver or otherwise supply peyote to a distributor as described in subsection (b) of this section; or

(4) deliver or supply peyote to an Indian only:

(A) by allowing the Indian to enter land to harvest or use peyote; and

(B) if the Indian would otherwise be allowed to purchase peyote from a distributor under this subchapter.

(d) Harvest fee limitation. Unless the landowner is registered as a distributor, the director will deem the landowner to be selling or distributing peyote if the landowner bases the fee charged or collected under subsection (c)(1) of this section on the amount of peyote harvested, cut, or collected by the Indian using or entering the land.

§13.56 Security, Record Keeping, Inventory, Inspection, and Reporting Discrepancy, Loss, Theft, or Diversion.

A distributor must comply with the applicable provisions of:

(1) Subchapter H of this chapter (relating to Security);

(2) Subchapter I of this chapter (relating to Record Keeping);

(3) Subchapter J of this chapter (relating to Inventory);

(4) Subchapter K of this chapter (relating to Inspection); and

(5) Subchapter L of this chapter (relating to Reporting Discrepancy, Loss, Theft, or Diversion).

§13.57. Communication with Director (CSR Section).

If a person is required or allowed by this subchapter to make a notification, report, or other written, telephonic, electronic, or personal communication to the director, the person must make the communication to the director through the CSR Section at the address indicated in §13.8 of this title (relating to Telephone Number and Address - Controlled Substances Registration Section).

§13.58. Miscellaneous.

(a) Peyote in another jurisdiction unaffected. Nothing in this subchapter allows, prohibits, or otherwise affects the ability of a person to deliver, supply, sell, hunt, harvest, cut, collect, transport, or possess peyote in:

(1) another state or country, including Mexico or Canada, while acting under the authority of that jurisdiction; or

(2) Texas while acting under the authority of federal law, if the peyote was obtained from Mexico.

(b) AIRFA. Nothing in this subchapter affects the ability of an individual to use, possess, or transport peyote under federal law, if the individual:

(1) is an Indian of any blood quantum as the term Indian is defined in AIRFA;

(2) is a member of a federally recognized Indian tribe; and

(3) intends to use the peyote for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion.

(c) Registration subchapter applies. Except as otherwise provided by this subchapter, Subchapter B of this chapter (relating to Registration) applies to a peyote registration under this subchapter.

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

Filed with the Office of the Secretary of State, on March 8, 2001.

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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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SUBCHAPTER D. OFFICIAL PRESCRIPTIONS

37 TAC §§13.71 - 13.86

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.006(4), which provides that the director of the department shall adopt rules, subject to commission approval, considered necessary for the control of the department; and Health and Safety Code, §481.003(a).

Texas Government Code, §411.004(3) and §411.006(4), and Health and Safety Code, §481.003(a) are affected by this proposal.

§13.71. Subchapter Definitions.

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

(1) Emergency situation - A situation described in the Code of Federal Regulations, Title 21, Chapter II, §1306.11(d).

(2) NDC # - A National Drug Code number.

(3) Reportable prescription - A prescription for a controlled substance:

(A) listed in Schedule II; and

(B) not excluded from this subchapter by a rule adopted under the Act, §481.0761(b).

§13.72. Official Prescription Program.

(a) Who may order form. A practitioner may order a quantity of official prescription forms from the director only if the practitioner is registered by the director and DEA under both state and federal law to prescribe a Schedule II controlled substance.

(b) Source. A practitioner may order the forms from the director (Texas Prescription program).

(c) Institutional practitioner. This subsection applies only to an individual who is employed by a hospital or other training institution that is registered by the director. An institutional practitioner, who is authorized by a hospital or institution to prescribe a Schedule II controlled substance under the registration of the hospital or institution, may order official prescription forms under this section, if:

(1) the practitioner prescribes a controlled substance in the usual course of the practitioner's training, teaching program, or employment at the hospital or institution;

(2) the appropriate state health regulatory agency has assigned an institutional permit or similar number to the practitioner; and

(3) the hospital or institution:

(A) maintains a current list of each institutional practitioner and each assigned institutional permit number; and

(B) makes the list available to another registrant or a member of a state health regulatory or law enforcement agency for the purpose of verifying the authority of the practitioner to prescribe the substance.

§13.73. Form.

(a) Use. A practitioner may issue a prescription for a Schedule II controlled substance only on an official Texas prescription form. This subsection also applies to a prescription issued in an emergency situation.

(b) Refills prohibited. A Schedule II prescription may not be refilled.

(c) Completion. A practitioner who prescribes any quantity of a Schedule II controlled substance must complete an official prescription form by legibly filling in the spaces provided.

(d) Other requirements. A practitioner:

(1) may not postdate an official prescription; and

(2) must ensure all information on the prescription is legible on all copies, including stamped or preprinted instructions.

(e) Triplicate prescription. When a practitioner uses a triplicate prescription to prescribe a Schedule II controlled substance to a patient in a non-emergency situation, the practitioner must detach Copy 1 and Copy 2 without separation and give both copies to the patient to take to the pharmacy for filling.

§13.74. Exceptions to Use of Form.

(a) Medication order. An official prescription form is not required for a medication order written for a patient who is admitted to a hospital at the time the medication order is written and filled.

(1) A practitioner may dispense or cause to be dispensed a Schedule II controlled substance to a patient who:

(A) is admitted to the hospital; and

(B) will require an emergency quantity of a controlled substance upon release from the hospital.

(2) Under paragraph (1) of this subsection, the controlled substance:

(A) may only be dispensed in a properly labeled container; and

(B) may not be more than a seven-day supply or the minimum amount needed for proper treatment of the patient until the patient can obtain access to a pharmacy, whichever is less.

(b) Patient admitted to hospital. Subsection (a) of this section applies to a patient who is admitted to a hospital, including a patient:

(1) admitted to:

(A) a general hospital, special hospital, licensed ambulatory surgical center, surgical suite in a dental school, or veterinary medical school; or

(B) a hospital clinic or emergency room, if the clinic or emergency room is under the control, direction, and administration as an integral part of a general or special hospital;

(2) receiving treatment with a Schedule II controlled substance from another person, who is:

(A) a member of a life flight helicopter medical team or an emergency medical ambulance crew or a paramedic-emergency medical technician; and

(B) considered an extension of an emergency room of a general or special hospital; or

(3) receiving treatment with a Schedule II controlled substance while the patient is an inmate incarcerated in a correctional facility operated by the Texas Department of Criminal Justice.

(c) Animal admitted to hospital. Subsection (a) of this section applies to an animal admitted to an animal hospital, including an animal that is a permanent resident of a zoo, wildlife park, exotic game ranch, wildlife management program, or state or federal research facility.

(d) Long-Term Care Facility (LTCF). An official prescription form is not required in a long-term care facility if:

(1) an individual administers the substance to an inpatient from the facility's medical emergency kit;

(2) the individual administering the substance is an authorized practitioner or an agent acting under the practitioner's order; and

(3) the facility maintains the proper records as required for an emergency medical kit in an LTCF.

(e) Therapeutic optometrist. An official prescription form is not required when a therapeutic optometrist administers a topical ocular pharmaceutical agent in compliance with:

(1) the Texas Optometry Act; and

(2) a rule adopted by the Texas Optometry Board under the authority of the Texas Optometry Act.

§13.75. Pharmacy Responsibility - Generally.

Upon receipt of a properly completed official prescription form, a dispensing pharmacist must:

(1) sign the prescription;

(2) enter the date filled and the pharmacy prescription number;

(3) indicate on all copies whether the pharmacy dispenses to the patient a quantity less than the quantity prescribed; and

(4) enter the following information on all copies, if different from the prescribing practitioner's information:

(A) the brand name or, if none, the generic name of the controlled substance dispensed; or

(B) the strength, quantity, and dosage form of the Schedule II controlled substance used to prepare the mixture or compound.

§13.76. Pharmacy Responsibility - Electronic Reporting.

Within the time required by the Act, a pharmacy must submit the following data elements to the director:

(1) the prescribing practitioner's DPS registration number;

(2) the official prescription control number;

(3) the patient's (or the animal owner's) name, age (or date of birth), and address (including city, state, and zip code);

(4) the date the prescription was issued and filled;

(5) the NDC # of the controlled substance dispensed;

(6) the quantity of controlled substance dispensed;

(7) the pharmacy's prescription number; and

(8) the pharmacy's DPS registration number.

§13.77. Electronic Compatibility.

If a pharmacy submits information to the director electronically, the pharmacy must submit the information by electronic media, including a disk, tape, cassette, modem, or other manner compatible with industry standards and approved by the director.

§13.78. Waiver from Electronic Reporting.

(a) Minimum prescription threshold. If a pharmacy fills a small number of reportable prescriptions, the pharmacy may request from the director a waiver from electronic reporting. If a waiver is granted, the pharmacy must file reportable prescriptions with the director on a form approved under §13.79(c) of this title (relating to Pharmacy Responsibility - Non-electronic Reporting).

(b) Inadequate technology. If a pharmacy is not automated or cannot meet the requirements in §13.77 of this title (relating to Electronic Compatibility), the pharmacy may request from the director a waiver from electronic reporting. The request must clearly describe the technological inadequacies in the pharmacy.

(c) Written request. The waiver must be requested annually in writing.

(d) Duration. If granted, the waiver will remain in effect for no longer than twelve months, beginning the first day of the month following the month the waiver was granted.

§13.79. Pharmacy Responsibility - Non-electronic Reporting.

(a) With waiver. A pharmacy must comply with §13.76 of this title (relating to Pharmacy Responsibility - Electronic Reporting) unless the pharmacy has obtained from the director a waiver from electronic reporting under §13.78 of this title (relating to Waiver from Electronic Reporting).

(b) Non-electronic information. Within the time required by the Act, a pharmacy approved for non-electronic reporting under this subchapter must submit the following information to the director on a form approved by the director:

(1) the information required under §13.76 of this title (relating to Pharmacy Responsibility - Electronic Reporting);

(2) the prescribing practitioner's name; and

(3) the dispensing pharmacy's name, address, and telephone number.

(c) Approved forms. The director expressly approves the following non-electronic reporting forms, if the form in question legibly includes all information required by subsection (b) of this section:

(1) Copy 1 of a triplicate prescription form;

(2) a copy of a single official prescription form; and

(3) a printed computer record of the prescription.

§13.80. Pharmacy Responsibility - Emergency Situation.

(a) Documentation. If a pharmacy dispenses a Schedule II controlled substance in an emergency situation pursuant to an orally or telephonically communicated prescription from a practitioner or the practitioner's designated agent, the pharmacist must promptly reduce the prescription to writing, including the information required:

(1) by law for a standard prescription; and

(2) by this subchapter for an official prescription.

(b) Other requirements. After dispensing a controlled substance in an emergency under this section, the dispensing pharmacy must, within the time required by the Act:

(1) maintain the written record created under subsection (a) of this section until the pharmacy receives the original official prescription from the practitioner;

(2) note the emergency nature of the prescription;

(3) upon receipt from the practitioner, attach the original official prescription to the orally or telephonically communicated prescription;

(4) retain both documents in the pharmacy records; and

(5) send the information required under this subchapter to the director (Texas Prescription Program).

§13.81. Pharmacy Responsibility - Questionable Prescription.
If a dispensing pharmacist receives an official prescription form that creates a substantial question or doubt in the mind of the dispensing pharmacist, the pharmacist must, before filling the prescription, communicate with the patient or the prescribing practitioner in order to resolve the question or doubt.

§13.82. Pharmacy Responsibility - Out-of-State Practitioner.
If a pharmacist in this state receives a prescription, that is not on an official prescription form, that is for a Schedule II controlled substance, and that is issued by a practitioner in another state, the pharmacy may fill the prescription if:

(1) the practitioner is authorized by the other state to prescribe the substance;

(2) the pharmacy has a plan approved by and on file with the director allowing the activity; and

(3) the pharmacy processes and submits the prescription according to the reporting requirements approved in the plan.

§13.83. Return of Unused Form.

(a) Requirements. An unused official prescription form is invalid and the practitioner or another person acting on behalf of the practitioner must return the unused form to the director (Texas Prescription Program) with an appropriate explanation not later than the 30th day after the date:

(1) the practitioner's license to practice, Texas controlled substances registration number, or DEA number is canceled, revoked, suspended, denied, or surrendered or amended to exclude the handling of all Schedule II controlled substances; or

(2) the practitioner dies.

(b) Institutional practitioner. An individual who is an institutional practitioner must return an unused official prescription form to the administrator of the hospital or other training institution upon completion or termination of the individual's training at the hospital or institution. The administrator must return an unused official prescription form to the director (Texas Prescription Program) not later than the 30th day after the date the individual completes or terminates all training programs.

(c) Licensed practitioner. Except as provided by subsection (d) of this section, no individual may continue to use an official prescription form issued under an institutional practitioner's permit number or similar number after the individual has been properly and individually licensed as a practitioner by the appropriate state health regulatory agency.

(d) Waiver. The director may upon request waive the requirements of subsections (b) and (c) of this section and allow an individual to continue to use an institutional practitioner number under this subchapter after the individual has been licensed as a practitioner by the appropriate state health regulatory agency.

§13.84. Release of Non-statistical Information.

(a) To whom. The director may release Texas Prescription Program information obtained under the Act, §481.075 only to an individual listed in the Act, §481.076(a).

(b) Purpose. An individual described by subsection (a) of this section may only request information for a purpose listed in the Act, §481.076.

(c) Written request. The director may require an individual seeking information under this section to submit a written request to the director before the director releases to the individual the information contained on or derived from the prescription.

(d) Proper need and Return of Information report. The director will require a person requesting information under the Act, §481.076(a)(3), to show a proper need for the information. The showing of proper need is ongoing. The director may require the person to periodically submit to the director a Return of Information report documenting use of the information and the status of the investigation or prosecution.

§13.85. Deletion or Return.

(a) Generally. Under the authority of the Act, §481.0761(b), the director may determine whether a Schedule II controlled substance should be deleted from or returned to the official prescription program.

(b) Deletions. The director has determined:

(1) the burden imposed by the official prescription program on each controlled substance listed in this subsection substantially outweighs the risk of diversion; and

(2) the following controlled substances are deleted from the program: (none).

(c) Returns. The director has determined:

(1) the burden imposed by the official prescription program on each controlled substance listed in this subsection does not substantially outweigh the risk of diversion; and

(2) the following controlled substances are returned to the program: (none).

§13.86. Communication with Director (Texas Prescription Program).
If a person is required or allowed by this subchapter to make a notification, report, or other written, telephonic, or personal communication to the director, the person must make the communication to the director through the Texas Prescription Program at the address indicated in §13.9 of this title (relating to Telephone Number and Address - Texas Prescription Program).

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

Filed with the Office of the Secretary of State, on March 8, 2001.

TRD-200101393
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 424-2135

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SUBCHAPTER E. PRECURSORS AND APPARATUS

37 TAC §§13.101 - 13.115

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.006(4), which provides that the director of the department shall adopt rules, subject to commission approval, considered necessary for the control of the department; and Health and Safety Code, §481.003(a).

Texas Government Code, §411.004(3) and §411.006(4), and Health and Safety Code, §481.003(a) are affected by this proposal.

§13.101. Subchapter Definitions.

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

(1) Annual permit - A permit issued to a person by the director under this subchapter authorizing the person to receive or deliver a precursor or apparatus for one year from the date of issue or renewal.

(2) Apparatus - An item of chemical laboratory equipment covered by this subchapter, that is designed, made, or adapted to manufacture a controlled substance or a controlled substance analogue. The term:

(A) does not include any item expressly deleted from the list of apparatus in §13.115 of this title (relating to Additions or Deletions) after being determined by the director to no longer jeopardize public health and welfare by evidenced proliferation or use in clandestine laboratories or other illicit manufacturer of a controlled substance or controlled substance analogue; and

(B) includes, except as provided by subparagraph (A) of this paragraph:

(i) any item listed under the Act, §481.080(a); and

(ii) any additional items expressly named to the list in §13.115 of this title (relating to Additions or Deletions) after being determined by the director to jeopardize public health and welfare by evidenced proliferation or use in clandestine laboratories or other illicit manufacturer of a controlled substance or controlled substance analogue.

(3) Clandestine laboratory - An illicit chemical laboratory or similar operation consisting of a sufficient combination of precursor and apparatus items used or usable in the illicit manufacture or synthesis of a controlled substance or a controlled substance analogue.

(4) Deliver - To sell, transfer, or otherwise furnish a precursor or apparatus. The term includes taking an order to furnish a precursor or apparatus.

(5) Distributor - A manufacturer, wholesaler, retailer, or a person who sells, transfers, or otherwise furnishes a precursor or apparatus.

(6) Legitimately established business or Business - A business that conforms to all recognized and accepted principles, standards, rules, and laws governing the activities of manufacturing, purchasing, selling, trading, or otherwise lawfully dealing with commodities. While the business engages in such activities, the term includes an individual, corporation, government, business trust, estate, trust, partnership, association, or other legal entity.

(7) Located in this state - The person or the person's business office:

(A) is physically located in Texas;

(B) maintains a Texas mailing address for business conduct relating to a precursor or apparatus;

(C) processes or fills orders from a warehouse, branch office, or other site physically located in Texas; or

(D) takes an order using an employee or agent who is physically located in Texas at the time the order is taken.

(8) NAR-22 - A DPS Form NAR-22 furnished by the director and used to report a transaction under this subchapter.

(9) One-time permit - A permit issued by the director to a person authorizing a single receipt or distribution of a precursor or apparatus.

(10) Otherwise furnish - To initiate a transaction resulting or intending to result in the receipt or distribution of a precursor or apparatus to a person in this state, regardless of whether the person initiating the transaction is the owner or possessor of the item or merely a broker.

(11) Permit application - A form obtained from the director (PCLAS) and submitted by a person seeking a one-time or annual permit to receive or deliver a precursor or apparatus under this subchapter.

(12) Precursor - A chemical substance item covered by this subchapter and commonly used in the illicit manufacture of a controlled substance or a controlled substance analogue. The term:

(A) does not include any item expressly deleted from the list of precursors in §13.115 of this title (relating to Additions or Deletions) after being determined by the director to no longer jeopardize public health and welfare by evidenced proliferation or use in clandestine laboratories or other illicit manufacturer of a controlled substance or controlled substance analogue; and

(B) includes, except as provided by subparagraph (A) of this paragraph:

(i) any item listed under the Act, §481.077(a); and

(ii) any additional items expressly named to the list in §13.115 of this title (relating to Additions or Deletions) after being determined by the director to jeopardize public health and welfare by evidenced proliferation or use in clandestine laboratories or other illicit manufacturer of a controlled substance or controlled substance analogue.

(13) Recipient - A person who receives, orders, or otherwise seeks to receive a precursor or apparatus, whether through purchase, lease, loan, gift, or other transfer.

(14) Waiting period - The 21-day period required before a person may lawfully receive or deliver a precursor or apparatus under the Act, §481.077(f) or §481.080(h).

§13.102. Who Must Obtain Permit.

(a) Generally. Except as provided by subsections (c) or (d) of this section, a person must obtain a permit from the director (PCLAS), if the person is physically located:

(1) inside this state and the person:

(A) takes an order from or delivers a precursor or apparatus to another person who is required under this section to obtain a permit to receive the item or to observe the 21-day waiting period under this subchapter;

(B) receives a precursor or apparatus from another person who is located inside or outside this state; or

(C) places an order to purchase a precursor or apparatus even if the person will be physically located outside this state when the sale is completed or the item is received; or

(2) outside this state when an order is placed if the person will be physically located in this state when the sale is completed or the item is received.

(b) Types of permits. Under this subchapter, the director may issue:

(1) a one-time permit to a business or individual; or

(2) an annual permit to a legitimately established business.

(c) Voluntary submission to permitting. No person is required to obtain a permit under this subchapter, if the person is described by §13.103 of this title (relating to Permit Exception). Even if the person is not required to obtain a permit under this subchapter, the director may issue a permit to a person who qualifies and voluntarily applies for the permit. If the person voluntarily obtains a permit, this chapter applies to the person as long as the person holds the permit.

(d) Distribution to a school. A school district or public or private institution of higher education is excepted from the permit requirements of the Act. A private school is not excepted and must comply with the Act and this subchapter. A distributor, who takes an order from or delivers a precursor or apparatus to an excepted school district or institution, must comply with §13.110(h) - (j) of this title (relating to NAR-22). The distributor is not required to:

(1) obtain a distributor permit for that transaction;

(2) observe the 21-day waiting period before completing the transaction;

(3) obtain a permit or letter of authorization from the excepted recipient before completing the transaction; or

(4) report the transaction to the director.

(e) Separate permit for separate location. An applicant who represents a business must make a separate application and obtain a separate permit for each principal place of business.

(f) Distribution to a business. If a business entity described by this subsection does not have a permit, a distributor may lawfully deliver the item to the business without a permit, but only after complying with all other provisions of this subchapter, including a letter of authorization under §13.107 of this title (relating to Business Letter of Authorization) and observation of the 21-day waiting period under §13.108 of this title (relating to Waiting Period).

§13.103. Permit Exception.

The director declares by rule a person to be excepted from the permit requirements with respect to a precursor or apparatus covered by this subchapter, if the person:

(1) is excepted from the permit requirements under the Act, §481.0621 or §481.077(l);

(2) is a controlled substances registrant under the authority of the Act, §481.077(c) or §481.080(e);

(3) is a peace officer, who is in the actual discharge of official duties;

(4) is an officer or employee of a federal, state, or local governmental entity, who receives or delivers the item while acting in the usual course of the person's duty, business, or employment;

(5) is a common or contract carrier, a warehouseman, or an employee of a carrier or warehouseman whose possession of the precursor or apparatus is in the usual course of business or employment;

(6) has a valid letter of authorization for the item under §13.107 of this title (relating to Business Letter of Authorization);

(7) receives or delivers the item only in the usual course of business and within a single corporation or other legitimately established business entity for which consent to inspect has been given under §13.104 of this title (relating to Requirements for Permit Issuance);

(8) is an employee acting on behalf of a legitimately established business and under a permit or letter of authorization of a distributor or recipient;

(9) is a distributor located outside this state, without regard to whether the recipient is located inside or outside this state; or

(10) is a recipient who places an order to receive and receives the precursor or apparatus while located outside this state.

§13.104. Requirements for Permit Issuance.

(a) One time. The director will issue a one-time permit to distribute or receive a stated precursor or apparatus to a person who:

(1) submits a properly completed permit application;

(2) would not be subject to denial of an application for controlled substances registration under the separate standards for denial found in the Act, §481.063(e);

(3) demonstrates the item will be used solely for legitimate purposes;

(4) complies with federal, state, and local environmental protection, fire, or other related health and safety standards; and

(5) delivers to the director an appropriate written consent described in §13.237 of this title (relating to Inspection of Permit Holder).

(b) Waiver. The director may waive the requirements of subsection (a)(2) of this section based upon the circumstances surrounding the conviction or supervision described in the Act, §481.063(e)(2), after considering the factors described in the Texas Occupations Code, Chapter 53.

(c) Annual. The director will issue an annual permit to an applicant to receive or deliver a precursor or apparatus if the applicant:

(1) meets each one-time permit requirement; and

(2) represents a legitimately established business.

§13.105. Permit Application.

(a) Requirements. A person who seeks a permit under this subchapter must comply with this section and Subchapter F of this chapter (relating to Applications).

(b) Source. An applicant may obtain a form for an original permit application by writing the director (PCLAS). An applicant must make a new or original application for:

(1) a one-time permit on a DPS Form NAR-120; or

(2) an annual permit on a DPS Form NAR-121;

(c) Expiration of annual permit. Except as provided by subsection (d) of this section, a permit document expires after one year from the month of issuance. A permit may indicate the expiration date.

(d) Extension. The director may extend a permit for a period of less than 12 additional months, if the director determines the extension is necessary to evenly allocate the expiration dates of all permits.

(e) Effect of modification or renewal. Except as provided by subsection (d) of this section, modification of a permit or early renewal does not affect the current or future date of expiration.

(f) Effect of expiration. After expiration, the former permit provides the permit holder with no authority to receive or deliver a precursor or apparatus.

(g) Grace period. After expiration under this section, a former permit holder may apply for a new permit. During a six-month grace period after expiration and before termination under subsection (h) of this section, the director (PCLAS) may reserve the original permit number in the name of the original applicant.

(h) Termination. A permit terminates:

(1) at the end of a grace period of six months allowed by the director after expiration; or

(2) if the permit holder is a legitimately established business, when the business ceases legal existence or discontinues business practice. The director will presume that a distributor has discontinued business practice under this subsection if the business has not submitted a NAR-22 reporting a sale or other delivery for two years or more.

(i) New permit required after termination. After termination, a former permit holder must apply for a new permit and may be issued a different permit number.

(j) Effect of termination. After termination, the former permit provides the permit holder with no authority to receive or deliver a precursor or apparatus.

(k) Discontinued activity. If the permit holder is a legitimately established business and discontinues business practice, the permit holder or a representative of the holder must notify the director through the PCLAS by close of business. The director may immediately terminate the permit of a person reported to the director under this subsection.

(l) No fee. There is no application or issuance fee for a permit issued under this subchapter.

§13.106. Permit Document.

(a) Issuance. The director will issue a permit document to an applicant who qualifies under the applicable provisions of the Act, Subchapter C, and this subchapter.

(b) NAR-97, one-time. The director will issue a one-time permit on DPS Form NAR-97, containing:

(1) the name, address, identification information, and control number of the permit; and

(2) the activity authorized by the permit.

(c) NAR-94, annual. The director will issue an annual permit on DPS Form NAR-94, containing:

(1) the name, address, and number of the permit;

(2) any limitation on precursor or apparatus activity authorized under the permit; and

(3) the expiration date of the permit.

(d) Display. The permit holder must:

(1) maintain the permit document so the person may promptly retrieve and display it at any time upon proper demand; and

(2) not display the document at the physical location of the person's principal place of business.

(e) A one-time permit is only valid for:

(1) a single transaction; or

(2) one year from the day of issuance, whichever is less.

(f) Transfer. A permit holder may not transfer or assign to another person a permit document or number or an authority conferred by the permit.

§13.107. Business Letter of Authorization.

(a) Permit alternative. In lieu of a permit authorizing immediate distribution, a legitimately established business may receive a precursor or apparatus from a distributor within this state after a 21-day waiting period by presenting or providing to the distributor a letter of authorization from the business.

(b) Contents. A letter of authorization from a business recipient must include:

(1) the information required under the Act, §481.077(d)(2)(A) or §481.080(f)(2)(A);

(2) the precursor or apparatus sought;

(3) the name of business issuing the letter;

(4) the issue date of the letter;

(5) the mailing and physical address, including the number and street name, city, state, and zip code; and

(6) the signature of the individual executing the letter on behalf of the business.

(c) Ordering. A business recipient must provide a letter of authorization to the distributor, if the business orders a precursor or apparatus through an automated ordering system without a permit.

(d) Constructive compliance. If a prospective business recipient submits a purchase order or purchase voucher to a distributor, the director will deem the order or voucher to be sufficient as a letter of authorization if:

(1) it contains the information required in subsection (b) of this section; and

(2) the distributor retains the order or voucher on file.

(e) Expiration. A letter of authorization expires one year from the day of issue.

(f) Retention. The distributor must retain the original letter of authorization on file and forward a copy of the letter, along with a proposed NAR-22 or other communication adequately detailing the proposed transaction, to the director (PCLAS). Until expiration, a distributor may use the original for future distributions. The recipient must issue a new letter:

(1) after the letter expires; or

(2) if material information required in the original letter changes.

§13.108. Waiting Period.

(a) 21 days, generally. The Act requires a 21-day waiting period for a precursor or apparatus transfer. Except as provided by this subchapter, a distributor may not deliver a precursor or apparatus before the required waiting period has passed.

(b) Timing of delivery. If a recipient has met the exception, permit, or letter of authorization requirements of this subchapter, a distributor may deliver a precursor or apparatus:

(1) after the required 21-day waiting period has elapsed, if the distributor has submitted the required report of the prospective transaction to the director (PCLAS); or

(2) before the otherwise required waiting period has elapsed, if the director issues a permit.

(c) Permit alternative. A valid one-time or annual permit allows a distributor to complete the transaction before the required 21-day has elapsed, if:

(1) the prospective recipient presents proper identification to the distributor under §13.110 of this title (relating to NAR-22); and

(2) the permit contains no apparent alterations, if it is a one-time permit; or

(3) the recipient furnishes to the distributor the permit number, if it is an annual permit.

(d) Beginning date. Except as provided by this subsection, the 21-day waiting period begins on the date the director receives a copy of the letter of authorization. If the distributor mails the letter of authorization to the director (PCLAS) and the director receives the letter of authorization more than three days after it was postmarked, the 21-day waiting period begins three days after the date the distributor's letter was postmarked.

§13.109. Reporting Distribution.

(a) Generally. Except as provided by this section, a distributor must use a NAR-22 to report to the director (PCLAS) each incident in which the distributor delivers a precursor or apparatus to a person located inside this state. A distributor, who is located in this state and who delivers a precursor or apparatus to a person located inside this state, must report the transaction to the director (PCLAS), whether or not the recipient holds a permit issued under this subchapter.

(b) Business without permit. A distributor, who seeks to deliver a precursor or apparatus to a legitimately established business, that does not have a permit and is not excepted from the permit requirements of the Act or this subchapter, must report the proposed transfer to the director. The report must include a copy of the letter of authorization, along with a proposed NAR-22 or other communication adequately detailing the proposed transaction, and must be transmitted to the director (PCLAS). The distributor may lawfully deliver the item only after observing the 21-day waiting period under §13.108 of this title (relating to Waiting Period).

(c) Time. Except as provided by subsections (d) through (i) of this section, the report must be made not later than the seventh day after the distributor completes the transaction.

(d) Comprehensive monthly report. The director may authorize a distributor to make a comprehensive monthly report of transactions covered by this section. If authorized to make a monthly report, the distributor:

(1) must make the report to the director (PCLAS); and

(2) may make the report on:

(A) one or more complete NAR-22 forms, that are submitted at one time under this section and that contain all information required for each relevant transaction with a particular individual recipient; or

(B) a single, complete NAR-22 with the total monthly information clearly tabulating all relevant transactions with a particular recipient.

(e) Copy of one-time permit. When making a comprehensive monthly report, a distributor must attach the original copy (Copy 1) of each one-time permit to the original copy (Copy 1) of the NAR-22. A comprehensive monthly report is due on the 30th day after the end of the month covered by the report and may be submitted earlier.

(f) Computer report. A distributor may make the comprehensive monthly report by submitting a computer-generated report, if:

(1) the director (PCLAS):

(A) receives a request to approve monthly reports at least 30 days before the first month for which approval is sought;

(B) authorizes the computer-generated report; and

(C) approves the method of reporting, including:

(i) hard copy;

(ii) magnetic tape;

(iii) PC compatible diskette; or

(iv) other similar, compatible method; and

(2) the information contained in the report is in the same order and completeness as it appears in the applicable parts of the NAR-22.

(g) Accuracy. The distributor:

(1) is responsible for the accuracy of the computer-generated report; and

(2) must promptly correct a data entry or transmission error.

(h) Rescission. The director may rescind authorization to use computer-generated reports with 30 days notice to the distributor.

(i) Demand letter. If the director determines a manufacturer or wholesaler has failed to comply with subsections (d) through (g) of this section, the director may send a demand letter to the business. The director will send the letter certified mail, return receipt requested. The letter may:

(1) require:

(A) the business to provide the director all or part of the information required by statute and this subchapter not later than the 30th day after the date the director mailed the demand letter;

(B) submission of all or part of the information maintained for the past two-year period; or

(C) strict compliance with the reporting requirements of this subchapter for a stated period of time; and

(2) find that, for a stated period of time, subsections (d) through (f) of this section do not apply to the business.

§13.110. NAR-22.

(a) Generally. The NAR-22 contains information required from a distributor to describe the relevant details of the transaction, including information about a recipient of a precursor or apparatus.

(b) Format. The distributor must complete the NAR-22 in the manner described by the current copy of the DPS Pamphlet NAR-11d, that has been published by the director and made available to the public through the PCLAS.

(c) Presentation. A prospective recipient must present an original one-time permit to the distributor, so the distributor can complete the information required under this section. A copy or an electronic transmission of a one-time permit is not sufficient under this subsection. The prospective recipient may present the permit in person or by mail before or at the time of distribution.

(d) ID source. The distributor must obtain the information required to identify a recipient under a one-time permit from information observed by the distributor on a:

(1) state driver license or state issued identification card physically presented by the recipient; or

(2) copy of a state driver license or state issued identification card mailed or electronically transmitted by the recipient.

(e) Ensure ID. A distributor must take reasonable steps to ensure proper identification of a potential recipient, if the prospective recipient holds:

(1) a one-time permit and:

(A) presents the documents in person, the distributor must compare the picture on the driver license or identification card with the physical appearance of the individual prospective recipient; or

(B) mails or electronically transmits the documents, the distributor must compare information on the copy of the license or card with the relevant information on the permit.

(2) an annual permit and:

(A) presents the identification documents in person, the distributor must compare the picture on the driver license or identification card with the physical appearance of the individual prospective recipient; or

(B) mails or electronically transmits the identification documents, the distributor must compare information on the copy of the license or card with the relevant information on the permit.

(f) Constructive compliance. The director will deem a distributor to be in compliance with subsection (e) of this section if the information on the one-time permit and the license or card is essentially the same and the distributor compared and matched the name, date of birth, home address, and license or card number.

(g) Vehicle information. If the recipient owns or operates a motor vehicle that is used during the transaction, the distributor must record the year, state, and number of the vehicle license plate displayed on the vehicle.

(h) Exception claimed. A distributor may not complete a transaction with a person claiming an exception until the distributor has complied with this section.

(i) Proof of exception required. If a potential recipient claims an exception under the Act or these rules, the distributor must obtain the information required to identify the recipient claiming the exception in the same manner as required under subsections (d) through (g) of this section. If an employee or representative of an excepted agency places an order:

(1) in person, the distributor must request the employee or representative to display, present, or provide to the distributor:

(A) proof of agency employment by displaying agency identification;

(B) the name and telephone number of the individual's supervisor to contact in order to verify employment;

(C) a controlled substances registration number; or

(D) other reasonable proof that the Act or this subchapter does not apply to the individual or to the particular transaction; or

(2) by mail or otherwise without appearing in person, the distributor must take reasonable steps to ensure that the claim is legitimate including, for example, an order placed on agency letterhead to be mailed to an agency address.

(j) Unless the distributor is familiar with the person claiming the exception, the distributor must take reasonable steps to verify the claim by contacting the business, agency, or supervisor provided to the distributor under subsection (i) of this section.

§13.111. Mixed Precursor.

This subchapter does not apply to a precursor:

(1) mixed or combined with another noncontrolled chemical or substance in the manufacture of a substance;

(2) used for a legitimate purpose; and

(3) only reclaimable through a distillation or extraction process.

§13.112. Out-of-State Activity.

(a) Distributor. Except as required by this section, a distributor who is located outside this state may distribute without complying with this subchapter. A distributor who is located in this state must meet:

(1) the permit requirements of §13.102 of this title (relating to Who Must Obtain Permit); and

(2) the reporting requirements of §13.109 of this title (relating to Reporting Distribution).

(b) Recipient. If the recipient is located outside this state at the time of order and at the time of receipt, this subchapter does not apply and the distributor need not require a permit or a letter of authorization from the recipient.

§13.113. Security, Record Keeping, Inventory, Inspection, and Reporting Discrepancy, Loss, Theft, or Diversion.

A distributor or recipient must comply with the applicable provisions of:

(1) Subchapter H of this chapter (relating to Security);

(2) Subchapter I of this chapter (relating to Record Keeping);

(3) Subchapter J of this chapter (relating to Inventory);

(4) Subchapter K of this chapter (relating to Inspection); and

(5) Subchapter L of this chapter (relating to Reporting Discrepancy, Loss, Theft, or Diversion).

§13.114. Communication with Director (PCLAS).

If a person is required or allowed by this subchapter to make a notification, report, or other written, telephonic, or personal communication to the director, the person must make the communication to the director through the PCLAS at the address indicated in §13.10 of this title (relating to Telephone Number and Address - Precursor Chemical/Laboratory Apparatus Section).

§13.115. Additions or Deletions.

(a) Generally. Under the authority of the Act, §481.077(b) and §481.080(d), the director may determine a precursor or apparatus should be added to or deleted from the precursor or apparatus lists.

(b) Precursor additions. The director has determined:

(1) each chemical precursor substance listed in this subsection does jeopardize public health and welfare and is proliferating or being used in clandestine laboratories or other illicit manufacture of a controlled substance or controlled substance analogue; and

(2) each of the following items are named to the list of chemical precursor substances subject to the Act, §481.077(a): red phosphorus and hypophosphorous acid.

(c) Precursor deletions. The director has determined:

(1) each chemical precursor substance listed in this subsection does not jeopardize public health and welfare and is not proliferating or being used in clandestine laboratories or other illicit manufacture of a controlled substance or controlled substance analogue; and

(2) each of the following items are deleted from the list of chemical precursor substances subject to the Act, §481.077(a): (none).

(d) Apparatus additions. The director has determined:

(1) each item of chemical laboratory apparatus listed in this subsection does jeopardize public health and welfare and is proliferating or being used in clandestine laboratories or other illicit manufacture of a controlled substance or controlled substance analogue; and

(2) each of the following items are named to the list of items of chemical laboratory apparatus subject to the Act, §481.080(a): (none).

(e) Apparatus deletions. The director has determined:

(1) each item of chemical laboratory apparatus listed in this subsection does not jeopardize public health and welfare and is not proliferating or being used in clandestine laboratories or other illicit manufacture of a controlled substance or controlled substance analogue; and

(2) each of the following items are deleted from the list of items of chemical laboratory apparatus subject to the Act, §481.080(a): (none).

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

Filed with the Office of the Secretary of State, on March 8, 2001.

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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 424-2135

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SUBCHAPTER F. APPLICATION

37 TAC §§13.131-13.137

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.006(4), which provides that the director of the department shall adopt rules, subject to commission approval, considered necessary for the control of the department; and Health and Safety Code, §481.003(a).

Texas Government Code, §411.004(3) and §411.006(4), and Health and Safety Code, §481.003(a) are affected by this proposal.

§13.131. Subchapter Definitions.

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

(1) Registrant--A person who holds a registration or permit covered by this chapter.

(2) Registration--A registration issued under this chapter, including a general controlled substances registration or a specific peyote distributor registration and a precursor or apparatus permit issued under this chapter.

§13.132. Application Requirements.

(a) Time. A person who is required or allowed to register and who is not so registered may apply for registration at any time. A person who is currently registered may not apply for renewal of registration more than 60 days before the expiration date of the current registration.

(b) Form and content, generally. A person must make application for an original registration or renewal of registration on a form provided by the director and submitted to the director through the appropriate section of the Narcotics Service. An application must contain all information called for, unless:

(1) the information is not applicable; and

(2) the applicant expressly so states on the application.

(c) Applicant responsibility. The applicant is responsible for the application. If the director has not sent a form to or received a form from the applicant, this does not relieve the applicant from responsibility for:

(1) being registered or permitted;

(2) making a timely, complete application;

(3) paying the applicable fee; and

(4) updating any information as required by §13.208 of this title (relating to Requirement to Update Information).

(d) Signature. This subsection and subsection (e) of this section do not apply to a permit application. Except as provided by subsection (e) of this section, one of the following individuals must sign an application form and each additional document or statement required by the director:

(1) the applicant, if the applicant is an individual;

(2) a general partner of the applicant, if the applicant is a partnership;

(3) an officer of the applicant, if the applicant is a corporation or other business association;

(4) the administrator of the applicant, if the applicant is a hospital or teaching institution; or

(e) Alternative signature. If an individual is not listed in subsection (d) of this section, an applicant who is listed may authorize the individual to sign an application form or other document on the applicant's behalf by filing a power of attorney. The applicant must:

(1) ensure that the power of attorney is signed by an individual who is listed in subsection (d) of this section; and

(2) file the power of attorney with the director (CSR Section).

(f) Rejectable signature. The director may reject an application if a signature required by this chapter is incomplete or insufficient, including a signature accompanied by a notation that the signature is "reserved," "without prejudice," "locus sigilli," "L. S.," or otherwise apparently less than fully effective for the required purpose.

§13.133. Application Form and Content.

(a) Request. An applicant may request an application for registration or renewal from the director.

(b) Form. An applicant must make a new, original, or renewal application on the form required by this chapter.

(c) Renewal. The director will mail a form for an application for renewal to a registrant approximately 60 days before the expiration date of the registration.

(d) Applicant responsibility. A person should promptly notify the director through the appropriate section of the Narcotics Service if the person is a:

(1) controlled substances or peyote distributor registrant, who does not receive a renewal form within 30 days before the expiration date of the registration; or

(2) permit holder, who does not receive a renewal form within seven days before the expiration date of the registration.

(e) A CSR registrant must sign a consent to inspect under the Act, §481.063(a).

§13.134. Acceptance for Filing.

(a) Date received. The director will note the date the director receives an application submitted to the appropriate section of the Narcotics Service for filing.

(b) Acceptance. If the director determines the application is complete, the director will accept the application for filing. The director will not generally accept an application that fails to comply with this subchapter. In the case of a minor defect as to completeness, the director may accept the application for filing and ask the applicant to submit additional information to remedy the defect.

(c) Rejection. Not later than the 60th day after the date the director receives a defective application for filing, the director will mail written notice to the applicant rejecting the application and informing the applicant of its deficiency. The director will return a defective application to the applicant along with notice of the reason for rejecting the application for filing. An applicant may correct a rejected or defective application and resubmit it for filing at any time, if a new registration is being sought.

(d) Time limit. Not later than the 60th day after the date the director accepts an application for filing, the director will determine whether to deny or issue the registration.

(e) Multiple registrations. Although a person attempting to obtain or renew more than one registration may submit all of the registration applications in one package, an individual application must contain all the information called for on the individual form. No application may refer to another application for required information.

(f) Neutral effect of acceptance. The fact the director has accepted an application for filing does not mean the director will grant the application.

(g) Review. The director will review an application for registration and other information gathered during the inspection regarding the applicant in order to determine whether the applicant meets the relevant standards of this chapter and the Act, Subchapter C.

§13.135. Additional Information.

(a) May be required. If additional information is necessary to determine whether to issue or renew the application, the director may require an applicant to submit a document or written statement of fact relevant to the application.

(b) Failure to provide. If an applicant fails to furnish a document or statement within 60 days after being requested to do so by the director, the director will deem the failure to be a waiver by the applicant of an opportunity to present the information for consideration by the director in the matter.

§13.136. Amendment or Withdrawal of Application.

(a) Written request. An applicant may amend or withdraw an application without the permission of the director by submitting a written request to the director through the appropriate section of the Narcotics Service.

(b) Constructive withdrawal. After an application has been accepted for filing, the director will deem it withdrawn if:

(1) the applicant makes a request for withdrawal or return; or

(2) the applicant fails to respond within 60 days to official correspondence regarding the application.

§13.137. Modification.

(a) Availability. A registrant may apply to the director through the appropriate section of the Narcotics Service for registration modification to:

(1) authorize the addition or deletion of a schedule, precursor, or apparatus;

(2) change any information on the name line of the registration; or

(3) correct, at the discretion of the director, other information on the registration certificate or permit document.

(b) Written request. A person must notify the director in writing of the modification sought, including the signature of the registrant or other person who is authorized to sign an original application.

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

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SUBCHAPTER G. FORFEITURE AND DESTRUCTION

37 TAC §§13.151-13.165

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.006(4), which provides that the director of the department shall adopt rules, subject to commission approval, considered necessary for the control of the department; and Health and Safety Code, §481.003(a).

Texas Government Code, §411.004(3) and §411.006(4), and Health and Safety Code, §481.003(a) are affected by this proposal.

§13.151. Subchapter Definitions.

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

(1) Abusable glue and aerosol paint--Has the meaning given that term by the Texas Health and Safety Code, Chapter 485.

(2) Excess quantity--Unless otherwise modified under §13.157(d) of this title (relating to SOP for Destruction By Laboratory or Agency--Security Control), more than:

(A) two kilograms of bulk dry evidence, such as powder;

(B) 500 milliliters of bulk liquid evidence, such as a chemical precursor or liquid controlled substance;

(C) 200 dosage or abuse units of an item, such as tablets, capsules, liquids, or other items so measured;

(D) 50 pounds of bulk packaged marihuana;

(E) five individual controlled substance plants, such as marihuana or peyote; or

(F) five miscellaneous items of drug or inhalant paraphernalia.

(3) Hazardous material--An item that:

(A) creates a health or environmental hazard or prohibits safe storage because of its nature and quantity; or

(B) meets the hazardous waste criteria of the United States Environmental Protection Agency (EPA), because of its nature, including its corrosivity, ignitability, reactivity, toxicity, or other hazardous characteristic.

(4) Item--Controlled substance property, controlled substance plant, simulated controlled substance, volatile chemical or related inhalant paraphernalia, or abusable glue, aerosol paint, or related inhalant paraphernalia, as those terms are used in the Texas Health and Safety Code, Chapters 481-485.

(5) Laboratory--A crime laboratory located in this state that holds a registration number for the analysis of a controlled substance from the director and DEA.

(6) Lawful possession--Includes the possession of an item obtained in accordance with state or federal law.

(7) Simulated controlled substance--Has the meaning given that term by the Texas Health and Safety Code, Chapter 482.

(8) SOP--A standard operation procedure established under this subchapter.

(9) Volatile chemical--Has the meaning given that term by the Texas Health and Safety Code, Chapter 484.

§13.152. Summary Forfeiture.

(a) Generally. An item may be forfeited to the state under this subchapter if:

(1) the lawful possession of the item cannot be readily ascertained; and

(2) the law enforcement agency or peace officer seizing the item makes every reasonable effort to investigate lawful possession.

(b) Forfeiture requirements. Except as provided in subsection (c) of this section, an item is summarily forfeited to the state under this subchapter, if the item is of a type commonly abused and:

(1) an apparently legitimate possessor has voluntarily surrendered the item to a laboratory, law enforcement agency, or peace officer for the express purpose of destruction;

(2) no known lawful possessor can be determined; or

(3) no lawful possessor is reasonably likely to be located.

(c) Pharmaceuticals. A legitimately manufactured pharmaceutical item is not subject to summary forfeiture to the state under subsection (b) of this section, unless it:

(1) has been voluntarily surrendered by an apparently legitimate possessor to a laboratory, law enforcement agency, or peace officer for the express purpose of destruction; or

(2) was illegally sold or possessed under the Texas Health and Safety Code, Chapters 481-485.

(d) Doubtful case. If there is doubt about legitimacy or lawfulness, the laboratory, law enforcement agency, or peace officer contemplating destruction must seek a court order of destruction.

(e) Not required to accept an item. This subchapter only applies to an item that has been accepted by a laboratory, law enforcement agency, or peace officer for summary forfeiture or destruction. It does not require a laboratory, agency, or officer to accept a particular item for summary forfeiture or destruction.

§13.153. Item Legally Worthless as Criminal Evidence.

(a) Generally. This subchapter describes the documentation and security provisions to use once the decision to destroy has been made.

(b) Reasonable effort. Before a laboratory, law enforcement agency, or peace officer destroys an item under this subchapter, the director recommends but does not require a responsible party to make a reasonable effort to ensure the item:

(1) has no continuing evidentiary value or significance to any pending or contemplated criminal case; or

(2) is in excess quantity.

(c) If case filed. If a criminal case was filed involving an item, the person seeking destruction authorization or contemplating the giving of authorization to destroy must contact the office of the appropriate prosecutor or court before destruction to determine whether the item has any continuing evidentiary significance.

§13.154. Destruction Authority--Controlled Substance Property or Plant.

(a) Generally. Destruction with or without court order. A laboratory, law enforcement agency, or peace officer may destroy controlled substance property or a controlled substance plant covered by this section:

(1) with a court order under the authority of that order; or

(2) without a court order under the authority of one of the summary destruction provisions of the Act, Subchapter E.

(b) Statutory sources. A laboratory, law enforcement agency, or peace officer may destroy without a court order:

(1) a controlled substance plant under the authority of the Act, §481.152(d);

(2) an item of controlled substance property under the authority of the Act, §481.153(b); or

(3) an excess quantity of certain items under the authority of the Act, §481.160.

(c) Subchapter applies. The documentation and security provisions of this subchapter apply to destruction of an item of controlled substance property or plant under this section, except where provided otherwise in a court order of destruction.

§13.155. Destruction Authority--Other Item.

(a) Destruction with or without court order. A laboratory, law enforcement agency, or peace officer may destroy certain miscellaneous items covered by this section:

(1) with a court order under the authority of that order; or

(2) without a court order under the authority of one of the summary destruction provisions of the Texas Health and Safety Code, Chapters 482-485.

(b) Statutory sources. A laboratory, law enforcement agency, or peace officer may destroy without a court order:

(1) a simulated controlled substance under the authority of the Texas Health and Safety Code, §482.004;

(2) a volatile chemical or related inhalant paraphernalia under the authority of the Texas Health and Safety Code, §484.007; or

(3) an abusable glue, aerosol paint, or related inhalant paraphernalia under the authority of the Texas Health and Safety Code, §485.038.

(c) Dangerous drug. At the direction of the Texas State Board of Pharmacy, a law enforcement agency or peace officer may destroy without a court order a dangerous drug under the authority of the Texas Health and Safety Code, §483.074.

(d) Subchapter applies. The documentation and security provisions of this subchapter apply to destruction of a miscellaneous item under this section, except where provided otherwise in a court order of destruction.

§13.156. Destruction Authority--Court Order.

(a) Statutory authority. A court may issue an order of destruction for an item that:

(1) is controlled substance property or plant under the authority of the Act, §481.159; or

(2) was stolen or acquired in any other manner that made the acquisition a penal offense under the authority of the Texas Code of Criminal Procedure, Chapter 47.

(b) Security provisions required by the court. A laboratory, law enforcement agency, or peace officer carrying out a court order of destruction must comply with the documentation and security provisions of the order, if any.

(c) No security provisions required by the court. If the court order is silent about the manner of destruction, or if it does not specify or direct another manner of destruction inconsistent with this subchapter, the laboratory, law enforcement agency, or peace officer must comply with the documentation and security provisions of this subchapter.

§13.157. SOP for Destruction by Laboratory or Agency--Security Control.

(a) SOP required. Before allowing anyone, whether peace officer or civilian, to destroy an item under this subchapter, a laboratory or law enforcement agency must adopt a written SOP for the destruction of the kind of item sought to be destroyed.

(b) Compliance required. A laboratory or law enforcement agency must require that each person engaged in destruction under this subchapter must strictly follow each SOP. A written SOP may exceed a minimum requirement contained within this subchapter.

(c) Generally. In order to minimize the likelihood of pilferage or other unlawful diversion, an SOP must include requirements that are reasonably likely to:

(1) uncover the occurrence of a discrepancy, loss, theft, or other potential diversion; and

(2) identify and destroy the excess quantity of an item, in order to reduce the size of an exhibit while preserving its evidentiary value.

(d) Modify definition of "excess quantity." With the express approval of each appropriate prosecuting authority, an SOP may increase or decrease the amount of an item necessary to meet the definition of an "excess quantity" under that SOP.

(e) Specifically. An SOP must include a requirement that:

(1) a specific person or category of persons must seek destruction authorization for an item after it exceeds the maximum limits for item storage established by the SOP, including the duration and amount;

(2) a specific person or category of persons must make an immediate report to a supervisor of an unusual or suspicious incident or probable breach of security reasonably related to potential discrepancy, loss, theft, or other diversion;

(3) a supervisor must make a thorough investigation of the incident, including laboratory reanalysis if necessary; and

(4) a specific person or category of persons must contact the submitting peace officer, the submitting law enforcement agency, or the office of the prosecutor responsible for the case to seek:

(A) written authorization to destroy all or part of a particular exhibit; or

(B) blanket written authorization to destroy all or part of each exhibit that meets certain criteria.

§13.158. Manner of Destruction--Security Control.

(a) Destruction by anyone. A person may accomplish routine destruction of an item under this subchapter by burning in a suitable incinerator or by another method as long as the person performs the destruction in:

(1) a safe and responsible manner;

(2) compliance with all relevant federal, state, and local laws; and

(3) compliance with all requirements of the Texas Natural Resources Conservation Commission and the EPA.

(b) Private contract. If a laboratory, law enforcement agency, or peace officer contracts with a private entity to destroy the item, the private contractor must:

(1) hold a controlled substances registration number from the director and DEA; and

(2) obtain full permitting from the EPA as a hazardous waste transportation, storage, or disposal facility, as appropriate.

(c) Destruction by officer. The director recommends but does not require that an individual peace officer should not destroy hazardous material, unless that officer possesses the special expertise required to handle the material safely and lawfully.

§13.159. Two-Witness Rule--Security Control.

(a) Destruction by anyone. A laboratory, law enforcement agency, or peace officer may not destroy an item under this subchapter

without at least two individuals present to witness the actual destruction. One witness must be:

(1) a supervisor; or

(2) another individual expressly designated by a supervisor to witness that specific destruction incident.

(b) Destruction by laboratory. If a laboratory destroys the item, destruction must comply with:

(1) the security provisions of this chapter for a controlled substances registrant; and

(2) the documentation and security provisions of this subchapter that reference a laboratory.

(c) Destruction by agency or officer. If a law enforcement agency or peace officer destroys the item:

(1) no two individuals may serve as the sole witnesses to consecutive destruction incidents; and

(2) the director recommends but does not require both of the two witnesses should be peace officers from different law enforcement agencies.

§13.160. Destruction Inventory--Security Control.

(a) After laboratory analysis. If destruction under this subchapter follows a laboratory analysis process that has resulted in adequate repackaging and sealing of an item, the director will deem a destruction inventory to be sufficient if it consists of an inspection, accomplished without breaking the seal, in order to:

(1) verify the nature, kind, and quantity of the items sought to be destroyed as compared with the original laboratory submission; and

(2) determine the status of the packaging and seal integrity.

(b) No laboratory analysis. If destruction does not follow a laboratory analysis process that has resulted in adequate repackaging and sealing of an item, a destruction inventory must include:

(1) the relevant case or file number;

(2) the name of the seizing law enforcement agency or peace officer;

(3) a description of the packaging;

(4) a description of the status of the packaging and seal integrity; and

(5) the count and weight of the item, including the exact nature, kind, and quantity.

§13.161. Witness Responsibility--Security Control.

(a) Generally. For purposes of accountability, at least two of the witnesses to a destruction under this subchapter must, during a process conducted immediately before the physical destruction of an item:

(1) examine each item in a manner sufficient to complete the destruction inventory required by this subchapter;

(2) compare that destruction inventory with each previous inventory of the item, including one that may have been made as part of an evidence submission form, a laboratory analysis, or as part of the destruction authorization;

(3) examine each package for the integrity or breach of the package or seal;

(4) refuse to destroy an item that reasonably appears to have been tampered with or to be at variance with its purported count or weight; and

(5) ensure destruction of each item as soon as reasonably possible.

(b) Suspicious incident. Each witness must:

(1) investigate a suspicious incident or probable breach of security, including a discrepancy, loss, theft, or other potential diversion of an item to be destroyed; or

(2) report the incident or breach to an appropriate law enforcement agency or peace officer for investigation.

(c) Registrant security provisions may also apply. The registrant security provisions of this chapter apply if a witness to destruction under this subchapter is also registered individually as a controlled substances registrant or employed by a registrant. If so, the witness is responsible for making a written report to the director through the Narcotics Service of a probable breach of security under those provisions.

§13.162. Laboratory Retesting for Possible Tampering--Security Control.

(a) Suspicious incident. Unless there is an obvious, reasonable explanation for the event in question, each witness to a destruction under this subchapter is responsible for returning an item to a laboratory for testing to detect a discrepancy, loss, theft, or other potential diversion if:

(1) the count or weight of the item is substantially incorrect;

(2) a package has been opened; or

(3) there is another suspicious incident or probable breach of security.

(b) Laboratory options. If an individual returns an item to a laboratory for testing under this section, the laboratory may conduct an analysis sufficient to detect discrepancy, loss, theft, or other potential diversion or to resolve the particular suspicion surrounding the incident.

§13.163. Destruction Documentation--Security Control.

(a) Contemporaneous written statement. At or immediately after the time of a destruction under this subchapter, one of the witnesses to destruction must complete a written statement containing a detailed description of the destruction of the item, including all the relevant information required by this subchapter.

(b) Private contract. If a laboratory, law enforcement agency, or peace officer contracts with a private entity to destroy the item, the witnesses need not be present during the actual physical destruction of each item by the private contractor. A written statement under this subsection must document the status and handling of the item up to the point the laboratory, agency, or officer turned it over to the private contractor for destruction under the contract.

(c) Contents of statement. A statement may incorporate other documents by reference and must contain:

(1) relevant seizure information, including the seizing law enforcement agency or peace officer, the date and location of seizure, and the authority for seizure;

(2) the destruction authority, including the name, position, and reason given by the individual authorizing destruction;

(3) the manner of transportation to the destruction site, including the names of each individual transporting an item;

(4) an inventory of the items destroyed, including the nature, kind, and quantity of the item;

(5) the witnesses, including the name, title, agency, and signature of each witness;

(6) the date and location of destruction;

(7) manner of destruction; and

(8) each unusual or suspicious event that occurred during the destruction incident.

§13.164. Document Maintenance, Inspection, and Transmittal--Security Control.

(a) Generally. The laboratory, law enforcement agency, or peace officer who destroys an item under this subchapter must maintain the original destruction documents in a readily retrievable form after the date of destruction.

(b) Available to Director for inspection. The destroying laboratory, law enforcement agency, or peace officer must make the original destruction documents available for announced or unannounced inspection by the director.

(c) Copy upon request. If the director requests a copy of the destruction documentation, a laboratory, law enforcement agency, or peace officer destroying an item subject to this subchapter must provide the copy to the director within seven days.

(d) Destruction standard operating procedure (SOP). A laboratory or law enforcement agency adopting a written destruction SOP under this subchapter must:

(1) maintain the original copy of the SOP;

(2) make the original available for announced or unannounced inspection by the director or a member of the department; and

(3) provide the copy to the director under this section in the same manner as another destruction document.

§13.165. Communication with Director (Crime Lab Service).

If a person is required or allowed by this subchapter to make a notification, report, or other written, telephonic, or personal communication to the director, the person must make the communication to the director through the Crime Laboratory Service at the address indicated in §13.11 of this title (relating to Telephone Number and Address--Crime Laboratory Service).

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

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SUBCHAPTER H. SECURITY

37 TAC §§13.181-13.187

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.006(4), which provides that the director of the department shall adopt rules, subject to commission approval, considered necessary for the control of the department; and Health and Safety Code, §481.003(a).

Texas Government Code, §411.004(3) and §411.006(4), and Health and Safety Code, §481.003(a) are affected by this proposal.

§13.181. Subchapter Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise: Distributor - Includes a precursor or apparatus distributor under Subchapter E of this chapter (relating to Precursors and Apparatus).

§13.182. Registrant - Generally.

(a) To prevent diversion. A registrant and an applicant for registration must establish and maintain effective controls and procedures required directly or indirectly by this subchapter in order to prevent unauthorized access, theft, or diversion of a controlled substance from the legitimate to the illicit market.

(b) Lawful use. A registrant may only use a controlled substance for a lawful purpose, including:

(1) in a field of medicine, veterinary medicine, dentistry, pharmacy, or other health care profession;

(2) scientific research;

(3) delivery or sale to an authorized person; or

(4) in industrial channels.

(c) Other rules apply. Except as otherwise provided by this subchapter, a registrant must comply with the physical and other related security control provisions of the Code of Federal Regulations, Title 21, Chapter II, §§1301.71 - 1301.76. The director does not impose any security requirements on a peyote distributor under Subchapter C of this chapter (relating to Peyote) in addition to these federal requirements.

(d) Access control. During the regular course of business activities, a facility registered under the Act may not allow access by an individual to the facility's controlled substance storage area unless the individual is someone whose presence is authorized and required for efficient operation of the facility.

(e) Cabinet security. Except as provided by subsections (c) or (f) of this section, a registrant must store a controlled substance in a securely locked, substantially constructed cabinet or other security cabinet that meets federal security requirements.

(f) Constructive compliance. Although a cabinet fails to meet the security requirements of this section, the director may deem the cabinet to be in compliance if it is located in a room or area:

(1) to which the entrance door has been constructed so the hinge mountings inhibit removal; and

(2) for which a limited number of employees have keys or combinations to operate its locking device.

(g) Lock security. A registrant must:

(1) rekey a key lock if a key is lost or upon termination of an employee having possession of a key; and

(2) change a combination lock number:

(A) if a record of the combination is lost or stolen; or

(B) upon termination of an employee having knowledge of the combination.

§13.183. Pharmacy Registrant.

A facility registered as a pharmacy must comply with each rule of the Texas State Board of Pharmacy related to access, responsibility, and other security issues.

§13.184. Registrant's Employee.

(a) Disqualification. A registrant may not intentionally, knowingly, or recklessly employ or use in any manner an individual who will or is reasonably likely to have access to a controlled substance and who:

(1) has had a federal or state application for controlled substances registration denied, revoked, canceled, or suspended;

(2) has been convicted of a felony offense under a state or federal law;

(3) does not comply with a federal security control for a practitioner under the Code of Federal Regulations, Title 21, Chapter II, §1301.76;

(4) does not meet a federal employee screening standard for a non-practitioner under of the Code of Federal Regulations, Title 21, Chapter II, §§1301.90 - 1301.93; or

(5) has had a license revoked, canceled, or suspended by a state health regulatory agency.

(b) Disqualification waived. After considering the registrant's written request, the director may allow the registrant to employ an individual who has violated subsection (a) of this section. The director may not waive the requirements that a registrant not hire an individual during the two-year period immediately following the individual's conviction for a felony offense under state or federal law or until the terms of a sentence are satisfied, whichever is the longer period of time.

(c) Factors. Before making a waiver decision, the director may consider each relevant factor, including, but not limited to, the following:

(1) if the individual is a convicted felon, the suspension of sentence, placement of the individual on probation, and the successful completion by the individual of a court-ordered supervision;

(2) whether the health regulatory agency has reinstated or reissued the previously revoked, canceled, or suspended license of the individual; and

(3) whether the employment of that individual by a registrant is in the best interest of the public and the individual.

§13.185. Official Prescription Form.

(a) Accountability. A practitioner who obtains from the director an official prescription form is accountable for each numbered form.

(b) Prohibited acts. A practitioner may not:

(1) allow another practitioner to use the individual practitioner's official prescription form;

(2) pre-sign an official prescription blank; or

(3) leave an official prescription blank in a location where the practitioner should reasonably believe another could steal or misuse a prescription.

(c) While not in use. While an official prescription blank is not in immediate use, a practitioner may not maintain or store the book at a location so the book is easily accessible for theft or other misuse.

(d) Voided. A practitioner must account for each voided official prescription form by sending the voided form to the director (Texas Prescription Program).

§13.186. Precursor or Laboratory Apparatus.

(a) Required unless one-time permit. A distributor or recipient of a precursor or apparatus must comply with this subsection:

(1) unless the person is exempted or excepted from similar security requirements by this chapter or the Act, §481.077(k) or §481.080(m) as a one-time permit holder; or

(2) even though the person is exempted or excepted as described in paragraph (1) of this subsection, the person has voluntarily submitted to annual permitting under this chapter.

(b) Storage requirements. A business, distributor, or individual who holds a precursor chemical or laboratory apparatus permit will meet the following minimum security requirements to protect these controlled items. The permit holder will:

(1) establish and maintain a building, an enclosure within a building, or an enclosed yard that provides reasonably adequate security against the diversion of a controlled item;

(2) limit access to each storage area to the minimum number of individuals or employees necessary for the permit holder's activities; and

(3) designate an individual or a reasonably limited set of individuals with:

(A) responsibility for each area where a controlled item is stored; and

(B) authority to enter or control entry into the area.

(c) No physical barrier. In the absence of a physical barrier, such as a wall, partition, fence, or similar divider, the permit holder may comply with this section by another form of substantially increased security to limit physical access to the storage area under subsection (b)(2) of this section.

(d) Written designation. The permit holder will make the designation required by subsection (b)(3) of this section in writing and will make the designation available upon request in the same manner as a record kept under this chapter. The holder may update the designation record as necessary to reflect current practice.

(e) Observation. When maintenance personnel or a business guest, visitor, or similar individual is present in or passes through, an area covered by this section, the permit holder must provide for reasonably adequate observation of the area by an employee specifically designated under subsection (b)(3) of this section.

(f) Alarm system. If a permit holder has an alarm system that is in operation and being monitored, the permit holder must immediately report each unauthorized intrusion or other security breach to:

(1) a local law enforcement agency; or

(2) the director (PCLAS).

(g) No risk of diversion. A permit holder is not required to make the alarm report required under subsection (f) of this section, if there is a clearly innocent or other reasonable explanation for the security breach that does not involve a potential of diversion.

(h) Limited risk of diversion. The director may waive a security requirement of this section if a permit holder or applicant demonstrates that business procedures or other circumstances impose a more strict security requirement that indicates a significantly limited risk of diversion.

§13.187. Minimum Standards.

A standard contained in this subchapter is a minimum standard and may be exceeded where desirable or appropriate.

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

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SUBCHAPTER I. RECORD KEEPING

37 TAC §§13.201-13.209

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.006(4), which provides that the director of the department shall adopt rules, subject to commission approval, considered necessary for the control of the department; and Health and Safety Code, §481.003(a).

Texas Government Code, §411.004(3) and §411.006(4), and Health and Safety Code, §481.003(a) are affected by this proposal.

§13.201. Subchapter Definitions.

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

(1) Distributor--Includes a peyote distributor under Subchapter C of this chapter (relating to Peyote) and a precursor or apparatus distributor under Subchapter E of this chapter (relating to Precursors and Apparatus).

(2) Lawful possession--Includes possession of a precursor or apparatus obtained in accordance with state or federal law.

§13.202. Receipt or Disposition of Controlled Substance.

(a) Records required. A registrant must:

(1) maintain each record required to be kept under the Act or this chapter; and

(2) make the record available for inspection and copying by an individual described by §13.233 of this title (relating to Who May Inspect).

(b) When made. A registrant must:

(1) make the record contemporaneously with the event recorded; and

(2) ensure the record is kept current.

(c) Content. A registrant must keep a complete and accurate record of each:

(1) purchase or other acquisition of a controlled substance, including samples;

(2) disposal of a controlled substance; and

(3) dispensing of a Schedule V controlled substance by a pharmacist or intern to a retail purchaser without a prescription, in full compliance with federal law and regulations, state law, and the rules of the Texas State Board of Pharmacy.

(d) Other rules apply. A record of a purchase, acquisition, disposal, or dispensing of a controlled substance must include the information required under:

(1) the Code of Federal Regulations, Title 21, Chapter II, Part 1304; and

(2) the rules of each appropriate state health regulatory agency governing the conduct of the registrant.

(e) Accountability. A registrant must comply with the accountability provisions for disposal of an unused quantity of a controlled substance required under:

(1) the Code of Federal Regulations, Title 21, Chapter II, §1307.21; and

(2) the rules of each appropriate state health regulatory agency governing the conduct of the registrant.

(f) No printer. If a person maintains a record under this chapter using an automated data processing system and if the person does not have a printer available on site, then the individual:

(1) must make a useable copy available to an individual listed in subsection (a) of this section at the close of business the day after the audit; and

(2) who provides the copy, must certify that the information contained within the copy:

(A) is true and correct as of the date of audit; and

(B) has not been altered, amended, or modified.

§13.203. Order Forms (DEA Form 222).

A registrant must comply with the order form provisions for a controlled substance required under:

(1) the Code of Federal Regulations, Title 21, Chapter II, Part 1305; and

(2) the rules of each appropriate state health regulatory agency governing the conduct of the registrant.

§13.204. Pharmacy Registrant.

A registrant who possesses, completes, fills, or processes a prescription must comply with the record keeping provisions for a prescription, including labeling, required under:

(1) the Code of Federal Regulations, Title 21, Chapter II, Part 1306; and

(2) the rules of each appropriate state health regulatory agency governing the conduct of the registrant.

§13.205. Practitioner's Designated Agent.

(a) Prohibitions. A practitioner may designate another individual as an agent of the practitioner unless the designation is a subterfuge intended to circumvent materially the effect of a denial, suspension, revocation, or similar disciplinary action taken by the director, DEA, or a related health regulatory agency.

(b) Other rules apply. A practitioner who designates another individual as an agent must comply with each relevant provision of a federal regulation or rule of a state health regulatory agency governing the conduct of the practitioner.

(c) Requirements to be designated. A designated agent must be:

(1) a registered nurse licensed in this state;

(2) a licensed vocational nurse licensed in this state;

(3) a physician assistant licensed in this state; or

(4) an employee who is:

(A) located in the practitioner's office; and

(B) a member of the health care staff of the office.

(d) Current list. A practitioner must maintain in the practitioner's usual place of business a current written list of each individual designated as an agent under this section.

(e) List provided. When a practitioner adds an individual to or deletes an individual from list, the practitioner must provide upon request the current list to a pharmacy or pharmacist, the director, a member of the department, or an investigator listed in the Act, §481.076(a)(1).

§13.206. Precursor/Apparatus Records.

(a) Required unless one-time permit. A distributor or recipient of a precursor or apparatus must maintain records under this section:

(1) unless the person is exempted or excepted from reporting by this chapter or the Act, §481.077(k) or §481.080(m) as a one-time permit holder; or

(2) even though the person is exempted or excepted as described in paragraph (1) of this subsection, the person has voluntarily submitted to annual permitting under this chapter.

(b) Distributor. A distributor of a precursor or apparatus must:

(1) make an accurate and legible record of a distribution; and

(2) maintain the record after the date of the transaction.

(c) NAR-22. Proper completion of the DPS Form NAR-22 automatically generates the record of distribution on its Copy 2, that meets the record keeping requirement under this section while it remains in the distributor's record booklet.

(d) Readily retrievable. The distributor satisfies the record keeping requirement under this section by recording and maintaining the record of distribution as a readily retrievable record in an automated data processing system, if the system provides a comprehensive monthly report to the director (PCLAS).

(e) Letter of authorization. A distributor must keep an original letter of authorization on file after the date of transaction. A distributor may, but need not demand to see, copy, or keep a letter of authorization from a recipient if the recipient has an annual permit.

(f) Exception. This section does not apply to a recipient who:

(1) has lawful possession of a precursor or apparatus; and

(2) is excepted from the permit requirements of Subchapter E of this chapter (relating to Precursors and Apparatus).

(g) Limited risk of diversion. The director may waive a record keeping requirement of this section if a permit holder or applicant demonstrates that business procedures or other circumstances impose a more strict record keeping requirement that indicates a significantly limited risk of diversion.

§13.207. Record Retention Period.

(a) Two years, generally. Except as otherwise provided by law or this chapter, a record required to be made or kept by the Act or this chapter must be kept, maintained, and made available for inspection or copying for a period of two years.

(b) Beginning date. The two-year period described by this section commences on the later date of the day:

(1) the record was required to be created;

(2) the record was actually created; or

(3) the prescription was last refilled.

§13.208. Requirement to Update Information.

A person, who is an applicant for or holder of a registration or annual permit from the director, must notify the director through the appropriate section of the Narcotics Service before the seventh day after any change in the person's business name, address, and telephone number or other information required on the application, registration, or permit.

§13.209. Minimum Standards.

A standard contained in this subchapter is a minimum standard and may be exceeded where desirable or appropriate.

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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Thomas A. Davis, Jr.
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SUBCHAPTER J. INVENTORY

37 TAC §§13.221-13.224

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.006(4), which provides that the director of the department shall adopt rules, subject to commission approval, considered necessary for the control of the department; and Health and Safety Code, §481.003(a).

Texas Government Code, §411.004(3) and §411.006(4), and Health and Safety Code, §481.003(a) are affected by this proposal.

§13.221. Subchapter Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise: Distributor--Includes a peyote distributor under Subchapter C of this chapter (relating to Peyote) and a precursor or apparatus distributor under Subchapter E of this chapter (relating to Precursors and Apparatus).

§13.222. Controlled Substance Inventory.

A registrant must establish and maintain an inventory for a controlled substance as required under:

(1) the Code of Federal Regulations, Title 21, Chapter II, Part 1304; and

(2) the rules of each appropriate state health regulatory agency governing the conduct of the registrant.

§13.223. Precursor/Apparatus Inventory.

(a) Required unless one-time permit. A distributor or recipient of a precursor or apparatus must establish and maintain an inventory under this section:

(1) unless the person is exempted or excepted from inventory requirements by this chapter or the Act, §481.077(k) or §481.080(m) as a one-time permit holder; or

(2) even though the person is exempted or excepted as described in paragraph (1) of this subsection, the person has voluntarily submitted to annual permitting under this chapter.

(b) Initial inventory. A distributor or recipient must conduct an initial inventory to include each precursor or apparatus that is covered by this subchapter and in stock at the time of the inventory. The distributor or recipient must conduct the initial inventory not later than the 90th day after the date the director issues the initial permit under this chapter.

(c) Additional inventory. After the initial inventory, a distributor or recipient must conduct another inventory not later than the 24th month following the month of the last inventory.

(d) Constructive compliance. The director will deem a distributor or recipient to be in compliance with the inventory requirements of this section if the distributor or recipient:

(1) is a business that routinely conducts an annual inventory of all items; and

(2) maintains a readily retrievable record of each precursor or apparatus located during the inventory.

(e) Limited risk of diversion. The director may waive an inventory requirement of this section if a permit holder or applicant demonstrates that business procedures or other circumstances impose a more strict inventory requirement that indicates a significantly limited risk of diversion.

(f) One-time permit holder. This subchapter does not apply to the holder of a one-time permit for distribution or receipt of a precursor or apparatus under §13.104 of this title (relating to Requirements for Permit Issuance).

§13.224. Minimum Standards.

A standard contained in this subchapter is a minimum standard and may be exceeded where desirable or appropriate.

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

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SUBCHAPTER K. INSPECTION

37 TAC §§13.231-13.237

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.006(4), which provides that the director of the department shall adopt rules, subject to commission approval, considered necessary for the control of the department; and Health and Safety Code, §481.003(a).

Texas Government Code, §411.004(3) and §411.006(4), and Health and Safety Code, §481.003(a) are affected by this proposal.

§13.231. Subchapter Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise: Distributor--Includes a peyote distributor under Subchapter C of this chapter (relating to Peyote) and a precursor or apparatus distributor under Subchapter E of this chapter (relating to Precursors and Apparatus).

§13.232. Location Subject to Inspection.

(a) An individual named in §13.233 of this title (relating to Who May Inspect) may inspect the controlled premises of an applicant for or holder of:

(1) a controlled substances registration under Subchapter B of this chapter (relating to Registration);

(2) a peyote distributor registration under Subchapter C of this chapter (relating to Peyote); or

(3) a precursor or apparatus permit under Subchapter E of this chapter (relating to Precursors and Apparatus).

(b) The controlled premises of an applicant for or holder of a registration or permit includes each location where an item or record covered by this chapter is stored, used, or transferred within the holder's business or activity.

§13.233. Who May Inspect.

(a) Generally. This subchapter applies to the director's authority under the Act to enter and inspect a controlled premise. While engaged in the inspection or an activity reasonably related to the inspection, the director may examine, audit, inventory, or, as appropriate, copy an item or record found on the premises.

(b) Delegation. The director delegates authority described in subsection (a) of this section to each member of the department who is assigned to the Narcotics Service, whether or not the member is a commissioned peace officer.

(c) Assistance. When exercising an authority described in subsections (a) or (b) of this section, the director or member may be assisted by:

(1) a peace officer;

(2) another member of the department;

(3) a member of DEA;

(4) an investigator listed in the Act, §481.076(a)(1);

(5) a representative of an appropriate state health regulatory agency governing the conduct of a registrant; or

(6) another individual acting under the authority of the director or member.

§13.234. Time Limitations.

For the purpose of examining, auditing, inspecting, inventorying, or, where appropriate, copying an item subject to the Act or a record required to be made or kept under the Act or this chapter, the director or a member of the department may enter the controlled premises of an applicant or registrant at a reasonable time, including:

(1) normal business hours; or

(2) at another time when the controlled premises are occupied or open to the public.

§13.235. Interference With Inspection.

(a) Prohibited. If the Act or this subchapter authorizes an inspection, no individual in charge of a premise, item, or record covered by this subchapter may refuse or interfere with any of the following activities related to the inspection:

(1) entry to the premises;

(2) examination, audit, inspection, or inventory of the item or record;

(3) copying a record or related document; or

(4) sampling each chemical, drug, substance, precursor, or similar substance on the premises.

(b) One-time permit. Refusal or interference by an applicant for a one-time permit may be a ground for the director to deny the permit application.

§13.236. What May Be Inspected.

(a) Generally. Except as provided in subsections (b) or (c) of this section, the director may examine, audit, inspect, inventory and, where appropriate, copy:

(1) a record, report, or other document required to be made or kept under the Act;

(2) the security of the controlled premises; and

(3) each of the following records or controlled items if found on the premises:

(A) pertinent equipment;

(B) a chemical precursor or laboratory apparatus;

(C) a finished or unfinished drug;

(D) another substance, material, container, or labeling subject to the Act;

(E) all files, papers, processes, controls, or facilities appropriate for verification of a record required to be made or kept under the Act or otherwise bearing on the provisions of the Act;

(F) a stock of a controlled substance;

(G) a hypodermic syringe, needle, pipe, or other instrument, device, contrivance, equipment, control, container, label, or facility relating to a possible violation of the Act; or

(H) material used, intended to be used, or capable of being used as an adulterant or dilutant.

(b) Dispensing only. If an applicant has only sought or obtained a controlled substances registration to dispense the substance, the director may only inspect the records of the applicant or registrant. Under this subsection, the director may not examine, audit, inspect, inventory, or copy another item described in subsection (a) of this section.

(c) Prohibitions. Unless the owner, operator, or agent in charge of a controlled premises consents in writing, the director may not examine, audit, inspect, inventory, or copy:

(1) financial data;

(2) sales data (other than shipment data); or

(3) pricing data.

§13.237. Inspection of Permit Holder.

(a) Generally. The holder of a one-time permit for distribution or receipt of a chemical precursor or laboratory apparatus may be inspected subject to the limitations of the Act, §481.077(k) and §481.080(m) and §13.104 of this title (relating to Requirements for Permit Issuance).

(b) Consent to inspect--one-time. An applicant for a one-time permit must give written consent for one or more pre-permit inspections under this subchapter to determine eligibility for issuance of the permit. A written consent to an inspection under the Act, §481.078(e) or §481.081(e), is sufficient for a one-time permit if the consent is for initial inspection or any additional inspection to be conducted before issuance of the permit and at a reasonable time as necessary to determine qualification for the permit.

(c) Consent to inspect--annual. A written consent given by a person seeking an annual permit must include consent for an initial inspection to determine qualification for the permit sought and additional inspections conducted before or after issuance of the permit at a reasonable time as necessary to enforce the Act or this chapter.

(d) Statutory authority. A member of the department or peace officer is expressly authorized by the Act, §481.077(k) and §481.080(m), to audit, inspect, and copy a record of a purchase or sale of a precursor or apparatus of a person who holds an annual permit under Subchapter E of this chapter (relating to Precursors and Apparatus). Except as provided by subsection (b) of this section, this section does not apply to a person who holds a one-time permit.

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

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SUBCHAPTER L. REPORTING DISCREPANCY, LOSS, THEFT, OR DIVERSION

37 TAC §§13.251-13.254

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.006(4), which provides that the director of the department shall adopt rules, subject to commission approval, considered necessary for the control of the department; and Health and Safety Code, §481.003(a).

Texas Government Code, §411.004(3) and §411.006(4), and Health and Safety Code, §481.003(a) are affected by this proposal.

§13.251. Subchapter Definitions.

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

(1) Distributor--Includes a peyote distributor under Subchapter C of this chapter (relating to Peyote) and a precursor or apparatus distributor under Subchapter E of this chapter (relating to Precursors and Apparatus).

(2) Item--Includes:

(A) a controlled substance, including peyote;

(B) a precursor chemical;

(C) laboratory apparatus; or

(D) an official prescription form.

§13.252. Applicability.

(a) To discrepancy, loss, theft, or other potential diversion. Without regard to actual evidence of diversion, this subchapter applies to a discrepancy, loss, or theft of a controlled or other regulated item or substance or other situation involving a potential for diversion.

(b) Who must report. This subchapter applies to a person who is:

(1) a registrant under Subchapter B of this chapter (relating to Registration);

(2) a registered peyote distributor under Subchapter C of this chapter (relating to Peyote); or

(3) a precursor or apparatus permit holder under Subchapter E of this chapter (relating to Precursors and Apparatus), whether it is a one-time or annual permit.

§13.253. Reporting Discrepancy, Loss, Theft, or Other Potential Diversion.

(a) Generally. A person covered by this subchapter must notify the director not later than the third day after the date the person learns of:

(1) a discrepancy in the amount of an item ordered from a source inside or outside this state and the amount received, if not back ordered;

(2) a loss or theft during shipment from a source inside or outside this state; or

(3) a loss or theft from current inventory.

(b) How made. A person covered by this subchapter must notify the director by submitting a report to the director through the appropriate section of the Narcotics Service. The report must be made on:

(1) a DPS Form NAR-91, for a registrant under Subchapter B of this chapter (relating to Registration) or Subchapter C of this chapter (relating to Peyote);

(2) a DPS Form NAR-91B, for a precursor or apparatus permit holder under Subchapter E of this chapter (relating to Precursors and Apparatus); or

(3) a duplicate of the equivalent DEA form for reporting a theft or loss of a controlled substance to DEA.

(c) Form and content. A person making a report under this section must:

(1) make the report on regular business letterhead or other reporting form; and

(2) ensure the report contains the following information:

(A) the name, address, and telephone number of the business or other person preparing the report;

(B) the printed or typed name of the individual preparing the report; and

(C) the date the person prepares the report.

(d) Additional content. If the report under this section is of:

(1) a discrepancy, it must include:

(A) the name of the item ordered;

(B) the difference in the amount actually received; and

(C) the amount shipped according to the shipping statement or invoice; or

(2) a loss or theft from current inventory, it must include:

(A) the name and amount of the item lost or stolen;

(B) the physical location where the loss or theft occurred; and

(C) the date of discovery of the loss or theft; or

(3) a discrepancy, loss, theft, or other potential diversion that occurred during shipment of the item, it must include:

(A) the name of the common carrier or person who transported the item; and

(B) the date the item was shipped.

§13.254. Official Prescription.

(a) Report lost forms. Not later than close of business on the day of discovery, a practitioner must report a lost or stolen official prescription form to:

(1) the local police department or sheriff's office in an effective manner; and

(2) the director (Texas Prescription Program) by telephone at the number indicated in §13.9 of this title (relating to Telephone Number and Address--Texas Prescription Program).

(b) Recovery report. Not later than close of business on the day of recovery of an official prescription form previously reported lost or stolen, a practitioner must, before using the recovered form, notify:

(1) the local law enforcement agency to which the matter was originally reported; and

(2) the director (Texas Prescription Program).

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

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SUBCHAPTER M. DENIAL, REVOCATION, AND RELATED DISCIPLINARY ACTION

37 TAC §§13.271-13.278

The new sections are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.006(4), which provides that the director of the department shall adopt rules, subject to commission approval, considered necessary for the control of the department; and Health and Safety Code, §481.003(a).

Texas Government Code, §411.004(3) and §411.006(4), and Health and Safety Code, §481.003(a) are affected by this proposal.

§13.271. Subchapter Definitions.

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

(1) APA - The Administrative Procedure Act (Texas Government Code, Chapter 2001).

(2) Applicant - A person who applies for a registration or permit.

(3) Denial - Includes an action to deny an application for an original or renewal of a registration or permit.

(4) Disciplinary action - An action taken under this subchapter to accept a voluntary surrender or to reprimand, cancel, suspend, probate, revoke, or demonstrate expiration or termination of a current or former registration.

(5) Registrant - A person who holds a current or former registration or permit.

(6) Registration - A controlled substances registration, including a peyote distributor registration or a precursor or apparatus permit issued under this chapter.

(7) Serious misdemeanor - A Class A misdemeanor, a Class B misdemeanor, or another criminal offense punishable under the laws of this state, another state, or the United States by:

(A) confinement in a county jail or analogous penal institution; or

(B) a term of confinement of one year or less, if the jurisdiction does not differentiate between the location of felony or misdemeanor confinement.

§13.272. General Provisions.

(a) APA applies. Except as provided by this chapter, the APA applies if the director proposes to take disciplinary action against a person's registration or to deny a person's application for registration.

(1) The person is entitled to preliminary notice from the director and a hearing as a contested case under the APA.

(2) The director will send notice by certified mail or personally delivered to the most current address of the registrant or applicant contained in the director's files. If mailed, the notice is presumed to have been received by the registrant or applicant on the third business day after the date of mailing.

(b) Pleadings. If the director pleads appropriately:

(1) the director may take a disciplinary action or make a denial under this subchapter against a chemical precursor or laboratory apparatus permit in the same manner as a disciplinary action or denial against a controlled substances registration; and

(2) a successful disciplinary action or denial by the director will also operate against any other registration issued by the director under this chapter.

(c) Action may be limited. The director may limit a disciplinary action or denial to the particular activity, schedule, controlled substance within a schedule, precursor, apparatus, or other item for which grounds for the action exists.

(d) Notification of another agency. The director will promptly notify each appropriate federal or state health regulatory agency of an order taking a disciplinary action or denial against a registration or application, other than a permit issued under Subchapter E of this chapter (relating to Precursors and Apparatus).

(e) Invalidation. A registration may:

(1) expire or terminate;

(2) be canceled, surrendered, suspended, revoked, or otherwise invalidated; or

(3) be subject to reprimand or probation.

(f) Possession. Mere possession of the physical document does not necessarily mean that the person:

(1) still holds a current, valid registration; or

(2) currently holds, has ever held, or has any of the powers or rights indicated on the document.

(g) Hearing, evidence and procedure. Except as provided by this chapter, a hearing will be governed by the APA and will be held by an administrative law judge appointed by the State Office of Administrative Hearings. A hearing will be conducted in accordance with the procedures contained in Chapter 29 of this title (relating to Practice and Procedure), and the rules of the State Office of Administrative Hearings.

(h) Under the Act, §481.063(h), the APA does not apply to a denial, suspension, or revocation of an application for registration if the denial is based on a denial or other disciplinary action taken by DEA under the Federal Controlled Substances Act.

(i) Request for Hearing. An applicant or registrant may request a hearing under this subchapter by submitting a timely and properly addressed written request for a hearing to the director. To be timely, the request must be received by the director no later than fifteen calendar days after the date of the registrant's or applicant's receipt of the notice of denial or other disciplinary action. To be properly addressed, a request for hearing must be mailed or sent by e-mail or facsimile to the director at the return address included in the director's notice of denial or other disciplinary action or, if none, to the director at the address of the Narcotics Service indicated in §13.7 of this title (relating to Telephone Number and Address - Narcotics Service).

§13.273. Denial.

(a) Grounds. Except as provided by §13.264(b) of this title (relating to Revocation), the director may deny an application for registration and may refuse issuance of the appropriate registration if:

(1) the applicant has not affixed a signature required by this chapter;

(2) a required form is incomplete;

(3) a required document is incomplete, illegible, or missing;

(4) the application contains a false assertion by any person;

(5) the applicant has a registration currently revoked, suspended, or voluntarily surrendered; or

(6) the applicant does not qualify for the registration under the Act, §481.063(e).

(b) Hearing. An applicant may request a hearing upon denial or refusal under this section. If the director prevails at the hearing, the director may issue final order of denial.

§13.274. Revocation.

(a) Grounds. The director will revoke a registration if the registrant:

(1) violates a ground of denial described in the Act, §481.063(e);

(2) violates a section of this chapter where revocation is the penalty noted; or

(3) has a license or similar permit permanently revoked by an appropriate federal or state health regulatory agency.

(b) Effect on later application. Except as provided by this subsection, a person may not apply for registration until one year after the date a revocation became legally final.

(1) Within that year, the director will not reinstate a revoked registration unless the registrant submits a new application and proof by a preponderance of evidence that the facts supporting the revocation have been negated or otherwise substantially changed, such as:

(A) the felony conviction has been reversed or set aside on direct or collateral appeal, or a pardon based on subsequent proof of innocence has issued; or

(B) the license or similar permit was not permanently revoked by an appropriate federal or state health regulatory agency.

(2) After that year, the director will not reinstate a revoked registration unless the registrant submits a new application and:

(A) proof described by Subsection (b)(1) of this section; or

(B) a showing of good cause for the new registration.

(c) After invalidation. The director may revoke a registration even though it has become invalidated by some other means, such as:

(1) cancellation, expiration, or termination;

(2) suspension;

(3) voluntary surrender; or

(4) any other means.

(d) Hearing. Upon revocation under this section, the registrant may request a hearing. If the director prevails at the hearing, the director may issue a final order of revocation.

§13.275. Suspension.

(a) Grounds. Unless revocation is explicitly noted, the director may suspend a registration if the registrant:

(1) violates a provision of:

(A) these sections; or

(B) the Act; or

(2) has a license or similar permit suspended for a stated term by an appropriate federal or state health regulatory agency.

(b) Term, generally. Unless otherwise specified in subsections (c) and (d) of this section, the term of suspension is 12 months.

(c) Special term. The director may impose the same term as a court or federal or state health regulatory agency imposed in the underlying matter and if the court's judgment or adjudication is deferred for a felony or serious misdemeanor and the registrant is then placed on probation or community supervision, the term of suspension may be equal to the actual time served on probation.

(d) Additional term. Up to twelve months may be added to the term of a new suspension for each separate previous violation that has resulted in either a suspension, a probated suspension, or a written reprimand before the beginning date of the new suspension.

(e) Beginning date. A suspension or probation may be ordered to run concurrently or consecutively with another suspension or probation. The beginning date of the suspension is:

(1) a date agreed to by both parties that is no earlier than the date of the violation on which the action is based; or

(2) the earlier of the date:

(A) the registrant notifies the director in writing of the violation if the director later receives a signed waiver of a suspension hearing from the registrant that was postmarked within 10 days of its receipt by the registrant; or

(B) the suspension became legally final.

(f) End of suspension. A suspended registration remains suspended until one of the following events occurs.

(1) Before expiration of the terms of suspension and registration:

(A) the remainder of the suspension is probated; or

(B) a written request for reinstatement of the original registration is received from the registrant and accepted by the director based on good cause shown.

(2) After expiration of the term of suspension and before expiration of the term of registration, a written request for reinstatement of the original registration is received from the registrant and accepted by the director.

(3) After expiration of the terms of suspension and registration, a written application for a new registration is received from the registrant and accepted by the director.

(g) Suspension after invalidation. The director may suspend a registration even though it may have become invalid by some other means, such as:

(1) cancellation, expiration, or termination;

(2) voluntary surrender; or

(3) any other means.

(h) Hearing. Upon suspension under this section, the registrant may request a hearing. If the director prevails at the hearing, the director may issue a:

(1) final order of suspension; or

(2) final order of written reprimand under this subchapter.

§13.276. Probation or Reprimand.

(a) Probation or reprimand. With the agreement of the parties, the director may, upon proof of mitigating factors:

(1) probate all or part of the suspension term; or

(2) issue a written reprimand in lieu of suspension.

(b) Probation period. If probated, a suspension:

(1) may be probated for a period of up to twice the maximum term of suspension; and

(2) may not be probated for less than six months.

(c) Probation terms. The director may impose reasonable terms or conditions of probation, such as:

(1) special reporting conditions;

(2) special document submission conditions;

(3) no further rule or law violations; or

(4) any other reasonable term of probation.

(d) End of probation. A probated registration remains probated until:

(1) the term of suspension has expired;

(2) all other terms or conditions of probation have been fulfilled; and

(3) a written request for reinstatement has been received by the director from the registrant, unless the probation has been revoked by the director under subsection (e) of this section; or

(4) the registration has been revoked under §13.264 of this title (relating to Revocation).

(e) Revocation after probation. Before reinstatement, a probation under this section may be revoked upon a showing that a material term or condition has been violated before the expiration date of the probation, regardless of when the petition is filed.

(f) Upon revocation of the probation, the full term of suspension must be imposed with credit for all time already served on that probation.

§13.277. Voluntary Surrender.

(a) Grounds. A registrant may desire to voluntarily surrender a registration:

(1) as part of an employee termination agreement;

(2) as part of a plea bargain to a criminal charge;

(3) as part of an agreed settlement of registration action or other administrative action by another federal or state health regulatory agency; or

(4) for another reason.

(b) Term. A registrant may surrender a registration either permanently or for a stated term.

(c) Effective dates. For a voluntary surrender:

(1) its beginning date is the date stated in the request or, if none, the date it was received by the director;

(2) its ending date is the date stated in the request or, if none, it will be construed as a permanent surrender; and

(3) a permanent surrender has no ending date.

(d) Procedure. A registrant may voluntarily surrender a registration by sending, or causing to be sent, a signed, written request to the director, who may accept or reject the request. The signed written request must indicate that the registrant understands the consequences of the document being signed. The director may accept a request for voluntary surrender submitted to the director in any other form that indicates the registrant intends to voluntarily surrender the registration to the director.

(e) Liberal construction. The director may liberally construe the intent of a request and may, specifically, construe the surrender of a single registration to be a surrender of all other registrations held under this chapter, unless the request expressly states otherwise. The surrender should include a summary recitation of the reason for the surrender.

(f) Effect of surrender. If accepted, the registrant is no longer registered under either type of surrender:

(1) effective on the beginning date of the surrender; and

(2) until the person applies for and meets the requirements of a new registration.

(g) Denial after surrender. In case of a reapplication, the director will deny the new registration based upon a failure to meet the current minimum standards for registration. The director may:

(1) approve the new registration and impose a previously agreed condition, such as suspension, probated term of suspension; or

(2) deny a new registration of the same or other type based solely upon a voluntary surrender:

(A) if permanent; or

(B) if for a term that has not yet expired.

§13.278. Cancellation.

(a) Grounds. The director may cancel a registration if the director issued the registration in error.

(b) Hearing. Upon cancellation under this section, the registrant may request a hearing. If the director prevails at the hearing, the director may issue a final order of cancellation.

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

Filed with the Office of the Secretary of State, on March 8, 2001.

TRD-200101406
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 424-2135

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CHAPTER 15. DRIVERS LICENSE RULES
SUBCHAPTER B. APPLICATION REQUIREMENTS - ORIGINAL, RENEWAL, DUPLICATE, IDENTIFICATION CERTIFICATES

37 TAC §15.47

The Texas Department of Public Safety proposes new §15.47, concerning Electronically Readable Information. The new section is necessary in order for the department to comply with House Bill 571, passed during the 76th Texas Legislature, 1999, which limits the information placed on a Texas driver license in an electronically readable format, and allows for this information to be used for law enforcement and governmental purposes only.

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 for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five-year period the rules are in effect the public benefit anticipated as a result of enforcing the rule will be to limit the purposes for which personal information contained on the driver license/commercial driver license/identification certificate may be assessed in an electronically readable format. There is no anticipated adverse economic effect on individuals, small businesses, or micro-businesses.

Comments on the proposal may be submitted to Frank Elder, Assistant Chief of Driver License, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0300, (512) 424-2768.

The new section is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §521.005.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 are affected by this proposal.

§15.47. Electronically Readable Information.

(a) The information contained in the magnetic stripe of the driver license, commercial driver license, or identification certificate shall only include the information on the face of the license and the physical description of the licensee.

(b) Only law enforcement and governmental agency personnel acting in their official capacity can utilize the information provided in this format.

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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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 424-2135

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CHAPTER 16. COMMERCIAL DRIVERS LICENSE

SUBCHAPTER D. SANCTIONS AND DISQUALIFICATIONS

37 TAC §§16.93, 16.95, 16.98

The Texas Department of Public Safety proposes amendments to §16.93 and §16.98, and new §16.95, concerning Commercial Drivers License (CDL) Sanctions and Disqualifications. Amendment to §16.93 is necessary to update the statutory reference. Amendment to §16.98 reformats the section by adding new subsection (b), changes the title of the section, and updates the statutory reference. New §16.95 establishes a notice and hearing procedure as required by House Bill 3641 passed during the 76th Texas Legislature, 1999. The amendments and new section will further tie the commercial driver license administrative hearing process to the non-CDL administrative hearing process of Texas Transportation Code, Chapter 521, Subchapter N and 37 TAC §§15.81-15.85.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the rules are in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five year period the rules are in effect the public benefit anticipated as a result of enforcing the rules will be to provide for an efficient and consistent administrative hearing process in compliance with statute. There is no anticipated adverse economic effect on individuals, small businesses, or micro-businesses.

Comments on the proposal may be submitted to Frank Elder, Assistant Chief of Driver License, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0300, (512) 424-2768.

The amendments and new section are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §521.005.

Texas Government Code, §411.004(3) and Texas Transportation Code, §521.005 are affected by this proposal.

§16.93. Serious Traffic Violations and Habitual Violators.

(a) A driver who, during any three-year period, is convicted in any jurisdiction in the United States of two serious traffic violations in separate incidents, will be disqualified from driving a commercial motor vehicle (CMV) for a period of 60 days.

(b) A driver who, during any three-year period, is convicted in any jurisdiction in the United States of three serious traffic violations in separate incidents is disqualified from driving a CMV for a period of 120 days.

(c) Convictions which were the basis for initiation of disqualification action taken pursuant to subsections (a) of this section may be used again as the basis of disqualification action taken pursuant to subsection (b) of this section.

(d) Convictions which were the basis for initiation of disqualification action taken pursuant to subsections (a) and (b) of this section will also be used as the basis for suspension of the privilege to drive a non-CMV because the person is a habitual violator of the traffic law as defined in Texas Transportation Code, §521.292 (b)[~~521.294(h)~~].

(e) Convictions which occurred in the operation of a CMV that were the basis for proceedings initiated or administrative actions taken pursuant to the habitual violator provisions of Texas Transportation Code, §521.292(a)(3) [~~521.294(h)~~], may also be used as the basis for disqualification action pursuant to subsections (a) and (b) of this section.

(f) The term "serious traffic violation" as used in this chapter has the same definition as that found in Texas Transportation Code, §522.003(25).

(g) The Commercial Driver's License Act, Texas Transportation Code, Chapter 522, defines certain motor vehicle offenses as "serious traffic violations" for the purpose of administering the Act. An improper or erratic traffic lane change is one of the definitions of a "serious traffic violation" as set out in the Act. Since an improper or erratic lane change is not an offense title in Texas, the department has designated the following sections of the Texas Transportation Code, Chapter 545, as improper or erratic traffic lane changes for disqualification purposes pursuant to Texas Transportation Code, §522.081. The following interpretation is also meant to apply to the defensive driving section of the Texas Transportation Code, §§543.101-543.114. A conviction of either of these offenses will be considered by the department as a "serious traffic violation":

(1) Texas Transportation Code, §545.060 -"Changed Lane when Unsafe."

(2) Texas Transportation Code, §545.061 -"Failure to Yield Right-of-Way-Changing Lanes."

§16.95. Notice and Hearing Procedures for Commercial Driver License Disqualifications.

(a) Administrative hearings for disqualifications under Texas Transportation Code §522.087(b) will be conducted pursuant to Texas

Transportation Code, Chapter 521, Subchapter N and 37 TAC §§15.81 - 15.85.

(b) Administrative Hearings for non-resident commercial driver licensees will be scheduled in the county where the non-resident last made application for a Texas driver license, unless the licensee requests an alternative Texas county. The request must be in writing and part of the licensee's original request for the administrative hearing.

(c) All disqualification periods are set by statue and cannot be probated pursuant to Texas Transportation Code §522.085.

§16.98. Determination of Lifetime Disqualification when Administrative Hearing Required.

(a) [~~Each conviction of a violation enumerated in Texas Transportation Code, §522.081, will result in a one-year disqualification, or a three-year disqualification if committed while transporting hazardous materials.~~] Upon receipt of a second or subsequent conviction of any violation enumerated in Texas Transportation Code, §522.081(b) [~~522.081~~], an administrative hearing will be scheduled pursuant to the provisions of Texas Transportation Code, §522.087(b)[~~522.085 and §522.087~~], for the determination of a lifetime disqualification. The only issue at the hearing will be whether the licensee has been convicted of two or more violations of any of the offenses specified in Texas Transportation Code, §522.081(b)[~~522.081~~].

(b) The administrative hearing will be subject to notice and procedure requirements of Texas Transportation Code, Chapter 521, Subchapter N and 37 TAC §§15.81-15.85.

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

Filed with the Office of the Secretary of State, on March 8, 2001.

TRD-200101409
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 424-2135

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37 TAC §16.95, §16.96

(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 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 §16.95 and §16.96, concerning Commercial Drivers License (CDL) Sanctions and Disqualifications. The sections are proposed for repeal because they are no longer current. A new §16.95, which will be consistent with the administrative hearing process that was enacted by House Bill 3641, is being simultaneously filed with this proposal for repeal.

Tom Haas, Chief of Finance, has determined that for each year of the first five-year period the repeals are in effect there will be no fiscal implications for state or local government, or local economies.

Mr. Haas also has determined that for each year of the first five year period the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be current and updated rules which will provide for an efficient and consistent administrative hearing process in compliance with statute. There is no anticipated adverse economic effect on individuals, small businesses, or micro-businesses.

Comments on the proposal may be submitted to Frank Elder, Assistant Chief of Driver License, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0300, (512) 424-2768.

The repeals are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §522.005.

Texas Government Code, §411.004(3) and Texas Transportation Code, §522.005 are affected by this repeal.

§16.95. Administrative Hearings subject to Texas Transportation Code, §§521.291-521-305 and Notices for Nonresidents.

§16.96. Notifications of Administrative Hearings subject to Texas Transportation Code, §§521.291-521.305.

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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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 424-2135

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PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 151. GENERAL PROVISIONS

37 TAC §151.53

The Texas Department of Criminal Justice proposes an amendment to §151.53 concerning multiple employment with the state. The purpose of this section is to provide procedures regarding applications for, and the administration of, multiple employment with the State of Texas by employees of the Texas Department of Criminal Justice (TDCJ). The amendment stipulates that an employee may not work part-time for the TDCJ and full-time with another state agency.

David P. McNutt, Deputy Director for Administrative Services of the Department of Criminal Justice, has determined that for each year of the first five year period the amendment will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment as proposed.

Mr. McNutt also has determined that for each year of the first five year period the amendment is in effect, the public benefit anticipated as a result of enforcing the amendment will be clear and complete guidelines for TDCJ employees in the application and administration of multiple employment with the State of Texas. There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons required to comply with the amendment as proposed.

Comments should be directed to Carl Reynolds, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, carl.reynolds@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposal.

The amendment is proposed under Texas Government Code, §492.013, which grants general rulemaking authority to the Board; the Texas Constitution, Article XVI, Section 40; and Texas Government Code, Chapter 574, which specifically authorizes this section.

Cross Reference to Statute: Texas Constitution, Article XVI, Section 40, and Texas Government Code, Chapter 574.

§151.53. Multiple Employment with the State.

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

(c) Procedures.

(1) Qualifications. In order for multiple employment with the State to be approved, a conflict of interest must not exist between the office of or position with the primary employer and the secondary employer. The proposed multiple employment must be of benefit to the TDCJ and to the State of Texas. Multiple employment must not interfere with the performance of duties with the TDCJ. An employee may not work part-time for the TDCJ and full-time with another state agency. An employee's work hours or cycle shall not be changed to accommodate additional employment unless there is a clear benefit to the TDCJ.

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

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

Filed with the Office of the Secretary of State, on March 12, 2001.

TRD-200101448
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 463-9693

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 7. REFUGEE CASH ASSISTANCE PROGRAM

The Texas Department of Human Services (DHS) proposes amendments to §§7.201, 7.204, 7.211, 7.212, 7.301, 7.305, 7.306, 7.307, 7.401, 7.403, 7.405, 7.502, 7.601, 7.602, and 7.603 concerning AFDC ineligibility, social security numbers, marriage to a U.S. citizen, employment services, application and interview, income and resources, grant amounts and budgeting, financial management, food stamps, refugee medically needy program, family self-support services, reporting changes, sanctions for noncompliance with employment services requirements, fraud, recoupment, and appeal, and good cause; repeal of §7.304, §7.402, and §7.501 concerning income from voluntary resettlement agencies, sponsors and Medicaid/Early and Periodic Screening, Diagnosis and Treatment (EPSDT), and monthly reporting; and new sections §7.304, §7.402, and §7.404, concerning income from voluntary resettlement agencies, Medicaid/Texas Health Steps (THSteps), and sponsors and refugee medical assistance (RMA) program, in its Cash Assistance Program chapter. The purpose of the amendments, repeals, and new sections is to update obsolete language and adhere to federal regulations that were effective in April and June 2000. The updates allow easier access to basic services for the refugee population.

Eric M. Bost, commissioner, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the sections.

Mr. Bost also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of adoption of the proposed rules will be that households eligible for benefits from the Refugee Resettlement Programs of Refugee Cash Assistance (RCA) and Refugee Medical Assistance (RMA) are more likely to be eligible for assistance as a result of more flexible rules; the rules concern counting income, deductions, resources, and referrals for refugee children who are ineligible for Medicaid to Children's Health Insurance Program (CHIP). There will be no effect on small or micro businesses as a result of enforcing or administering the sections, because these sections do not apply to businesses but to refugees who are settling in a new country. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Questions about the content of this proposal may be directed to Melissa Saenz at (512) 438-4930 in DHS's Programs and Policy section. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-90, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Under §2007.003(b) of the Texas Government Code, the department has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, the department is not required to complete a takings impact assessment regarding these rules.

SUBCHAPTER B. ELIGIBILITY CRITERIA

40 TAC §§7.201, 7.204, 7.211, 7.212

The amendments are proposed under the Human Resources Code, Title 2, Chapter 31, which authorizes the department to administer financial assistance programs.

The amendments implement the Human Resources Code, §§31.001- 31.0325.

§7.201. TANF [~~AFDC~~] Ineligibility.

A refugee must be ineligible for the Temporary Assistance for Needy Families Program (TANF) [~~aid to families with dependent children (AFDC)~~] before being tested for eligibility under RCA.

§7.204. Social Security Numbers.

Requirements for Social Security Numbers are the same as outlined in the TANF [~~AFDC~~] rules.

§7.211. Marriage to a United States Citizen.

If a refugee marries a U.S. citizen, only the refugee can be eligible for RCA. Children resulting from the marriage are citizens and are not

eligible for RCA. DHS considers income of the refugee's spouse toward eligibility using stepparent policies and procedures outlined in the TANF [~~AFDC~~] rules.

§7.212. Employment Services.

All nonexempt refugees who are at least 16 years old and not older than 64 years must register for employment. DHS uses the same exemptions that it uses in the TANF [~~AFDC~~] program.

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

Filed with the Office of the Secretary of State, on March 9, 2001.

TRD-200101435
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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For further information, please call: (512) 438-3108

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SUBCHAPTER C. ELIGIBILITY DETERMINATION

40 TAC §§7.301, 7.304 - 7.307

The new section and amendments are proposed under the Human Resources Code, Title 2, Chapter 31, which authorizes the department to administer financial assistance programs.

The new section and amendments implement the Human Resources Code, §§31.001-31.0325.

§7.301. Application and Interview.

An applicant must complete and sign an application form to apply for refugee cash assistance. The applicant must also have a face-to-face [~~personal~~] interview with a Texas Department of Human Services (DHS) advisor [~~caseworker~~].

§7.304. Income from Voluntary Resettlement Agencies and Sponsors.

Texas Department of Human Services (DHS) exempts the income and resources of the sponsor or Voluntary Resettlement Agency (VOLAG). DHS exempts VOLAG grants from income. Refugee Cash Assistance (RCA) applicants are not eligible if they are recipients in a match grant program.

§7.305. Income and Resources.

(a) The TANF [~~AFDC~~] rules apply to RCA [~~except:~~] including an earned income disregard.

[~~(1) VOLAG grants are counted as unearned income toward eligibility.~~]

[~~(2) The $30 and 1/3 earned income disregard is not allowed.~~]

(b) SSI payments, and overpayments caused by SSI payments, are treated in the same manner as outlined in the TANF [~~AFDC~~] rules.

§7.306. Grant Amounts and Budgeting.

The same grant amounts and budgeting procedures in TANF [~~AFDC~~] rules are used for RCA.

§7.307. [~~Financial~~] Management.

DHS determines whether household expenses can be met by income according to the same requirements as outlined in the TANF [~~AFDC~~] rules.

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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Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 438-3108

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40 TAC §7.304

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

The repeal is proposed under the Human Resources Code, Title 2, Chapter 31, which authorizes the department to administer financial assistance programs.

The repeal implements the Human Resources Code, §§31.001-31.0325.

§7.304. Income from Voluntary Resettlement Agencies and Sponsors

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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Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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For further information, please call: (512) 438-3108

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SUBCHAPTER D. ELIGIBILITY FOR OTHER PROGRAMS

40 TAC §§7.401 - 7.405

The new sections and amendments are proposed under the Human Resources Code, Title 2, Chapter 31, which authorizes the department to administer financial assistance programs.

The new sections and amendments implement the Human Resources Code, §§31.001-31.0325.

§7.401. Food Stamps.

Refugees are eligible for food stamps the same as any other lawfully admitted alien. If all members of the household residing as a family unit receive either TANF [~~AFDC~~] or RCA, DHS considers the household a public assistance case. If the refugee group is residing with other persons who are not recipients of RCA or TANF [~~AFDC~~], DHS considers the household a non-public assistance case.

§7.402. Medicaid/Texas Health Steps (THSteps).

TANF, Medicaid, and THSteps rules apply to RCA, except that transitional Medicaid is denied if the eight-month limit is reached and eligibility for transitional coverage is not dependent on the receipt of RCA for a specific number of months out of the last six months.

§7.403. Refugee Medically Needy Program.

The Refugee Medically Needy Program is the same as outlined in the TANF [~~AFDC~~] Medically Needy Program rules except:

(1) the refugee must be ineligible for TANF [~~AFDC~~] medical programs.

(2) after being certified for the Refugee Medically Needy Program, the refugee continues to be eligible for Medical Programs (MP) without spend down regardless of new or increased earnings.[~~the refugee must meet all RCA eligibility requirements except work registration.~~]

§7.404. Refugee Medical Assistance (RMA) Program.

RMA is available to refugees who are ineligible for Medicaid, Medical Programs, or to refugees who choose to only apply for RMA.

(1) RMA eligibility is based on income and resources as of the date of application.

(2) RMA applicants whose income exceeds the Medically Needy Income Limit (MNIL) on the date of application are eligible if deducting incurred medical expenses puts the income under MNIL.

(3) Income from a match grant program is exempt in determining RMA eligibility.

§7.405. [~~Family~~] Self-support Services.

Refugees are eligible for all [~~family~~] self-support services if they meet eligibility requirements. [~~outlined in family self-support rules.~~] Services, such as English as a Second Language or job placements, are offered by local Voluntary Resettlement Agencies (VOLAGs).

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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Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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For further information, please call: (512) 438-3108

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40 TAC §7.402

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

The repeal is proposed under the Human Resources Code, Title 2, Chapter 31, which authorizes the department to administer financial assistance programs.

The repeal implements the Human Resources Code, §§31.001-31.0325.

§7.402. Medicaid/Early and Periodic Screening, Diagnosis, and Treatment (EPSDT).

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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Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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For further information, please call: (512) 438-3108

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SUBCHAPTER E. CLIENT REPORTING REQUIREMENTS

40 TAC §7.501

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

The repeal is proposed under the Human Resources Code, Title 2, Chapter 31, which authorizes the department to administer financial assistance programs.

The repeal implements the Human Resources Code, §§31.001-31.0325.

§7.501. Monthly Reporting.

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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Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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For further information, please call: (512) 438-3108

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40 TAC §7.502

The amendment is proposed under the Human Resources Code, Title 2, Chapter 31, which authorizes the department to administer financial assistance programs.

The amendment implements the Human Resources Code, §§31.001- 31.0325.

§7.502. Reporting Changes.

RCA clients must report changes according to the same requirements as outlined in TANF [~~AFDC~~] rules.

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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Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 438-3108

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SUBCHAPTER F. PENALTY PROVISIONS

40 TAC §§7.601 - 7.603

The amendments are proposed under the Human Resources Code, Title 2, Chapter 31, which authorizes the department to administer financial assistance programs.

The amendments implement the Human Resources Code, §§31.001- 31.0325.

§7.601. Sanctions for Noncompliance with Employment Services Requirements.

The same sanctions in TANF [~~AFDC~~] rules are used for RCA for refusal to comply with employment services requirements, including failure to appear for an interview, failure to apply for or accept employment, or failure to participate in training.

§7.602. Fraud, Recoupment, and Appeal.

TANF [~~AFDC~~] rules regarding fraud, referral, recoupment of overpayments, and the right to appeal apply to RCA.

§7.603. Good Cause.

If a refugee refuses to register for employment, participate in employment services, or voluntarily quits a job, he may remain eligible only if the good cause requirements in the TANF [~~AFDC~~] rules are met.

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

Filed with the Office of the Secretary of State, on March 9, 2001.

TRD-200101442
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 438-3108

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CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

The Texas Department of Human Services (DHS) proposes an amendment to §19.101, concerning definitions, and §19.802, concerning comprehensive care plans, in its Nursing Facility Requirements for Licensure and Medicaid Certification chapter. The purpose of the amendments is to allow providers the option of including a palliative plan of care in the comprehensive care plan at the request of residents of nursing facilities with terminal conditions or end stage diseases or other conditions. This part of the plan of care may be developed when curative care is no longer warranted.

Eric M. Bost, commissioner, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Bost also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of adoption of the proposed rule will emphasize that all facilities must meet end-of-life issues. The use of a palliative plan of care in the comprehensive care plan may be an option when curative care is no longer warranted or desired by the nursing facility resident, surrogate decision maker or the legal representative. There will be no adverse economic effect on large, small or micro businesses, because the amendment does not require additional staff or material goods to enforce. Providers currently complete plans of care. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Questions about the content of this proposal may be directed to Maxcine Tomlinson at (512) 438-3169 in DHS's Long Term Care Policy Division. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-068, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

SUBCHAPTER B. DEFINITIONS

40 TAC §19.101

Under §2007.003(b) of the Texas Government Code, the department has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, the department is not required to complete a takings impact assessment regarding these rules.

The amendment is proposed under the Health and Safety Code, Chapter 242, which authorizes the department to license and regulate nursing facilities.

The amendment implements the Health and Safety Code, 242.001- 242.268.

§19.101. Definitions.

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

(1)-(93) (No change.)

(94) Palliative Plan of Care - appropriate medical and nursing care for residents with advanced and progressive diseases for whom the focus of care is controlling pain and symptoms while maintaining optimum quality of life.

(95) [~~(94)~~] Patient care-related electrical appliance - An electrical appliance that is intended to be used for diagnostic, therapeutic, or monitoring purposes in a patient care area, as defined in Standard 99 of the National Fire Protection Association.

(96) [~~(95)~~] Person - An individual, firm, partnership, corporation, association, joint stock company, limited partnership, limited liability company, or any other legal entity, including a legal successor of those entities.

(97) [~~(96)~~] Person with a disclosable interest - A person with a disclosable interest is any person who owns at least a 5.0% interest in any corporation, partnership, or other business entity that is required to be licensed under Health and Safety Code, Chapter 242. A person with a disclosable interest does not include a bank, savings and loan, savings bank, trust company, building and loan association, credit union, individual loan and thrift company, investment banking firm, or insurance company, unless these entities participate in the management of the facility.

(98) [~~(97)~~] Pharmacist - An individual, licensed by the Texas State Board of Pharmacy to practice pharmacy, who prepares and dispenses medications prescribed by a physician, dentist, or podiatrist.

(99) [~~(98)~~] Physical restraint - See Restraints (physical).

(100) [~~(99)~~] Physician - A doctor of medicine or osteopathy currently licensed by the Texas State Board of Medical Examiners.

(101) [~~(100)~~] Physician assistant (PA) -

(A) A graduate of a physician assistant training program that is accredited by the Committee on Allied Health Education and Accreditation of the Council on Medical Education of the American Medical Association, or

(B) A person who has passed the examination given by the National Commission on Certification of Physician Assistants. According to federal requirements (42 CFR §491.2) a physician assistant is a person who meets the applicable state requirements governing the qualifications for assistant to primary care physicians, and who meets at least one of the following conditions:

(i) is currently certified by the National Commission on Certification of Physician Assistants to assist primary care physicians; or

(ii) has satisfactorily completed a program for preparing physician's assistants that:

(I) was at least one academic year in length;

(II) consisted of supervised clinical practice and at least four months (in the aggregate) of classroom instruction directed toward preparing students to deliver health care; and

(III) was accredited by the American Medical Association's Committee on Allied Health Education and Accreditation; or

(C) A person who has satisfactorily completed a formal educational program for preparing physician assistants who does not meet the requirements of paragraph (d)(2), 42 CFR §491.2, and has been assisting primary care physicians for a total of 12 months during the 18-month period immediately preceding July 14, 1978.

(102) [~~(101)~~] Podiatrist - A practitioner whose profession encompasses the care and treatment of feet who is licensed by the Texas State Board of Podiatry Examiners.

(103) [~~(102)~~] Poison - Any substance that federal or state regulations require the manufacturer to label as a poison and is to be used externally by the consumer from the original manufacturer's container. Drugs to be taken internally which contain the manufacturer's poison label, but are dispensed by a pharmacist only by or on the prescription order of a physician, are not considered a poison, unless regulations specifically require poison labeling by the pharmacist.

(104) [~~(103)~~] Practitioner - A physician, podiatrist, or dentist, when relating to Pharmacy Services.

(105) [~~(104)~~] Preadmission medical necessity determination - The determination of need for nursing facility care before the individual's admission into the nursing facility. This determination is valid until admission into a nursing facility or up to 30 days from the effective date.

(106) [~~(105)~~] PRN (pro re nata) - As needed.

(107) [~~(106)~~] Provider - The individual or legal business entity that is contractually responsible for providing Medicaid services under an agreement with DHS.

(108) [~~(107)~~] Psychoactive drugs - Drugs prescribed to control mood, mental status, or behavior.

(109) [~~(108)~~] Qualified surveyor - An employee of DHS who has completed state and federal training on the survey process and passed a federal standardized exam.

(110) [~~(109)~~] Quality assessment and assurance committee - A group of health care professionals in a facility who develop and implement appropriate action to identify and rectify substandard care and deficient facility practice.

(111) [~~(110)~~] Recipient - Any individual residing in a Medicaid certified facility or a Medicaid certified distinct part of a facility whose daily vendor rate is paid by Medicaid.

(112) [~~(111)~~] Registered nurse (RN) - An individual currently licensed by the Board of Nurse Examiners for the State of Texas as a Registered Nurse in the State of Texas.

(113) [~~(112)~~] Reimbursement methodology - The method by which DHS determines nursing facility per diem rates.

(114) [~~(113)~~] Remodeling - The construction, removal, or relocation of walls and partitions, the construction of foundations, floors, or ceiling-roof assemblies, the expanding or altering of safety systems (including, but not limited to, sprinkler, fire alarm, and emergency systems) or the conversion of space in a facility to a different use.

(115) [~~(114)~~] Renovation - The restoration to a former better state by cleaning, repairing, or rebuilding, including, but not limited to, routine maintenance, repairs, equipment replacement, painting.

(116) [~~(115)~~] Representative payee - A person designated by the Social Security Administration to receive and disburse benefits, act in the best interest of the beneficiary, and ensure that benefits will be used according to the beneficiary's needs.

(117) [~~(116)~~] Resident - Any individual residing in a nursing facility.

(118) [~~(117)~~] Resident assessment instrument (RAI) - An assessment tool utilized to conduct comprehensive, accurate, standardized, and reproducible assessments of each resident's functional capacity as specified by the Secretary of the U.S. Department of Health and Human Services. At a minimum, this instrument must consist of the Minimum Data Set (MDS) core elements as specified by the Health Care Financing Administration (HCFA); utilization guidelines; and Resident Assessment Protocols (RAPS).

(119) [~~(118)~~] Responsible party - An individual authorized by the resident to act for him as an official delegate or agent. Responsible party is usually a family member or relative, but may be a legal guardian or other individual. Authorization may be in writing or verbal.

(120) [~~(119)~~] Restraints (chemical) - Psychoactive drugs administered for the purposes of discipline, or convenience, and not required to treat the resident's medical symptoms.

(121) [~~(120)~~] Restraints (physical) - Any manual method, or physical or mechanical device, material or equipment attached, or adjacent to the resident's body, that the individual cannot remove easily which restricts freedom of movement or normal access to one's body.

(122) [~~(121)~~] Secretary - Secretary of Health and Human Services.

(123) [~~(122)~~] Services required on a regular basis - Services which are provided at fixed or recurring intervals and are needed so frequently that it would be impractical to provide the services in a home or family setting. Services required on a regular basis include continuous or periodic nursing observation, assessment, and intervention in all areas of resident care.

(124) [~~(123)~~] SNF - A skilled nursing facility or distinct part of a facility that participates in the Medicare program. SNF requirements apply when a certified facility is billing Medicare for a resident's per diem rate.

(125) [~~(124)~~] Social Security Administration - Federal agency for administration of social security benefits. Local social security administration offices take applications for Medicare, assist beneficiaries in filing claims, and provide information about the Medicare program.

(126) [~~(125)~~] Social Worker - A qualified social worker is an individual who is licensed, or provisionally licensed, by the Texas State Board of Social Work Examiners as prescribed by Chapter 50 of the Human Resources Code and who has at least:

(A) a bachelor's degree in social work, or

(B) similar professional qualifications which include a minimum educational requirement of a bachelor's degree and one year experience met by employment providing social services in a health care setting.

(127) [~~(126)~~] Standards - The minimum conditions, requirements, and criteria established in this chapter with which an institution must comply to be licensed under this chapter.

(128) [~~(127)~~] State plan - A formal plan for the medical assistance program, submitted to HCFA, in which the State of Texas agrees to administer the program in accordance with the provisions of the State Plan, the requirements of Titles XVIII and XIX, and all applicable federal regulations and other official issuances of the United States Department of Health and Human Services.

(129) [~~(128)~~] State survey agency - The Texas Department of Human Services is the agency, which through contractual agreement with the single state agency, is designated as the agency responsible for Title XIX survey and certification of nursing facilities and utilization review in the Title XIX nursing facilities.

(130) [~~(129)~~] Supervising physician - A physician who assumes responsibility and legal liability for services rendered by a physician assistant (PA) and has been approved by the Texas State Board of Medical Examiners to supervise services rendered by specific Pas. A supervising physician may also be a physician who provides general supervision of a nurse practitioner providing services in a nursing facility.

(131) [~~(130)~~] Supervision - General supervision, unless otherwise identified.

(132) [~~(131)~~] Supervision (direct) - Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within his sphere of competence. If the person being supervised does not meet assistant-level qualifications specified in this chapter and in federal regulations, the supervisor must be on the premises and directly supervising.

(133) [~~(132)~~] Supervision (general) - Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within his sphere of competence. The person being supervised must have access to the licensed and/or qualified person providing the supervision.

(134) [~~(133)~~] Supervision (intermittent) - Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within his sphere of competence, with initial direction and periodic inspection of the actual act of accomplishing the function or activity. The person being supervised must have access to the licensed and/or qualified person providing the supervision.

(135) [~~(134)~~] *Texas Register* - A publication of the Texas Register Publications Section of the Office of the Secretary of State which contains emergency, proposed, withdrawn, and adopted rules issued by Texas state agencies. The *Texas Register* was established by the Administrative Procedure and Texas Register Act of 1975.

(136) [~~(135)~~] Therapeutic diet - A diet ordered by a physician as part of treatment for a disease or clinical condition, in order to eliminate, decrease, or increase certain substances in the diet or to provide food which has been altered to make it easier for the resident to eat.

(137) [~~(136)~~] Therapy week - A seven-day period beginning the first day rehabilitation therapy or restorative nursing care is given. All subsequent therapy weeks for a particular individual will begin on that day of the week.

(138) [~~(137)~~] Threatened violation - A situation which, unless immediate steps are taken to correct, may cause injury or harm to a resident's health and safety.

(139) [~~(138)~~] TILE - Texas Index for Level of Effort; an index of 11 categories plus a default that consists of relative resource utilization groups. The index determines where a nursing facility client fits based upon service and care requirements. It determines the daily rate to be paid on behalf of the client.

(140) [~~(139)~~] TILE 202 restorative nursing - Nursing care and practices, based on a plan of care developed by the restorative team, designed to maintain or improve on goals achieved during physical or occupational therapy. Examples of TILE 202 restorative nursing include training and skill practice in self-feeding, bed mobility, transfers, ambulation, dressing or grooming, and active range of motion.

(141) [~~(140)~~] TILE error - Inaccuracies in a CARE form assessment of a Medicaid recipient which result in an incorrect TILE classification.

(142) [~~(141)~~] Title II - Retirement Survivors' Disability Insurance of the Social Security Act.

(143) [~~(142)~~] Title XVI - Supplemental Security Income (SSI) of the Social Security Act.

(144) [~~(143)~~] Title XVIII - Medicare provisions of the Social Security Act.

(145) [~~(144)~~] Title XIX - Medicaid provisions of the Social Security Act.

(146) [~~(145)~~] Total health status - Includes functional status, medical care, nursing care, nutritional status, rehabilitation and restorative potential, activities potential, cognitive status, oral health status, psychosocial status, and sensory and physical impairments.

(147) [~~(146)~~] TXMHMR - Texas Department of Mental Health and Mental Retardation.

(148) [~~(147)~~] UAR - DHS's Utilization and Assessment Review Section.

(149) [~~(148)~~] Uniform data set - See Resident Assessment Instrument (RAI).

(150) [~~(149)~~] Universal precautions - The use of barrier and other precautions by long term care facility employees and/or contract agents to prevent the spread of blood-borne diseases.

(151) [~~(150)~~] Utilization review committee - The group of health care professionals contracted by DHS to make individual determinations of medical necessity regarding nursing facility care. The Utilization Review Committee consists of physicians and registered nurses.

(152) [~~(151)~~] Vendor payment - Payment made by DHS on a daily-rate basis for services delivered to recipients in Medicaid-

certified nursing facilities. Vendor payment is based on the nursing facility's claim approval of the DHS-generated Nursing Facility Billing Statement to DHS. The Nursing Facility Billing Statement, subject to adjustments and corrections, is prepared from information submitted by the nursing facility which is currently on file in the computer system as of the billing date. Vendor payment is made at periodic intervals, but not less than once per month for services rendered during the previous billing cycle.

(153) [~~(152)~~] Working day - Any 24-hour period, Monday through Friday, excluding state and federal holidays.

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

Filed with the Office of the Secretary of State, on March 6, 2001.

TRD-200101348
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
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For further information, please call: (512) 438-3108

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SUBCHAPTER I. RESIDENT ASSESSMENT

40 TAC §19.802

The amendment is proposed under the Health and Safety Code, Chapter 242, which authorizes the department to license and regulate nursing facilities.

The amendment implements the Health and Safety Code, 242.001- 242.268.

§19.802. Comprehensive Care Plans.

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

(c) A comprehensive care plan may include a palliative plan of care. This plan may be developed only at the request of the resident, surrogate decision maker or legal representative for residents with terminal conditions, end stage diseases or other conditions for which curative medical interventions are not appropriate. The plan of care must have goals that focus on maintaining a safe, comfortable and supportive environment in providing care to a resident at the end of life.

(d) [~~(c)~~] The services provided or arranged by the facility must:

(1) meet professional standards of quality; and

(2) be provided by qualified persons in accordance with each resident's written plan of care.

(e) [~~(d)~~] The care plan must be made available to all direct care staff.

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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Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 438-3108

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CHAPTER 68. BUSINESS SERVICES
SUBCHAPTER E. FLEET MANAGEMENT

40 TAC §68.501

The Texas Department of Human Services (DHS) proposes new §68.501 concerning restrictions on assignment of agency vehicles in new Chapter 68, Business Services. The purpose of the section is to comply with Government Code §2171.1045, which requires that agencies adopt rules relating to the assignment and use of agency vehicles.

Eric M. Bost, commissioner, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Bost also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of adoption of the proposed rule will be the establishment of an agency motor pool that will increase vehicle use and improve the efficiency of vehicle fleet operations. There will be no adverse economic effect on small or micro businesses, because the rules only affect internal policies and procedures that are designed to increase vehicle use. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Questions about the content of this proposal may be directed to Keith Romel at (512) 438-5140 in DHS's Business Services division. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-66, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Under §2007.003(b) of the Texas Government Code, the department has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, the department is not required to complete a takings impact assessment regarding these rules.

The new section is proposed under the Human Resources Code, Title 2, Chapter 22, which authorizes the department to administer public assistance programs; and Texas Government Code §2171.1045, which directs state agencies to adopt rules consistent with the management plan adopted under §2171.104, relating to the assignment and use of the agency's vehicles.

The new section implements the Human Resources Code, §§22.001- 22.030 and the Government Code, §2171.1045.

§68.501. Restrictions on Assignment of Vehicles.

(a) the agency motor pool may consist of agency vehicles permanently assigned to state office or each regional field office.

(b) DHS state office monitors vehicle usage and makes recommendations on the consolidation of the agency's fleet as follows:

(1) each agency vehicle must be assigned to the agency motor pool and be available for checkout, and

(2) a vehicle may be assigned to an individual employee on a regular or everyday basis only if the agency makes a written finding that the assignment is critical to the needs and mission of the agency.

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

Filed with the Office of the Secretary of State, on March 7, 2001.

TRD-200101385
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 438-3108

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PART 4. TEXAS COMMISSION FOR THE BLIND

CHAPTER 167. BUSINESS ENTERPRISES PROGRAM

The Texas Commission for the Blind proposes the repeal of §§167.1-167.3 pertaining to the Business Enterprises Program and simultaneously proposes new §§167.1-167.16 pertaining to the operation of Business Enterprises of Texas. The repeal is necessary to allow the agency to adopt revised rules for the administration of the program. The new rules are the result of the agency's review of TAC, Chapter 167, under the requirements of Texas Government Code, §2001.039; and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999, and the culmination of a two-year study of the program. The recent change in the program's name from Business Enterprises Program to Business Enterprises of Texas is reflected in the new chapter title.

The proposed new rules implement Texas Human Resources Code, Chapter 94, pertaining to vending facilities operated by blind persons, and United States Code, Title 20, Chapter 6A, pertaining to vending facilities for blind in federal buildings. Section 167.2 defines terms used in these rules. Section 167.3 contains several general program policies, including the relationship of Business Enterprises of Texas (BET) to the agency's Vocational Rehabilitation Program and the fact that managing a BET facility constitutes full-time employment under the Rehabilitation Act of 1973, as amended. The section also contains rules on management subcontracting and the effect of a manager's outside employment on eligibility to manage a BET facility. Section 167.4 contains rules on BET administration, including the roles of the executive director and BET director. The section contains the conditions under which consultants may be used in facilities. Section 167.5 contains the agency's rules for entering the program for training. Section 167.6 sets forth the conditions for licensing and the nature of the license itself. Section 167.7 contains the agency's procedures for making initial assignment and requirements for applying for career advancement assignments. This section also contains rules for interviewing and selecting from the managers applying for a career advancement assignment and the process for investigating reports of improper contact during the selection process. Section 167.8 contains the agency's rules for providing facilities with fixtures, furnishings, and equipment and rules governing maintenance, repairs, and replacement. The section also contains the requirements for obtaining advances for stocks and supplies when a manager chooses to apply for another facility after the manager's initial assignment. Section 167.9 contains the set-aside fee schedule a manager is required to pay based on the manager's net proceeds. The section also sets forth allowable adjustments to the monthly set-aside fee. Section 167.10 contains the basic duties and responsibilities of managers. Section 167.11 contains the basic responsibilities of the Commission. Section 167.12 creates and sets forth rules related to the BET Elected Committee of Managers. Section 167.13 contains the conditions for nondisciplinary termination of a BET license. Section 167.14 sets forth rules for disciplinary actions, including types of disciplinary actions and notices of disciplinary procedures. Section 167.15 contains the procedures whereby managers who are dissatisfied with a Commission action arising from the operation of BET may appeal the action. Included are any timeframes in which the manager and commission must take action. Section 167.16 contains the agency's policies on establishing and closing facilities.

Alvin Miller, Chief Financial Officer, has determined that for the first five years the rules are in effect there will be no fiscal implications for state or local government as a result of the repeal or enforcing or administering the new rules. There will be no economic cost to small or micro-businesses as a result of enforcing these sections. The cost effect on individuals who are required to comply with the new rules will depend on a licensed manager's monthly facility net proceeds. Set-aside fees have been revised in these new rules. Based on the income of all managers last year, 83% of the affected licensed managers will pay less per month, 17% will pay more. There may be some additional cost to some managers in the form of interest payments if the manager finances the facility's initial inventory on a career advancement assignment with a bank loan. Because business plans are required when a manager applies for a career advancement facility, managers may incur an expense if the manager chooses to have someone who charges for the service assist with the plan.

Michael Hooks, BET Director, has determined that the public benefit anticipated as a result of the repeal and new rules as proposed will be the adoption of clearer rules for operating BET facilities in Texas pursuant to the Randolph-Sheppard Act.

Comments on the proposal may be submitted to Jean Crecelius, Policy and Rules Coordinator, Texas Commission for the Blind, 4800 North Lamar, Austin, Texas 78756, or by e-mail to jean.crecelius@tcb.state.tx.us, or by fax (512) 377-2682. Comments must be received by the Commission no later than 30 days from the date this proposal is published in the *Texas Register*.

40 TAC §§167.1-167.3

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Commission for the Blind or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under Human Resources Code §94.012, which authorizes the Commission to promulgate rules for the administration of the program and §94.016, which authorizes the commission to administer the program in accordance with the provisions of the Randolph-Sheppard Act (20 U.S.C. Section 107 et seq.).

The proposal also affects Human Resources Code §91.052, Vocational Rehabilitation Program for the Blind.

§167.1. Conformity to Federal Guidelines.

§167.2. Public Access to Internal Procedural Documents.

§167.3. Business Enterprises Manual.

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

Filed with the Office of the Secretary of State, on March 8, 2001.

TRD-200101415
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 377-0611

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CHAPTER 167. BUSINESS ENTERPRISES OF TEXAS

40 TAC §§167.1 - 167.16

The new rules are proposed under Human Resources Code §94.012, which authorizes the Commission to promulgate rules for the administration of the program and §94.016, which authorizes the commission to administer the program in accordance with the provisions of the Randolph-Sheppard Act (20 U.S.C. Section 107 et seq.).

The proposal also affects Human Resources Code §91.052, Vocational Rehabilitation Program for the Blind.

§167.1. Legal Authority.

(a) Program name. The Commission shall carry out its responsibilities for licensing blind persons to operate vending facilities on state, federal, and other property through its state program entitled Business Enterprises of Texas, formerly known as Business Enterprises Program. Any references still in existence to Business Enterprises Program shall mean Business Enterprises of Texas.

(b) Federal authority. The Commission operates Business Enterprises of Texas under the authority of the Randolph-Sheppard Act (20 USC. §107 et seq.) and implementing regulations (34 CFR §395.1 et seq.).

(c) State authority. The Commission operates Business Enterprises of Texas under the authority of Texas Human Resources Code, Title 5, Chapter 94, and is authorized in §94.016 to administer BET in accordance with the provisions of the Randolph-Sheppard Act.

(d) Statutory References. Unless expressly provided otherwise, a reference to any portion of a statute, rule, or regulation applies to all reenactments, revisions, or amendments of the statute, rule, or regulation.

§167.2. Definitions.

The following words and terms, when used in these rules, shall have the following meanings, unless the context clearly indicates otherwise. Unless expressly provided otherwise, words in the present or past tense include the future tense, and the singular includes the plural and the plural includes the singular. The masculine gender includes the feminine and neuter genders.

(1) Act--Randolph-Sheppard Act (20 USC, Ch. 6A, §107 et seq.).

(2) Application--The "BET Facility Assignment Application" form used by managers to apply for a facility.

(3) BET--Business Enterprises of Texas.

(4) BET Assignment--The document that sets forth the terms and conditions for management of a BET facility by the individual named as manager.

(5) BET director--The administrator of Business Enterprises of Texas; or, if there be no person in that capacity, the person designated by the executive director to perform that function; or if there be none, the executive director.

(6) BET facility--Automatic vending machines, cafeterias, snack bars, cart service, shelters, counters and such other appropriate auxiliary equipment which may be operated by BET managers and which is necessary for the sale of newspapers, periodicals, confections, tobacco products, foods, beverages and other articles or services dispensed automatically or manually and prepared on or off the premises in accordance with all applicable health laws, and including the vending or exchange of tickets for any lottery authorized by state law.

(7) BET manual--"Business Enterprises of Texas Manual of Operations," which contains these rules adopted by the Commission's board and accordant instructions and procedures by which BET facilities are to be managed.

(8) Blind (person who is)--A person whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses or whose visual acuity, if better than 20/200, is accompanied by a limit to the field of vision in the better eye to such a degree that its widest diameter subtends an angle of no greater than 20 degrees.

(9) Board--The Commission's governing body appointed pursuant to state law.

(10) Business day--A day on which state agencies are officially required to be open during their normal business hours.

(11) Commission--Texas Commission for the Blind.

(12) Commission staff - Employees of the Commission who have been delegated the authority by the executive director or his designee to take an action contained in these policies.

(13) ECM--Elected Committee of Managers.

(14) Executive Director--The Commission's chief executive officer.

(15) Expendables--Items that require a low capital outlay and have a short life expectancy, such as, by way of illustration and not limitation, smallwares, thermometers, china, glass, silverware, sugar and napkin dispensers, salt and pepper shakers, serving trays, mops, brooms, knives, spreaders, serving spoons, and ladles.

(16) Individual with a significant disability--An individual who has a severe physical or mental impairment that seriously limits one or more functional capacities (such as mobility or communication).

(17) Initial assignment--The first BET facility to which a manager is assigned after being licensed.

(18) Level 1 facility--A BET facility which in the prior year generated a net income after set-aside fees equal to or less than 170% of the median net income after set-aside fees of all BET managers for the prior year or, in the case of a new BET facility, is reasonably expected to generate said income.

(19) Level 2 facility--A BET facility which in the prior year generated a net income after set-aside fees greater than 170% of the median net income after set-aside fees of all BET managers for the prior year or, in the case of a new BET facility, is reasonably expected to generate said income.

(20) Manager--A person licensed by the Commission to manage a BET facility in Texas.

(21) Net sales--All sales, excluding sales tax.

(22) Other income--Money received by a manager from sources other than direct sales, such as vending commissions or subsidies.

(23) State property--Lands and buildings owned, leased, or otherwise controlled by the State of Texas; and equipment and facilities purchased and/or owned by the State of Texas.

(24) Vending machine--For the purpose of assigning vending machine income, a coin or currency operated machine that dispenses articles or services, except those machines operated by the United States Postal Service for the sale of postage stamps or other postal products and services. Machines providing services of a recreational nature and telephones shall not be considered to be vending machines.

§167.3. General Policies.

(a) Objectives. The objectives of Business Enterprises of Texas shall be:

(1) to provide employment opportunities for qualified individuals; and

(2) to administer a continuing process of career development for managers which encourages them to move into the private sector of business.

(b) Relationship of BET to Vocational Rehabilitation Program. The intent of Business Enterprises of Texas, as authorized in the Randolph-Sheppard Act and the Texas Human Resources Code, is to stimulate and enlarge the economic opportunities for the citizens of Texas who are blind or visually impaired by establishing a vending facility program in which such persons who are in need of employment are given preference in the operation of vending facilities selected and installed by the Commission. The Commission is required to administer BET in accordance with the Commission's vocational rehabilitation objectives. Therefore, a consumer receiving services from the Vocational Rehabilitation Program whose employment goal is to be a licensed manager shall have reached an employment outcome as that term is used in the Rehabilitation Act of 1973 when the consumer is licensed by the Commission and is managing a BET facility. The licensed manager shall not be considered an employee of the Commission, state, or federal government.

(c) Full-time employment. Managing a BET facility shall constitute full-time employment. Full-time shall mean being actively engaged in the management of a BET facility at least 40 hours a week unless a different period of time is approved subsequent to the effective date of this section or a different period of time has been approved by the Commission prior to the effective date of this subsection. Management is the personal supervision of the day-to-day operation of the assigned BET facility by the assigned manager.

(d) Management subcontracting. The management of a BET facility shall not be subcontracted except for temporary periods of time approved by the Commission or in those circumstances in which the Commission deems that subcontracting the operation of some parts of the facility are in the best interest of BET. In all events, subcontracting shall require the prior written consent of the Commission. This subsection shall not affect subcontracts in existence on the effective date of this subsection.

(e) Effect of outside employment. Managers earning adjusted gross incomes (as defined in the Internal Revenue Code and as reported to the IRS for the most recent year) from outside employment equal to or greater than their enterprise income or 170% of the prior year's median income of all BET managers, whichever is greater, are considered no longer in need of employment through BET and shall not be eligible to manage a BET facility. Personal income tax returns for this purpose shall be provided to the Commission upon request.

(f) Availability of funds. The administration of BET and the implementation of these policies are contingent upon the availability of funds for the purposes stated herein.

(g) BET manual. All BET policies adopted by the board shall be included in the BET manual. The BET director shall ensure that each manager is provided with a copy of the manual and any revisions thereto. The manager shall be responsible for reading the manual and acknowledging in writing that he or she has read and understands its contents. The BET director shall insure that the BET manual contains procedures whereby managers may obtain assistance in understanding BET policies and procedures.

(h) Accessibility of BET materials. All information produced by and provided to managers by the Commission shall be in an accessible format. When possible, materials will be sent in the format requested by the manager.

(i) Nondiscrimination.

(1) VR and BET participants. The Commission shall not discriminate against any blind person who is participating in or who may wish to participate in Business Enterprises of Texas on the basis of sex, age, religion, color, creed, national origin, political affiliation, or physical or mental impairment, insofar as such impairment does not preclude satisfactory performance.

(2) BET facilities. Managers shall operate BET facilities without discriminating against any present or prospective supplier, customer, employee, or other individual who might come into contact with the facility on the basis of sex, age, religion, color, creed, national origin, political affiliation or physical or mental impairment.

(j) Emergencies. The BET director is authorized to expend funds on an emergency basis for the purpose of protecting the state's investment in a BET facility not to exceed $15,000 in a fiscal year or $2,500 per facility incident.

§167.4. BET Administration.

(a) Executive director. The executive director (subject to Subchapter A, Chapter 531, Government Code, pertaining to the authority of the Commissioner of the Health and Human Services Commission over certain agency functions) is authorized to:

(1) establish personnel policies for Commission personnel employed in BET;

(2) establish BET plans, which at a minimum shall provide for all services, assistance, training, supervision, and planning necessary for the implementation and administration of BET; and

(3) delegate authority to implement these rules to the BET director.

(b) BET director. In addition to the responsibilities delegated to the BET director by the executive director, the BET director shall be responsible for:

(1) implementing BET personnel policies and development plans; and

(2) disseminating the information developed by the executive director related to BET plans and policies to all managers.

(c) Consultants.

(1) If the Commission determines a consultant is necessary to assist a manager or protect the interests of the agency, the Commission shall contract with a consultant and may pay for the consultant out of the facility revenues.

(2) If the Commission determines a consultant is necessary to assist a manager who is currently in a facility, the BET director shall consult with the manager prior to contracting with a consultant. The final authority, however, for contracting with a consultant shall rest with the Commission.

(3) All consultant contracts entered into by the Commission for the provision of support and mentoring services to the manager shall not exceed three years in duration, provided, however, that the contract may be extended for additional periods not to exceed one year each. No contract shall be extended until the manager has been consulted. The final discretion to extend the contract shall rest with the Commission.

(4) If the Commission determines it necessary to contract with a consultant to protect the interests of the Commission, the Commission shall enter into a separate agreement for that purpose with such terms and conditions as the Commission may deem appropriate.

§167.5. Training of Potential Managers.

(a) Prerequisites for training. To be eligible for BET training, consumers desiring a career with BET as a vocational rehabilitation program employment outcome must meet the following criteria:

(1) The person must be at least 18 years of age.

(2) The person must be a United States citizen residing in Texas (a birth certificate or other applicable documentation must be submitted with the application).

(3) The person must be blind.

(4) The person must have demonstrated proficiency in math, writing, and reading comprehension.

(5) The person must have adequate general health and stamina required to perform the basic functions of a manager.

(6) The person must have adequate mobility skills to safely operate a BET facility.

(7) The person must not have a history of substance abuse for the previous 12 months.

(b) Application process. Each eligible consumer interested in applying for BET training may submit an application and shall receive an interview and be informed of the results of the application.

§167.6. BET Licenses.

(a) Natural persons. Licenses to manage a BET facility shall be issued only to natural persons.

(b) Prerequisites. No person may be licensed until such person has satisfactorily completed all required BET training and otherwise continues to satisfy the criteria for entry into BET.

(c) Issuance. A license issued by the Commission shall bear the name of the manager, date of issue, and contain such other information as may be deemed to be appropriate from time to time by the executive director. The license shall be signed by the executive director on behalf of the Commission and State of Texas.

(d) Display. The license or a copy of the license shall be displayed prominently in the enterprise to which the manager is assigned.

(e) Property right. A license shall not create any property right in the manager to whom it is issued and shall be deemed only to inform the public and other interested parties that the manager has successfully completed BET training and is qualified and authorized to operate a BET facility.

(f) Transferability. A license is not transferable.

(g) Term. A license issued by the Commission shall be valid for an indefinite period, subject, however, to termination, revocation, or suspension pursuant to conditions specified in these policies pertaining to nondisciplinary termination of license and termination for disciplinary reasons.

§167.7. Initial and Career Advancement Assignment Procedures.

(a) Purpose. This section defines the process for the initial and career advancement assignments of managers. It is the goal of the process to provide a fair, unbiased, and impartial process for selection, transfer, and promotion.

(b) Initial assignment. Upon successful completion of BET training, the initial assignment for a newly-licensed manager shall be made by the BET director. The initial assignment shall be for a minimum of 12 months. The BET director shall make the assignment based on the following:

(1) availability of a Level 1 facility;

(2) recommendations from the BET training specialist and the ECM chairperson;

(3) manager's training records;

(4) manager's geographical concerns; and

(5) any other circumstances on a case-by-case basis.

(c) Career advancement assignments.

(1) Availability. All career advancement opportunities are dependent upon the availability of BET facilities.

(2) Notice. As BET facilities become available, written notice of such availability shall be given to all managers.

(3) On-site visits. An advertised facility shall be available for onsite visits upon reasonable notice by applicants.

(4) Eligibility. To apply for an available facility, a manager must meet the following requirements:

(A) The manager must have successfully managed a BET facility for a minimum of one year.

(B) The manager must have been current on all accounts payable for the preceding 12 months prior to the date of the facility announcement.

(C) The manager must not be on probation under the section of these rules relating to disciplinary actions.

(D) The manager must meet eligibility requirements of the facility's host organization.

(E) The manager must not have submitted two or more insufficient fund checks to the Commission within the 12 months prior to the date of the facility announcement.

(F) The manager must not have submitted two or more late reports within the 12 months prior to the date of the facility announcement.

(G) If unassigned, the manager must have fulfilled all resignation requirements in the manager's last facility or be displaced and eligible to apply for a facility.

(H) The manager must have an inventory of merchandise and expendables in the manager's current facility as the Commission has determined sufficient for its satisfactory operation.

(I) The manager must satisfy the Commission that he can acquire the merchandise and expendables required for the available facility.

(J) A manager who has been placed on probation is not eligible for promotion and transfer for 30 days following release from probation.

(K) A manager who has been placed on probation twice within a twelve-month period is not eligible for promotion or transfer for six months following release from probation.

(L) A manager who has been placed on probation three times within a two-year period is not eligible for promotion or transfer for one year following release from probation.

(5) BET application deadline. A manager may apply for an available facility by submitting an application not later than the 12th business day (exclusive of date of mailing) after the date the facility notice was mailed. The submission date shall be:

(A) the date the application is delivered to the Commission; or

(B) 3 days after deposit of the application in the United States mail, whichever is earlier; or

(C) the date the application is delivered to an overnight courier.

(6) BET application contents. A copy of the current form of the application shall be included in the BET manual. The substance of the application form shall not be modified except by action of the Commission's board. Modifications shall be provided to all managers prior to their effective date.

(7) Preliminary review of applications. Commission staff and the ECM representative in each geographic area in which the applying managers are currently located shall review all applications from their areas and shall verify the applying manager's eligibility and the accuracy of the application. In the event an ECM representative is an applicant for an available BET facility, the ECM chairperson shall appoint another ECM member for the review. The reviewing Commission staff and ECM representative shall provide assistance upon request to enable the applicant to correctly complete the application. Completed applications shall then be forwarded to the BET director who shall provide copies to the ECM and Commission staff in the area in which the available facility is located.

(8) Level 1 assignments. Assignments to Level 1 facilities shall be made by the BET director after reviewing the recommendations and assessments of all applicants conducted by the ECM representative and Commission staff for the regions in which the available facilities are located.

(9) Level 2 assignments. For Level 2 assignments, the following additional procedures shall apply:

(A) Business plan. An applicant must submit a business plan to the BET director no later than the 20th business day after the postmark date on the notice of facility availability. Upon request by an applicant, the Commission staff in the area in which the available facility is located shall provide a standard packet of information to the applicant containing information necessary to prepare the business plan. The Commission staff shall deliver the packet to the applicant no later than the 3rd business day after receiving a request.

(B) Establishment of pool of impartial and qualified individuals. The Commission shall establish and maintain a pool of qualified individuals. The pool members shall be individuals who:

(i) have no personal, professional, or financial interest that would be in conflict with the objectivity of the individual;

(ii) neither have nor have had any association with the Commission or Business Enterprises of Texas prior to being considered as a pool member; and

(iii) have at least 5 years experience in business at a managerial or executive level, including experience in budget preparation and administration, personnel supervision or management; and administration of business plans or equivalents to business plans in the sector of business in which the person has experience.

(C) Evaluation of business plans. All business plans shall be reviewed and evaluated by an individual chosen at random from the pool of impartial and qualified individuals. Business plans shall be evaluated and scored based on a scoring system of 100 points. The evaluations and scores shall then be forwarded to the BET director for consideration by the selection panel in the selection process.

(D) Selection panel. A selection panel consisting of one representative from the ECM, one Commission staff member, and one individual from the pool of impartial and qualified individuals shall be chosen by means of a computer program that selects randomly from a database. The selection of each panel member shall be from among all persons within their respective categories, except that the impartial member may not be the individual who evaluated the business plans. If the member of a category of panel members who is selected is unable or refuses to serve, the BET director shall use the same method of random selection until three members are chosen.

(E) Presiding officer. The impartial panel member shall serve as the presiding officer of the selection panel.

(F) Interview notices. Applicants shall be notified by first class U. S. Mail of the date, place and time of the selection panel interview no fewer than 10 business days prior to the convening of the selection panel.

(G) Selection panel materials. Completed applications and business plans shall be provided to the selection panel members no fewer than 5 business days prior to the date the selection panel is to convene.

(H) Duties of selection panel. The selection panel shall review the documents provided and interview the applicants. The selection panel shall then rank the top three applicants. The selections shall be transmitted to the BET director, who shall in turn notify the highest ranked applicant of the decision of the selection panel. The available facility shall be offered to the applicants in order of ranking.

(I) Reports of improper contact. Members of the selection panel must report improper contacts to the BET director or the executive director. Improper contact is defined as any communication with a member of the selection panel for the purpose of influencing or manipulating, directly or indirectly, the selection of an applicant for the facility being considered for assignment. Nothing contained in this section, however, shall be deemed to prohibit any manager from endorsing or supporting any candidate for selection by furnishing a letter or other document to that effect to be included with the applying manager's application. At the conclusion of the selection panel's responsibilities, each panel member shall be required to sign a statement certifying whether the member had, or had knowledge of, an improper contact during the selection proceedings.

(J) Process for investigating reports of improper contact. When improper contact is reported, each applicant for the facility under consideration shall be informed as to the improper contact. The information provided to the applicants shall describe the nature of the improper contact but shall not divulge the identities of any persons allegedly participating in such improper contact. Each applicant may make objection to continuation by the existing panel and request that a new panel be formed to select the manager for the available facility. The executive director, upon the request of any applicant for the facility or upon the request of the BET director, shall determine if the improper contact is such as to require that the panel be disbanded and a new panel formed. In making that decision, the executive director shall consider all relevant factors, including the objections, if any, of the applicants, to determine if the improper contact is likely to influence the decision of the selection panel. If the executive director determines that the improper contact is likely to influence the selection process, the executive director shall direct that the panel be disbanded and that a new panel be formed to consider the selection for the facility being considered. The executive director shall inform all applicants of his decision to continue the selection process with the existing panel or to form a new panel and shall state the basis of the decision. The actions prescribed as a consequence of improper contact set forth in policies pertaining to disciplinary actions shall apply whether or not any improper contact results in the panel being disbanded.

(K) Exceptions to assignment and selection procedures. Unusual circumstances may require exceptions to assignment and selection procedures. Exceptions to these procedures shall be made only if the circumstance is not covered by assignment procedures and failure to react to the circumstance would be detrimental to BET or a manager. Notwithstanding anything in this section, no exceptional procedure shall result in the removal of a manager from a facility except for reasons contained in policies pertaining to disciplinary actions. Assignment and selection decisions that are exceptions to these procedures shall be made by the BET director after discussing relevant information with the ECM chairperson and receiving the chairperson's recommendation. Should a decision contrary to the ECM chairperson's recommendation be made, the BET director shall provide a written explanation of the decision to the ECM chairperson.

§167.8. Fixtures, Furnishings, and Equipment; Initial Inventory and Expendables.

(a) Survey. When a BET facility becomes available for assignment to a manager, Commission staff shall conduct a survey of the site to determine the fixtures, furnishings, and equipment required to allow the facility to operate in accordance with projections by Commission staff as to the potential for the facility. When such facility is an existing one, the survey shall consider the need for replacement or repair of fixtures, furnishings, and equipment.

(b) Facility plan. Commission staff shall prepare a detailed schedule of the requirements for fixtures, furnishings, and equipment for the facility, including specifications for each item required and a site plan of the facility depicting the placement of the fixtures, furnishings, and equipment within the facility.

(c) Acquisition, placement, and installation. When satisfied as to the fixtures, furnishings, and equipment required for the facility, Commission staff shall cause the necessary fixtures, furnishings, and equipment to be purchased or otherwise acquired and placed and/or installed in or upon the facility in accordance with the approved plans.

(d) Ownership.

(1) All state fixtures, furnishings, and equipment within the facility shall at all times remain the property of the State of Texas. Their use by the facility manager shall be as a licensee only.

(2) The Commission shall have the sole authority to direct, control, transfer, and dispose of such fixtures, furnishings, and equipment as it determines to be appropriate and necessary.

(e) Modifications. No modifications or alterations shall be made to state-owned fixtures, furnishings, and equipment by any person, firm, or entity without the express prior written approval of the Commission, which shall be granted or not granted solely at the discretion of the Commission.

(f) Upkeep and maintenance.

(1) The manager assigned to a facility shall be provided with manuals, instructions, and guides in an accessible format to state-owned fixtures, furnishings, and equipment within the facility.

(2) It shall be the responsibility of the manager to keep Commission fixtures, furnishings, and equipment in a clean and sanitary condition and to perform maintenance required or recommended by the manufacturers or vendors of the fixtures, furnishings, and equipment.

(3) The manager shall keep and maintain accurate records of all maintenance performed on Commission fixtures, furnishings, and equipment. Any failure or refusal of the manager to perform the maintenance referred to herein shall result in the manager being required to reimburse the Commission for any cost or expense resulting from such failure or refusal.

(g) Repairs and replacements.

(1) The Commission shall be responsible for all necessary repairs of any of the state-owned fixtures, furnishings, and equipment located within the facility except for repairs necessitated by the negligence, abuse, or misuse of the fixtures, furnishings, or equipment by the manager or the manager's employees. The cost of repairs necessitated by negligence, abuse, or misuse by the manager or the manager's employees shall be the sole responsibility of the manager. Failure to make such repairs shall result in disciplinary action pursuant to these rules.

(2) The BET director shall establish and implement procedures for effecting the timely necessary repairs and for the payment for such services. There shall be included in these procedures specific procedures for initiating repairs by the manager and a list of approved vendors for repairs, which shall be provided to each manager as published and as revised from time to time.

(3) Under no circumstances is a manager authorized to have the cost of repairs charged to the Commission or have repairs made by anyone other than approved vendors unless specific authority to do so has been given to the manager in writing by Commission staff. Each vendor included in the approved list of vendors for repairs shall be informed by Commission staff of this prohibition and of the procedures for authorized repairs and for payment for services.

(4) Commission staff on their own initiative or upon request by a manager shall determine the need for replacement of any fixtures, furnishings, or equipment. If such need is determined, Commission staff shall report the need to the BET director. If authorized by the BET director, replacement fixtures, furnishings, or equipment shall be acquired from available BET funds.

(5) Fixtures, furnishings, and equipment shall not include expendables. Each manager of a facility shall be responsible for replacing all such items with items of comparable quality as those being replaced and originally furnished by the Commission.

(h) Initial inventory of merchandise and expendables for newly-licensed managers. The Commission shall furnish without

charge the initial inventory of merchandise and expendables for the first facility of a newly-licensed manager. The initial inventory of merchandise and expendables shall be sufficient, as projected by the Commission, to provide the manager with merchandise and expendables for 30 days.

(i) Subsequent inventory of merchandise and expendables.

(1) The manager shall maintain an inventory of merchandise and expendables in the same quantity as the initial merchandise and expendables transferred to the manager upon assignment to the facility. If the Commission determines that changed circumstances require a different amount of merchandise and expendables, the Commission shall communicate in writing to the manager the new amount of merchandise and expendables. If a new amount of merchandise and expendables is necessary to provide for the satisfactory operation of the facility, that new amount of inventory must be maintained by the manager.

(2) Managers assigned to any facility other than their initial assignment in Texas shall acquire the merchandise and expendables as determined by the Commission to be sufficient to satisfactorily operate the facility.

(j) Purchases on credit. Managers must notify the Commission in advance of any purchase of merchandise and expendables on credit.

(k) Obtaining an advance from the Commission for initial inventory. Managers may apply to the Commission for an advance to purchase an initial inventory of merchandise and expendables. The granting of an advance is discretionary and may be granted only under the following conditions:

(1) The manager must satisfy the Commission in writing as to why the advance is needed and why the funds are not available from other sources.

(2) Before an advance is granted by the Commission pursuant to this section, the manager must submit evidence satisfactory to the Commission that the financing has been sought from at least two commercial financial institutions, such as, by way of example, the Small Business Administration, banks, savings and loans, credit unions, or like institutions.

(3) The manager shall satisfy the Commission as to the manager's ability to repay the advance within 12 months.

(4) Managers with outstanding balances on advances are not eligible for transfer to another assignment.

(l) Transfer of fixtures, furnishings, equipment, and inventory of merchandise and expendable Items. When a manager is assigned to an existing BET facility, the responsibility for the fixtures, furnishings, and equipment of that facility, as well as its inventory of merchandise and expendable items, shall be transferred to the incoming manager. The BET director shall develop and implement procedures for effecting such transfers to assure that both the incoming and outgoing managers have full knowledge of the nature and condition of the items being transferred.

§167.9. Set-Aside Fees.

(a) Purpose. It is the policy of the Texas Commission for the Blind to require from managers the payment of a set-aside fee based on the monthly net proceeds of their BET facilities. The purpose of requiring such payment is:

(1) to promote to the greatest possible extent the concept of a manager being an independent business person;

(2) to cause BET to be to the greatest extent possible, with due regard to other considerations, self-supporting;

(3) to encourage and stimulate growth in BET; and

(4) to provide incentives for the increased employment opportunities for blind Texans.

(b) Use of funds. To the extent permitted or required by applicable laws, rules, and regulations, the funds collected as set-aside fees shall be used by the Commission for the following purposes:

(1) maintenance and replacement of equipment for use in BET;

(2) purchase of new equipment for use in BET;

(3) management services;

(4) assuring a fair minimum return to managers; and

(5) the establishment and maintenance of retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time.

(c) Method of computing net proceeds.

(1) Net proceeds is the amount remaining from the sale of merchandise of a BET facility, all vending machine income, and other income accruing to the manager from the facility after deducting the reasonable and necessary cost of such sale, but excluding set-aside charges required to be paid by the manager. Net sales are all sales, excluding sales tax.

(2) Costs of sales that may be deducted from net sales to calculate net proceeds in a reporting period shall be limited to:

(A) cost of merchandise sold;

(B) wages paid to employees;

(C) payroll taxes; and

(D) the following reasonable miscellaneous operating expenses that are directly related to the operation of the BET facility:

(i) discretionary expenses, not to exceed 1.5% of the monthly net sales, or $150, whichever is greater;

(ii) rent and utilities authorized in the permit or contract;

(iii) business taxes, licenses, and permits;

(iv) telecommunication services;

(v) liability, property damage, and fire insurance;

(vi) Worker's Compensation insurance;

(vii) employee group hospitalization/health insurance;

(viii) employee retirement contributions (the plans must be IRS-approved and not for the manager);

(ix) janitorial services, supplies, and equipment;

(x) bookkeeping and accounting services;

(xi) trash removal and disposal services;

(xii) service contracts on file with the Commission;

(xiii) legal fees directly related to the operation of the facility (legal fees directly or indirectly related to actions against governmental entities are not deductible);

(xiv) medical expenses directly related to accidents that occur to employees at the facility, not to exceed $500;

(xv) purchase of personally owned or leased equipment that has been approved by the Commission for placement in the facility;

(xvi) repairs and maintenance to personally owned or leased equipment that has been approved by the Commission to be placed within the facility;

(xvii) consumable office supplies; and

(xviii) exterminator/pest control services.

(3) All reports by managers shall be accompanied by such supporting documents as may be required by the Commission.

(d) Method of computing monthly set-aside fee. The amount of set-aside fee owed shall be according to the following schedule:

(1) On net proceeds of $1 to $999.99, the amount shall be 2% of the manager's net proceeds.

(2) On net proceeds of $1,000 to $1,499.99, the amount shall be 3% of the manager's net proceeds.

(3) On net proceeds of $1,500 to $1,999.99, the amount shall be 4% of the manager's net proceeds.

(4) On net proceeds of $2,000 to $5,999.99, the amount shall be $80 plus 18% of the manager's net proceeds over $2,000.

(5) On net proceeds of $6,000 or more, the amount shall be $800 plus 24% of the manager's net proceeds over $6,000.

(e) Payment of set-aside fee. The set-aside fee shall be submitted with the manager's monthly statement of facility operations. The BET director shall develop and implement procedures for the preparation and submittal of monthly statements.

(f) Adjustments to monthly set-aside fee.

(1) When a "single point of contact" is required under the provisions of §167.16 of this title, pertaining to establishing and closing facilities, the monthly set-aside payment for the contact manager shall be reduced by 3% for each manager represented.

(2) To encourage managers to hire individuals with significant disabilities, managers shall deduct from their set-aside payment up to 50% of the wages or salary paid to a blind or otherwise significantly disabled employee during any month up to an amount not to exceed 5% of the set-aside payment amount for that month. A manager may make this deduction for any number of employees who are individuals who are blind or otherwise significantly disabled so long as that deduction from the set-aside payment amount does not exceed 25% of the total set-aside payment due, or $1,250.00, whichever is less. The manager shall provide such documentation to the Commission as required by the Commission to verify such employment and the right to the reduction in set-aside fees. For the purposes of this paragraph, the term "blind or otherwise significantly disabled employee" does not include:

(A) the manager,

(B) a blind or otherwise significantly disabled person within the first degree of consanguinity or affinity to the manager, or

(C) a blind or otherwise significantly disabled person claimed as a dependent, either in whole or in part, on the manager's United States income tax return.

(3) Any adjustments provided for in paragraphs (1) and (2) of this subsection shall not apply for any month in which the set-aside fee is not paid in a timely manner.

(4) To encourage managers to promptly file their monthly statement of facility operations and pay their monthly set-aside fee, managers shall have their monthly set-aside fee increased by 5% if either their monthly statement or the monthly set-aside fee is not timely received by the Commission in accordance with BET procedures for their preparation and submittal. None of the terms of this rule shall ever be construed to create a contract to pay, as consideration for the use, forbearance, or detention of money, interest at a rate in excess of the maximum rate permitted by applicable laws. This adjustment to the set-aside fee is not imposed as interest, but if for any reason whatever this adjustment is considered to be interest, the Commission shall refund to the manager any and all amounts as shall be necessary to cause the "interest" paid to produce a rate equal to the maximum rate permitted by applicable laws.

§167.10. Duties and Responsibilities of Managers.

(a) Managers must comply with applicable law, these rules, written agreements with hosts, the BET Assignment, the requirements of the BET manual, and any proper and authorized instruction by Commission staff.

(b) Managers must comply with procedures prescribed by the Comptroller of Public Accounts for the payment of sales taxes and provide evidence to the Commission of timely sales tax remittances.

(c) Managers must not jeopardize the Commission's right, title, and interest in the BET facility, its equipment, or the lease or agreement with the property managers.

(d) Managers must maintain a professional appearance and act in a professional manner while managing a BET facility.

(e) Managers must open a commercial business account in which they maintain sufficient funds to operate the BET facility.

(f) Managers must purchase and maintain in force liability and product liability insurance and shall name the licensee and the State of Texas as named insured. The host shall be added as an insured when required.

(g) Managers must hire sufficient employees to insure the efficient operation of the BET facility and to provide adequate service to customers.

(h) Managers must be actively engaged at least 40 hours a week in the management of the BET facility to which they are assigned unless a different period of time is approved by the Commission subsequent to the effective date of this section or a different period of time was approved by the Commission prior to the effective date of this section.

(i) Managers must take appropriate and timely actions to correct deficiencies noted on BET facility audits or reviews.

(j) Managers must provide satisfactory service to the BET facility host and customers.

(k) Except in the case of an emergency, managers must provide prior notice to the Commission of leave due to illness, vacation, or for personal reasons.

§167.11. Responsibilities of the Commission.

(a) Management services. The Commission shall provide each manager with regular and systematic management services, which shall, at a minimum, include:

(1) explanations of the Commission's rules, procedures, policies, and standards;

(2) recommendations on ways in which the facility may be made more profitable for the manager;

(3) techniques to develop positive relationships with customers, assistants and management of the host organization;

(4) possible solutions to problems recognized by the manager or brought to the manager's attention by Commission staff or the facility host;

(5) continuing education and training courses and opportunities for managers designed to enhance skills, productivity and profitability; and

(6) information about laws, rules, and regulations affecting the operation of a BET facility.

(b) Training. The Commission shall conduct a special training seminar each year for all managers to inform them of new BET developments and to provide instruction on new, relevant topics to enhance upward mobility.

(c) Facility operating conditions. The Commission shall establish the conditions for operation of a BET facility. The operating conditions shall include, among other things, pricing requirements, hours of operation, and menu items or product lines. The Commission may revise the operating conditions from time to time as market conditions warrant. The final authority and ultimate responsibility for determining the prices to be charged for products sold through BET facilities shall rest with the Commission

(d) BET financial data. Upon request, the Commission shall provide managers with access to BET financial data. Also upon request, the Commission staff shall provide assistance to the manager in interpreting the data.

(e) Inventory payment. When a manager leaves the manager's initial assignment, the Commission shall pay the manager or the manager's heirs the value of the usable stock and supplies above the amount provided to the manager upon initial assignment.

§167.12. BET Elected Committee of Managers.

(a) Authority. The Elected Committee of Managers (ECM) is created and shall operate pursuant to Section 107b-1 of the Act.

(b) Relationship to Commission. The ECM shall be presumed as the sole representative of all managers to the Commission in matters contained in the Act and implementing regulations requiring the active participation of the ECM. Active participation means an ongoing process of good faith negotiations between the Elected Committee of Managers and the Commission in the development of BET policies and procedures prior to implementation. The Commission shall have the ultimate responsibility for the administration and operation of all aspects of BET and has final authority in decisions affecting BET.

(c) Relationship to managers.

(1) It shall be the sole responsibility of the managers who elect the members of the ECM to insure that the persons elected represent all managers.

(2) The ECM shall, in addition to all other matters set forth in these rules or by law or regulation affecting the administration of BET, act as advocates for the managers and trainees and shall strive to improve, expand, and make profitable and successful BET to the greatest possible extent for the mutual benefit of the Commission and of the consumers who participate in the program.

(d) BET policies, rules, and procedures. In all matters related to policies and rules, the Commission's board has the ultimate responsibility and the ultimate authority for their establishment and adoption. The ECM shall actively participate in the consideration of significant BET decisions and in deliberations of rules and policies affecting BET. Whenever a committee of the Commission's board is to consider policies and/or rules related to BET for recommendation to the full board, the board's presiding officer shall request that the chairman of the ECM participate in the committee's discussions and deliberations as an ex officio member. When, in the discretion of the board's presiding officer, one or more additional members of the ECM would enhance the decision-making process by participating in the committee's actions, the ECM chairman shall be requested to appoint one or more other ECM members to participate. In all consideration and deliberations of such board committee, any members of the ECM acting as ex officio members shall be entitled to fully participate in all discussions and deliberations to the same extent as are board committee members. ECM members participating in the committee process shall be bound by the rules and procedures by which the committee operates and by the management decisions made by the board committee chairman. The nature of the participation by the ECM members is advisory and no member of the ECM or any person who is not a member of the board may vote on any issue requiring a vote by the committee members.

(e) BET administrative decisions. In matters concerning the administration of BET, the ultimate responsibility and authority for making administrative decisions affecting BET is that of the Commission. The BET director shall establish and maintain a continuing dialogue and exchange of information with the ECM as to decisions regarding the administration of BET and shall seek ECM input and advice on all decisions affecting the administration of the program. In cooperation with the ECM chairman and such other additional members of the ECM as the BET director deems necessary and appropriate, the BET director shall develop and implement methods of establishing and maintaining the dialogue and exchange of information. The methods developed shall be set out in detail in a written format and shall be included in the BET manual.

(f) Exclusions from participation. Neither the ECM nor any member thereof nor any manager is an employee, officer, or official of the State of Texas. Therefore, the ECM shall not participate in any decision-making process regarding personnel of the Commission, personnel policies, or personnel administration.

(g) Structure. The ECM shall, to the extent possible, be composed of managers who are representative of all managers in BET based on such factors as geography and facility type and size. One representative shall be elected from each designated ECM district created by the Commission and as may be revised or modified from time to time.

(h) Qualifications. Each candidate for election to the ECM must:

(1) be a manager in good standing;

(2) have been an active, assigned manager for a minimum of one year prior to nomination; and

(3) be assigned to a facility in the ECM district he or she is seeking to represent.

(i) Nomination, election and replacement. The BET director and the ECM shall establish and implement written procedures for the nomination, election, and replacement of managers to the ECM. All such procedures shall be included in the BET manual. No changes in any procedure for the nomination, election, or replacement of ECM representatives shall be made without the concurrence of a majority of the ECM. At a minimum, procedures established pursuant to this subsection shall:

(1) insure that all candidates are qualified;

(2) insure that all managers receive notice of the election procedures and of all dates and times for actions related to such elections in a timely manner so as to allow full participation by managers in the nomination and election process;

(3) insure that each manager is provided an opportunity to nominate and elect candidates from the manager's district;

(4) allow for secret ballots; and

(5) insure that only managers actually assigned to a facility in the district are elected to represent the district on the ECM.

(j) Changing districts. A member of the ECM shall automatically be removed as a representative from a district when that member is no longer assigned to a BET facility within the district from which elected.

(k) Term of office. The term of office for ECM members shall be two years beginning on January 1 following the election. Even- and odd-numbered districts shall alternate election years. Any ECM member elected to fill a vacancy shall serve the remainder of the unexpired term of the manager who vacated a position.

(l) Officers. The ECM shall select from among its members at the first meeting of every year the chairperson and any other officers the ECM may from time to time elect.

(m) Meetings. The ECM shall meet once during each calendar year for the purpose of electing officers and again as it may establish by bylaw. It shall be the duty of the ECM chairman to provide to the BET director with a written meeting agenda ten business days in advance of each meeting.

(n) Internal procedures of the ECM. The ECM shall establish bylaws to govern their internal operation and order of business and shall provide the Commission with a copy.

(o) Travel expenses. Expenses for travel, meals, lodging, or other related expenses while the ECM representative is attending meetings approved by the Commission shall be reimbursed by the Commission at the rate allowed for travel by Commission staff. Travel for official business other than attendance at approved ECM meetings shall be reimbursed only when the travel is approved in advance by the BET director.

§167.13. Nondisciplinary Termination of License.

(a) Causes for nondisciplinary termination. The license of a manager shall be terminated upon the occurrence of any one of the following:

(1) The manager's visual acuity is improved by any means to the point at which the manager no longer satisfies the definition of blind.

(2) The manager becomes otherwise permanently disabled and as a result of such permanent disability is unable to perform the essential functions of operating and maintaining a BET facility. Permanently disabled is a condition that is medically documented and has existed or is expected to exist for at least twelve months. The determination of permanently disabled shall be made by the executive director or his designee after review of medical documentation and other information relevant to the issue. Other information relevant to the issue shall include recommendations from Commission staff and the ECM, pertinent information from the manager's BET file or provided by the manager, and reports of examinations or evaluations, if any, obtained by the Commission and the manager.

(3) The manager is unassigned and has not applied for an assignment for a period of 12 consecutive months.

(b) Examination and evaluation. In any situation in which the vision or other disability of a manager is at issue with respect to termination of a license, the Commission or the manager may require an examination or evaluation by professionals to determine whether the manager is otherwise permanently disabled and as a result of such permanent disability is unable to perform the essential functions of operating and maintaining a BET facility. The reports of such professionals shall be furnished to the executive director and manager. Any failure of the manager to participate in required examinations or evaluations shall be grounds for disciplinary action.

(c) Restoration of license. A license terminated for nondisciplinary reasons may be restored at the discretion of the executive director if the condition or conditions causing the nondisciplinary termination have been satisfactorily resolved. In considering a decision whether to restore a license terminated for nondisciplinary reasons, the executive director shall consult with appropriate BET staff, the ECM chairperson, and any advocate for the manager and shall consider all pertinent information and/or documentation provided by any of the persons described in this subsection.

(d) Conditional restoration. If the executive director determines that a license terminated for nondisciplinary reasons should be restored, the executive director may condition the restoration of the license on any reasonable matters, such as, by way of illustration, continued medical treatment or therapy, or completion of refresher or other courses of training.

§167.14. Disciplinary Actions.

(a) Causes for disciplinary action. The happening of any one or more of the following acts or omissions by a manager shall result in disciplinary action:

(1) Failing to personally operate the assigned facility as set forth in the permit or contract with the host and/or in the manager's record of assignment unless prior approval to operate the facility in another manner has been obtained from the Commission.

(2) Failing to pay moneys due from the operation of the facility, including, but not limited to, taxes, fees, or assessments to a governmental entity or supplier, or knowingly giving false or deceptive information to or failing to disclose required information to or misleading in any manner a governmental entity (including the Commission) or a supplier.

(3) Failing to file required financial and other records with the Commission or preserve them for the time required by these policies and procedures.

(4) Failing to cooperate in a timely manner with audits conducted by the Commission or other state or federal agencies.

(5) Failing to maintain insurance coverage required by these policies and procedures.

(6) Using BET equipment or facility premises to operate another business.

(7) Failing to properly maintain facility equipment in a clean and operable condition within the scope of the manager's level of maintenance authorization.

(8) Intentionally abusing, neglecting, using, or removing facility equipment without written Commission authorization.

(9) Substance abuse while operating a facility; or other abusive use of substances that interferes with the operation of the facility.

(10) Operating a BET facility in a manner that endangers the Commission's investment in the facility.

(11) Using privileged information concerning an existing facility to compete with the Commission for the facility.

(12) Failing to comply with any federal or state law prohibiting discrimination and failure to assure services without distinction on the basis of race, gender, color, national origin, religion, age, political affiliation, or disability.

(13) Failing to maintain the necessary skills and abilities for effectively managing a facility.

(14) Using a facility to conduct unlawful activities.

(15) Failing to comply with the manager's responsibilities under applicable law, these rules, the requirements of the BET manual, or any proper and authorized instruction by Commission personnel.

(b) Acts of improper contact. The participation in any one or more of the following acts or omissions by a manager shall result in termination of the manager's license:

(1) Contacting or communicating with a member of a selection panel or an applicant for a facility then being considered for assignment for the purpose of influencing or manipulating, directly or indirectly, the selection of an applicant for the facility being considered for assignment.

(2) Causing another person to contact or communicate with a member of a selection panel or an applicant for a facility then being considered for assignment for the purpose of influencing or manipulating, directly or indirectly, the selection of an applicant for the facility being considered for assignment.

(3) Giving or offering to give, directly or indirectly, expressly or by implication, a thing of value, tangible or intangible, including promises of future benefit, for the purpose of influencing or manipulating any decision or process of BET.

(4) Causing another person to give or offer to give, directly or indirectly, expressly or by implication, a thing of value, tangible or intangible, including promises of future benefit, for the purpose of influencing or manipulating any decision or process of BET.

(c) Disciplinary action pending an appeal. The Commission may at its discretion suspend disciplinary action pending the outcome of an appeal.

(d) Types of disciplinary actions. There are four types of disciplinary actions:

(1) Written reprimand. Written reprimand means a formal statement describing violations of applicable law, these rules, the requirements of the BET manual, or any proper and authorized instruction by Commission personnel.

(2) Probation. Probation means allowing a manager to continue in BET in an effort to satisfactorily remedy a condition that is not acceptable under these rules. If the condition causing probation is satisfactorily remedied within the time periods specified in the written notice of probation, the probation will be lifted. If the unacceptable condition is not remedied within the time specified, additional and more serious disciplinary actions may ensue. When a manager who has been on probation three times in a three-year period qualifies for probation for the fourth time within said three years, the Licensed Manager's license may be revoked according to Commission procedures.

(3) Loss of facility. Loss of facility means the removal of a manager from the manager's current facility for disciplinary reasons.

(4) Termination. Termination means the cessation of a license issued to a manager to operate a facility and the removal of the manager from BET.

(e) Disciplinary procedures.

(1) The Commission shall make the decision as to what disciplinary action to take based upon the seriousness of the violation, the damage to BET, and the manager's disciplinary record. The foregoing language notwithstanding, when the act or omission alleged to be a matter requiring disciplinary action is one or more of those described in subsection (b) of this section, the disciplinary action to be taken shall in every case be termination of the license.

(2) Upon receipt of information which indicates that disciplinary action may be appropriate, the Commission shall take the following actions prior to making a determination as to taking disciplinary action:

(A) The Commission shall notify the manager in writing of the allegations and reasons that disciplinary action is being considered. The notice shall either be hand delivered and read to the manager, or it shall be delivered to the manager's work or home address.

(B) The manager shall have 5 business days to respond, either in person or in writing, to the notice. The response shall be made to the individual designated in the notice. After receiving the manager's response, the Commission shall decide what disciplinary action, if any, is appropriate. If no response is timely received from the manager, the Commission shall decide what disciplinary action, if any, is to be taken without the manager's response.

(C) If a decision is made to issue a written reprimand, the written reprimand will be accompanied by a brief summary of the evidence justifying the reprimand, suggested steps for correcting the violation, and consequences of not correcting the violation. All reprimands shall contain notice of the manager's right to appeal the reprimand and a statement that failure to correct the violation may result in further disciplinary action.

(D) If a decision is made to place a manager on probation, the Commission shall deliver to the manager a letter of probation containing the following:

(i) the specific reasons for probation;

(ii) the remedial action required to remove the manager from probation;

(iii) the time within which said remedial action must take place;

(iv) the consequences of failure to take remedial action within the prescribed time frame; and

(v) notice of the manager's right to appeal.

(E) Upon satisfactory completion of the remedial action outlined in the letter of probation, a manager shall be removed from probation.

(F) Failure of the manager to complete remedial requirements within the prescribed time frame shall result in one or more of the following actions:

(i) required training;

(ii) extension of probation;

(iii) restrictions on applying for another facility;

(iv) removal from the facility;

(v) termination of license.

(G) If, after the manager has had an opportunity to respond, a decision is made that sufficient grounds exist to remove the manager from a facility, the Commission shall notify the manager in writing by hand delivery or certified U. S. Mail, return receipt

requested, that the manager's assignment to the BET facility has been terminated and the manager must vacate the facility. The removal letter shall contain the following information:

(i) specific reasons for removal from the facility;

(ii) actions required by the manager, if any;

(iii) requirements for obtaining reassignment; and

(iv) notice of the manager's right to appeal.

(H) If, after the manager has had an opportunity to respond, a decision is made that sufficient grounds exist for termination, the Commission shall notify the manager in writing by hand delivery or certified U. S. Mail, return receipt requested, that the Commission has decided that sufficient cause exists to terminate the manager's license. The manager shall be instructed to vacate the facility if the manager has not already done so. The termination letter shall contain the following information:

(i) specific reasons for termination;

(ii) actions required by the manager, if any;

(iii) procedures for applying for any other Commission services for which the person may be eligible; and

(iv) notice of the manager's rights under the Randolph-Sheppard Act.

(3) The provisions of paragraph (2) notwithstanding, pending a determination with respect to disciplinary action, a manager may be removed from a facility if the Commission considers such removal in the best interest of BET.

(4) During the license termination process, the manager shall not be eligible for assignment to any other BET facility.

§167.15. Procedures for Resolution of Manager's Dissatisfaction.

(a) Appealable actions. These rules provide the procedures for managers who are dissatisfied with a Commission action arising from the operation of BET.

(b) Actions not subject to appeal. The phrase "Commission action arising from the operation of BET" in subsection (a) does not include the following actions of the Commission:

(1) the hiring, firing or discipline of Commission employees;

(2) the challenge of federal or state law, or rules previously approved by the Secretary of Education pursuant to the Randolph-Sheppard Act; or

(3) an action by the Commission unless it is alleged that the action is in violation of applicable law, these rules, the requirements of the BET manual, any proper and authorized instruction by Commission personnel, or is unreasonable. Unreasonable shall mean without rational basis or arbitrary and capricious.

(c) Commission discretion and sovereign immunity. The Commission does not waive its right and duty to exercise its lawful and proper discretion. The Commission does not waive its sovereign immunity.

(d) Remedies. Remedies available to resolve dissatisfaction shall correct the action complained of from the earlier time of:

(1) agreement by the parties as to an appropriate remedy, or

(2) a final resolution pursuant to the Randolph-Sheppard Act that the Commission acted in violation of applicable law, these rules, the requirements of the BET manual, any proper and authorized instruction by Commission personnel, or acted unreasonably.

(e) Informal administrative review. The manager has the right to request an informal administrative review to resolve a dissatisfaction. The purpose of an informal administrative review is to allow a manager a quick means for resolving a dissatisfaction arising from the operation or administration of BET. The Commission shall attempt to resolve complaints at the informal administrative review level. Informal administrative reviews shall be conducted according to the following:

(1) The manager or manager's representative must submit a written request for an informal administrative review no later than the 20th business day after the occurrence of the disputed action. The request shall be considered timely if it is either postmarked or delivered to the Commission within said 20 business days.

(2) An informal administrative review shall be conducted only by a member or members of the administrative staff of the Commission who have not participated in the Commission action in question.

(3) The written request for an informal administrative review must describe with reasonable particularity the specific action sufficient to provide notice as to the action which is alleged to be unreasonable or in violation of applicable law, these rules, the requirements of the BET manual, or any proper and authorized instruction by Commission personnel. The request must, to the best of the Complainant's knowledge, contain the dates those actions occurred and the law or regulation must be reasonably identified if an action is alleged to be in violation of law, these rules, the requirements of the BET manual, or regulation. The request must also identify the desired relief or remedy.

(4) The informal administrative review shall be held during regular Commission working hours at a district or local office location. Unless agreed otherwise by the parties, an informal administrative review shall be conducted no later than the 45th business day after the date the Commission receives the request.

(5) Reader or other communication services, if needed, shall be arranged for the manager by the Commission upon request by the manager at least three business days prior to the review date.

(6) The Commission staff member conducting the informal administrative review shall determine whether the action arising out of the operation or administration of BET was in violation of applicable law, these rules, the requirements of the BET manual, any proper and authorized instruction by Commission personnel or is unreasonable. If the action is found to be not in violation of applicable law, these rules, the requirements of the BET manual, any proper and authorized instruction by Commission personnel or not unreasonable, the staff member shall not substitute his discretion for that of the discretion exercised by the Commission.

(7) The reviewing Commission staff member shall prepare brief findings of fact, conclusions, and recommendations no later than the 10th business day after the conclusion of the review. These shall be sent to the executive director, who shall review them and make his own determination as to whether to accept the findings, conclusions and recommendation of the reviewing staff member. The executive director shall inform the manager of his decision in writing no later than the 10th business day after receipt of the recommendation.

(8) When an informal administrative review does not resolve a dispute to the satisfaction of a manager, such manager may request a full evidentiary hearing in accordance with the provisions of these rules and regulations.

(f) Full evidentiary hearing. A manager has the right to request a full evidentiary hearing to resolve a dissatisfaction according to the following:

(1) A manager has the right to request a full evidentiary hearing without first going through an informal administrative review.

(2) A request for an evidentiary hearing must be made no later than the 20th business day after the occurrence of the agency action about which the manager complains. The executive director, upon request of the complaining party, may extend the time period for filing a grievance upon the showing of good cause by the complaining party for such additional period if such request is made no later than the 20th business day after the occurrence of the agency action about which the manager complains.

(3) A manager requesting a full evidentiary hearing after the conduct of an informal administrative review must request such hearing in writing no later than the 20th business day after receipt of the executive director's decision.

(4) A request for a full evidentiary hearing must be in writing and transmitted to the executive director. A request that is postmarked within the applicable time frame shall be considered timely delivered if properly posted.

(5) The request for a full evidentiary hearing must describe the specific action with reasonable particularity sufficient to provide notice as to the action which is alleged to be unreasonable or in violation of applicable law, these rules, the requirements of the BET manual, or any proper and authorized instruction by Commission personnel. The request must, to the best of the complainant's knowledge, contain the date the action occurred and the law or regulation must be reasonably identified if an action is alleged to be in violation of law, these rules, the requirements of the BET manual, or regulation. The request must also identify the desired relief or remedy.

(6) The manager may be represented in the evidentiary hearing by legal counsel or other representative of the manager's choice, at the manager's expense.

(7) Reader or other communication services, if needed, shall be arranged for the manager by the Commission upon request by the manager at least three business days prior to the hearing date.

(8) The manager shall be notified in writing of the time and place fixed for the hearing and of the manager's right to be represented by legal or other counsel.

(9) The presiding officer at the hearing shall be an impartial and qualified official who has no involvement either with the Commission action which is at issue or with the administration or operation of BET.

(10) Hearings shall be conducted in accordance with the Randolph-Sheppard Act, these rules, and the State Office of Administrative Hearings (SOAH) procedures for hearing contested case hearings contained in 1 TAC §105.1 et seq. to the extent those procedures do not conflict with the Act or these rules.

(11) Managers bringing complaints shall have the burden of proving their cases by the preponderance of evidence. Managers shall present their evidence first.

(12) A record shall be made of the evidence and shall be made available to the parties by the Commission no later than the 30th business day after the close of the hearing.

(13) The hearing officer shall issue a recommendation which shall set forth the principal issues and relevant facts adduced at the hearing and the applicable provisions of law, rule, the requirements of the BET manual, or any proper and authorized instruction by Commission personnel. The recommendation shall contain findings of fact and conclusions with respect to each of the issues, and the reasons and bases for the conclusions.

(14) In formulating a recommendation, the hearing officer shall not evaluate whether the Commission's actions were wise, efficient, or effective. Rather, the hearing officer is limited to determining whether the Commission's actions were unreasonable, or violated applicable law, these rules, the requirements of the BET manual, or any proper and authorized instruction by Commission personnel.

(15) Should the hearing officer find that the actions taken by the Commission were unreasonable, or violated applicable law, these rules, the requirements of the BET manual, or any proper and authorized instruction by Commission personnel, the hearing officer shall also recommend any prospective action necessary to correct the violations.

(16) The hearing officer's recommendation shall be made no later than the 30th business day after the receipt of the official transcript. The recommendation shall be delivered promptly to the executive director.

(17) The executive director shall review the recommendation of the hearing officer and forward a decision to the manager no later than the 20th business day after receipt of the hearing officer's recommendation.

(g) Arbitration. A manager appealing the Commission's decision must file a complaint with the Secretary of Education no later than the 20th business day after receipt of such decision in conformity with the provisions of Sec. 395.13 of the Act, pertaining to arbitration of vendor complaints.

§167.16. Establishing and Closing Facilities.

(a) Establishing facilities.

(1) On its own initiative, at the request of an agency that controls federal or state property, or at the request of a private organization, the Commission shall survey the property, blueprints, or other available information concerning the property to determine whether the installation of a BET facility is feasible and consonant with applicable laws and regulations and with the Commission's vocational rehabilitation objectives.

(A) If the installation of a BET facility is determined to be feasible, the Commission shall proceed to develop plans for the establishment of a facility in accordance with procedures promulgated and implemented by the Commission staff and, when the facility is developed, shall assign a manager to the facility.

(B) If the Commission determines that the location being considered for a BET facility is not appropriate for use in the program or that the creation of the facility is not feasible and the location being considered is on state property, then the following shall occur:

(i) The BET director shall, no later than the 40th business day after the date the location was brought to the attention of the Commission or the Commission became aware of its possible use as a BET facility, certify to the executive director that the location being considered is not appropriate for BET use or that it is not feasible to establish a BET facility at the location.

(ii) The location shall be made available to the Texas Rehabilitation Commission in accordance with state law.

(2) The procedures set forth in this section shall apply whether the consideration of a location is an initial or a subsequent review.

(b) Maximizing employment opportunities.

(1) On the effective date of this section, the Commission shall hereafter maximize the number of employment opportunities for persons who are blind by applying the procedures set forth in this subsection. This subsection shall not affect the current assignment of any manager at the time this section becomes effective.

(2) Upon the opening of a new location or upon needing to advertise and assign a manager to an existing facility, the Commission shall determine whether the opportunity exists to increase the number of employment opportunities for persons who are blind. The Commission shall increase the number of employment opportunities in a location when all of the following circumstances exist:

(A) The location must be physically suited to support the operation of two or more BET facilities, such as, by way of illustration and not by way of definition or limitation:

(i) a single building in which two or more clearly separate and distinct facilities can be located in two or more separate areas of the building;

(ii) a location comprised of a complex of buildings, each of which can support one or more BET facilities; or

(iii) a location that includes two or more clearly separate and distinct sites that can support different operations, such as two or more dining areas; a dining area and a site for vending machines; a cafeteria and one or more other types of BET facilities; or any combination of the foregoing.

(B) The creation of two or more facilities from one location must provide from at least one of the facilities before set-aside fees an income equal to or greater than 600% of the state median income of all managers for the preceding year.

(C) Once the requirement in subparagraph (B) is satisfied, if any additional facility is not projected to provide before set-aside fee an income of at least 200% of the state median income of all managers for the preceding year, such site shall be assigned by the Commission as a satellite location. Once the satellite location produces net proceeds in excess of 200% of the state median income per year before set aside fees, it shall be advertised for assignment as a full-time employment opportunity pursuant to these rules.

(D) Once the requirement in subparagraph (B) is satisfied, if at least one additional facility is projected to provide before set-aside fee an income of at least 200% of the state median income of all managers for the preceding year, then the Commission shall advertise such facility or facilities pursuant to these rules.

(E) There is no circumstance beyond the control of the Commission which precludes assignment of more than one manager to the same location.

(F) Under no circumstances shall more than one manager be assigned to a clearly separate and distinct site regardless of income produced or any other factors. Additionally, under no circumstances shall a site be divided into separate facilities by any means other than by actual physical separation.

(G) In those situations in which multiple managers are assigned to a single location and the host of the location requires a single point of contact, the Commission shall designate from among the managers assigned to the location a directing manager to serve as the single point of contact. The directing manager shall be compensated for these services in accordance with policies for paying set-aside fees.

(c) Closing facilities.

(1) Except for temporary closings by Commission staff, no BET facility shall be closed by the Commission until each of the following has occurred:

(A) The BET director has certified to the executive director that the facility is no longer a feasible or viable BET facility and provides reasons for that opinion.

(B) The executive director has approved the proposed closing of the facility.

(C) The facility has been made available to the Texas Rehabilitation Commission for operation of a facility by a person disabled by conditions other than blindness if the location is on state property, and the Texas Rehabilitation Commission has declined the facility.

(2) All facility closings shall be reported to the Commission's board at the regular meeting of the board next following such closing with the reasons for the closing.

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

Filed with the Office of the Secretary of State, on March 8, 2001.

TRD-200101416
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 377-0611

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PART 11. TEXAS COMMISSION ON HUMAN RIGHTS

CHAPTER 338. EXEMPTED RESIDENTIAL REAL ESTATE-RELATED TRANSACTIONS

40 TAC §338.6

The Texas Commission on Human Rights proposes the amendment of §338.6, concerning Familial Status. This amendment is necessary to demonstrate that the TCHR adheres to the same principles regarding housing for older persons to its federal counterpart, the Department of Housing and Urban Development, which issued a final rule on this matter. Pursuant to §301.002(3) of the Texas Property Code, a purpose of the Texas Fair Housing Act is to provide rights and remedies substantially equivalent to those granted under federal law.

The Commission has determined that for each year of the first five years the amended rule is in effect, there will be no fiscal impact on state and local government as a result of enforcing and administering the amended rule.

The Commission has also determined that there will be neither an economic cost nor adverse impact on small businesses as a result of the amended rule.

Comments on the proposed amendment must be submitted within 30 days after the publication of the proposed section in the Texas Register to Katherine A. Antwi, Interim Executive Director, Mail Code 344, Texas Commission on Human Rights, P.O. Box 13006, Austin, Texas, 78711. Any requests for a public hearing must be submitted separately to the Interim Executive Director.

This rule is amended under the Texas Property Code, Chapter 301, Section 301.062, and 40 Texas Administrative Code Chapter 336, Section 336.1 and Chapter 335, Section 335.4. Under the Texas Property Code, Section 301.062, the Commission may adopt rules as necessary to implement the Texas Fair Housing Act. The Texas Administrative Code Title 40, Sections 335.4 and 336.1, provide that the Commission may adopt rules and regulations to execute the duties and functions of the Texas Commission on Human Rights.

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

§338.6. Familial Status

(a) Nothing in the Texas Fair Housing Act regarding discrimination based on familial status applies to housing for older persons, if the commission determines that the housing is specifically designed and operated to assist elderly persons under a federal or state program; the housing is intended for, and solely occupied by, persons 62 years of age or older; or the housing is intended and operated for occupancy by at least one person 55 years of age or older per unit as determined by commission rules.

(b) The exemption related to housing for persons 62 years or older, satisfies the requirements of this section even though:

(1) there are persons residing in such housing on September 13, 1988, who are under 62 years of age, provided that all new occupants are persons 62 years of age or older;

(2) there are unoccupied units, provided that such units are reserved for occupancy for persons 62 years of age or older;

(3) there are units occupied by employees of the housing (and family members residing in the same unit) who are under 62 years of age provided they perform substantial duties directly related to the management or maintenance of the housing.

(c) The exemption related to housing intended and operated for occupancy by at least one person 55 years of age or older per unit, shall satisfy the following requirements:

~~[(1) the housing facility has significant facilities and services specifically designed to meet the physical or social needs of older persons. Significant facilities and services specifically designed to meet the physical or social needs of older persons include, but are not limited to, social and recreational programs, continuing education, information and counseling, recreational, homemaker, outside maintenance and referral services, an accessible physical environment, emergency and preventive health care programs, congregate dining facilities, transportation to facilitate access to social services, and services designed to encourage and assist residents to use the services and facilities available to them (the housing facility need not have all of these features to qualify for the exemption under this section);]~~

~~[(2) it is not practicable to provide significant facilities and services designed to meet the physical or social needs of older persons and the housing facility is necessary to provide important housing opportunities for older persons. In order to satisfy this requirement the owner or manager of the housing facility must demonstrate through credible and objective evidence that the provision of significant facilities and services designed to meet the physical and social needs of older persons would result in depriving older persons in the relevant geographic area of needed and desired housing. The following factors, among others, are relevant in meeting the requirements of this paragraph:]~~

~~[(A) whether the owner or manager of the housing facility has endeavored to provide significant facilities and services designed to meet the physical or social needs of older persons either by the owner or by some other entity. Demonstrating that such services and facilities are expensive to provide is not alone sufficient to demonstrate that the provision of such services is not practicable:]~~

~~[(B) the amount of rent charged, if the dwellings are rented, or the price of the dwellings, if they are offered for sale;]~~

~~[(C) the income range of the residents of the housing facility;]~~

~~[(D) the demand for housing for older persons in the relevant geographic area;]~~

~~[(E) the range of housing choices for older persons within the relevant geographic area;]~~

~~[(F) the availability of other similarly priced housing for older persons in the relevant geographic area. If similarly priced housing for older persons with significant facilities and services is reasonably available in the relevant geographic area then the housing facility does not meet the requirements of this paragraph;]~~

~~[(G) the vacancy rate of the housing facility;]~~

(1) [~~(3)~~] at least 80% of the units in the housing facility are occupied by at least one person 55 years of age or older per unit [~~except that a newly constructed housing facility for first occupancy after March 12, 1989, need not comply with this paragraph until 25% of the units in the facility are occupied~~]:

(A) a newly constructed housing facility for first occupancy after March 12, 1989, need not comply with this paragraph until 25% of the units in the facility are occupied;

(B) a housing facility or community may not evict, refuse to renew leases, or otherwise penalize families with children in order to achieve occupancy of at least 80% of the occupied units by at least one person 55 years of age or older.

(2) [~~(4)~~] the owner or manager of a housing facility publishes and adheres to policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older. The following factors, among others, are relevant in determining whether the owner or manager of a housing facility has complied with the requirements of this paragraph:

(A) the manner in which the housing facility is described to prospective residents;

(B) the nature of any advertising designed to attract prospective residents;

(C) age verification procedures;

(D) lease provisions;

(E) written rules and regulations;

(F) actual practices of the housing facility or community;[~~owner or manager in enforcing relevant lease provisions and relevant rules or regulations;~~]

(G) public posting in common areas of statements describing the facility or community as housing for persons 55 years of age or older.

(3) [~~(5)~~] housing satisfies the requirements of this section even though:

(A) on September 13, 1988, under 80% of the occupied units in the housing facility are occupied by at least one person 55 years of age or older per unit, provided that at least 80% of the units that are occupied by new occupants after September 13, 1988, are occupied by at least one person 55 years of age or older;

(B) there are unoccupied units, provided that at least 80% of such units are reserved for occupancy by at least one person 55 years of age or older;

(C) there are units occupied by employees of the housing (and family members residing in the same unit) who are under 55 years of age provided they perform substantial duties directly related to the management or maintenance of the housing.

(d) The owner or manager of a housing facility may not be held personally liable for monetary damages for discriminating on the basis of familial status, if the person acted with the good faith belief that the housing facility qualified for a housing for older persons exemption:

(1) the person claiming the good faith belief defense must have actual knowledge that the housing facility has asserted in writing that it qualifies for a housing for older persons exemption;

(2) a housing facility must certify before the date on which discrimination is claimed to have occurred, to the person claiming the defense that it complies with the requirements of such an exemption as housing for persons 55 years of age or older in order for such person to claim the defense.

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

Filed with the Office of the Secretary of State, on March 5, 2001.

TRD-200101310
Katherine A. Antwi
Interim Executive Director
Texas Commission on Human Rights
Earliest possible date of adoption: April 22, 2001
For further information, please call: (512) 437-3457

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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 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 800. GENERAL ADMINISTRATION

SUBCHAPTER B. ALLOCATIONS AND FUNDING

40 TAC §§800.51 - 800.54, 800.57, 800.58, 800.61, 800.62

The Texas Workforce Commisson has withdrawn from consideration proposed amendments to §§800.51-800.54, 800.57, 800.58, 800.61, 800.62 which appeared in the October 6, 2000, issue of the *Texas Register* (25 TexReg 10127).

Filed with the Office of the Secretary of State on March 6, 2001

TRD-200101361
John Moore
Assistant General Counsel
Texas Workforce Commission
Effective date: March 6, 2001
For further information, please call: (512) 463-2573

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40 TAC §§800.55, 800.56, 800.59

The Texas Workforce Commission has withdrawn from consideration proposed repeals to §§800.55, 800.56, 800.59 which appeared in the October 6, 2000 issue of the *Texas Register* (25 TexReg 10130).

Filed with the Office of the Secretary of State on March 6, 2001

TRD-200101360
John Moore
Assistant General Counsel
Texas Workforce Commission
Effective date: March 6, 2001
For further information, please call: (512) 463-2573

♦ ♦ ♦

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 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 22. PRACTICE AND PROCEDURE

The Public Utility Commission of Texas (commission) adopts amendments to various sections of the commission's Procedural Rules in Chapter 22, Subchapters A - O as published in the November 10, 2000 *Texas Register* (25 TexReg 11201). These amendments are adopted under Project Number 22870.

These sections are adopted with changes to the text as proposed: §22.51, Notice for Public Utility Regulatory Act, Chapter 36, Subchapters C-E; Chapter 51, §51.009; and Chapter 53, Subchapters C-E, Proceedings; §22.52, Notice in Licensing Proceedings; §22.71, Filing of Pleadings, Documents, and Other Materials; §22.104, Motions to Intervene; §22.123, Appeal of an Interim Order; and §22.242, Complaints.

These sections are adopted with no changes to the text as proposed: §22.1, Purpose and Scope; §22.2, Definitions; §22.22, Service on the Commission; §22.33, Tariff Filings; §22.35, Informal Disposition; §22.72, Formal Requisites of Pleadings and Documents to be Filed with the Commission; §22.75, Examination and Correction of Pleadings and Documents; §22.101, Representative Appearances; §22.102, Classification of Parties; §22.103, Standing to Intervene; §22.105, Alignment of Parties; §22.126, Bonded Rates; §22.127, Certification of an Issue to the Commission; §22.143, Depositions; §22.161, Sanctions; §22.181, Dismissal of a Proceeding; §22.203, Order of Procedure; §22.226, Exhibits; §22.241, Investigations; §22.243 Rate Change Proceedings; §22.244, Review of Municipal Rate Actions; §22.262, Commission Action After a Proposal for Decision; §22.264 Rehearing; and §22.281 Initiation of Rulemaking.

The amendments are necessary to maintain clear, efficient rules of practice and procedure before the commission and include modifications to:

(1) Remove references to the position of "general counsel" as was required prior to September 1, 1999 by the Public Utility Regulatory Act (PURA) §12.101(2). The statutory requirement for a general counsel was removed from the Public Utility Regulatory Act (PURA) by Acts 1999, 76th Legislature, chapter 405, §61(1), effective September 1, 1999. Any references to "general counsel" in the Procedural Rules as proposed now refer to the General Counsel who oversees the administrative functions of the agency, not the statutory functions as previously required by PURA;

(2) Modify procedures relating to service on the commission;

(3) Clarify procedures regarding informal disposition in uncontested proceedings;

(4) Modify the number of copies needed for applications for certificates of operating authority and service provider certificates of operating authority, and establish the number of copies required for certification of retail electric providers and for registration of power generation companies, self-generators or aggregators. The number of copies required is proposed at seven copies to enable the Customer Protection Division (CPD) to also receive a copy for review so that they can timely file their recommendation. The forms for each of these applications will be modified accordingly;

(5) Clarify procedures for receipt by the commission of confidential material;

(6) Clarify procedures for changing an authorized representative and information regarding notification or service;

(7) Modify procedures for late intervention to manage recurring late filings with the commission;

(8) Establish procedures for motions for reconsideration of interim orders issued by the commission;

(9) Clarify procedures for motions for rehearing;

(10) Modify procedures so that an affirmative vote is needed by only one commissioner to add any motion for rehearing, motion for reconsideration, appeal, or request for oral argument to an open meeting agenda ballot; and

(11) Clarify and correct references to other statutes, rules, and divisions within the commission and other minor non-substantive changes.

The commission received comments on the proposed amendments from Entergy Gulf States, Inc. (EGSI), TXU Electric Company (TXU), the AEP Texas Utilities (AEP), and Reliant Energy, Inc. (Reliant).

§22.35(b)(1) Methods of Disposition, Notice of Approval

AEP commented that the commission should provide additional clarity as to the types of proceedings that can be delegated, or at a minimum, the process by which a category is added to the list and where the list is to be found. Further, AEP requested that the commission should state in this adoption preamble the legal

authority upon which it relies to make the delegation to administratively approve certain proceedings. AEP argued that with disclosure of this information, all parties will be informed and aware of the type of proceeding that may be applied to a particular application.

The commission relies on the Public Utility Regulatory Act (PURA) §14.001, Power to Regulate and Supervise, for its authority to delegate administrative approval of certain uncontested proceedings. PURA §14.001 states that "The commission has the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by this title that is necessary and convenient to the exercise of that power and jurisdiction." The delegation of authority to approve certain types of cases administratively is limited to those cases in which there are no contested issues of facts of law. The commission finds that delegating its authority to process cases administratively results in no harm to any party. Further, such delegation improves the administrative efficiency of the agency and it is in the public interest to dispose of these cases in an expeditious manner. In addition, simply because a case is eligible for administrative approval does not guarantee that it will be processed that way. Upon request of any party, or on the administrative law judge's own motion, the case may be presented to the commission via proposed order. Delegation of the types of cases subject to administrative approval is made by the commission in open meeting. As provided in the rule, a list of the type of cases the commission has delegated shall be kept on the commission's web site at www.puc.state.tx.us. The commission finds that the rule language is clear as written and makes no changes to §22.35.

§22.51(a)(1)(F) and 22.51(b)(2)(F); §22.52(a)(1)(A), 22.52(a)(3)(A), and 22.52(b)(1)

TXU commented that the commission should delete all references to either the "Office of Customer Protection" or the proposed revision, to "Customer Protection Division" entirely. Specifically, TXU proposed that the sentence read "Further information may also be obtained by calling the Public Utility Commission at (512) 936-7120 or (888) 782-8477." TXU stated that listing the phone numbers to the commission is adequate, and that deleting the department name would lessen the need for future revisions to the procedural rules.

The commission agrees and has made the suggested revisions.

§22.71(d), Confidential material

EGSI commented that it believes the potential benefits of the proposed amendment to §22.71(d), requiring confidential information to be routed through Central Records, are significantly outweighed by both its burdens and inherent risks. EGSI states that: (1) Central Records would have to create a separate filing system to segregate confidential materials from non-confidential materials (AEP supports this issue); (2) the burden would be placed on the commission to determine whether "a person's privacy or property interests" *(i.e.,* in fuel reconciliation proceedings) are implicated in any open records request made of the agency and the requirement to notify those persons pursuant to Texas Government Code §552.305; (3) the proposal would needlessly increase the risk of inadvertent disclosure of protected materials by increasing the risk of human error; (4) that proposed amendment should not apply to confidential materials considered "highly sensitive"; and (5) that if adopted, the proposed amendment should apply only to dockets initiated after the effective date of the adopted rule.

The commission disagrees with EGSI that both its burdens and inherent risks significantly outweigh the potential benefits of the proposed amendment. The new procedures will increase the safety and control of confidential material by ensuring that the materials are delivered to a central location, properly logged in and tracked throughout the entire proceeding. Central Records has already established a procedure to segregate confidential material from non-confidential material. The fact that materials designated as confidential are delivered to Central Records instead of any other division in the commission in no way alters the commission's responsibilities under Texas Government Code, Chapter 552. The commission's obligations under Chapter 552 remain the same regardless of who receives the material on behalf of the commission. Materials designated as "highly sensitive" are considered a subset of confidential materials and shall be provided to the commission in the same manner as other confidential material. The extra protections for highly sensitive material are established in the protective orders for each proceeding. The commission has modified §22.71 to clarify that confidential material are not "filed" in the sense that they are subject to the commission's other filing requirements. The confidential materials are not kept in Central Records, but are moved to locked and secured areas on the seventh and eighth floors of the commission's offices. Once the amendment to §22.71 becomes effective, all confidential materials shall be provided to the commission pursuant to the current rule, regardless of whether the proceeding was initiated prior to the effective date of the rule.

Reliant and AEP filed comments requesting that the proposed rule be modified to codify the commission's policy that a limited number of commission staff will handle the confidential material and that each staff person will sign an agreement not to open the sealed containers of confidential information. Reliant also provided a copy of the amended protective order in Docket Number 22355, *Application of Reliant Energy Incorporated for Approval of Unbundled Cost of Service Rate Pursuant to PURA §39.201 and Public Utility Commission Substantive Rule §25.344.* Reliant noted that it and the commission's Legal Division requested an amendment to the protective order in that proceeding to be consistent with the proposed practice. Reliant and AEP suggested that a similar protective order be adopted in future cases so that there will be continuity between the protective orders and the amended procedural rule.

Although the commission does not believe it is necessary to codify internal management or organization in it's procedural rules, it understands the parties' need for assurance that confidential material is being handled with the utmost care. The commission agrees to include language that staff who handle the delivery and securing of confidential material shall sign an agreement not to open the sealed containers, as long as the containers are properly marked pursuant to §22.71(d)(1). The commission appreciates Reliant's efforts in providing a modified protective order to assist with the transition in the commission's procedures for confidential material and finds that the protective order in Docket Number 22355 meets parties concerns as well as the amended requirements of §22.71. The commission supports using a similar protective order in other proceedings.

TXU commented that the term "filing materials made confidential by law" should be revised to "making available materials designated as confidential." TXU states that the types of materials that

may be designated as confidential are addressed in the commission's substantive rules and protective orders and should not be defined in this rule. TXU stated that any discussion concerning the appropriateness of the "confidential" designation should be properly handled within the docketed proceeding. TXU further suggested that the term "filing" should not be used when referring to confidential information as it implies that the commission's other "filing" requirements apply to confidential information and suggested alternative language.

The commission agrees and has modified the rule accordingly.

TXU commented that confidential materials are provided to the commission in at least two different situations: (1) in response to a discovery request, and (2) in accordance with commission filing package requirements prior to a control number being assigned. TXU stated that the proposed rule does not contemplate the second category and suggested that the language in paragraph (1) be modified to take this into consideration and to include a process to obtain a control number at the time of filing, so that the confidential materials may be clearly marked at the time they are provided to Central Records. TXU also requested clarification of whether the "cover letter" would be available to the public or remain with the confidential material.

The cover letters are kept in the file in Central Records and are available to the public. The cover letter helps to ensure a complete list of filings that have been made. Due to the volume of filings, a number can not be assigned immediately while the parties are waiting in line. Parties need to ensure that cover letters and containers for new applications are clearly marked with the identity of the filing party and the style of the proceeding. Central Records will fill in the control number as soon as it is available. The rule has been modified accordingly.

TXU suggested that the requirement to mark each page as "confidential" be modified so as to require each page be marked confidential "or in such a manner as is in accordance with the applicable protective order."

The commission agrees that some flexibility is needed in this area and has amended the rule to require the materials to have each page marked confidential ". . . or as required by the individual protective orders in each proceeding."

AEP commented that consideration should be made to designate a person in Central Records to be the recipient of confidential information and to formalize the process of handing off documents to the Legal Division to reduce the chances of error. AEP also commented that the commission should consider a separate procedure for information classified as "highly sensitive confidential information." AEP also requested clarification of the storage requirements for confidential material and that procedures for document retention and disposal should be thoroughly described.

Confidential material will be received by the filing clerk and turned over to the director of Central Records, or in the director's absence, the director's designee trained in the handling and management of confidential material. All confidential materials are stored in locked and secured areas on the seventh and eight floors. The commission finds that it is not necessary to add language to this effect in the rule. As previously stated, the commission finds that "highly sensitive confidential material" is a subset of confidential material and any additional requirements for protecting this material are found in the protective orders for each proceeding. Language has been added to §22.71 to clarify that confidential information shall be maintained and returned pursuant to the protective orders in each proceeding and/or the commission's records retention schedule as approved by the Texas State Library and Archives Commission.

§22.104(d)(5), Motions to intervene

AEP commented that to avoid potential conflict between paragraphs (4) and (5), paragraph (5) should be limited to those circumstances not covered in paragraph (4).

The commission agrees and has modified the rule accordingly.

§22.123, Appeal of an Interim Order and Motions for Reconsideration of Interim Orders Issued by the Commission

AEP believes this section could be improved by not only requiring the party to show the reasons why an order is unjustified or improper, but also show how the threshold issues in subsection (b)(1) are met. AEP also suggested language to clarify that interim orders are not subject to motions for rehearing prior to the issuance of a final order.

The commission agrees with AEP's suggested changes and has modified the proposed rule.

TXU suggested that subsection (b)(2) clarify the timing for filing a motion for consideration of an oral interim order by adding the language ". . . when no written order is to be issued."

The commission agrees and has made the change.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting these sections, the commission makes other minor grammatical and sentence structure modifications for the purpose of clarifying its intent and non-substantive modifications to conform to the proposed amendments to the Procedural Rules, Subchapters P, Q, and R.

SUBCHAPTER A. GENERAL PROVISIONS AND DEFINITIONS

16 TAC §22.1, §22.2

These amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998 & Supplement 2001) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 6, 2001.

TRD-200101346
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: March 26, 2001
Proposal publication date: November 10, 2000
For further information, please call: (512) 936-7308

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SUBCHAPTER B. THE ORGANIZATION OF THE COMMISSION

16 TAC §22.22

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998 & Supplement 2001) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 6, 2001.

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Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: March 26, 2001
Proposal publication date: November 10, 2000
For further information, please call: (512) 936-7308

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SUBCHAPTER C. CLASSIFICATION OF APPLICATIONS OR OTHER DOCUMENTS INITIATING A PROCEEDING

16 TAC §22.33, §22.35

These amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998 & Supplement 2001) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

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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Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
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Proposal publication date: November 10, 2000
For further information, please call: (512) 936-7308

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SUBCHAPTER D. NOTICE

16 TAC §22.51, §22.52

These amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998 & Supplement 2001) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

§22.51. Notice for Public Utility Regulatory Act, Chapter 36, Subchapters C - E; Chapter 51, §51.009; and Chapter 53, Subchapters C - E, Proceedings.

(a) Notice in a proceeding seeking a rate increase. In proceedings under PURA, Chapter 36, Subchapters C and E; Chapter 51, §51.009; or Chapter 53, Subchapters C and E involving the commission's original jurisdiction over a utility's proposed increase in rates, the applicant shall give notice in the following manner:

(1) Publication of notice. The applicant shall publish notice of its statement of intent to change rates in a conspicuous form and place at least once a week for four consecutive weeks prior to the effective date of the proposed rate change, in a newspaper having general circulation in each county containing territory affected by the proposed rate change. The published notice shall contain the following information:

(A) the effect the proposed change is expected to have on the revenues of the company for major rate proceedings, the change must be expressed as an annual dollar increase over adjusted test year revenues and as a percent increase over adjusted test year revenues;

(B) the effective date of the proposed rate change;

(C) the classes and numbers of utility customers affected by the rate change;

(D) a description of the service for which a change is requested;

(E) whenever possible, the established intervention deadline; and

(F) the following language: "Persons who wish to intervene in or comment upon these proceedings should notify the Public Utility Commission of Texas (commission) as soon as possible, as an intervention deadline will be imposed. A request to intervene or for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326. Further information may also be obtained by calling the Public Utility Commission at (512) 936-7120 or (888) 782-8477. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. The deadline for intervention in the proceeding is 45 days after the date the application was filed with the commission."

(2) Notice by mail. The applicant shall mail notice of its statement of intent to change rates to all of the applicant's affected customers. This notice may be mailed separately or may be mailed with customer billings. At the top of this notice, the following language shall be printed in prominent lettering: "Notice of Rate Change Request." The notice must meet the requirements of paragraph (1) of this subsection. Whenever possible, the established intervention deadline shall be included in the notice.

(3) Notice to municipalities. The applicant shall mail or deliver a copy of the statement of intent to the appropriate officer of each affected municipality at least 35 days prior to the effective date of the proposed rate change.

(b) Notice in PURA, Chapter 36, Subchapters C and E; Chapter 51, §51.009; or Chapter 53, Subchapters C and E proceeding seeking a rate decrease. In proceedings initiated pursuant to PURA, Chapter 36, Subchapters C and E; Chapter 51, §51.009; or Chapter 53, Subchapters C and E in which a rate reduction that does not involve a rate increase for any customer is sought, the applicant shall give notice in the following manner:

(1) Publication not required. The applicant may not be required to publish notice of its statement of intent to change rates in any newspaper when the utility is seeking to reduce rates for all affected customers.

(2) Notice by mail to affected customers. The applicant shall mail notice of the proposed rate decrease to all of the applicant's affected customers. This notice may be mailed separately or may be mailed with customer billings. At the top of this notice, the following language shall be printed in prominent lettering: "Notice of Rate Decrease Request." The notice shall contain the following information:

(A) the effect the proposed change is expected to have on the revenues of the applicant, expressed as an annual dollar decrease from adjusted test year revenues and as a percent decrease from adjusted test year revenues;

(B) the effective date of the proposed rate decrease;

(C) the classes and numbers of utility customers affected by the rate decrease;

(D) a description of the service for which a rate change is requested;

(E) whenever possible, the established intervention deadline; and

(F) the following language: "Persons who wish to intervene in or comment upon these proceedings should notify the Public Utility Commission of Texas (commission) as soon as possible, as an intervention deadline will be imposed. A request to intervene or for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326. Further information may also be obtained by calling the Public Utility Commission at (512) 936-7120 or (888) 782-8477. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. The deadline for intervention in the proceeding is 45 days after the date the application was filed with the commission."

(3) Notice to municipalities. The applicant shall mail or deliver a copy of the statement of intent to the appropriate officer of each affected municipality at least 35 days prior to the effective date of the proposed rate decrease.

(c) Notice in PURA, Chapter 36, Subchapter D; or Chapter 53, Subchapter D rate investigation. In an investigation into a utility's rates pursuant to PURA, Chapter 36, Subchapter D; or Chapter 53, Subchapter D, the presiding officer may require the utility under investigation to provide reasonable notice to its customers and affected municipalities. Reasonable notice may include notice of the type set forth in subsection (a) of this section.

(d) Affidavits regarding notice. The applicant shall submit affidavits attesting to the provision of the notice required or ordered pursuant to this section within a reasonable time and by such date as may be established by the presiding officer.

(1) Publisher's affidavits. Proof of publication of notice shall be made in the form of a publisher's affidavit which shall specify the newspaper(s) in which the notice was published; the county or counties in which the newspaper(s) is or are of general circulation; and the dates upon which the notice was published.

(2) Affidavit for notice to affected customers. If notice to affected customers has been provided, an affidavit attesting to the provision of notice to affected customers shall specify the dates of the provision of such notice; the means by which such notice was provided; and the affected customer classes to which such notice was provided.

(3) Affidavit for notice to municipality. An affidavit attesting to the provision of notice to municipalities shall specify the dates of the provision of notice and the identity of the individual cities to which such notice was provided.

§22.52. Notice in Licensing Proceedings.

(a) Notice in electric licensing proceedings. In all electric licensing proceedings except minor boundary changes, the applicant shall give notice in the following ways:

(1) Applicant shall publish notice of the applicant's intent to secure a certificate of convenience and necessity in a newspaper having general circulation in the county or counties where a certificate of convenience and necessity is being requested, once each week for two consecutive weeks beginning with the week after the application is filed with the commission. This notice shall identify in general terms the type of facility if applicable, and the estimated expense associated with the project.

(A) The notice shall also include the following statement in the first paragraph: "Persons with questions about this project should contact (name of utility contact) at (utility contact telephone number). Persons who wish to intervene in the proceeding or comment upon action sought, should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the Public Utility Commission at (512) 936-7120 or (888) 782-8477. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. The deadline for intervention in the proceeding is (date 45 days after the date the application was filed with the commission) and a letter requesting intervention should be received by the commission by that date."

(B) The notice shall further describe in clear, precise language the geographic area for which the certificate is being requested and the location of all preferred and alternative routes of the proposed facility. This description shall refer to area landmarks, including but not limited to geographic landmarks, municipal and county boundary lines, streets, roads, highways, railroad tracks, and any other readily identifiable points of reference, unless no such references exist for the geographic area.

(C) The notice shall state a location where a map may be reviewed and from whom a copy of the map may be obtained. The map shall clearly and conspicuously illustrate the location of the area for which the certificate is being requested including the preferred location and any alternative locations of the proposed facility, and shall reflect area landmarks, including but not limited to geographic landmarks, municipal and county boundary lines, streets, roads, highways, railroad tracks, and any other readily identifiable points of reference, unless no such references exist for the geographic area.

(D) Proof of publication of notice shall be in the form of a publisher's affidavit which shall specify the newspaper(s) in which the notice was published, the county or counties in which the newspaper(s) is or are of general circulation the dates upon which the notice was published, and a copy of the notice as published. Proof of publication shall be submitted to the commission as soon as available.

(2) Applicant shall, upon filing an application, also mail notice of its application to municipalities within five miles of the requested territory or facility, neighboring utilities providing the same utility service within five miles of the requested territory or facility, and the county government(s) of all counties in which any portion of the proposed facility or requested territory is located. The notice shall contain the information as set out in paragraph (1) of this subsection and a map as described in paragraph (1) of this subsection. An affidavit attesting to the provision of notice to municipalities, utilities, and counties shall specify the dates of the provision of notice and the identity of the individual municipalities, utilities, and counties to which such notice was provided. Before final approval of any modification in the applicant's proposed route(s), applicant shall provide notice as required under this paragraph to municipalities, utilities and counties affected by the modification which have not previously received notice. The notice of modification shall state such entities will have 20 days to intervene.

(3) Applicant shall, upon filing an application, mail notice of its application to the owners of land, as stated on the current county tax roll(s), who would be directly affected by the requested certificate, including the preferred location and any alternative location of the proposed facility. For purposes of this paragraph, land is directly affected if an easement would be obtained over all or any portion of it, or if it contains a habitable structure that would be within 200 feet of the proposed facility.

(A) The notice must contain all information required in paragraph (1) of this subsection and contain the following statement in the first paragraph of the notice printed in bold-face type: "Your land may be directly affected in this proceeding. If the preferred route or one of the alternative routes requested under the certificate is approved by the Public Utility Commission of Texas, the utility will have the right to build a facility which may directly affect your land. This proceeding will not determine the value of your land or the value of an easement if one is needed by the utility to build the facility. If you have questions about this project, you should contact (name of utility contact) at (utility contact telephone number). If you wish to participate in this proceeding by becoming a party or to comment upon action sought, you should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the Public Utility Commission at (512) 936-7120 or (888) 782-8477. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. If you wish to participate in this proceeding by becoming a party, the deadline for intervention in the proceeding is (date 45 days after the date the application was filed with the commission), and you must send a letter requesting intervention to the commission which is received by that date."

(B) The notice must include a map as described in paragraph (1) of this subsection. Applicants may provide either a map of the entire proposed and alternative routes or maps for each county.

(C) Before final approval of any modification in the applicant's proposed route(s), applicant shall provide notice as required under subparagraphs (A) and (B) of this paragraph to all directly affected landowners who have not already received such notice.

(D) Proof of notice may be established by an affidavit affirming that the applicant sent notice by first-class mail to each of the persons listed as an owner of directly affected land on the current county tax roll(s). The proof of notice shall include a list of all landowners to whom notice was sent and a statement of whether any formal contact related to the proceeding between the utility and the landowner other than the notice has occurred. This proof of notice shall be filed with the commission no later than 20 days after the filing of the application.

(E) Upon the filing of proof of notice as described in subparagraph (D) of this paragraph, the lack of actual notice to any individual landowner will not in and of itself support a finding that the requirements of this paragraph have not been satisfied. If, however, the utility finds that an owner of directly affected land has not received notice, it shall immediately provide notice in the same form described in subparagraphs (A) and (B) of this paragraph, except that the notice shall state that the person has fifteen days to intervene. The utility shall immediately notify the commission that such supplemental notice has been provided.

(4) The utility shall hold at least one public meeting prior to the filing of its licensing application if 25 or more persons would be entitled to receive direct mail notice of the application.

(5) Failure to provide notice in accordance with this section shall be cause for day-for-day extension of deadlines for intervention and for commission action on the application.

(6) Upon entry of a final, appealable order by the commission approving an application, the utility shall provide notice to all owners of land who previously received direct notice. Proof of notice under this subsection shall be provided to the commission's staff.

(A) If the owner's land is directly affected by the approved route, the notice shall consist of a copy of the final order.

(B) If the owner's land is not directly affected by the approved route, the notice shall consist of a brief statement that the land is no longer the subject of a pending proceeding and will not be directly affected by the facility.

(b) Notice in telephone licensing proceedings. In all telephone licensing proceedings, except minor boundary changes, applications for a certificate of operating authority, or applications for a service provider certificate of operating authority, the applicant shall give notice in the following ways:

(1) Applicants shall publish in a newspaper having general circulation in the county or counties where a certificate of convenience and necessity is being requested, once each week for two consecutive weeks, beginning the week after the application is filed, notice of the applicant's intent to secure a certificate of convenience and necessity. This notice shall identify in general terms the types of facilities, if applicable, the area for which the certificate is being requested, and the estimated expense associated with the project. Whenever possible, the notice should state the established intervention deadline. The notice shall also include the following statement: "Persons with questions about this project should contact (name of utility contact) at (utility contact telephone number). Persons who wish to intervene in the proceeding or comment upon action sought, should contact the Public Utility Commission, P.O. Box 13326, Austin, Texas 78711-3326, or call the Public Utility Commission at (512) 936-7120 or (888) 782-8477. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. The deadline for intervention in the proceeding is (date 70 days after the date the application was filed with the commission) and you must send a letter requesting intervention to the commission which is received by that date." Proof of publication of notice shall be in the form of a publisher's affidavit, which shall specify the newspaper(s) in which the notice was published; the county or counties in which the newspaper(s) is or are of general circulation; and the dates upon which the notice was published. Proof of publication shall be submitted to the commission as soon as available.

(2) Applicant shall also mail notice of its application, which shall contain the information as set out in paragraph (1) of this subsection, to cities and to neighboring utilities providing the same service within five miles of the requested territory or facility.

Applicant shall also provide notice to the county government of all counties in which any portion of the proposed facility or territory is located. The notice provided to county governments shall be identical to that provided to cities and to neighboring utilities. An affidavit attesting to the provision of notice to counties shall specify the dates of the provision of notice and the identity of the individual counties to which such notice was provided.

(3) Failure to provide notice in accordance with this section shall be cause for day-for-day extension of deadlines for intervention.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. PLEADINGS AND OTHER DOCUMENTS

16 TAC §§22.71, 22.72, 22.75

These amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998 & Supplement 2001) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

§22.71. Filing of Pleadings, Documents and Other Materials.

(a) Applicability. This section applies to all pleadings as defined in §22.2 of this title (relating to Definitions) and the following documents:

(1) All documents filed relating to a rulemaking proceeding;

(2) Applications filed pursuant to the Public Utility Regulatory Act (PURA) or the commission's substantive rules in Chapter 25 and 26 of this title.

(3) Letters or memoranda relating to any item with a control number;

(4) Reports pursuant to PURA, commission rules or request of the commission.

(5) Discovery requests and responses.

(b) File with the commission filing clerk. All pleadings and documents required to be filed with the commission shall be filed with the commission filing clerk, and shall state the control number on the heading, if known.

(c) Number of items to be filed. Unless otherwise provided by this chapter or ordered by the presiding officer, the number of copies to be filed, including the original, are as follows:

(1) applications, petitions, and complaints: ten copies;

(2) applications for expanded local calling: seven copies;

(3) applications for certificates of operating authority (COAs) or service provider certificates of operating authority (SPCOA), amendments to COA or SPCOA applications, and all pleadings or documents related to the applications for COAs or SPCOAs: seven copies;

(4) applications for certification of retail electric providers or for registration of power generation companies, self-generators or aggregators: seven copies;

(5) tariffs:

(A) for review under §22.33 of this title (relating to Tariff Filings), including discovery responses for tariffs filed under §22.33 of this title: six copies;

(B) related to docketed proceedings: ten copies; and

(C) related to discovery responses in docketed proceedings: four copies;

(6) exceptions, replies, interim appeals, requests for oral argument, and other documents addressed to the commissioners: 19 copies;

(7) testimony and briefs: 11 copies, except that in contested cases transferred to the State Office of Administrative Hearings, parties must file 13 copies of testimony and briefs;

(8) rate, fuel factor, and fuel reconciliation filing packages: 11 copies;

(9) applications for certificates of convenience and necessity for transmission lines or boundary changes, certificate of convenience and necessity exemptions, and service area exceptions: seven copies;

(10) discovery requests: five copies;

(11) discovery responses: four copies;

(12) reports filed pursuant to the Public Utility Regulatory Act or the commission's Substantive Rules: four;

(13) comments to proposed rulemakings: 16; and

(14) other pleadings and documents: ten copies, except that in contested cases transferred to the State Office of Administrative Hearings (SOAH), parties must file 12 copies of other pleadings and documents.

(d) Confidential material:

(1) A party providing materials designated as confidential shall deliver them in an enclosed, sealed and labeled container, accompanied by an explanatory cover letter. The cover letter shall identify the control number, if available, and style of the proceeding and explain the nature of the sealed materials. The container shall identify the control number, if available, style of the proceeding, and name of the submitting party, and be marked "CONFIDENTIAL & UNDER SEAL" in bold print at least one inch in size and include any other markings as required by the individual protective orders in each proceeding. Each page of the confidential material shall be marked "confidential" or as required by the individual protective orders in each proceeding.

(2) Unless otherwise provided by this chapter or order of the presiding officer the number of copies of confidential material delivered to the commission shall be as follows:

(A) related to arbitrations: one copy;

(B) related to discovery: two copies;

(C) related to contested cases transferred to the SOAH: two copies to Central Records and one copy delivered directly to SOAH;

(D) related to any other proceeding: two copies; and

(E) related to request for proposal for goods and/or services: one copy

(3) Unless otherwise provided by this chapter or order of the presiding officer, all confidential material shall be delivered to the commission's Central Records. All commission employees receiving confidential materials through Central Records, or otherwise handling or routing confidential materials for any purpose, shall sign an agreement not to open any sealed containers marked pursuant to paragraph (1) of this subsection. Confidential material shall not be filed with the commission electronically unless specific arrangements are made and agreed to by the parties involved on a case-by-case basis.

(A) Material related to arbitrations. Central Records will route the one copy to the commission's Policy Development Division.

(B) Material related to contested cases transferred to SOAH and other docketed proceedings. Central Records will maintain one file copy, that is not accessible to the public or commission staff. Central Records will route the additional copy to the commission's Legal Division. Commission staff who have signed an agreement to abide by the protective order in the proceeding may view the copy of the confidential material maintained by the commission's Legal Division. The party who provides the confidential material will be responsible for delivering one copy of confidential materials not related to discovery to SOAH.

(C) Request for proposal for goods and/or services. Confidential material related to a request for proposal for goods and/or services will be delivered to the commission's General Counsel or the General Counsel's authorized representative.

(4) Confidential materials shall be maintained, destroyed and/or returned to the providing party pursuant to the individual protective orders in each proceeding and the commissions Records Retention Schedule as approved by the Texas State Library and Archives Commission.

(e) Receipt by the commission. Pleadings and any other documents shall be deemed filed when the required number of copies and the electronic copy, if required, in conformance with §22.72 of this title (relating to Formal Requisites of Pleadings and Documents to be Filed with the Commission) are presented to the commission filing clerk for filing. The commission filing clerk shall accept pleadings and documents if the person seeking to make the filing is in line by the time the pleading or document is required to be filed.

(f) No filing fee. No filing fee is required to file any pleading or document with the commission.

(g) Office hours of the commission filing clerk. With the exception of open meeting days, for the purpose of filing documents, the office hours of the commission filing clerk are from 9:00 a.m. to 5:00 p.m., Monday through Friday, on working days.

(1) On open meeting days, the commissioners and the Policy Development Division may file items related to the open meeting on behalf of the commissioners between the hours of 8:00 a.m. and 9:00 a.m. The commissioners and the Policy Development Division shall provide the filing clerk with an extra copy of all documents filed pursuant to this paragraph for public access.

(2) Central Records will open at 8:00 a.m. on open meeting days. With the exception of paragraph (1) of this subsection, no filings will be accepted between the hours of 8:00 a.m. and 9:00 a.m.

(h) Filing a copy or facsimile copy in lieu of an original. Subject to the requirements of subsection (c) of this section and §22.72 of this title, a copy of an original document or pleading, including a copy that has been transmitted through a facsimile machine, may be filed, so long as the party or the attorney filing such copy maintains the original for inspection by the commission or any party to the proceeding.

(i) Filing deadline. All documents shall be filed by 3:00 p.m. on the date due, unless otherwise ordered by the presiding officer.

(j) Filing deadlines for documents addressed to the commissioners.

(1) Except as provided in paragraph (2) of this subsection, all documents from parties addressed to the commissioners relating to any proceeding that has been placed on the agenda of an open meeting shall be filed with the commission filing clerk no later than seven days prior to the open meeting at which the proceeding will be considered provided that no party is prejudiced by the timing of the filing of the documents. Documents that are not filed before the deadline and do not meet one of the exceptions in paragraph (2) of this subsection, will be considered untimely filed, and may not be reviewed by the commissioners in their open meeting preparations.

(2) The deadline established in paragraph (1) of this subsection does not apply if:

(A) The documents have been specifically requested by one of the commissioners;

(B) The parties are negotiating and such negotiation requires the late filing of documents; or

(C) Good cause for the late filing exists. Good cause must clearly appear from specific facts shown by written pleading that compliance with the deadline was not reasonably possible and that failure to meet the deadline was not the result of the negligence of the party. The finding of good cause lies within the discretion of the commission.

(3) Documents filed under paragraph (2) of this subsection shall be served on all parties by hand delivery, facsimile transmission, or by overnight courier delivery.

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SUBCHAPTER F. PARTIES

16 TAC §§22.101 - 22.105

These amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998 & Supplement 2001) (PURA) which provides the

commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

§22.104. Motions to Intervene.

(a) Necessity for filing motion to intervene. Applicants, complainants, and respondents, as defined in §22.2 of this title (relating to Definitions), are necessary parties to proceedings which they have initiated or which have been initiated against them, and need not file motions to intervene in order to participate as parties in such proceedings.

(b) Time for filing motion. Motions to intervene shall be filed within 45 days from the date an application is filed with the commission, unless otherwise provided by statute, commission rule, or order of the presiding officer. The motion shall be served upon all parties to the proceeding and upon all persons that have pending motions to intervene.

(c) Rights of persons with pending motions to intervene. Persons who have filed motions to intervene shall have all the rights and obligations of a party pending the presiding officer's ruling on the motion to intervene.

(d) Late intervention.

(1) A motion to intervene that was not timely filed may be granted. In acting on a late filed motion to intervene, the presiding officer shall consider:

(A) any objections that are filed;

(B) whether the movant had good cause for failing to file the motion within the time prescribed;

(C) whether any prejudice to, or additional burdens upon, the existing parties might result from permitting the late intervention;

(D) whether any disruption of the proceeding might result from permitting late intervention; and

(E) whether the public interest is likely to be served by allowing the intervention.

(2) The presiding officer may impose limitations on the participation of an intervenor to avoid delay and prejudice to the other parties.

(3) Except as otherwise ordered, an intervenor shall accept the procedural schedule and the record of the proceeding as it existed at the time of filing the motion to intervene.

(4) In an electric licensing proceeding in which a utility did not provide direct notice to an owner of land directly affected by the requested certificate, late intervention shall be granted as a matter of right to such a person, provided that the person files a motion to intervene within 15 days of actually receiving the notice. Such a person should be afforded sufficient time to prepare for and participate in the proceeding.

(5) Late intervention after Proposal for Decision (PFD) or Proposed Order (PO) issued. For late interventions, other than those pursuant to paragraph (4) of this subsection, the procedures in subparagraphs (A) - (B) of this paragraph apply:

(A) Agenda ballot. Upon receipt of a motion to intervene after the PFD or PO has been issued, the Policy Development Division shall send separate ballots to each commissioner to determine whether the motion to intervene will be considered at an open meeting. The Policy Development Division shall notify the parties by letter whether a commissioner by individual ballot has added the motion to intervene to an open meeting agenda, but will not identify the requesting commissioner(s).

(B) Denial. If after five working days of the filing of a motion to intervene, which has been filed after the PFD or PO has been issued, no commissioner has by agenda ballot, placed the motion on the agenda of an open meeting, the motion is deemed denied. If any commissioner has balloted in favor of considering the motion, it shall be placed on the agenda of the next regularly scheduled open meeting or such other meeting as the commissioners may direct by the agenda ballot. In the event two or more commissioners vote to consider the motion, but differ as to the date the motion shall be heard, the motion shall be placed on the latest of the dates specified by the ballots. The time for ruling on the motion shall expire three days after the date of the open meeting, unless extended by action of the commission.

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. PREHEARING PROCEEDINGS

16 TAC §§22.123, 22.126, 22.127

These amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998 & Supplement 2001) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

§22.123. Appeal of an Interim Order and Motions for Reconsideration of Interim Order Issued by the Commission.

(a) Appeal of an interim order.

(1) Availability of appeal. Appeals are available for any order of the presiding officer that immediately prejudices a substantial or material right of a party, or materially affects the course of the hearing, other than evidentiary rulings. Interim orders shall not be subject to exceptions or application for rehearing prior to issuance of a proposal for decision.

(2) Procedure for appeal. If the presiding officer intends to reduce an oral ruling to a written order, the presiding officer shall so indicate on the record at the time of the oral ruling and shall promptly issue the written order. Any appeal to the commission from an interim order shall be filed within ten days of the issuance of the written order or the appealable oral ruling when no written order is to be issued.

The appeal shall be served on all parties by hand delivery, facsimile transmission, or by overnight courier delivery.

(3) Contents. An appeal shall specify the reasons why the interim order is unjustified, improper, or immediately prejudices a substantial or material right of a party or materially affects the course of the hearing.

(4) Responses. Any response to an appeal shall be filed within five working days of the filing of the appeal.

(5) Motion for stay. Pending a ruling by the commissioners, the presiding officer may, upon motion, grant a stay of the interim order. A motion for a stay shall specify the basis for a stay. Good cause shall be shown for granting a stay. The mere filing of an appeal shall not stay the interim order or the procedural schedule.

(6) Agenda ballot. Upon filing of an appeal, the Policy Development Division shall send separate ballots to each commissioner to determine whether they will consider the appeal at an open meeting. The Policy Development Division shall notify the parties by letter whether a commissioner by individual ballot has added the appeal to an open meeting agenda, but will not identify the requesting commissioner(s).

(7) Denial or granting of appeal.

(A) If after ten days of the filing of an appeal, no commissioner has, by agenda ballot, placed the appeal on the agenda of an open meeting, the appeal is deemed denied.

(B) If any commissioner has balloted in favor of considering the appeal, it shall be placed on the agenda of the next regularly scheduled open meeting or such other meeting as the commissioner may direct by the agenda ballot. In the event two or more commissioners vote to consider the appeal, but differ as to the date the appeal shall be heard, the appeal shall be placed on the latest of the dates specified by the ballots. The time for ruling on the appeal shall expire three days after the date of the meeting, unless extended by action of the commission.

(8) Reconsideration of appeal by presiding officer. The presiding officer may treat an appeal as a motion for reconsideration and may withdraw or modify the order under appeal prior to a commission decision on the appeal. The presiding officer shall notify the commission of its decision to treat the appeal as a motion for reconsideration.

(b) Motion for reconsideration of interim order issued by the commission.

(1) Availability of motion for reconsideration. Motions are available for any interim order of the commission that immediately prejudices a substantial or material right of a party, or materially affects the course of the hearing, other than evidentiary rulings. Interim orders shall not be subject to exceptions prior to issuance of a proposal for decision or motions for rehearing prior to the issuance of a final order.

(2) Procedure for motion for reconsideration. If the commission does not intend to reduce an oral ruling to a written order, the commission shall so indicate on the record at the time of the oral ruling. A motion for reconsideration of an interim order issued by the commission shall be filed within five workings days of the issuance of the written interim order or the oral interim ruling. The motion for reconsideration shall be served on all parties by hand delivery, facsimile transmission, or by overnight courier delivery.

(3) Content. A motion for reconsideration shall specify the reasons why the interim order is unjustified or improper.

(4) Responses. Any response to a motion for reconsideration shall be filed within three working days of the filing of the motion.

(5) Agenda ballot. Upon filing a motion for reconsideration, the Policy Development Division shall send separate ballots to each commissioner to determine whether they will consider the motion at an open meeting. The Policy Development Division shall notify the parties by letter whether a commissioner by individual ballot has added the motion to an open meeting agenda, but will not identify the requesting commissioner(s).

(6) Denial or granting of motion.

(A) If after five working days of the filing of a motion no commissioner has, by agenda ballot, placed the motion on the agenda for an open meeting, the motion is deemed denied.

(B) If any commissioner has balloted in favor of considering the motion, it shall be placed on the agenda for the next regularly scheduled open meeting or such other meeting as the commissioner may direct by the agenda ballot. In the event two or more commissioners vote to consider the motion, but differ as to the date the motion shall be heard, the motion shall be placed on the latest of the dates specified by the ballots. The time for ruling on the motion shall expire three days after the open meeting, unless extended by action of the commission.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER H. DISCOVERY PROCEDURES

16 TAC §22.143

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998 & Supplement 2001) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

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SUBCHAPTER I. SANCTIONS

16 TAC §22.161

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998 & Supplement 2001) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

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SUBCHAPTER J. SUMMARY PROCEEDINGS

16 TAC §22.181

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998 & Supplement 2001) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

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SUBCHAPTER K. HEARINGS

16 TAC §22.203

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998 & Supplement 2001) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

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SUBCHAPTER L. EVIDENCE AND EXHIBITS IN CONTESTED CASES

16 TAC §22.226

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998 & Supplement 2001) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

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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Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7308

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SUBCHAPTER M. PROCEDURES AND FILING REQUIREMENTS IN PARTICULAR COMMISSION PROCEEDINGS

16 TAC §§22.241 - 22.244

These amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998 & Supplement 2001) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

§22.242. Complaints.

(a) Records of complaints. Any affected person may complain to the commission, either in writing or by telephone, setting forth any act or thing done or omitted to be done by any electric utility or telecommunications utility in violation or claimed violation of any law which the commission has jurisdiction to administer or of any order, ordinance, rule, or regulation of the commission. The commission staff may request a complaint made by telephone be put in writing if necessary to complete investigation of the complaint. The commission shall keep information about each complaint filed with the commission. The commission shall retain the information pursuant to the agency's records retention schedule as approved by the Texas State Library and Archives Commission. The information shall include:

(1) the date the complaint is received;

(2) the name of the complainant;

(3) the subject matter of the complaint;

(4) a record of all persons contacted in relation to the complaint;

(5) a summary of the results of the review or investigation of the complaint; and

(6) for complaints for which the commission took no action, an explanation of the reason the complaint was closed without action.

(b) Access to complaint records. The commission shall keep a file about each written complaint filed with the commission that the commission has the authority to resolve. The commission shall provide to the person filing the complaint and to the persons or entities complained about the commission's policies and procedures pertaining to complaint investigation and resolution. The commission, at least quarterly and until final disposition of the complaint, shall notify the person filing the complaint and each person or entity complained of about the status of the complaint unless the notice would jeopardize an undercover investigation.

(c) Informal resolution required in certain cases. A person who is aggrieved by the conduct of an electric utility or telecommunications utility or other person must present a complaint to the commission for informal resolution before presenting the complaint to the commission.

(1) Exceptions. A complainant may present a formal complaint to the commission, without first referring the complaint for informal resolution, if:

(A) the complainant is commission staff, , the Office of Public Utility Counsel, or any city;

(B) the complaint is filed by a qualifying facility and concerns rates paid by an electric utility for power provided by the qualifying facility, the terms and conditions for the purchase of such power, or any other matter that affects the relations between an electric utility and a qualifying facility;

(C) the complaint is filed by a person alleging that an electric utility or a telecommunications utility has engaged in anti-competitive practices; or

(D) the complaint has been the subject of a complaint proceeding conducted by a city.

(2) For any complaint that is not listed in paragraph (1) of this subsection, the complainant may submit to the commission a written request for waiver of the requirement for attempted informal resolution. The complainant shall clearly state the reasons informal resolution is not appropriate. The commission staff may grant the request for good cause.

(d) Termination of informal resolution. The commission staff shall attempt to informally resolve all complaints within 35 days of the date of receipt of the complaint. The commission staff shall notify, in writing, the complainant and the person against whom the complainant is seeking relief of the status of the dispute at the end of the 35-day period. If the dispute has not been resolved to the complainant's satisfaction within 35 days, the complainant may present the complaint to the commission. The commission staff shall notify the complainant of the procedures for formally presenting a complaint to the commission.

(e) Formal Complaint. If an attempt at informal resolution fails, or is not required under subsection (c) of this section, the complainant may present a formal complaint to the commission.

(1) Requirement to present complaint concerning electric utility to a city. If a person receives electric utility service or has applied to receive electric utility service within the limits of a city that has original jurisdiction over the electric utility providing service or requested to provide service, the person must present any complaint concerning the electric utility to the city before presenting the complaint to the commission.

(A) The person may present the complaint to the commission after:

(i) the city issues a decision on the complaint; or

(ii) the city issues a statement that it will not consider the complaint or a class of complaints that includes the person's complaint.

(B) If the city does not act on the complaint within 30 days, the commission may send the city a letter requesting that the city act on the complaint. If the city does not respond or act within 30 days from the date of the letter, the complaint shall be deemed denied by the city and the commission shall consider the complaint.

(2) The commission staff may permit a complainant to cure any deficiencies under this subsection and may waive any of the requirements of this subsection for good cause, if the waiver will not materially affect the rights of any other party. A formal complaint shall include the following information:

(A) the name of the complainant or complainants;

(B) the name of the complainant's representative, if any;

(C) the address, telephone number, and facsimile transmission number, if available, of the complainant or the complainant's representative;

(D) the name of the electric utility or telecommunications utility or other person against whom the complainant is seeking relief;

(E) if the complainant is seeking relief against an electric utility, a statement of whether the complaint relates to service that the complainant is receiving within the limits of a city;

(F) if the complainant is seeking relief against an electric utility within the limits of a city, a description of any complaint proceedings conducted by the city, including the outcome of those proceedings;

(G) a statement of whether the complainant has attempted informal resolution through the commission staff and the date on which the informal resolution was completed or the time for attempting the informal resolution elapsed;

(H) a description of the facts that gave rise to the complaint; and

(I) a statement of the relief that the complainant is seeking.

(f) Copies to be provided. A complainant shall file the required number of copies of the formal complaint, pursuant to §22.71 of this title (relating to Filing of Pleadings, Documents, and Other Materials). A complainant shall provide a copy of the formal complaint to the person from whom relief is sought.

(g) Docketing of complaints. Any complaint that substantially complies with the requirements of this section shall be docketed.

(h) Continuation of service during processing of complaint. In any case in which a formal complaint has been filed and an allegation is made that an electric utility or a telecommunications utility or other person is threatening to discontinue a customer's service, the presiding officer may, after notice and opportunity for hearing, issue an order requiring the electric utility or telecommunications utility or other person to continue to provide service during the processing of the complaint. The presiding officer may issue such an order for good cause, on such terms as may be reasonable to preserve the rights of the parties during the processing of the complaint.

(i) List of cities without regulatory authority. The commission shall maintain and make available to the public a list of the municipalities that do not have exclusive original jurisdiction over all electric rates, operations, and services provided by an electric utility within its city or town limits.

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 N. DECISION AND ORDERS

16 TAC §22.262, §22.264

These amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998 & Supplement 2001) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

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SUBCHAPTER O. RULEMAKING

16 TAC §22.281

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998 & Supplement 2001) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 22. PRACTICE AND PROCEDURE

SUBCHAPTER L. EVIDENCE AND EXHIBITS IN CONTESTED CASES

16 TAC §22.225

The Public Utility Commission of Texas (commission) adopts an amendment to §22.225 relating to Written Testimony and Accompanying Exhibits with no changes to the proposed text as published in the December 22, 2000 *Texas Register* (25 TexReg 12558). This amendment is adopted under Project Number 22870.

The amendment is necessary to:

(1) Remove the reference to the position of "general counsel" as required prior to September 1, 1999 by the Public Utility Regulatory Act (PURA) §12.101(2). The statutory requirement for a general counsel was removed from the Public Utility Regulatory Act (PURA) by Acts 1999, 76th Legislature, chapter 405, §61(1), effective September 1, 1999. Any references to "general counsel" in the Procedural Rules as proposed now refer to the General Counsel who oversees the administrative functions of the agency, not the statutory functions as previously required by PURA;

(2) Add a requirement that utilities file written testimony and exhibits supporting their application contemporaneous with the filing of an application for construction of a transmission facility that has been designated as critical to the reliability of the Electric Reliability Council of Texas (ERCOT) system and is to be considered on an expedited basis. This requirement will allow commission staff and affected landowners sufficient time to review the evidence prior to a hearing or commission decision; and

(3) Clarify and correct references to other commission rules.

The commission received one comment on the proposed amendment from TXU Electric Company (TXU). TXU commented that additional issues not addressed in the applicant's prefiled testimony and exhibits may be raised by an intervenor or by the commission and included in the list of issues to be addressed at hearing as part of an Order of Referral and/or Preliminary Order. TXU proposed adding language to new paragraph (8) stating that nothing in the proposed rule shall prohibit the applicant from filing supplemental direct testimony addressing topics in a preliminary order that were not previously addressed in the applicant's direct testimony.

The commission concludes that the additional language proposed by TXU is unnecessary and inappropriate. The commission notes that the proposed rule mirrors the filing requirements for a major rate case and the commission is not aware of the problem described by TXU ever arising in that context. Instead, at new paragraph (10), the proposed rule contemplates additional testimony being filed at the discretion of the presiding officer. Finally, should specific directions to address additional issues be necessary, such directions could be incorporated into the Order of Referral and/or Preliminary Order itself.

All comments, including any not specifically referenced herein, were fully considered by the commission.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998, Supplement 2001) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 14.052, 39.151, 39.152 and 39.155.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER K. RELATIONSHIPS WITH AFFILIATES

16 TAC §25.275

The Public Utility Commission of Texas (commission) adopts new §25.275, relating to a Code of Conduct for Municipally Owned Utilities and Electric Cooperatives Engaged in Competitive Activities, with changes to the proposed text as published in the December 1, 2000, *Texas Register* (25 TexReg 11811). This new section is adopted under Project Number 22361. The new rule is necessary to implement the Public Utility Regulatory Act, Texas Utilities Code Annotated §39.157(e) (Vernon 1998, Supplement 2001) (PURA) as it relates to adopting a code of conduct for municipally owned utilities (MOUs) and electric cooperatives (COOPs) once they decide to implement retail choice and begin providing service outside their certificated areas. PURA §39.157(e) directs the commission to establish a code of conduct that must be observed by MOUs, COOPs, and their affiliates to protect against anticompetitive practices, and requires that the code of conduct be consistent with PURA Chapters 40 and 41 and not be more restrictive than the rules adopted for transmission and distribution (T&D) utilities under PURA §39.157(d).

Project Number 22361 was opened on March 31, 2000. As part of the drafting process, commission staff conducted workshops on August 16, 2000 and October 17, 2000 in Austin to receive input from potentially affected persons. Written comments from a number of interested parties were submitted in connection with both of these workshops and commission staff attempted to find areas of agreement among the parties during these workshops. The commission considered the draft rule for publication at the November 16, 2000 open meeting.

The commission received written comments on the proposed new section on January 2, 2001, from TXU Electric-From the Perspective of a Future TXU Retail Electric Provider (TXU), the City of Denton (Denton), Brazos Electric Power Cooperative, Inc. (Brazos), and jointly from Texas Public Power Association and Texas Electric Cooperatives (TPPA/TEC). On January 16, 2001, the commission received reply comments from TXU, Denton, and TPPA/TEC.

Section 25.275, as published in the *Texas Register* on December 1, 2000, establishes broad safeguards to govern the interaction between the transmission and distribution business unit (TDBU) of an MOU or a COOP and its affiliates. The proposed section sets rules and enforcement procedures to govern transactions between the TDBU and its affiliates to avoid potential anticompetitive practices such as cross-subsidization between regulated and competitive activities. The proposed rule also establishes certain reporting requirements for MOUs and COOPs.

Denton specifically objected to the proposed rule because it required an MOU/COOP to functionally separate and create a TDBU. Denton argued that PURA §40.055(a)(2) and §41.055(2) give the governing bodies of MOU/COOPs the discretion to determine whether to unbundle any energy-related activities and, if they choose to unbundle, whether to do so structurally or functionally. Accordingly, staff proposed an additional subsection (o) to the published rule, which includes the same safeguards to protect against anticompetitive activities, but allows flexibility for the MOU/COOP to decide how to meet those safeguards without having to create a functionally separate TDBU.

On January 22, 2001, a public hearing on the proposed rule with subsection (o) was held at the commission's offices and

representatives from TPPA, TEC, Denton, and Brazos provided oral comments. On January 24, 2001, the commission received supplemental written comments on subsection (o) from Brazos, Denton, and TXU. On January 26, 2001, the commission received supplemental reply comments on subsection (o) from TPPA/TEC, Denton, TXU, and Reliant Energy HL&P (Reliant).

General Comments.

Denton commented that the decisions by MOUs or COOPs about whether to compete in the retail electric market and the form under which they may compete are given by PURA exclusively to the governing bodies of the MOU/COOPs. Denton further noted that the commission's jurisdiction over MOUs and COOPs is strictly limited by PURA and that neither MOUs nor COOPs are required to unbundle their energy-related functions in order to engage in retail competition. Denton argued that MOUs are very different from investor owned utilities (IOUs) in their ownership and governance and that MOUs generally pale in size to IOUs. With regard to MOUs, Denton noted that PURA provides that if an MOU chooses to unbundle, it may further choose whether to do so structurally or functionally. Also, Denton argued that the code of conduct should apply only to anticompetitive activities and to affiliate activities limited to structurally unbundled affiliates. Denton commented that any provisions in the MOU code of conduct that are not related to the prohibition of anticompetitive practices are not authorized by PURA. It noted that requirements that force a *de facto* unbundling are not only illegal, but also deter an MOU from choosing to compete because it would increase the operating costs of the MOU. Denton provided several examples of specific rule provisions that impose additional costs and burdens on MOUs and thus discourage an MOU from choosing to compete in the retail electric market.

In addition, Denton argued that the use of operational constraints between divisions of the same entity violates PURA and, through the erection of barriers, will discourage MOUs from providing customer choice. Instead, Denton argued that the rule should clearly identify anticompetitive practices without resorting to the imposition of unjustified and illegal constraints on how a functionally or structurally bundled MOU transacts business within itself or shares information within itself. If the procedures and safeguards implemented by the MOUs are not appropriate, or are not sufficient to prove their compliance to a complainant or the commission, then the statutorily provided penalty would apply, and the MOU would lose its opportunity to compete outside its service area.

In reply comments, TPPA/TEC stated that Denton's position, which is based on a literal reading of certain PURA provisions, "was not the best approach to protect the public interest in these circumstances...." They averred that the commission's proposed rule, if modified as TPPA/TEC had advocated, would accomplish the objectives of recognizing the diversity among and the special features of publicly owned power entities, while protecting against anticompetitive activities. Nevertheless, TPPA/TEC said that if the commission decides to follow Denton's preferred approach, they would hope to cooperate with the commission to develop a workable rule that treats MOUs and COOPs in a similar way.

TXU argued in reply comments that Denton was "out of step" with other MOU/COOPs and that the broad objections are contrary to Legislative intent and would result in a code of conduct insufficient to protect competition. TXU further commented that Denton's solution that MOU/COOPs be allowed to devise their own safeguards for ensuring that they do not engage in anticompetitive practices is unacceptable. TXU argued that standards found in the proposed rule are necessary to ensure that competition is protected. TXU highlighted the fact that other MOU/COOPs recognize that a code of conduct can have no effect if there is not some separation of wires activities from retail competitive activities within the MOU/COOP. TXU argued that it is implausible to expect MOU/COOPs to adopt adequate safeguards without requiring some standards for what is acceptable.

The commission agrees with Denton that the language in PURA allows the governing bodies of MOU/COOPs to decide whether to unbundle, and if they decide to unbundle, whether to do so structurally or functionally. Accordingly, the commission has added subsection (o) to accommodate an MOU/COOP that chooses to participate in the competitive electric retail market on a bundled basis (Bundled MOU/COOP). Minor changes were made to the published rule in subsections (a), (b), (c), and (n) to accommodate Bundled MOU/COOPs. Subsection (o) focuses on the broad concepts of anticompetitive safeguards and places the burden on the Bundled MOU/COOP in the form of annual reporting and audits to ensure that the Bundled MOU/COOP does not engage in anticompetitive practices. As noted by TXU, it will be difficult for MOU/COOPs to adopt adequate safeguards without requiring some structure or standard for what is acceptable. Any structure adopted by the commission, however, may be viewed as requiring *de facto* functional unbundling. Accordingly, the commission adopts the general prohibition against anticompetitive practices and defers resolution concerning the adequacy of specific safeguards to the contested case implementation proceeding. After the initial implementation plan is approved, the Bundled MOU/COOP will file annual reports and will be subject to an independent audit requirement once every three years. These provisions will assist the commission in ensuring that a Bundled MOU/COOP does not engage in anticompetitive practices on an ongoing basis.

The commission finds that the modifications for a Bundled MOU/COOP require a revision to the title of the rule from "Code of Conduct for Municipally Owned Utilities and Electric Cooperatives and Their Competitive Affiliates" to "Code of Conduct for Municipally Owned Utilities and Electric Cooperatives Engaged in Competitive Activities."

The commission notes that while Denton objected to the code as proposed, the other MOU/COOPs represented by TPPA/TEC supported many of the standards and guidelines set forth in the published rule. The commission prefers the approach taken by TPPA/TEC, and notes that ensuring that safeguards are in place to protect against anticompetitive practices is more practical with a functional separation. Therefore, the commission declines to make substantial revisions to subsections (c) through (n) of the published rule, except as set forth herein.

Denton commented that parts of the proposed rule are confusing and unclear and, therefore, would be difficult to comply with. Specifically, it pointed to the definitions of "TDBU" and "affiliate." It also pointed to subsections (b)(3)(B) and (d) as other examples of how difficult it will be for a bundled MOU to comply with the proposed rule. Further, Denton argued that the circular cross-references in subsection (m)(3) are confusing and can lead to inadvertent violations of the rule. Moreover, it argued that subsection (g) is unclear in the situation where there is no TDBU. It suggested that the rule could be simplified enormously by separately listing the obligations of each category of MOU/COOP

and eliminating the cross-references and special exclusions and instructions.

With respect to the organization of the rule and the application section, the commission acknowledges that the cross-referencing of the rule for small and mid-sized MOUs and COOPs may be time consuming. However, MOUs and COOPs which will be required to comply with the rule and as represented by TPPA/TEC, with the exception of Denton, did not object to the format of the proposed rule. Accordingly, the commission finds that repetition of certain sections of the rule is not preferable to the existing organization of the rule.

Preamble Question 1 - Compliance variation depending on size of the TDBU.

TPPA/TEC supported a three-tiered approach to regulating the MOU/COOP TDBU. They stated that applying "the full effect of the code" on smaller MOUs and COOPs would impose disproportionate burdens on these utilities that their customers would pay for without necessarily receiving any benefits. Also, they observed that smaller MOUs and COOPs have neither the market power to raise prices or eliminate competitors, nor the incentive to maximize profits for shareholders. In the view of TPPA/TEC, "imposing a one size fits all approach may well act as a significant deterrent to adoption of customer choice." Likewise, TXU did not object to a tiered approach, although TXU argued that the size demarcations should be different, as discussed below. On the other hand, Denton argued that any distinction between MOUs and COOPs based on the total number of megawatt hour sales is an arbitrary division. Denton argued that the MOU/COOPs should have the flexibility to determine what procedures and safeguards are appropriate for that specific MOU/COOP in order to enable it to comply with the requirements in a code of conduct. Denton argued that a better way to account for the size differential among MOUs and COOPs is to comprehensively require them to implement adequate safeguards to preclude employees of any entity, including its competitive affiliate, if applicable, from gaining access to information in a manner that would allow or provide a means to transfer confidential information from an MOU/CCOP to such entity.

The commission agrees with TXU and TPPA/TEC and finds that the tiered approach is most appropriate. The commission finds that smaller MOUs and COOPs would face disproportionate burdens in meeting all aspects of the code, and that their customers would have to pay for these burdens without necessarily receiving any benefits. In addition, smaller MOUs and COOPs do not have the market power to raise prices or eliminate competitors. The commission finds, as previously noted in the preamble to the published rule, that the ultimate barrier to entry is a decision by a small MOU or COOP not to opt into electric retail competition due to overburdensome restrictions or reporting requirements. With respect to Denton's comments, the commission has added subsection (o), which requires a Bundled MOU/COOP to implement adequate safeguards to preclude employees of any bundled entity of any size from gaining access to information in a manner that would allow or provide a means to transfer confidential information.

With respect to the size demarcations with the tiered approach, TPPA/TEC supported the three sizes of MOU/COOPs as proposed in the rule. On the other hand, TXU argued that the threshold for a large TDBU should be lowered from six million megawatt-hours (MWh) to one million MWh. TXU argued that as proposed, only two out of 73 MOUs, Austin Energy and San Antonio Public Service, fall into the large category, and none of the 70 COOPs fall into the large category. In addition, TXU argued that the MWh increase necessary to move from the mid-size to large categories is unrealistically inflated, requiring MOUs or COOPs to double, triple, or quintuple in size before reaching the large category. TXU further argued that many of the mid-sized MOUs and COOPs are in areas of high growth. TXU's proposal would require the following seven entities to meet the additional requirements of the "large" classification: Garland Power & Light System; Lubbock Power & Light; Denton Municipal Utilities; Pedernales Electric Coop, Inc.; Bluebonnet Electric Coop, Inc.; CoServe Electric; and Guadalupe Valley Electric Coop. TXU argued that the most significant additional requirements between the mid-sized and large classifications are that a large TDBU must: track migration of employees; ensure compliance with the code for new competitive affiliates; provide for detailed safeguards related to the sharing of employees, facilities, or other resources with competitive affiliates; ensure safeguards during the provision of corporate support services; post the provision of aggregated customer information to a competitive affiliate and make such aggregation services available to third parties if made available to a competitive affiliate; not allow competitive affiliates preferential T&D information; require competitive subsidiaries that use the MOU/COOP's trademark, name, brand, or logo to use a disclaimer; refrain from engaging in joint marketing activities; and limit responses to customer inquiries about competitive affiliate or competitive products or services.

In reply comments, TPPA/TEC objected to TXU's proposal to reduce the threshold between large and mid-sized TDBUs from six million MWh per year to one million MWh. They contended that whereas the six-million figure naturally divides the two largest urban areas in ERCOT not served by IOUs from the other public-power entities, the one-million figure is arbitrary: it would lump San Antonio and Austin with other much smaller public systems, while several entities slightly smaller than the latter systems would remain in the mid-sized category.

The commission agrees with TPPA/TEC and declines to modify the MWh thresholds for the size classifications. However, the commission agrees with TXU regarding some of the additional requirements for mid-size TDBUs, as modified to accommodate the fact that mid-size TDBUs will not have the resources necessary to implement the full separation and reporting required for large TDBUs.

First, the commission finds that tracking migration and sharing of employees should be required of mid-sized TDBUs. The commission acknowledges that this requirement was previously omitted due to the fact that some mid-size TDBUs will have employees that perform both T&D functions and competitive energy-related activities. The code contains adequate provisions to protect against the improper use of confidential information, and to ensure that there are no opportunities for preferential treatment or unfair competitive advantage, and that no significant opportunities for cross-subsidization occur by virtue of this sharing. However, the commission finds that it would be appropriate to require mid-sized TDBUs to report information for shared employees, similar to the information requested for transferring employees. Accordingly, the commission adds this requirement as new subsection (b)(4)(D) and modifies the language in subsection (f) requiring that the mid-sized TDBU document assignment of employees engaged in activities for both the TDBU and competitive affiliates.

Second, the commission finds that the safeguards for the provision of corporate support services as set forth in subsection (j)(3) should be applicable to mid-sized TDBUs. The commission acknowledges that a mid-sized TDBU may share personnel performing corporate support services with its competitive affiliate, but the shared corporate support staff should not be used as a means to facilitate the transfer of confidential information from the TDBU to a competitive affiliate. Accordingly, the commission adds new subsection (b)(4)(J). The commission also notes a language clarification to subsection (j)(3) relating to corporate support services to reflect that corporate support services may be provided by entities other than the TDBU.

Third, the commission finds that mid-sized TDBUs should ensure compliance with the code for new competitive affiliates as set forth in subsection (h) of this section and therefore adds new subsection (b)(4)(F). Posting notice of the newly created competitive affiliate on an Internet site or other public electronic bulletin board for 30 days should not be overly burdensome on a mid-sized TDBU.

The commission declines to make the other adjustments requested by TXU because the burdens placed on the mid-sized MOU/COOP would be disproportionate to the benefits received. In addition, the commission finds that there are adequate safeguards in the code to protect against anticompetitive activities without the additional provisions suggested by TXU.

With respect to the method for determining size by measuring the delivery of total metered electric energy through an MOU/COOP T&D system, TPPA/TEC approved the published method but proposed that the concept be limited to energy delivered for retail sale. TPPA/TEC argued that "introducing wholesale energy metered through a system adds an ambiguous element" that could "confound the intent of categorizing by size based on local wires system service," because wholesale electricity flows "may be metered in some respect," even if the ultimate retail customer does not reside in the TDBU's certificated service area. Moreover, TPPA/TEC supported the comments filed by Brazos to the effect that the "wholesale" reference could lead to the inclusion of entities that merely provide bulk power to member distribution systems.

Brazos focused its comments on a concern that generation and transmission (G&T) cooperatives may be subject to the code of conduct because the proposed rule counts energy delivered at wholesale when determining the size of the TDBU. Brazos suggested adding language that would exclude G&T cooperatives. Brazos further challenged the commission's ability to apply the proposed code of conduct to G&T cooperatives.

TXU replied that Brazos' concern was unfounded because a G&T cooperative will not be a TDBU subject to the proposed rules because it does not have a certificated service area and will not have the ability to opt into competition. TXU further argued that the G&T cooperative will not be a competitive affiliate of a TDBU because competitive affiliates must sell products or services at retail.

TPPA/TEC recommended in reply comments that the definitions in subsections (c)(8), (9), and (12) (now subsections (c)(10), (11), and (14)) be modified to delete the reference to wholesale. TXU further stated in reply comments that it does not object to such modification.

The commission agrees with the parties and deletes the reference to wholesale from subsections (c)(8), (9), and (12) (now subsections (c)(10),(11), and (14)). Because the code is therefore not applicable to Brazos' wholesale transactions or other G&T cooperatives, the commission does not specifically address Brazos' comments challenging the commission's jurisdiction with respect to applying the provisions of subsections (d), (g), and (e) to Brazos.

TPPA/TEC also recommended that the size classifications be escalated each year by the average load growth in Texas. If such a calculation factor is not included, they urged that proposed subsection (b)(5)(A) (now subsection (b)(6)(A)) be modified to extend the implementation of a larger size classification to two years, rather than six months. TXU opposed the escalator based on growth in Texas and, likewise, opposed expanding the time for compliance from six months to two years.

The commission finds that using the escalation factor for load growth adds unnecessary complexity and does not account for the fact that as systems grow, even if the growth is relative to growth in the entire market, the system should acquire the additional resources to meet stricter standards in the code of conduct. The commission agrees with TPPA/TEC that an MOU or COOP that grows into another classification should have more than six months to meet the more stringent code requirements. Accordingly, the commission modifies subsection (b)(6)(A) to give an MOU/COOP one year after size reclassification to meet the applicable code requirements.

Preamble Question 2 - When the code of conduct becomes applicable.

TPPA/TEC opposed requiring MOU/COOPs to adhere to an internal code of conduct during the transition period. They asserted that such a requirement would conflict with the law, which decrees that the code becomes effective when the TDBU begins competing outside its service area. Likewise, Denton argued that PURA §40.054(b) is very clear as to when an MOU becomes subject to the code of conduct, *i.e.*, when it has chosen to participate in customer choice and is providing electric energy at retail to customers outside its service area. Denton further argued that there is no statutory basis for requiring an internal code of conduct during a period when the MOU is transitioning to competition but is otherwise not subject to the code via the provisions of PURA.

TXU argued that the code should be applicable during a 120-day transition period and, in support noted that the code adopted for IOUs required a code during the transition period from January 10, 2000 to full retail competition. TXU noted that as MOU/COOPs prepare for competition, it is important that safeguards be in place to ensure that anticompetitive conduct does not occur. TXU argued that competitors will be at a distinct disadvantage if, during the transition period, competitive affiliates of MOU/COOPs have their competitive activities subsidized and are allowed unfettered access to confidential information.

Reiterating the position taken in their initial comments, TPPA/TEC opposed TXU's request to apply the code of conduct during the 120-day transition period in their reply comments. TPPA/TEC stated that MOUs and COOPs, unlike IOUs, do not face a transition period imposed by statute because public-power systems are not required to adopt customer choice by any date.

The commission agrees with TPPA/TEC and Denton and declines to impose a code of conduct for MOUs or COOPs during any transition period. The commission determines that PURA is

clear as to when the code of conduct becomes applicable and public-power systems are not required to adopt customer choice.

Preamble Question 3 - Mandatory provision of products and services by the TDBU.

TPPA/TEC, Denton, and Brazos opposed requiring TDBUs to offer to third parties products and services, other than corporate support services, that are made available to competitive affiliates. TPPA/TEC expressed concern that such a requirement could jeopardize the tax-exempt status of bonds issued by MOUs and COOPs. Specifically, TPPA/TEC argued that Internal Revenue Service (IRS) private-use regulations raise this threat if an MOU uses facilities funded by tax-exempt bonds for the benefit of private parties and that a COOP would face the same threat if it earns over 15% of its gross revenues from activities other than selling electricity to its members. TPPA/TEC cited the following as examples of products or services provided to a competitive affiliate that could activate these concerns: engineering services, marketing services, transportation, land and facilities, and credit support. TPPA/TEC commented that subjecting MOUs and COOPs to such a risk would violate PURA §40.104. In addition, TPPA/TEC commented that requiring an MOU to extend non-discriminatory credit availability to a third party could violate the Texas Constitution, Article III, section 52, which prohibits lending of credit to private parties.

TPPA/TEC maintained that more than adequate protection against unfair advantage to a public-power entity's competitive affiliate results from requiring that products and services provided to such an affiliate be priced at approximate market value or fully allocated cost, without preferential discounts or other benefits. Therefore, TPPA/TEC recommended deleting subsections (b)(2)(E) and (b)(3)(I) and modifying subsection (k)(2) accordingly.

TXU argued in reply comments that the proposed rule does not require shared services like transportation, land and facilities, and credit support to be provided to non-affiliated entities.

The commission agrees, in part, with TPPA/TEC. The commission does not want to jeopardize the tax-exempt status of bonds issued by MOUs and COOPs. The commission finds that credit availability is not a product or service that should be provided on a non-discriminatory basis. The commission has considered those services cited by TPPA/TEC (*e.g.*, engineering services, marketing services, transportation, land and facilities, and credit support), and agrees with TXU that it is unlikely that competitors would request such services. Consequently, it is highly unlikely that the 15% of gross revenue threshold will ever be reached. Accordingly, the commission has modified subsection (k)(2) to exclude credit availability from the mandatory provision of products and services and to protect against violations of PURA §40.104 and §41.104, and the Texas Constitution, Article II, section 52.

Subsection (a), Purpose.

TXU urged in correspondence dated February 20, 2001, for the commission to include a statement of principles that would explicitly set forth the anti-competitive conduct being prohibited in the proposed rule. TXU argued that a statement of principles would provide MOU/COOPs with better direction in complying with the rule, provide competitors with greater assurance that MOU/COOPs will compete fairly, and identify more clearly the intent of the rule.

The commission agrees with TXU and finds that a statement of principles should be provided in subsection (a) to assist MOU/COOPs in devising safeguards against anticompetitive practices. It is intended by this rule that no MOU/COOP subject to this section shall engage in the following anticompetitive practices: 1) subsidize competitive activities directly or indirectly through rates charged for the provision of electric service; 2) allow discriminatory access to transmission and distribution products and services; 3) allow preferential access to transmission and distribution-related information; 4) allow unauthorized access to confidential customer information; and 5) allow employees performing transmission and distribution functions to provide leads to or promote the products of competitive affiliates or any persons providing competitive energy-related activities on behalf of a Bundled MOU/COOP.

Subsection (b), Application.

To conform the rule's language to that in PURA §40.054(b) and §41.054(b), TPPA/TEC recommended modifying subsection (b)(1)(B)(i) to refer to "the date of customer choice" rather than September 1, 1999. TXU stated in reply comments that it did not object to such modification.

The commission agrees with the parties and modifies the language to reflect the date of customer choice rather than September 1, 1999.

In reply comments, TPPA/TEC recommended that a "technical correction" be made to subsection (b)(3)(B) (now subsection (b)(4)(B)). They observed that this provision conflicts with subsection (b)(3)(L), which specifies the actions a mid-sized TDBU must take if a customer or potential customer makes an unsolicited request for distribution service, competitive service, or information regarding such services. To eliminate this conflict, TPPA/TEC recommended deleting the following language: "including copies of policies implementing subsection (m)(3) of this section, requests for specific competitive affiliate information."

The commission agrees with the corrections suggested by TPPA/TEC and revises subsection (b)(4)(B) accordingly.

In supplemental comments, TXU recommended modifying the newly revised subsection (b)(7) (previously subsection (b)(6)) to clarify "between" which two entities the prohibited items cannot go. In supplemental reply comments, TPPA/TEC opined that TXU's suggestion does not improve the provision's language, as it restricts the paragraph's meaning to the Bundled MOU/COOP's interactions with persons outside the MOU/COOP, whereas the proposed version covers both these interactions and those of personnel within the MOU/COOP.

The commission agrees with TXU and modifies subsection (b)(7) to clarify that a Bundled MOU/COOP shall not circumvent the provisions of PURA §39.157(e) or this section by using any persons to provide information, services, products, or subsidies that would be prohibited by this section between persons providing T&D service on behalf of the Bundled MOU/COOP and persons providing competitive energy-related activities on behalf of the Bundled MOU/COOP. The commission disagrees with TPPA/TEC that the proposed language covered both these interactions and those of personnel within the MOU/COOP.

Subsection (c), Definitions.

TPPA/TEC recommended deleting the last sentence in the definition of "affiliate" in subsection (c)(1), as it has the effect of expanding the commission's jurisdiction beyond the scope set forth in PURA. TXU argued in reply comments that the definition should remain as proposed and provide a mechanism for

the commission, after notice and hearing, to determine if an affiliate relationship exists in order to protect against attempts to circumvent the rules.

The commission agrees with TXU and finds that it is proper to include in the definition of "affiliate" an entity determined to be an affiliate by the commission after notice and hearing based on criteria parallel to those prescribed in PURA §11.006. This definition is consistent with that in the IOU code of conduct.

Brazos filed supplemental comments stating that the definition of "Bundled MOU/COOP" in subsection (c)(2) should be revised to limit energy-related services to retail activities. Denton recommended in supplemental comments that the reference to subsection (o)(3)(1) should really be subsection (o)(3)(A) and that the requirement that the MOU/COOP state whether it will provide competitive energy services on a bundled basis should be added to subsection (b)(2). In supplemental reply comments TXU agreed with Denton that the reference to subsection (o)(3)(A) should be changed to subsection (b)(2).

The commission finds that the clarification requested by Brazos is not necessary as the term "energy-related activities" in subsection (c)(2), as discussed below, is limited to retail sales. The commission agrees to clarify the place where the Bundled MOU/COOP must file its statement that it will be operating on a bundled basis and incorporates this additional language in subsection (o)(3)(A)(i). Finally, the commission corrects the typographical error to correctly reflect subsection (o)(3)(A) instead of subsection (o)(3)(1).

Denton filed supplemental comments that the definition of "competitive energy services" (now subsection (c)(5)), and as it is used throughout the rule, should be replaced by the term "competitive energy-related activities." Denton stated that the former term is a defined term in the commission's rules, §25.341(6) of this title, and such definition would include "many activities that would not appropriately be applied to MOU/COOPs." In supplemental reply comments, TXU stated that it does not believe Denton's change is necessary. TPPA/TEC noted in supplemental reply comments that "the provision of" should be stricken from Denton's proposed language.

The commission agrees with Denton and TPPA/TEC and replaces the term "competitive energy services" with "competitive energy-related activities" throughout the rule. The commission further deletes the phrase "the provision of."

TXU proposed that the definitions of "large transmission and distribution business unit (TDBU)" (now subsection (c)(10)) and "Mid-size transmission and distribution business unit (TDBU)" (now subsection (c)(11)) be revised in accordance with its suggestions discussed in Preamble Question 1. Denton, in reply comments, disagreed with TXU's suggestion that the definition of large and mid-size TDBUs be changed so as to bring more MOU/COOPs within the large category. Denton noted that TXU's argument completely ignores the reality of the size of the market power wielded by MOUs and COOPs and the detrimental consequences that this proposal would have on state-wide retail competition.

For the reasons discussed in response to Preamble Question 1, the commission declines to modify the size demarcations for mid-size or large TDBUs.

As discussed in response to Preamble Question 1, TPPA/TEC stated their preference in reply comments for deleting "and wholesale" from subsection (c)(8) and (9), relating to large TDBUs and mid-sized TDBUs, respectively (now subsection (c)(10) and (11)) as proposed in their original comments. TPPA/TEC further replied that "at retail" should be added to subsection (c)(14) (now subsection (c)(16)), instead of adopting Brazos' suggestion to completely exempt G&T COOPs from the rule. TPPA/TEC asserted that "other entities besides G&Ts with similar functions could be affected by the current language, and ... any of these entities might conduct retail energy sale or distribution activities that should bring them within the code's scope." TXU stated in reply comments that it did not object to not counting electric energy delivered at wholesale.

For the reasons discussed in response to Preamble Question 1, the commission agrees with the parties and adopts modifications to the definitions of small, mid-sized, and large TDBUs to delete the reference to wholesale. In addition, the commission agrees with TPPA/TEC and adopts their suggested modification to the definition of TDBU.

To conform the definition of "municipally owned utility/electric cooperative (MOU/COOP)" to that in the definition of "affiliate," TPPA/TEC proposed modifying the last sentence in subsection (c)(10) (now subsection (c)(12)) by replacing the word "controls" with "has an affiliate relationship with." TXU stated in reply comments that it did not object to this modification.

The commission agrees with the parties and adopts the proposed modification to subsection (c)(12), definition of MOU/COOP.

TPPA/TEC recommended deleting the last sentence in subsection (c)(14) (now subsection (c)(16)), which defines a TDBU. TPPA/TEC commented that the language "A TDBU shall not provide competitive energy services" conflicts with PURA, including Chapters 40 and 41, which give MOU/COOPs the ability to decide what services they will provide and whether to provide services on a bundled or unbundled basis. TXU stated in reply comments that it does not object to authorizing a TDBU to provide competitive energy services that it is specifically authorized by statute to provide. However, TXU is opposed to allowing TDBUs to provide competitive energy services not specifically authorized by statute and is opposed to the change as suggested by TPPA/TEC. As a compromise, TXU suggested adding "except as specifically authorized by statute."

The commission agrees to the modification proposed by TXU because it acknowledges that PURA may allow a TDBU to perform certain competitive energy-related activities. However, the commission declines to delete the language as suggested by TPPA/TEC because if the TDBU is providing competitive energy services beyond what is specifically permitted by PURA, then the MOU/COOP is operating as a Bundled MOU/COOP and is subject to subsection (o) of the rule relating to Bundled MOU/COOPs. An MOU or a COOP with a TDBU has chosen to embrace a functional separation approach to participating in a competitive market, and therefore consistent with that approach, the TDBU should not be providing competitive energy services, except as specifically authorized by statute.

Subsection (h), Ensuring compliance for new competitive affiliates.

TXU commented that subsection (h) should be amended to include an audit requirement. As proposed, subsection (h) is only applicable to large TDBUs and requires the MOU/COOP to post notice of newly created competitive affiliates and to ensure that its annual report of code-related activities reflects all changes that result from the creation of new competitive affiliates. TXU

commented that MOU/COOPs should be required to have a compliance audit prepared by an independent auditor when requested by the commission, the Office of Public Utility Counsel, or an interested third party, and that an MOU/COOP could only be audited once every three years. TXU further suggested that the MOU/COOP should be required to file the results of the audit with the commission within one month of the audit's completion. TXU noted that this proposal is less burdensome than the mandatory audit provisions in the IOU code of conduct. TXU argued that relying on third parties to complain about code of conduct abuses is not a sufficient deterrent to such abuses.

In reply comments, TPPA/TEC opposed TXU's recommendation to add a provision requiring compliance audits to deter code-of-conduct abuses. They contended that subsection (n)(7)(C), which authorizes the commission to conduct such an audit, provides "both a sufficient deterrent and a completely adequate mechanism for the commission to use in enforcing the code's provisions." Allowing any interested party to require a compliance audit, they asserted, could impose significant financial burdens for many public-power systems, which, unlike IOUs, have no shareholders to bear the cost. Moreover, TPPA/TEC argued that public-power systems need no additional deterrent against anti-competitive behavior because their governing bodies are accountable to their owner/customers for implementing the community's desire to participate fairly in customer choice.

The commission agrees with TXU that third-party audits are necessary to ensure that the spirit, intent, and letter of the law are followed. The commission agrees with TXU that audits serve four important purposes. First, audits ensure that adequate safeguards, consistent with the proposed rules, are in place. Second, audits act as a deterrent to violative conduct. Third audits identify weaknesses in a compliance program. Finally, audits detect rule violations. The commission agrees with TPPA/TEC, however, that subsection (n)(7)(C), which authorizes the commission to conduct such an audit, is sufficient in light of the safeguards for unbundled MOU/COOPs found in subsections (d) through (n) as applicable. The commission adopts an audit requirement for Bundled MOU/COOPs as set forth in subsection (o) for the reasons discussed in detail below.

Subsection (i), Separation of TDBU from its competitive affiliates.

TPPA/TEC recommended modifying subsection (i)(1) by deleting "that the commission determines" from the language "safeguards that the commission determines are adequate to preclude employees of a competitive affiliate from gaining access to confidential information ...." TPPA/TEC argued that requiring such commission intervention would be burdensome to the commission and needlessly duplicative of the code implementation filing required by subsection (n)(1). TXU objected in reply comments and stated that the commission should approve a TDBU's proposed safeguards for sharing employees, officers, and certain resources.

The commission agrees with TXU and declines to make the modification suggested by TPPA/TEC. As noted by TPPA/TEC, the commission will determine whether the safeguards presented by the MOU or COOP in its implementation filing are adequate to preclude employees of a competitive affiliate from gaining access to confidential information, so there is no harm or extra burden imposed by leaving the language as originally proposed.

TXU commented that subsection (i)(1) should be modified to protect against sharing of certain employees and information by large TDBUs. TXU suggested adding the following revision to subsection (i)(1): "In order to ensure that information regarding the billing rates of a retail electric provider are not disclosed to a competitive affiliate, MOU/COOPs classified as large may not share billing, marketing or sales employees or any information regarding the billing rates or practices of a retail electric provider with a competitive affiliate." TXU argued that the potential for conflict of interest, and therefore unfair competitive advantage, exists where MOU/COOPs are permitted to share certain employees and information regarding market rates charged by competitors in instances where the customer opts to receive a single bill for transmission, distribution, and generation services from the MOU/COOP. TXU argued that a retail electric provider (REP) would be at a significant disadvantage in retaining customers or bidding on new customers if the MOU/COOP's competitive affiliate is privy to its pricing information because an employee receiving the billing information from the REP is also a marketing or business development person for the competitive affiliate. TXU argued that, at a minimum, large TDBUs should be prohibited from sharing employees who would possess pricing information of REPs and from disclosing that pricing information to a competitive affiliate.

In reply, TPPA/TEC opposed TXU's proposed additional language prohibiting large MOU/COOPs from sharing with a competitive affiliate any employees involved in billing, marketing, or sales, or any information concerning the rates or practices of a competitive REP. According to TPPA/TEC, the desired protection "is already thoroughly provided by provisions in the proposed code," and TXU's suggested language "would merely create ambiguities regarding the safeguards already provided for." In particular, TPPA/TEC asserted that TXU's language would conflict with the code's provisions allowing "employee migration and sharing, subject to information safeguards, and the sharing of information subject to public interest criteria, by absolutely prohibiting the sharing of such employees and such information."

Although the commission acknowledges the concerns of TXU, PURA specifically allows the MOU/COOP to perform the billing option in the event the customer opts to receive a single bill for transmission, distribution, generation, and other services. The commission notes that information concerning rates of REPs must be disclosed pursuant to the customer protection rules and, in many instances will be available from the REP's Internet website. If TXU's concern centers on customer specific contracts, the commission notes that the MOU/COOP will not have the information concerning the rate to bill until after the customer has executed a contract with a REP. It is assumed that the REP will protect itself with penalties for early termination of the contract which would make it more difficult for the MOU/COOP to use pricing information in such a manner as to attempt to undercut a REP's rates and attract a customer away from the REP. In addition, the commission notes that the proposed rule contains additional safeguards and limitations regarding disclosure of confidential information and that such provisions should protect against any of the anticompetitive concerns raised by TXU.

Subsection (j), Transactions between a TDBU and its competitive affiliates.

TXU commented that the code must ensure proper cost allocation. TXU argued that while the proposed rule does address the issue of transactions between an MOU/COOP and its competitive affiliates, the rule neglects to ensure, first, that MOUs and COOPs do not subsidize the business activities of a competitive affiliate with their revenues, or second, that the

cost of shared services, including corporate support services, offices, employees, property, equipment, computer systems, information systems, and any other assets, services, or products shared between a TDBU and its competitive affiliate, are fully allocated. TXU argued that an MOU/COOP is not restricted from setting its wires rates at a level high enough to subsidize the competitive activities of its competitive affiliates. TXU contended that under this scenario, it would be difficult for any other REP to compete because the competitive affiliate could profitably charge artificially low rates for energy. TXU argued that the rule must be modified to ensure that the costs of the employees' time and the equipment used are properly allocated between the MOU/COOP and its competitive affiliate. TXU cited PURA §41.054(f), which states that "An electric cooperative shall maintain separate books and records of its operations and the operations of any subsidiary and shall ensure that the rates charged for provision of electric service do not include any costs of its subsidiary or any other costs not related to the provision of electric service." Accordingly, TXU suggested adding the following language to subsection (j)(1): "A TDBU shall not subsidize the business activities of a competitive affiliate with its revenues. A TDBU and its competitive affiliate shall fully allocate costs for any shared services, including corporate support services, offices, employees, property, equipment, computer systems, information systems, and any other shared assets, services, or products."

In reply comments, TPPA/TEC opposed TXU's proposal to prohibit any subsidization of competitive affiliate activities with revenues from a public-power entity and to require full allocation of costs for corporate support services and related shared assets. They maintained that the proposed rule deals with subsidization and cost allocation in a way that reasonably allows for the unique characteristics of public-power systems. The proposed rule, they noted, requires that a TDBU's prices reflect market value or fully allocated cost, with certain appropriate exceptions. TPPA/TEC noted that corporate support services, for example, are difficult or impossible to segregate among the benefiting functions, so the rule requires that such activities are to be conducted so as to not allow for *significant opportunities* for cross subsidization of the competitive affiliate. Similarly, they said, the rule properly distinguishes between the records of a competitive division and those of a competitive subsidiary.

The commission agrees with TXU that cross subsidization is an anticompetitive practice, and as such is prohibited, both by PURA and the code of conduct. The commission finds, however, that subsection (j)(1) of the proposed rule adequately addresses TXU's concerns. The proposed rule requires "any transaction between a TDBU and its competitive affiliate to be accomplished at pricing levels that are fair and reasonable to the customers of the TDBU, and that reflect the approximate market value of the assets or the fully allocated cost of the assets, services, or products...." In addition, subsection (o) provides adequate safeguards with regard to Bundled MOU/COOPs, as more fully explained in the discussion of subsection (o). Finally, the commission notes that the circumstances are different for MOU/COOPs than for IOUs. The MOU/COOPs are owned and controlled, either directly or indirectly, by their members/citizens/customers. Accordingly, it is expected that the citizens of an MOU or members of a COOP would not allow their governing bodies to engage in behaviors that result in cross subsidizes to their detriment.

Subsection (k), Safeguards related to provision of projects and services.

With regard to subsection (k)(2), TPPA/TEC and Denton noted that any code of conduct provision that required a municipality to violate any private-use restrictions would be in violation of PURA §40.104, which provides in part that nothing shall impair the tax-exempt status of municipalities, nor shall anything in PURA compel any municipality to use its facilities in a manner that violates any contractual provisions, bond covenants, or other restrictions applicable to facilities financed by tax-exempt debt. TXU argued in reply comments that a TDBU should be required to provide non-discriminatory access to its products and services.

As discussed in Preamble Question 3, the commission adopts modification to the language proposed in subsection (k)(2).

Subsection (l), Information safeguards.

TPPA/TEC recommended deleting subsection (l)(5). This provision requires a TDBU desiring to share information with a competitive affiliate, other than that related to corporate support services or otherwise allowed by the code, to prove to the commission that the public interest will not be impaired by such a release of information. Again, TPPA/TEC contended that this degree of commission oversight is unnecessary for public-power entities. Instead, they concluded, the complaint process and the code-implementation procedure provide sufficient protection to ensure that the code's objectives are achieved, without the burdensome approval process of (l)(5). TXU replied that the prohibition on a TDBU sharing non-public TDBU information with a competitive affiliate should remain in place.

The commission declines to delete the requirement in subsection (l)(5) that the TDBU prove to the commission that a sharing of information that is not otherwise covered in the code of conduct will not compromise the public interest prior to any such sharing. This requirement is only applicable to large TDBUs in instances where the information sharing has not been otherwise addressed. Accordingly, commission oversight should not be excessive or burdensome, especially in light of the code-implementation procedures.

Subsection (n), Remedies and enforcement.

In order to deter complaints intended to harass or ones made after records become unavailable and behavior may have changed, TPPA/TEC proposed amending subsection (n)(2)(B) to include a three-year limitations period within which any complaint must be filed. TXU stated in reply comments that it did not object to this modification; however, it noted that this limit gives further support for the audit requirement.

The commission finds that the modification suggested by TPPA/TEC is reasonable and should be adopted. MOU/COOPs are required to retain certain records of transactions under the code for a period of three years. It is possible that after a three-year period, no records would exist with which the MOU/COOP could respond or defend a claim. Accordingly, this limitations period is appropriate.

Subsection (o), Provisions for Bundled MOU/COOPs.

General Comments on Subsection (o).

Denton stated in supplemental comments that it is pleased to have the right of choice recognized in the proposed rule. On the other hand, TXU and Reliant urged in supplemental comments and supplemental reply comments that subsection (o) should be deleted from the proposed rule. TXU expressed concern that

the proposed rule was modified to create an entirely new category of MOU/COOP, *i.e.*, the Bundled MOU/COOP. Reliant argued that subsection (o) could potentially damage the competitive market, and, at a minimum, the rule should be postponed until this subsection undergoes the appropriate scrutiny that had been afforded the remainder of the rule. TXU observed that only one commenter had not recognized the need for some degree of unbundling. Absent a commission decision to delete subsection (o), TXU advocated making the subsection's safeguards more stringent. TXU did, however, support the requirements of a mandatory audit and a contested hearing for addressing the greater risk of anti-competitive behavior.

Brazos stated in supplemental comments that many of this subsection's provisions "would be so onerous and unworkable as to require all" MOU/COOPs to unbundle in order to compete outside their certificated service area. It asserted that most of the provisions in subsection (o) are vague and ambiguous. Denton disagreed in supplemental reply comments with Brazos' characterization of subsection (o) as penalizing Bundled MOU/COOPs. Denton observed that small MOU/COOPs would have the choice to unbundle or remain bundled, and that a Bundled MOU/COOP's implementation plan (required by subsection (o)(3)(A)) would afford flexibility for the MOU/COOP in satisfying the subsection's requirements. In addition, Denton disputed Brazos' contention that a Bundled MOU/COOP would have to speculate whether its procedures would be sufficient to ensure the proper transfer of assets or products. It said that the implementation filing would enable the MOU/COOP to obtain a commission order approving its procedures and safeguards.

TXU noted in supplemental reply comments that subsection (o) does not penalize smaller MOU/COOPs if they choose to unbundle, but rather that the smaller MOU/COOP has four options regarding application of code of conduct rules. First, it could not opt into competition and not be subject to any code of conduct rules. Second, it could opt into competition but not compete outside their certificated service areas and not be subject to any code of conduct rules. Third, it could opt into competition, compete outside its certificated service area and be subject to the limited safeguards under subsection (b)(3). Finally, it could opt into competition, compete outside its certificated service area, and be a Bundled MOU/COOP subject to the more extensive safeguards of (o).

TXU assessed the safeguards in subsection (o) to be comparable in degree to those facing mid-size TDBUs in other parts of the rule, but less stringent than those applying to large TDBUs. Therefore, it contended, additional restrictions should be added to this subsection, as large public-power entities otherwise would be motivated to remain bundled. Specifically, TXU proposed revisions to prohibit cross-subsidies and joint marketing. Denton agreed in supplemental reply comments with TPPA/TEC that TXU was incorrect in arguing that subsection (o) constitutes a more lenient alternative for large MOU/COOPs. The public entities noted that only Bundled MOU/COOPs must undergo contested hearings to have their implementation plans approved; Denton opined that such hearings, at which TXU and other large retail providers could participate, would impose safeguards ensuring that large Bundled MOU/COOPs do not engage in anti-competitive activity. TPPA/TEC also observed that the Bundled MOU/COOP would face a compliance audit every three years. TPPA/TEC additionally argued that large MOU/COOPs actually have a greater incentive to unbundle because the separation of functions offers a more efficient mode of competition for organizations with more employees and other resources. Moreover, they contended, the more explicit standards set out in the provisions applicable to unbundled entities provide more certainty in planning competitive activities.

TPPA/TEC stated in supplemental reply comments that they agreed that subsection (o) does not and should not substantively modify the other sections of the proposed code of conduct.

As previously discussed, the commission adopts subsection (o) to comply with the provisions of PURA that allow the governing bodies of MOU/COOPs to decide whether to unbundle, and if they decide to unbundle, whether to do so functionally or structurally. The commission notes that Denton's concerns were raised early in the informal workshop sessions, and that the proposed subsection (o) is similar in format and concept to the proposed code filed by Denton on August 3, 2000. Accordingly, the parties have been afforded ample opportunity to review and consider the concepts of subsection (o). The commission acknowledges that some provisions in subsection (o) lack the specificity that is found in other sections of the rule but defers resolution to the contested case implementation proceeding.

Subsection (o)(1), Transactional safeguards relating to provision of products and services.

Brazos argued in supplemental comments that subsection (o)(1)(A), which prohibits tying arrangements, would prevent the offering of bundled services. TPPA/TEC joined Denton in supplemental reply comments disputing Brazos' conclusion that subsection (o)(1)(A) would prevent a Bundled MOU/COOP from continuing to offer bundled service offerings to its customers. These commenters noted that subsection (k)(1) contains a similar provision prohibiting an unbundled TDBU from conditioning the provision of a product, service, or pricing benefit on the purchase of any other good or service from the TDBU or its competitive affiliate. They also asserted, in Denton's words, that a "small MOU/COOP will always be able to *offer* the bundled service, but it will never be able to *require the purchase* of the bundled service." TXU agreed that the provision does not prohibit a Bundled MOU/COOP from bundling together various products to sell to customers. To better mirror the tying provision applicable to unbundled entities, TPPA/TEC suggested inserting the words "transmission or distribution" into subsection (o)(1)(A) so that the provision would read as follows: "A Bundled MOU/COOP shall not condition the provision of any transmission or distribution product, service, pricing benefit, or alternative terms or conditions upon the purchase of any other good or service from the Bundled MOU/COOP."

The commission finds that the prohibition against tying arrangements does not prevent the optional offering of bundled services; but merely prohibits a mandatory tying. The commission incorporates the language modification suggested by TPPA/TEC to better mirror the tying provisions applicable to unbundled entities.

With respect to subsection (o)(1)(B), Denton reiterated in supplemental comments its view that this provision, requiring the Bundled MOU/COOP to provide competitive energy services to all entities in a non-discriminatory fashion, should apply only if the product or service could be made available to a third party. Consequently, it advocated adding a provision to subsection (b)(1), the general applicability subsection, stating that nothing in the section shall require an MOU/COOP to provide to third parties products or services in violation of the MOU/COOP's private-use restrictions. Denton restated in supplemental reply

comments its belief that the phrase "persons providing competitive energy services on behalf of the Bundled MOU/COOP" was intended to refer to third parties outside the MOU/COOP. To clarify this intent, Denton suggested revising the phrase to read "persons outside the Bundled MOU/COOP providing competitive energy services on behalf of the Bundled MOU/COOP." TPPA/TEC endorsed Denton's comments in supplemental reply comments, with certain exceptions. In connection with Denton's comments on the provisions in subsection (o)(1)(B), TPPA/TEC contended that Denton's suggested addition to subsection (b) would inadequately protect MOU/COOPs. This addition incorrectly assumes, they said, that private-use concerns can be mitigated by the manner of providing products and services to third parties. According to TPPA/TEC, statutory and constitutional constraints prohibit the mandatory provisions of products and services contemplated in subsections (o)(1)(B) and (k)(1). In addition, they claimed, practical constraints in some cases could require that a third party be charged a fee for municipal services. TXU, in supplemental reply comments, reurged its argument that private-use restrictions do not affect products and services sold in competitive markets.

For the reasons discussed under subsection (k)(2), the commission addresses this concern by adding language to this section that the provision of any such products or services shall not violate PURA §40.104 or §41.104, or the Texas Constitution, Article III, section 52.

To ensure that the Bundled MOU/COOP does not include costs from competitive activities in its distribution rates, thereby obtaining an unfair advantage against competitors, TXU recommended in supplemental comments adding a new subparagraph (o)(1)(C) to explicitly prohibit such cross-subsidization. In supplemental reply comments, Denton and TPPA/TEC strongly opposed TXU's proposed specific cross-subsidization modifications to subsection (o). Denton opined that TXU's proposals would effectively nullify subsection (o), as they would impose the unbundling requirements the new subsection seeks to avoid. TPPA/TEC expressed a similar conclusion with respect to small MOU/COOPs, which, they said, "cannot guarantee an absolute absence of subsidy or accomplish full allocation of costs" involving shared functions.

Denton likewise stated that TXU's "blanket prohibition against subsidizing" competitive activities would require virtual unbundling and is unnecessary in light of the other protections provided by subsection (o)(1)(C).

The commission agrees in part with TXU and incorporates language prohibiting cross-subsidization, as modified to be consistent with the other provisions of the proposed rule that refer to significant opportunities for cross-subsidization.

Regarding subsection (o)(1)(C) (now subsection (o)(1)(D)), Denton, in supplemental comments, deemed "too onerous" the requirement that a Bundled MOU/COOP maintain separate books of accounts and records of all transactions involving the provision of competitive energy services. Denton recommended instead requiring the maintenance of only *segregated* accounts for such transactions. It stated that the latter requirement, which subsection (d)(4) applies to competitive divisions of functionally unbundled MOU/COOPs, would leave a good audit trail and allow the commission to determine compliance, without possibly necessitating "financial unbundling" to maintain the separate books. Denton added that if the commission does not consider segregated accounts sufficient, it could require Bundled MOU/COOPs to use the FERC chart of accounts or a comparable tracking method. TXU argued that this requirement is critical and recommended adding to the old subsection (o)(1)(C) (now subsection (o)(1)(D)) the following sentence to ensure against cross-subsidization: "Such expenses shall not be included in the Bundled MOU/COOP's transmission and distribution rates."

The commission agrees with Denton and modifies subsection (o)(1)(D) to require segregated accounts reflecting the FERC chart of accounts or a comparable tracking method. The commission also agrees with TXU and incorporates TXU's proposed language changes.

Brazos argued in supplemental comments that subsection (o)(1)(D) (now subsection (o)(1)(G)), regarding transfer or use of assets or products to provide competitive energy services, is too vague, saying that it is unclear what situation would be covered by the required safeguards regarding the transfer or use of assets or products "by a person providing competitive energy services on behalf of the bundled MOU/COOP to provide a competitive energy service." Denton suggested deleting the phrase "to provide competitive energy service" to clarify this provision. TXU stated in supplemental reply comments that it did not object to Denton's proposed modification.

The commission notes Brazos' concern but concludes that because the Bundled MOU/COOP has decided to remain bundled, it has the responsibility to devise a plan that ensures that the transfer is in accordance with the guidelines of this section. The commission agrees with the clarification suggested by Denton and supported by TXU and, therefore, deletes the specified language.

Denton expressed concern in supplemental comments that subparagraphs (E) and (F) (now subparagraphs (F) and (G) in subsection (o)(1)) could prohibit the sharing of personnel that is otherwise permitted by the rule. It stated that subparagraph (E) (now subparagraph (F)), by not allowing the transfer of confidential information in the provision of corporate support services, could prevent a Bundled MOU/COOP's employees from performing their roles. Denton likewise asserted that subparagraph (F), by disallowing preferential access "by any person providing competitive energy services" to information about its T&D systems, could have such a disabling effect if a Bundled MOU/COOP's employee's job results in his or her having information about both sets of services. Denton opined that subparagraphs (A) through (D) of subsection (o)(2) provide adequate protection against the inappropriate use of these types of information. Consequently, it recommended revising subparagraph (E) (now subparagraph (F)) by replacing the language "not allow, provide, or create a means for the transfer of confidential information, the opportunity for preferential treatment ..." with "comply with the provisions of subsection (o)(2)(A) through (D) hereof, thereby preventing the opportunity for preferential treatment ...." In addition, it recommended adding to subparagraph (F) (now subparagraph (G)) the sentence, "Such information shall be provided as required in subsection (o)(2)(D) hereof."

In contrast, Reliant and TXU objected in supplemental reply comments to Denton's suggested modifications. Reliant noted that success and fairness of the competitive market must take precedence over the difficulty any one company may have in unbundling services, and that some separation of function is absolutely necessary. Reliant and TXU argued that individuals with knowledge of the T&D systems cannot be permitted to use that knowledge in their retail marketing function regarding

competitive energy services. TXU proposed what it characterized as "although not a complete safeguard, a reasonable protection" to allow the sharing of all employees except those employees involved in marketing roles. TXU and Reliant strongly objected to the modifications suggested by Denton to subsections (o)(1)(E) and (F) (now subsections (o)(1)(F) and (G)). Further objections to the sharing of employees engaged in T&D functions and retail marketing functions were expressed by TXU and Reliant addressing subsection (o)(1)(I).

Although the commission acknowledges the concerns of TXU, as stated in the discussion regarding subsection (i)(1), there are safeguards in the proposed rule that prohibit the use of confidential information in an anticompetitive manner. The commission agrees with the concerns of Denton and declines to adopt the modifications suggested by TXU and Reliant because the modifications would have the implications of requiring a functional unbundling. The commission adopts Denton's suggested modifications to subsection (o)(1)(F).

TXU proposed revising subsection (o)(1)(H) (previously subsection (o)(1)(G)) to ensure that there is no cross subsidization when sharing personnel, facilities, and resources. Denton objected to TXU's proposed changes, claiming it would force at least partial unbundling and that the changes are not needed because the MOU/COOP's implementation plan must provide adequate safeguards against anti-competitive behavior.

The commission agrees with TXU and incorporates additional language to ensure against cross-subsidization. Likewise, as discussed in response to Preamble Question 1, documenting the sharing of employees engaged in both T&D functions and competitive energy-related activities is necessary to enforce against anticompetitive activities so the commission modifies subsection (o)(1)(H) accordingly. The commission finds that requiring a Bundled MOU/COOP to document the assignment of shared employees will not require unbundling and will provide the commission with the relevant and necessary data in the event the commission must address a complaint regarding anticompetitive actives.

TXU also objected to the "ambiguous statement" in subsection (o)(1)(H) (now subsection (o)(1)(I)) intended to prevent anti-competitive marketing and advertising activities by the Bundled MOU/COOP. Such a statement, TXU claimed, is a poor substitute for the specific safeguards of subsection (m), which are applicable in their entirety to large TDBUs. To strengthen this provision and to lessen confusion, TXU recommended adding the following sentences at the end of old subparagraph (H): "Specifically, a Bundled MOU/COOP's T&D function and its competitive energy services function shall not engage in joint marketing, advertising or promotional activities, including, but not limited to those activities set forth in Subsection (m)(2)(B) relating to a TDBU and its competitive affiliate. Further, any person having access to confidential, proprietary customer information shall not be permitted to assist or engage in marketing, advertising and promotional activities, including, but not limited to those activities set forth in Subsection (m)(2)(A)(i)-(v)." TPPA/TEC argued in reply comments that TXU's suggested elaborations on the marketing and advertising safeguards intrude on the Bundled MOU/COOP's required implementation filing.

Although the commission shares the concerns of TXU, the suggestions proposed would require the Bundled MOU/COOP to functionally separate its marketing activities and, therefore, must be rejected. The commission has, however, incorporated language to prevent cross-subsidization and tracking with respect to shared personnel, which would include any employees involved in both marketing and advertising and engaged in T&D functions.

TXU noted in supplemental comments that the phrase "employee marketing" is substituted in subsection (o)(2)(A) for the term "person providing competitive energy-related activities" as used throughout the rest of the rule. Denton opposed TXU's proposed technical correction to subsection (o)(2)(A). Denton averred that the use of the word "employee," rather than "person," is appropriate for this provision. Denton argues that the term "employee" clarifies that the Bundled MOU/COOP's employees are prohibited from showing favoritism to third parties acting on the MOU/COOP's behalf to the detriment of unrelated third parties.

First, the commission prefers the term "person" because it is broader than the term "employee." Second, the term "persons providing competitive energy-related activities on behalf of the Bundled MOU/COOP" should be used for consistency throughout the rule. Finally, the commission modifies the language from "employees of any third party" to "any entities" and reverses the order of these named persons and entities to be consistent with subsection (l)(1) of this section.

Denton voiced concern in supplemental comments regarding subsection (o)(2)(B). It stated that by prohibiting the release of proprietary customer information to "a person providing competitive energy services on behalf of the Bundled MOU/COOP," this subparagraph would prevent an employee from performing both T&D functions and competitive functions. Denton claimed that the required implementation plan will specify how the MOU/COOP "will prevent the unauthorized release of such information by an employee who wears several hats." In supplemental reply comments, TXU restated its belief that employees engaged in marketing of competitive energy services should not be shared with that part of the MOU/COOP responsible for T&D system operations.

The commission agrees with Denton that the implementation plan of the Bundled MOU/COOP is the appropriate place to specify how the Bundled MOU/COOP will prevent the unauthorized release of such information by an employee who wears several hats. As requested by Denton, the commission clarifies that "a person providing competitive energy-related activities on behalf of the Bundled MOU/COOP" refers to any employee who engages in any amount of competitive energy related activities, regardless of whether that employee is responsible for other non-competitive energy related activities.

To clarify that subsection (o)(2)(D) pertains to the accounting of costs incurred in providing information to customers about the Bundled MOU/COOP's competitive energy services, Denton, in supplemental comments recommended modifying the second sentence. Specifically, it suggested replacing the phrase "such service in accordance with subsection (o)(1)(C)" with "the provision of such information in the same manner as transactions involving the provision of competitive energy related activities, in accordance with subsection (o)(1)(C)." TXU stated in supplemental reply comments that it agrees with Denton's proposed change.

The commission agrees with the parties' suggested clarification and modifies the language accordingly.

Denton noted in supplemental comments that despite the requirement in subsection (o)(3)(C) that the Bundled MOU/COOP

file copies of its contracts with its "competitive affiliates," the bundled entity would have no such affiliates. Denton also objected to the possibility that this provision could require the bundled entity to file with the commission copies of contracts it may have with third parties providing competitive energy services on the MOU/COOP's behalf. It claimed that such contracts are exempt from the public-disclosure requirements of the Public Information Act. Moreover, Denton asserted that such a requirement would place a Bundled MOU/COOP at a competitive disadvantage to both IOUs and unbundled MOU/COOPs, which are required by subsection (e) only to provide copies of agreements with its competitive affiliates, not with third parties. In supplemental reply comments, TXU stated that it did not object to the deletion of "competitive affiliate," but it does object to removing the requirement that a Bundled MOU/COOP must file contracts it has with "persons providing competitive energy services on behalf of a Bundled MOU/COOP" because the relationship with and transaction between an MOU/COOP and these "persons" are the focus of the proposed rule.

The commission agrees with Denton and TXU and deletes the term "competitive affiliate," as a Bundled MOU/COOP will likely not have an affiliate. The commission agrees with Denton and modifies the language to clarify that the Bundled MOU/COOP does not have to produce any contracts it has with third parties if such contracts were negotiated on an arm's length basis. The commission does not require IOUs to provide contracts with third parties and the commission cannot be more restrictive on MOU/COOPs. The commission notes that it has the authority to disallow unreasonable expenses when setting the rates for IOU T&D utilities, but no such authority exists for MOU/COOPs.

Finally, Denton and TXU suggested corrections to typographical errors in subsection (o)(3)(B) and (C).

The commission incorporates these editorial corrections.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

This new rule is adopted under the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated §§14.002, 39.157(e), 40.001, 40.004, 40.054, 40.056, 41.001, 41.004, 41.054, and 41.056 (Vernon 1998, Supplement 2001). Section 14.002 provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. Section 39.157(e) requires that the commission establish a code of conduct that must be observed by COOPs and MOUs and their affiliates to protect against anticompetitive practices. Chapter 40 addresses competition for MOUs and river authorities, and Chapter 41 addresses competition for COOPs. Specifically, §40.001 addresses the law applicable to MOUs. Section 40.004 gives the commission jurisdiction over MOUs for certain purposes. Section 40.054 subjects the MOU to the commission's authority in certain instances. Section 40.056 grants the commission authority over complaints for anticompetitive actions. Section 41.001 addresses the law applicable to COOPs. Section 41.004 gives the commission jurisdiction over COOPs for certain purposes. Section 41.054 subjects the COOP to the commission's authority in certain instances. Section 41.056 grants the commission authority over complaints for anticompetitive actions.

Cross Reference to Statutes: PURA §§14.002, 39.157(e), 40.001, 40.004, 40.054, 40.056, 41.001, 41.004, 41.054, and 41.056.

§25.275. Code of Conduct for Municipally Owned Utilities and Electric Cooperatives Engaged in Competitive Activities.

(a) Purpose. To protect against anticompetitive practices, consistent with the provisions of the Public Utility Regulatory Act (PURA) §39.157(e) and Chapters 40 and 41, the provisions of this section establish safeguards to govern the interaction between the transmission and distribution business unit (TDBU), as defined in subsection (c) of this section, of a municipally owned utility (MOU) or electric cooperative (COOP) and its competitive affiliates, and establish specific anticompetitive standards to apply to the activities of Bundled MOU/COOPS, as defined in subsection (c) of this section. It is intended by this section that no MOU/COOP subject to this section shall engage in the following anticompetitive practices:

(1) Subsidize competitive activities directly or indirectly through rates charged for the provision of electric service;

(2) Allow discriminatory access to transmission and distribution products and services;

(3) Allow preferential access to transmission and distribution-related information;

(4) Allow unauthorized access to confidential customer information; and

(5) Allow employees performing transmission and distribution functions to provide leads to or promote the products of competitive affiliates or any persons providing competitive energy-related activities on behalf of a Bundled MOU/COOP.

(b) Application.

(1) General application. This section applies to the TDBU of a municipally owned utility or an electric cooperative (collectively referred to as MOU/COOP) operating in the State of Texas, and the transactions or activities between the TDBU and its competitive affiliates, and to an MOU/COOP that is conducting the activities of a TDBU and of a competitive affiliate on a bundled basis, provided that each of the following conditions is met:

(A) The MOU/COOP has chosen to participate in customer choice pursuant to PURA §40.051(b) or PURA §41.051(b).

(B) The competitive affiliate of an MOU/COOP or a Bundled MOU/COOP is providing electric energy at retail to consumers in Texas outside its certificated retail service area. For the purposes of this section, an MOU/COOP shall not be considered to be providing electric energy to retail consumers outside its certificated retail service area if:

(i) the MOU/COOP was serving the area prior to the date of customer choice;

(ii) after receiving notice that the MOU/COOP or its affiliate is selling electric energy at retail outside its retail service area, which identifies the service location, the MOU/COOP or its affiliate promptly investigates and thereafter takes reasonable steps to cease the provision of service outside its service area as soon as reasonably practicable; or

(iii) there is a dispute concerning the service area boundary and no commission order resolving the dispute has become final or the commission's order is subject to appeal.

(2) Effect of unbundling on application. Pursuant to PURA §40.055 and §41.055 it is the discretion of the governing body

of the MOU/COOP to determine whether to unbundle any energy-related activities, and whether to do so structurally or functionally. The MOU/COOP shall file with the commission, in conjunction with the filing required by subsections (n)(1)(A) or (o)(3)(A) of this section, a written declaration of whether it chooses to structurally or functionally unbundle or whether it will provide services in a competitive market on a bundled basis. The written declaration may be amended from time to time but no amendment shall be effective before it is filed with the commission. The MOU/COOP shall comply with this section as follows:

(A) A structurally or functionally unbundled MOU/COOP shall comply with the provisions of this subsection, as applicable to entities of its size. Subsection (o) of this section is not applicable to a functionally or structurally unbundled MOU/COOP.

(B) A Bundled MOU/COOP shall comply with the requirements of paragraphs (5) and (7)-(9) of this subsection, subsection (n)(2)-(10), and subsection (o) of this section.

(3) Small TDBU. A small unbundled TDBU is subject to the following provisions of this section only:

(A) paragraphs (1) and (5)-(9) of this subsection, application;

(B) subsection (i)(4) of this section, separate books and records;

(C) subsection (j)(1) of this section, transactions with competitive affiliates; however, transactions provided for under subsection (j)(1) of this section shall be conducted at pricing levels that are fair and reasonable to the customers of the small TDBU and that reflect not less than the book value of the assets and the cost of employee time determined on the basis of aggregate percentage of time devoted by the employee to the competitive function or transmission and distribution function and do not include any discounts, rebates, fee waivers or alternative tariff terms and conditions;

(D) subsection (k)(1) of this section, tying arrangements prohibited;

(E) subsection (k)(2) of this section, products and services available on a non-discriminatory basis; and

(F) subsection (n) of this section, remedies and enforcement.

(4) Mid-size TDBU. A mid-size unbundled TDBU is subject to the following provisions of this section only:

(A) paragraphs (1) and (5)-(9) of this subsection, application;

(B) subsection (d) of this section, annual report of code-related activities; however, a mid-size TDBU shall report only with respect to the activities for which it is subject to regulation under this section;

(C) subsection (e) of this section, copies of contracts or agreements;

(D) subsection (f) of this section, tracking migration and sharing of employees;

(E) subsection (g) of this section, reporting deviations from the code of conduct; however, a mid-sized TDBU shall only report deviations with respect to the activities for which it is subject to regulation under this section;

(F) subsection (h) of this section, ensuring compliance for new competitive affiliates;

(G) subsection (i) of this section, separation of a TDBU from its competitive affiliates; however, sharing of employees, facilities, or other resources with competitive affiliates shall be allowed, and the safeguards shall be deemed achieved through compliance with the transactional, information transfer, and marketing and advertising standards applicable to a mid-size TDBU under subsections (j), (k), and (l) of this section;

(H) subsection (j)(1) of this section, transactions with competitive affiliates; however, transactions provided for under subsection (j)(1) of this section shall be conducted at pricing levels that are fair and reasonable to the customers of the mid-size TDBU and that reflect not less than the book value of the assets and the cost of employee time determined on the basis of aggregate percentage of time devoted by the employee to the competitive function or transmission and distribution function and do not include any discounts, rebates, fee waivers or alternative tariff terms and conditions;

(I) subsection (j)(2) of this section, records of transactions;

(J) subsection (j)(3) of this section, provision of corporate support services, except to the extent that sharing of confidential information may not practicably be avoided due to cross-functional responsibilities of employees;

(K) subsection (k)(1) of this section, tying arrangements prohibited;

(L) subsection (k)(2) of this section, products and services available on a non-discriminatory basis;

(M) subsection (l)(1) of this section, proprietary customer information;

(N) subsection (1)(2) of this section, nondiscriminatory availability of aggregate customer information. A mid-size TDBU shall make aggregate customer information available to all non-affiliates under the same terms and conditions and at the same price or fully allocated cost that it is made available to any of its competitive affiliates, but is not otherwise subject to the reporting requirements in subsection (l)(2) of this section.

(O) subsection (l)(3) of this section, no preferential access to transmission and distribution information. A mid-size TDBU shall comply with this paragraph except to the extent preferential access may not practicably be avoided due to cross-functional responsibilities of employees or other operating constraints as reasonably determined by the mid-size TDBU;

(P) instead of the restrictions in subsection (m)(2) of this section, a mid-sized TDBU may participate in joint marketing, advertising, and promotional activities with a competitive affiliate, provided that the mid-size TDBU informs the customer that the competitive energy services to which the promotional activities are directed are available from other providers as well as the mid-size TDBU and makes available to the customer upon request a copy of the most recent list of competitive energy service providers as developed and maintained by the commission;

(Q) instead of the restrictions in subsections (m)(3) and (m)(4) of this section, if a customer or potential customer of a mid-size TDBU makes an unsolicited request for distribution service, competitive service, or information relating to such services, the mid-size TDBU shall inform the customer that competitive energy-related activities are available not only from the mid-size TDBU but also from

other providers. The mid-size TDBU shall make available to a customer upon request a copy of the most recent list of competitive energy service providers as developed and maintained by the commission and may make available telephone numbers and other commonly available information; and

(R) subsection (n) of this section, remedies and enforcement.

(5) Duration of code application. This section applies to a TDBU and a Bundled MOU/COOP, regardless of whether it is classified as large, mid-size or small, only so long as each of the conditions of paragraph (1) of this subsection continue to be met.

(6) Report of energy system sales and declaration of code applicability. A report of total metered electric energy (MWh) delivered through the TDBU's system for sale at retail and wholesale, for the average of the three most recent calendar years, shall be filed annually with the commission by each MOU/COOP subject to the provisions of this section. The initial report shall be filed in conjunction with subsection (n)(1) of this section. After the initial report filing, the report of energy system sales shall be filed annually by June 1, and shall encompass the period from January 1 through December 31 of the preceding year. The annual report of energy system sales shall be filed under a control number designated by the commission for each calendar year. Both the initial and annual reports of energy sales shall include a statement from the MOU/COOP affirming that it is classified as either a small, mid-size, or large TDBU.

(A) In the event that the MWhs delivered through the TDBU's system increase so that a TDBU is reclassified to a larger size, the TDBU shall notify the commission through the annual report of energy system sales. The TDBU shall have one year from the date of the reclassification to implement the applicable provisions of this section.

(B) Petition for exception to reclassification. Any TDBU may petition the commission for exception to the size determination. Upon request, if a small TDBU is reclassified as a mid-sized TDBU, the commission may consider an adjustment for growth based upon total Texas retail sales.

(7) No circumvention of the code of conduct. An MOU/COOP shall not circumvent the provisions of PURA §39.157(e) or this section by using any affiliate to provide information, services, products, or subsidies that would be prohibited by this section between a competitive affiliate and a TDBU. A Bundled MOU/COOP shall not circumvent the provisions of PURA §39.157(e) or this section by using any persons to provide information, services, products, or subsidies that would be prohibited by this section between persons providing transmission and distribution service on behalf of the Bundled MOU/COOP and persons providing competitive energy-related activities on behalf of the Bundled MOU/COOP.

(8) Good cause exception. An MOU/COOP that is or may become subject to this section may petition the commission at any time for an exception or waiver of any provision of this section on a showing of good cause. Good cause may be demonstrated by showing that the cost or difficulty of achieving compliance outweighs the benefit to be achieved or that there are other alternative actions that are likely to produce reasonable results under the circumstances.

(9) Notice of conflict with other regulation and petition for waiver. Nothing in this section shall affect or modify the obligation or duties relating to any rules or standards of conduct that may apply to an MOU/COOP or its affiliates, whether competitive or noncompetitive, under orders or regulations of the Federal Energy Regulatory Commission (FERC), Securities and Exchange Commission (SEC), or shall violate PURA, Chapters 40 and 41, subchapter C. An MOU/COOP shall file with the commission a notice of any provision in this section that conflicts with FERC or SEC orders or regulations. An MOU/COOP that is subject to statutes or regulations in any state that conflict with a provision of this section may petition the commission for a waiver of the conflicting provision on a showing of good cause.

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

(1) Affiliate - An entity, including a business unit or division, that controls, is controlled by, or is under common control with, an MOU/COOP. Control means the power and authority to direct the management or policies of an entity through directly or indirectly owning or holding at least a 5.0% voting or ownership interest. Affiliate includes an entity determined to be an affiliate by the commission after notice and hearing based on criteria parallel to those prescribed in PURA §11.006.

(2) Bundled MOU/COOP - An MOU/COOP that is conducting both transmission and distribution activities and competitive energy-related activities on a bundled basis without structural or functional separation of transmission and distribution functions from competitive energy-related activities and that makes a written declaration of its status as a Bundled MOU/COOP pursuant to subsection (o)(3)(A) of this section.

(3) Competitive affiliate - An affiliate of an MOU/COOP that provides services or sells products at retail in a competitive energy-related market in this state, including telecommunications services to the extent those services are energy-related. An affiliate of an MOU/COOP that is selling energy only in the capacity of a provider of last resort within the scope of PURA §40.053(c) and (d) or PURA §41.053 (c) and (d) is not a competitive affiliate under this definition. The term competitive affiliate shall include both competitive divisions and competitive subsidiaries.

(4) Competitive division (CD) - A competitive affiliate that is organized as a division or other part of an MOU/COOP.

(5) Competitive energy-related activities - Services or products that are sold at retail in a competitive energy-related market in this state, including telecommunications services to the extent those services are energy-related.

(6) Competitive subsidiary (CS) - A competitive affiliate that is organized as a corporation or other legally distinct entity.

(7) Confidential information - Any information not intended for public disclosure and considered to be confidential or proprietary by persons privy to such information. Confidential information includes, but is not limited to, information relating to the interconnection of customers to an MOU/COOP's transmission or distribution systems, proprietary customer information, trade secrets, competitive information relating to internal manufacturing processes, and information about an MOU/COOP's transmission or distribution system, operations, or plans for expansion.

(8) Corporate support services - Services shared by a TDBU, or an affiliate created to perform corporate support services, with the MOU/COOP's affiliates of joint corporate oversight, governance, support systems, and personnel. For a Bundled MOU/COOP, "corporate support services" includes governance, support systems, and personnel.

(A) Examples of services that may be shared, to the extent the services comply with this section, include human resources, procurement, information technology, regulatory services, administrative services, real estate services, legal services, accounting, environmental services, research and development unrelated to marketing activity and/or business development for the competitive affiliate regarding its services and products, internal audit, community relations, corporate communications, financial services, financial planning and management support, corporate services, corporate secretary, lobbying, corporate planning, and community economic development if the economic development activities are within the MOU/COOP's certificated retail service area.

(B) Examples of services that may not be shared, except as otherwise allowed under the terms of this section, include engineering, purchasing of electric transmission facilities and service, transmission and distribution system operations, and marketing.

(9) Fully allocated cost - The cost of a product, service, or asset based on book values for the component elements established through generally accepted accounting principles (GAAP); or alternatively, an internal transfer price based upon the actual or expected (budgeted) operating and maintenance expenses and a capital component, as appropriate, divided by the expected or actual units for the service or product produced. Such transfer prices may be set as needed but shall not be used beyond a three year period without review. The operating and maintenance expenses shall be fully loaded with applicable overheads. The capital component shall consider the original cost of the associated assets and a reasonable return. Such internal prices may include an allowance for transfers to a municipal general fund at the discretion of the municipality.

(10) Large transmission and distribution business unit (TDBU) - A TDBU that:

(A) delivers total metered electric energy through its system for sale at retail for the average of the three most recent calendar years greater than 6,000,000 MWh; and

(B) is otherwise subject to the provisions of this section as provided in subsection (b)(1) of this section.

(11) Mid-size transmission and distribution business unit (TDBU) - A TDBU that:

(A) delivers total metered electric energy through its system for sale at retail for the average of the three most recent calendar years that is less than or equal to 6,000,000 MWh and is greater than 500,000 MWh; and

(B) is otherwise subject to the provisions of this section as provided in subsection (b)(1) and (b)(4) of this section.

(12) Municipally owned utility/electric cooperative (MOU/COOP) - A municipally owned utility (MOU) as defined in PURA §11.003(11) or an electric cooperative (COOP) as defined in PURA §11.003(9). As used in this section, MOU/COOP does not include a competitive affiliate but does include an MOU, a COOP, or a river authority that has an affiliate relationship with a TDBU that is a division or part of the MOU/COOP.

(13) Proprietary customer information - Any information compiled by a TDBU on a customer in the normal course of providing electric service that makes possible the identification of any individual customer by matching such information with the customer's name, address, account number, type or classification of service, historical electricity usage, expected patterns of use, types of facilities used in providing service, individual contract terms and conditions, price, current charges, billing records, or any other information that the customer has expressly requested not be disclosed. Information that is redacted or organized in such a way as to make it impossible to identify the customer to whom the information relates does not constitute proprietary customer information.

(14) Small transmission and distribution business unit (TDBU) - A TDBU that:

(A) delivers total metered electric energy through its system for sale at retail of less than 500,000 MWh for the average of the three most recent calendar years; and

(B) is otherwise subject to the provisions of this section as provided in subsection (b)(1) and (b)(3) of this section.

(15) Transaction - Any interaction between a TDBU and its competitive affiliates in which a service, asset, product, property, right, or other item is transferred or received by either the TDBU or its competitive affiliates.

(16) Transmission and distribution business unit (TDBU) - The business unit of an MOU/COOP, whether structurally unbundled as a separate legal entity or functionally unbundled as a division, that owns or operates for compensation in this state equipment or facilities to transmit or distribute electricity at retail, except for facilities necessary to interconnect a generation facility with the transmission or distribution network, a facility not dedicated to public use, or a facility otherwise excluded from the definition of electric utility in a qualifying power region certified under PURA §39.152. TDBU does not include an MOU/COOP that owns, controls, or is an affiliate of the TDBU if the TDBU is organized as a separate corporation or other legally distinct entity. Except as specifically authorized by statute, a TDBU shall not provide competitive energy-related activities.

(d) Annual report of code-related activities. A report of activities related to this section shall be filed annually with the commission. Using forms approved by the commission, a TDBU shall report activities among itself and its competitive affiliates in accordance with the requirements of this section. The report shall be filed by June 1, and shall encompass the period from January 1 through December 31 of the preceding year during which the MOU/COOP was subject to this section.

(e) Copies of contracts or agreements. A TDBU shall reduce to writing and file with the commission copies of any contracts or agreements it has with its competitive affiliates. The filing of an earnings report does not satisfy the requirements of this section. All contracts or agreements shall be filed by June 1 of each year as attachments to the annual report of code-related activities required in subsection (d) of this section. In subsequent years, if no significant changes have been made to the contract or agreement, an amendment sheet may be filed in lieu of refiling the entire contract or agreement.

(f) Tracking migration and sharing of employees. An MOU/COOP shall track and document the movement between the TDBU and its competitive affiliates of all employees engaged in transmission or distribution system operations, including persons employed by the MOU/COOP who are engaged in transmission or distribution system operations on a day-to-day basis or who have knowledge of transmission or distribution system operations. An MOU/COOP shall also document the assignment of shared employees engaged in both transmission or distribution system operations and competitive energy-related activities, if any. Employee migration and sharing information shall be included in the MOU/COOP's annual report of code-related activities. For migrating employees, the tracking information shall include an identification code, the respective titles held while employed at the TDBU and the competitive affiliate, and the effective dates of the migration. For shared employees, the tracking

information shall include the employees' name, job title, scope of activities, and allocation of time to transmission and distribution functions and competitive energy-related activities.

(g) Reporting deviations from the code of conduct. A TDBU shall report information regarding the instances in which deviations from this section were necessary to ensure public safety or system reliability pursuant to this section. The information reported shall include the nature of the circumstances involved and the date of the deviation. Within 30 days of each deviation relating to a competitive affiliate, the MOU/COOP shall report this information to the commission and shall conspicuously post the information on its Internet site or a public electronic bulletin board for 30 consecutive calendar days. Information regarding a deviation shall be summarized in the MOU/COOP's annual report of code-related activities.

(h) Ensuring compliance for new competitive affiliates. An MOU/COOP and a new competitive affiliate are bound by this code of conduct, to the extent applicable, immediately upon creation of the new competitive affiliate. The MOU/COOP shall post a conspicuous notice of any newly created competitive affiliates on its Internet site or a public electronic bulletin board for 30 consecutive calendar days. Additionally, the MOU/COOP shall ensure that its annual report of code-related activities reflects all changes that result from the creation of new competitive affiliates.

(i) Separation of a TDBU from its competitive affiliates.

(1) Sharing of employees, officers and directors, property, equipment, computer and information systems, other resources, and corporate support services. An MOU/COOP and its competitive affiliate may share common employees, officers and trustees/directors, property, equipment, computer and information systems, other resources, and corporate support services, if the TDBU implements safeguards that the commission determines are adequate to preclude employees of a competitive affiliate from gaining access to confidential information in a manner that would allow or provide a means to transfer confidential information from the TDBU to the competitive affiliate, create an opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of a competitive affiliate.

(2) Employee transfers and temporary assignments.

(A) An MOU/COOP shall not assign to a competitive affiliate for less than one year employees engaged in transmission or distribution system operations unless safeguards are in place to prevent transfer of confidential information. TDBU employees engaged in transmission or distribution system operations, including persons employed by a structurally unbundled service company affiliate of the TDBU who are engaged on a day-to-day basis in or have knowledge of transmission or distribution system operations and are transferred to a competitive affiliate, shall not remove or otherwise provide or use confidential information or information gained from the TDBU or affiliated service company, in a discriminatory or exclusive fashion to the benefit of the competitive affiliate or to the detriment of non-affiliated electric suppliers.

(B) Movement of employees to a competitive affiliate may be accomplished either through the employee's termination of employment with the TDBU and acceptance of employment with the CS or through a transfer to the CD as long as the transfer results in the TDBU bearing no ongoing costs associated with that employee.

(C) Transferring employees shall sign a statement indicating that they are aware of and understand the restrictions set forth in this section. The TDBU also shall post a conspicuous notice of such a transfer on its Internet site or other public electronic bulletin board within 24 hours and for at least 30 consecutive calendar days.

(D) Employees may be temporarily assigned to an affiliate or non-affiliated TDBU to assist in restoring power in the event of a major service interruption or to assist in resolving emergency situations affecting system reliability. Any such deviation shall be reported and posted on the TDBU's Internet site or other public electronic bulletin board within 24 hours and for at least 30 consecutive calendar days.

(3) Sharing of office space. A TDBU's office space shall be physically separate from the office space of its competitive affiliates. Physical separation is accomplished by having office space in separate buildings or, if within the same building, by a method such as having offices on separate floors or with separate access.

(4) Separate books and records. A TDBU shall maintain separate books of accounts and records from those of any CS. In a proceeding under subsection (n)(3) of this section, the commission may review records relating to a transaction between a TDBU and a CS. Costs of CDs, other than those costs related to corporate support services, shall be segregated by account.

(A) In accordance with generally accepted accounting principles, a TDBU shall record all transactions with its CS whether they involve direct or indirect expenses, and all transactions with CDs that relate to the transmission and distribution function.

(B) A TDBU shall prepare financial statements that are not consolidated with those of a CS.

(5) Limitations on credit support by a TDBU for a competitive affiliate. A TDBU and its affiliates may share credit, investment, or financing arrangements with a competitive affiliate if the TDBU implements adequate safeguards precluding employees of a competitive affiliate from gaining access to information in a manner that would allow or provide a means to transfer confidential information from the TDBU to the competitive affiliate or lead to customer confusion. Nothing in this section shall impair existing contracts, covenants, or obligations between an MOU/COOP and its lenders and holders of bonds issued on behalf of or by an MOU/COOP.

(A) MOU. In issuing debt related to competitive affiliates, an MOU shall be governed by and maintained, operated, and managed in accordance with the laws of the State of Texas, including the ordinances and resolutions authorizing the issuance of any form of indebtedness and the provisions thereof, which require that funds reasonably necessary for operation and maintenance expenses (including TDBU operation and maintenance expenses) have priority in any pledge of gross revenues of the municipally owned utility system.

(B) COOP. A COOP TDBU shall not allow a competitive affiliate to obtain credit under any arrangement that would include a specific pledge of assets reasonably necessary for TDBU operations or a pledge of gross revenues of the TDBU.

(j) Transactions between a TDBU and its competitive affiliates.

(1) Transactions with competitive affiliates. Except for transfers implementing unbundling, transfers of property pursuant to a rate order having the effect of a financing order, credit support, and corporate support services provided by a TDBU to its competitive affiliate, any transaction between a TDBU and its competitive affiliate shall be accomplished at pricing levels that are fair and reasonable to the customers of the TDBU and that reflect the approximate market value of the assets or the fully allocated cost of the assets, services, or products, and that do not include any preferential discounts, rebates,

fee waivers or alternative tariff terms and conditions. Such transfers include, but are not limited to, the following:

(A) sale or provision of products or services by a TDBU to its competitive affiliate;

(B) purchase or acquisition of products, services, or assets by a TDBU from a competitive affiliate; or

(C) assets transferred from a TDBU to a competitive affiliate.

(2) Records of transactions. Each transaction between a TDBU and its competitive affiliates, other than those involving corporate support services or transactions governed by tariffs of general applicability filed at the commission or approved by the TDBU's governing body, shall be reflected in a contemporaneous written record of the transaction including the date of the transaction, name of the competitive affiliate, name of a TDBU employee knowledgeable about the transaction, and description of the transaction. Such records shall be maintained for three years.

(3) Provision of corporate support services. A TDBU may engage in transactions directly related to the provision of corporate support services with its competitive affiliate. Such transactions shall be carried out in such a way as to not allow or provide the means for the transfer of confidential information from the TDBU to the competitive affiliate, the opportunity for preferential treatment or unfair competitive advantage, customer confusion, or significant opportunities for cross-subsidization of the competitive affiliate.

(k) Safeguards relating to provision of products and services.

(1) Tying arrangements prohibited. A TDBU shall not condition the provision of any product, service, pricing benefit, or alternative terms or conditions upon the purchase of any other good or service from the TDBU or its competitive affiliate.

(2) Products and services available on a non-discriminatory basis. Any product or service, other than corporate support services or credit arrangements, made available by a TDBU to its competitive affiliate shall be made available to all similarly situated entities at the same price and on the same basis and manner that the product or service was made available to the competitive affiliate, provided however, that such provision does not violate PURA §40.104 or §41.104, or the Texas Constitution, Article III, section 52. Any service required to be provided in compliance with PURA §39.203 shall be provided in a non-discriminatory manner and in accordance with the tariffs developed pursuant to any commission rule implementing that section.

(l) Information safeguards.

(1) Proprietary customer information. Upon request by the customer, a TDBU shall provide a customer with the customer's proprietary customer information. Unless a TDBU obtains prior affirmative written consent or other verifiable authorization from the customer as determined by the commission, or unless otherwise permitted under this subsection, it shall not release any proprietary customer information to a competitive affiliate or to any other entity, other than the customer, an independent organization as defined by PURA §39.151, or a provider of corporate support services for the sole purpose of providing corporate support services in accordance with subsection (j)(3) of this section. The TDBU shall maintain records that include the date, time, and nature of information released when it releases customer proprietary information to another entity in accordance with this paragraph. The TDBU shall maintain records of such information for a minimum of three years and shall make the records available for third party review within three business days of a written request or at a time mutually agreeable to the TDBU and the third party. When the third party requesting review of the records is not the customer, commission, or Office of Public Utility Counsel, the records may be redacted in such a way as to protect the customer's identity. If proprietary customer information is released to an independent organization or a provider of corporate support services, the independent organization or entity providing corporate support services is subject to the rules in this subsection with respect to releasing the information to other persons.

(A) Exception for law, regulation, or legal process. A TDBU may release proprietary customer information to another entity without customer authorization where authorized or requested to do so by the commission or by law, regulation, or legal process. Nothing in this rule requires disclosure of information that may be withheld from disclosure under Texas Government Code, Chapter 552.

(B) Exception for release to governmental entity. Without customer authorization, a TDBU may release proprietary customer information to a federal, state, or local governmental entity or in connection with a court or administrative proceeding involving the customer or the TDBU, provided however, that the TDBU shall take all reasonable actions to protect the confidentiality of such information, including, but not limited to, providing such information under a confidentiality agreement or protective order, and shall also promptly notify the affected customer in writing that such information has been requested.

(C) Exception to facilitate transition to customer choice. In order to facilitate the transition to customer choice, an MOU/COOP may release proprietary customer information to its competitive affiliate without authorization of those customers, where either entity will be exercising the function of retail electric provider or provider of last resort, provided however, that such information may be released only during the six-month period prior to implementation of customer choice, during the six-month period prior to implementation or expansion of a pilot project, or such additional periods as may be prescribed by the commission.

(D) Exception for release to providers of last resort. On or after January 1, 2002, a TDBU may provide proprietary customer information to a provider of last resort without customer authorization for the purpose of serving customers who have been switched to the provider of last resort.

(E) Exception for release to customer's selected competitive retailer. Subject to demonstration by the competitive retailer that the customer has selected that competitive retailer, a TDBU shall release proprietary customer information for a particular customer to the competitive retailer chosen by that customer in connection with provision of metering data or otherwise in compliance with the Access Tariff applicable to the TDBU under PURA §39.203.

(2) Nondiscriminatory availability of aggregate customer information. A TDBU may aggregate non-proprietary customer information, including, but not limited to, information about a TDBU's energy-related goods or services. However, except in circumstances solely involving the provision of corporate support services in accordance with subsection (j)(3) of this section, a TDBU shall aggregate non-proprietary customer information for a competitive affiliate only if the TDBU makes such aggregation service available to all non-affiliates under the same terms and conditions and at the same price or fully allocated cost as it is made available to any of its competitive affiliates. In addition, no later than 24 hours prior to a TDBU's provision to its competitive affiliate of aggregate customer information, the TDBU shall post a conspicuous notice on its Internet site or other public electronic bulletin board for at least 30 consecutive calendar days, providing the following information: the name of the competitive affiliate to which the information will be provided, the rate charged or cost

allocated for the information, a meaningful description of the information provided, and the procedures by which non-affiliates may obtain the same information under the terms and conditions. The TDBU shall maintain records of such disclosure information for a minimum of three years and shall make such records available for third party review within three business days of a written request or at a time mutually agreeable to the TDBU and the third party.

(3) No preferential access to transmission and distribution information. A TDBU shall not allow preferential access by its competitive affiliates to information about its transmission and distribution systems.

(4) Other limitations on information disclosure. Nothing in this rule is intended to alter the specific limitations on disclosure of confidential information in the Texas Utilities Code, the Texas Government Code, Chapter 552, or the commission's substantive and procedural rules.

(5) Other information. Except as otherwise allowed in this subsection, a TDBU shall not share information with competitive affiliates, except for information required to perform allowed corporate support services unless the TDBU can prove to the commission that the sharing will not compromise the public interest prior to any such sharing. Information that is publicly available, or that is unrelated in any way to utility activities, may be shared.

(m) Safeguards relating to joint marketing and advertising.

(1) Name and logo. A TDBU may not, prior to September 1, 2005, allow the use of its corporate trademark, name, brand, or logo by a CS on employee business cards or in any written or auditory advertisements of specific services to existing or potential residential or small commercial customers located within the TDBU's certificated service area, whether through radio or television, Internet-based, or other electronic format accessible to the public unless the CS includes a disclaimer with its use of the TDBU's corporate trademark, name, brand, or logo. Such disclaimer of the corporate trademark, name, brand, or logo in the material distributed must be written in a bold and conspicuous manner or clearly audible, as appropriate for the communication medium, and shall state the following: "{Name of CS} is not the same entity as {name of TDBU} and you do not have to buy {name of CS}'s products to continue to receive quality services from {name of TDBU}." A TDBU may allow the use of its corporate name, brand, or logo by a CD in any context.

(2) Joint marketing, advertising, and promotional activities.

(A) A TDBU shall not:

(i) provide or acquire leads on behalf of its competitive affiliates;

(ii) solicit business or acquire information on behalf of its competitive affiliates;

(iii) give the appearance of speaking or acting on behalf of any of its competitive affiliates in connection with any marketing, advertising or promotional activities, other than community economic development activities;

(iv) share market analysis reports or other types of proprietary or non-publicly available reports relating to retail energy sales, including, but not limited to, market forecast, planning, or strategic reports with its competitive affiliates; or

(v) request authorization from its customers to pass on information exclusively to its competitive affiliate.

(B) A TDBU shall not engage in joint marketing, advertising, or promotional activities of its products or services with those of a competitive affiliate in a manner that favors the competitive affiliate. Such joint marketing, advertising, or promotional activities include, but are not limited to, the following activities:

(i) acting or appearing to act on behalf of a competitive affiliate in any communications and contacts with any existing or potential customers;

(ii) joint sales calls;

(iii) joint proposals, either as requests for proposals or responses to requests for proposals;

(iv) joint promotional communications or correspondence, except that a TDBU may allow a competitive affiliate access to customer bill advertising inserts so long as access to such inserts is made available on the same terms and conditions to non-affiliates offering similar services as the competitive affiliate that uses bill inserts;

(v) joint presentations at trade shows, conferences, or other marketing events within the state of Texas; and

(vi) providing links from a TDBU's Internet web site to a competitive affiliate's Internet web site.

(C) At a customer's unsolicited request, a TDBU may participate in meetings with a competitive affiliate to discuss technical or operational subjects regarding the TDBU's provision of transmission or distribution services to the customer but only in the same manner and to the same extent the TDBU participates in such meetings with unaffiliated electric or energy services suppliers and their customers. Representatives of a TDBU may be present during a sales discussion between a customer and the TDBU's competitive affiliate but shall not participate in the discussion or purport to act on behalf of the competitive affiliate.

(3) Requests for specific competitive affiliate information. If a customer or potential customer makes an unsolicited request to a TDBU for information specifically about any of its competitive affiliates, the TDBU may refer the customer or potential customer to the competitive affiliate for more information. Under this paragraph, the only information that a TDBU may provide to the customer or potential customer is the competitive affiliate's address and telephone number. The TDBU shall not transfer the customer directly to the competitive affiliate's customer service office via telephone or provide any other electronic link whereby the customer could contact the competitive affiliate through the TDBU. When providing the customer or potential customer information about the competitive affiliate, the TDBU shall not promote its competitive affiliate or its competitive affiliate's products or services, nor shall it offer the customer or potential customer any opinion regarding the service of the competitive affiliate or any other service provider.

(4) Requests for general information about products or services offered by competitive affiliates and their competitors. If a customer or potential customer requests general information from a TDBU about products or services provided by its competitive affiliate or the competitors of its CS or CD, the TDBU shall not promote its competitive affiliate or its competitive affiliate's products or services, nor shall the TDBU offer the customer or potential customer any opinion regarding the service of the competitive affiliate or any other service provider. The TDBU may direct the customer or potential customer to a telephone directory or to the commission, or provide the customer with a recent list of suppliers developed and maintained by the commission, but the TDBU may not refer the customer or potential customer

to the competitive affiliate except as provided for in paragraph (3) of this subsection.

(n) Remedies and enforcement.

(1) Code implementation filing.

(A) Not later than 120 days prior to the implementation of customer choice by an MOU/COOP, a TDBU shall file with the commission its plan for implementing the provisions of this section, addressing all applicable requirements of this section in the context of its operations as they will be conducted in the competitive retail market. The TDBU shall post notice of its filing on its Internet site or a public electronic bulletin board for 30 consecutive days and shall provide copies of the filing to requesting parties. Interested parties may file comments on the filing with the commission within 30 days following the filing and shall provide copies of such comments to the TDBU. Commission staff shall review the code implementation filing and provide to the TDBU its comments and recommendations as to any suggested changes in the filing within 60 days following the date of the filing. The TDBU may amend its initial filing based on the comments and recommendations and shall file any such amendments not later than 75 days following the date of the initial filing. The filing provided for in this paragraph is not subject to the contested hearings process, except upon complaint by an interested party or the commission staff.

(B) In lieu of the implementation filing provided for in subparagraph (A) of this paragraph, an MOU/COOP may file with the commission a statement that it does not at this time intend to provide electric energy at retail to consumers in Texas outside its certificated retail service area as provided for in subsection (b)(1)(B) of this section. Subsequently, if an MOU/COOP intends to provide electric energy at retail to consumers in Texas outside its certificated retail service area as provided for in subsection (b)(1)(B) of this section, it shall file with the commission the implementation filing provided for in subparagraph (A) of this paragraph not later than 120 days prior to the time it provides retail electric energy in Texas outside its certificated retail service area.

(2) Informal complaint procedure. A TDBU or a Bundled MOU/COOP shall establish and file with the commission a complaint procedure for addressing alleged violations of this section. This procedure shall contain a mechanism whereby all complaints shall be placed in writing and shall be referred to a designated officer or other person employed by the TDBU or the Bundled MOU/COOP.

(A) All complaints shall contain:

(i) the name of the complainant;

(ii) a detailed factual report of the complaint, including all relevant dates, entities or divisions involved, employees involved, and the specific claim.

(B) A complaint must be filed with the TDBU or the Bundled MOU/COOP within 90 days of the date the complaining party knew, or with diligent investigation should have known, that the violation occurred, but in no event may a complaint be filed more than three years after the violation occurred.

(C) The designated officer shall acknowledge receipt of the complaint in writing within five working days of receipt. The designated officer shall provide a written report communicating the results of the preliminary investigation to the complainant within 30 days after receipt of the complaint, including a description of any course of action that will be taken.

(D) In the event the TDBU or the Bundled MOU/COOP and the complainant are unable to resolve the complaint, the complainant may file a formal complaint with the commission. In the event the complainant advises the TDBU or the Bundled MOU/COOP that the complainant does not consider the complaint fully resolved by the course of action proposed by the TDBU or the Bundled MOU/COOP then the TDBU or the Bundled MOU/COOP shall notify the complainant of his or her right to file a formal complaint with the commission and shall provide the complainant with the commission's address and telephone number. The informal complaint process shall be a prerequisite for filing a formal complaint with the commission.

(E) A large TDBU or Bundled MOU/COOP shall report to the commission regarding the nature and status of informal complaints handled in accordance with this paragraph in its annual report of code-related activities filed pursuant to subsection (d) of this section. The information reported to the commission shall include the name of the complainant and a summary report of the complaint, including all relevant dates, companies involved, employees involved, the specific claim, and any actions taken to address the complaint. Such information on all informal complaints that were initiated or remained unresolved during the reporting period shall be included in the annual report of code-related activities of the large TDBU or Bundled MOU/COOP.

(3) Filing a complaint. Following the informal process, a formal complaint may be filed with the commission alleging a violation of this section. No complaint shall be valid unless filed with the commission within 30 days after the designated officer or employee of the TDBU or the Bundled MOU/COOP mails its written report communicating the results of the preliminary investigation to the complainant. Each complaint shall contain the name of the complainant and a detailed factual report of the complaint, including all relevant dates, entities or divisions involved, employees involved, and the specific claim. Additionally, each complaint shall identify the specific provisions of this section that are alleged to have been violated, contain a sworn affidavit that the facts alleged are true and correct to the best of the affiant's knowledge and belief, and if the complainant is a corporation, a statement from a corporate officer that he or she is authorized to file the complaint.

(4) Notification of complaint and opportunity to respond. The commission shall provide a copy of the complaint to the TDBU or the Bundled MOU/COOP. The TDBU or the Bundled MOU/COOP shall respond to the complaint in writing within 15 days. The TDBU or the Bundled MOU/COOP and the complainant shall make a good faith effort to resolve the complaint on an informal basis as promptly as practicable.

(5) Settlement conference. Upon request by the MOU/COOP subject to the complaint, commission staff shall conduct a settlement conference. At such settlement conference, each party, including the commission staff, shall recommend what steps are necessary to cure any violation that it believes has occurred. Discussions at the settlement conference, including the recommendations to cure the violation, shall not be admissible at a hearing on the complaint.

(6) Opportunity to cure. The MOU/COOP shall have three months to cure the violation in accordance with an agreement arising from the settlement conference or following a hearing. An MOU/COOP may cure the violation in any reasonable manner as set forth in the settlement agreement or hearing, including taking action designed to prevent recurrence of the violation or amending the rule or order.

(7) Enforcement by the commission. In the event the commission finds there has been a violation which has not been reasonably cured, the commission may enforce the provisions of this section.

(A) The commission may recommend actions to be taken by the MOU/COOP within a prescribed time, and if such actions are not taken, the commission may:

(i) seek an injunction to eliminate or remedy the violation or series or set of violations; or

(ii) limit or prohibit retail service outside the certificated retail service area of the TDBU or the Bundled MOU/COOP until the violation or violations are adequately remedied. This remedy shall not be applied in a manner that would interfere with or abrogate the rights or obligations of parties to a lawful contract.

(B) In assessing enforcement remedies, the commission shall consider the following factors:

(i) the prior history of violations by the TDBU or the Bundled MOU/COOP, if any, found by the commission after hearing;

(ii) the efforts made by the TDBU or the Bundled MOU/COOP to comply with the commission's rules;

(iii) the nature and extent of economic benefit gained by the TDBU's competitive affiliate or the Bundled MOU/COOP;

(iv) the damages or potential damages resulting from the violation or series or set of violations;

(v) the size of the business of the competitive affiliate involved; and

(vi) such other factors deemed appropriate and material to the particular circumstances of the violation or series or set of violations.

(C) The commission may conduct a compliance audit of affiliate activities to ensure compliance with the code of conduct.

(8) No immunity from antitrust enforcement. Nothing in these affiliate rules shall confer immunity from state or federal antitrust laws. Enforcement actions by the commission for violations of this section do not affect or preempt antitrust liability, but rather are in addition to any antitrust liability that may apply to the anti-competitive activity. Therefore, antitrust remedies may also be sought in federal or state court to cure anti-competitive activities.

(9) No immunity from civil relief. Nothing in these affiliate rules shall preclude any form of civil relief that may be available under federal or state law, including, but not limited to, filing a complaint with the commission consistent with this subsection.

(10) Preemption. This section supersedes any procedures or protocols adopted by an independent organization as defined by PURA §39.151, or similar entity, that conflict with the provisions of this section.

(o) Provisions for Bundled MOU/COOPs.

(1) Transactional safeguards relating to provision of products and services. To protect against anticompetitive activities, the provisions of this subsection apply to all Bundled MOU/COOPs meeting the qualifications set forth in subsection (b)(1)(A) and (B) of this section, regardless of whether the MOU/COOP has any affiliates or competitive affiliates.

(A) Tying arrangements prohibited. A Bundled MOU/COOP shall not condition the provision of any transmission or distribution product, service, pricing benefit, or alternative terms or conditions upon the purchase of any other good or service from the Bundled MOU/COOP.

(B) Products and services available on a non-discriminatory basis. Any product or service, other than corporate support services or credit arrangements, made available by a Bundled MOU/COOP to any third party or any persons providing competitive energy-related activities on behalf of the Bundled MOU/COOP, shall be made available to all similarly situated entities at the same price and on the same basis and manner that the product or service was made available to any persons providing competitive energy-related activities on behalf of the Bundled MOU/COOP, provided however, that such provision does not violate PURA §40.104 or §41.104, or the Texas Constitution, Article III, section 52. Any service required to be provided in compliance with PURA §39.203 shall be provided in a non-discriminatory manner and in accordance with the tariffs developed pursuant to any commission rule implementing that section.

(C) Cross-subsidization prohibited. A Bundled MOU/COOP shall not create significant opportunities for cross subsidization of competitive energy-related activities with revenues from distribution and transmission rates.

(D) Records of transactions involving competitive energy-related activities. A Bundled MOU/COOP shall maintain segregated accounts and records of all transactions regarding the provision of competitive energy-related activities consistent with the FERC chart of accounts or a comparable tracking method. In accordance with generally accepted accounting principles, a Bundled MOU/COOP shall separately record all transactions regarding the provision of competitive energy-related activities and all transactions relating to the transmission and distribution function. Such records shall include all expenses, whether direct or indirect, and at the fully allocated cost to provide such competitive energy service. Such expenses shall not be included in the Bundled MOU/COOP's transmission and distribution rates.

(E) Transfer or use of assets or products to provide competitive energy-related activities. A Bundled MOU/COOP shall implement procedures and safeguards to ensure that the transfer or use of assets or products by a person providing competitive energy-related activities on behalf of the Bundled MOU/COOP shall be accomplished at pricing levels that are fair and reasonable to the customers of the transmission and distribution system of the Bundled MOU/COOP and at pricing levels that do not include any preferential discounts, rebates, fee waivers or alternative tariff terms and conditions.

(F) Provision of corporate support services. The provision of corporate support services by a Bundled MOU/COOP to provide competitive energy-related activities shall be carried out in such a way as to comply with the provisions of paragraph (2)(A)-(D) of this subsection, thereby preventing the opportunity for preferential treatment or unfair competitive advantage, customer confusion, or significant opportunities for cross-subsidization.

(G) No preferential access to transmission and distribution information. A Bundled MOU/COOP shall not allow preferential access by any person providing competitive energy-related activities on behalf of the Bundled MOU/COOP to information about its transmission and distribution systems. Such information shall be provided as required in paragraph (2)(D) of this subsection.

(H) Sharing of personnel, facilities, and resources. A Bundled MOU/COOP shall implement procedures and safeguards governing the sharing of personnel, facilities, officers and directors, equipment, and corporate support services with persons providing competitive energy-related activities on behalf of the Bundled MOU/COOP to ensure that confidential information is protected, that there are no opportunities for preferential treatment or unfair competitive advantage, that undue customer confusion will be prevented, and that no significant opportunities for cross-subsidization are created. A Bundled MOU/COOP shall document the assignment of shared employees engaged in both transmission or distribution system operations and the provision of competitive energy-related activities. For shared employees, the tracking documentation shall include the employees' name, job

title, scope of activities, and allocation of time to the transmission and distributions functions and competitive energy-related activities. The tracking documentation for shared employees shall be filed annually with the annual report of code-related activities required by paragraph (3)(B) of this subsection.

(I) Marketing and advertising. A Bundled MOU/COOP shall implement procedures and safeguards relating to the marketing and advertising of the Bundled MOU/COOP's competitive energy-related activities to prevent favoritism being shown to the competitive energy-related activities provided by the Bundled MOU/COOP, to prevent customer confusion, to prevent the inappropriate sharing of customer information, and to prevent significant opportunities for cross-subsidization.

(2) Informational safeguards. The following provisions apply to Bundled MOU/COOPs.

(A) Sharing of customer information. A Bundled MOU/COOP shall implement adequate safeguards to preclude any persons providing competitive energy-related activities on behalf of the Bundled MOU/COOP, or any other entities, from gaining access to information in a manner that would allow or provide a means to transfer confidential information, create an opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization. Non-proprietary information possessed by the Bundled MOU/COOP that is made available to any persons providing competitive energy-related activities provided by the Bundled MOU/COOP shall likewise be made available to third parties providing competitive energy-related activities at the Bundled MOU/COOP's cost to produce such information for the third party.

(B) Proprietary customer information. Upon request by the customer, a Bundled MOU/COOP shall provide a customer with the customer's proprietary customer information. Unless a Bundled MOU/COOP obtains prior affirmative written consent or other verifiable authorization from the customer as determined by the commission, or unless otherwise permitted under this subparagraph, it shall not release any proprietary customer information to a person providing competitive energy-related activities on behalf of the Bundled MOU/COOP or to any other entity, other than the customer, an independent organization as defined by PURA §39.151, or a provider of corporate support services for the sole purpose of providing corporate support services. The Bundled MOU/COOP shall be permitted to release proprietary customer information under the same terms and conditions as a TDBU as set forth in subsections (l)(1)(A)-(E) of this section.

(C) Nondiscriminatory availability of aggregate customer information. A Bundled MOU/COOP may aggregate non-proprietary customer information, including, but not limited to, information about a Bundled MOU/COOP's energy-related goods or services. However, except in circumstances solely involving the provision of corporate support services, a Bundled MOU/COOP shall aggregate non-proprietary customer information for a third party or any person providing competitive energy-related activities only if the Bundled MOU/COOP makes such aggregation service available to all non-affiliates and third parties under the same terms and conditions and at the same price or fully allocated cost as it is made available to any person providing competitive energy-related activities on behalf of the Bundled MOU/COOP.

(D) Requests for information. If a customer or potential customer of a Bundled MOU/COOP makes an unsolicited request for distribution service, competitive energy-related activities, products or services provided by an Bundled MOU/COOP, or for information relating to such products or services, the Bundled MOU/COOP shall inform the customer that competitive energy-related activities are available not only from the Bundled MOU/COOP, but also from other providers. If the Bundled MOU/COOP provides the customer or potential customer with information about competitive energy-related activities offered by the Bundled MOU/COOP, the Bundled MOU/COOP must record and allocate the costs associated with the provision of such information in the same manner as transactions involving the provision of competitive energy related activities, in accordance with paragraph (1)(C) of this subsection. The Bundled MOU/COOP shall not offer the customer or potential customer any opinion regarding the service of any other competitive energy service provider. Upon request, the Bundled MOU/COOP shall make available to a customer a copy of the most recent list of competitive energy service providers as developed and maintained by the commission and may make available telephone numbers and other commonly available information. Such information shall also be made available by the Bundled MOU/COOP to its transmission and distribution customers at the time the Bundled MOU/COOP undertakes marketing to those customers of its competitive energy-related activities.

(3) Reporting and auditing requirements. A Bundled MOU/COOP shall maintain and file the following information so the commission can ensure that the Bundled MOU/COOP is not engaging in any anticompetitive activities as a result of its competitive energy-related activities being bundled with the transmission and distribution operation.

(A) Code implementation filing.

(i) Not later than 120 days prior to the implementation of customer choice by a Bundled MOU/COOP, the Bundled MOU/COOP shall file with the commission a written declaration that it will operate as a Bundled MOU/COOP and its plan for implementing the provisions of this section. The plan shall address all applicable requirements of this section in the context of operations as they will be conducted in the competitive retail market. The Bundled MOU/COOP shall post notice of its filing on its Internet site or a public electronic bulletin board for 30 consecutive days and shall provide copies of the plan to requesting parties. The code implementation plan proposed by the Bundled MOU/COOP shall be subject to a contested hearing process. Interested parties may file comments on the filing with the commission. The commission shall issue an order either approving the code implementation plan, approving the plan with modifications, or rejecting the plan within 120 days.

(ii) In lieu of the implementation filing provided for in clause (i) of this subparagraph, a Bundled MOU/COOP may file with the commission a statement that it does not at this time intend to provide electric energy at retail to customers in Texas outside its certificated retail service area as provided for in subsection (b)(1)(B) of this section. Subsequently, if a Bundled MOU/COOP intends to provide electric energy at retail to consumers in Texas outside its certificated retail service area as provided for in subsection (b)(1)(B) of this section, it shall file the implementation filing provided for in clause (i) of this subparagraph with the commission not later than 120 days prior to the time it intends to provide retail electric energy in Texas outside its certificated retail service area.

(B) Annual report of code-related activities. A report of activities related to this subsection shall be filed annually with the commission under a control number designated by the commission. The report shall be filed by June 1 and shall encompass the period from January 1 through December 31 of the preceding year. The report shall contain detailed information on how the Bundled MOU/COOP met each of the provisions of paragraphs (1) and (2) of this subsection and any deviations from the actions set forth in the initial code compliance filing. Commission staff shall review the annual report of

code-related activities. The filing provided for in this paragraph is not subject to the contested hearings process, except upon complaint by an interested party or the commission staff.

(C) Copies of contracts or agreements. A Bundled MOU/COOP shall reduce to writing and file with the commission copies of any contracts or agreements it has with any persons providing competitive energy-related activities on behalf of the Bundled MOU/COOP. The Bundled MOU/COOP does not have to produce any contracts it has with third parties if such contracts were negotiated on an arm's length basis. The requirements of this section are not satisfied by the filing of an earnings report. All contracts or agreements shall be filed by June 1 of each year as attachments to the annual report of code-related activities required in subparagraph (B) of this paragraph. In subsequent years, if no significant changes have been made to the contract or agreement, an amendment sheet may be filed in lieu of refiling the entire contract or agreement.

(D) Compliance audits. No later than one year after the Bundled MOU/COOP becomes subject to this section as set forth in subsection (b)(1) and (2) of this section, and, at a minimum, every third year thereafter, the Bundled MOU/COOP shall have an audit prepared by independent auditors that verifies that the Bundled MOU/COOP is in compliance with this section. The Bundled MOU/COOP shall file the results of each audit with the commission within one month of the audit's completion.

(4) Remedies and enforcement. Bundled MOU/COOPs shall be subject to the provisions of subsection (n)(2)-(10) of this section on the same terms and conditions as the TDBU.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 8, 2001.

TRD-200101413
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Effective date: March 28, 2001
Proposal publication date: December 1, 2000
For further information, please call: (512) 936-7308

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TITLE 22. EXAMINING BOARDS

PART 10. TEXAS FUNERAL SERVICE COMMISSION

CHAPTER 201. LICENSING AND ENFORCEMENT--PRACTICE AND PROCEDURE

22 TAC §201.19

The Texas Funeral Service Commission adopts new §201.19 Correspondence without changes to the proposed text as published in the January 12, 2001, issue of the *Texas Register* (26 TexReg 273).

The Texas Funeral Service Commission adopts a new section to establish the requirement that all correspondence to an establishment or to the funeral director in charge shall be sent to the street address of the establishment as reflected on the license application.

No comments were received.

The new section is adopted under Section 651.152 of the Texas Occupation Code, as amended by Section 18 of House Bill 3516, 76th Legislature which authorizes the Commission to issue such rules and regulations as may be necessary to effect the intent of the provisions of this Section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 7, 2001.

TRD-200101384
O.C. "Chet" Robbins
Executive Director
Texas Funeral Service Commission
Effective date: March 27, 2001
Proposal publication date: January 12, 2001
For further information, please call: (512) 936-2474

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PART 18. TEXAS STATE BOARD OF PODIATRIC MEDICAL EXAMINERS

CHAPTER 375. RULES GOVERNING CONDUCT

22 TAC §375.1

The Texas State Board of Podiatric Medical Examiners adopts an amendment to §375.1 concerning definitions defining the term "foot" with changes to the proposed text that was published in the December 1, 2000, issue of the *Texas Register* (25 TexReg 11840). The rule was initially published in an earlier issue of the *Texas Register*.

The changes that were made change where it says "tibia, fibula in articulation" to "tibia and fibula in their articulation".

The definition of "podiatry" provided by the podiatry practice act, Tex. Occup. Code §202.001(4), addresses the scope of practice of podiatry in broad, general terms. The board has determined that there exists uncertainty among various groups resulting from the lack of a definition of the term "foot" in the podiatric practices act. Podiatrists aren't entirely sure of the limits of their practice; insurance companies aren't sure for what procedures podiatrists may charge; hospitals aren't entirely sure about the scope of practice for podiatrists; and the public has no guidance to determine whether a podiatrist is practicing within the scope of practice. The board has determined that the definition of the "foot" should be clarified for purposes of the practice of podiatry. It also has determined that the definition should reflect the long-standing practice of podiatry in the State of Texas. The definition the board has adopted is based on a common sense approach to the treatment of patients that is medically sound and protects the patient's interests. The board has applied its expertise in identifying those injuries or other conditions that affect that ability of the foot to function. The rule was arrived at after considering the public welfare and safety, its effect on the consumer, and various definitions that exist for foot. This definition best describes the foot as it functions in the human body.

What commonly is referred to in layman's terms as the "ankle" is included in the definition of "foot" because injury to the ankle causes a failure in the foot's ability to function properly. A procedure on the ankle would be within the podiatrist's scope of practice to the extent that the injury to the ankle causes the inability of any part of the rest of the foot to function properly. While a surgical procedure is being performed on the part of the foot below the ankle, it frequently occurs that the tendon or ligament being repaired is one which is attached to the lower part of the foot on one end and is attached to a higher part of the foot, on the other end. The podiatrist is in the best position to repair the damage on the higher end of that tissue at the same time as the damage to the tissue is being repaired a few centimeters below that spot. Although some of these tissues may be attached at the foot on one end and as high as the knee at the other end, the board, by this rule, limits the scope of podiatric practice to that area that is no higher up the human body than the area at the level at which the structures affect the function of the foot.

In other instances, after the podiatrist begins surgery, damage to the ankle is noted for the first time. The podiatrist is in the best position to repair the damage during the surgery rather than subjecting the patient to a separate surgical procedure on another day along with the exposure to anesthesia, the discomfort, and other medical risks, costs, and inconveniences that arise from having to return on another day to perform a second procedure that could have been performed during the first surgery. One alternative would be for the podiatrist to obtain another surgeon while the patient is still anesthetized, to complete the repair, assuming another surgeon can be found on short notice. The other option would be to close the patient, leaving the injury as is, until another appointment can be made for another surgery, risking additional injury to the patient in the meantime. Both of those options are not acceptable, when the podiatrist is trained to perform the procedure to repair the damage to the ankle. Of course, a podiatrist that is not trained to perform surgery of the ankle or of the tissues that attach to a location above the lower foot, would not be authorized to perform the procedure, not because the definition does not allow it, but because the proper practice of podiatric medicine consistent with the public health and welfare would require an unqualified podiatrist to refrain from attempting procedures that are not within the podiatrist's capability. The podiatric practice act already protects against such an occurrence by making it a violation of the act for a podiatrist to practice podiatry in a manner inconsistent with the public health and welfare.

Numerous comments were received in response to the proposed rule. The comments and the board's response to the comments follow below:

Comment #1: There seemed to be a generalized concern by many commentators about the word "tibula".

Commentators: There were ten individuals who presented this comment.

TSBPME Response: There was a typographical error in which "tibula" should have been printed tibia. The rule was republished in the December 1, 2000 issue of the *Texas Register* 25 TexReg 11840, showing the correct spelling.

Comment #2: Most of the commentators were very concerned with the proposed definition of the word "foot" and cited many other sources, as will as their own definitions that they felt were more applicable to the word "foot".

These definitions included:

Dorland's Illustrated Medical Dictionary, 29th Edition; W.B. Saunders Company, Copyright 2000: "1. The distal portion of the Primate leg, upon which an individual stands and walks. It consists, in man, of the tarsus, metatarsus, and phalanges and the tissues encompassing them."

Stedman's Medical Dictionary, 27th Edition: Lippincott, Williams, Wilkins, Copyright 2000; "1. The lower, pedal, podalic extremity of the leg."

Webster's Ninth New Collegiate Dictionary; Merriam-Webster, Inc., Copyright 1984. "1. The terminal part of the vertebrate leg upon which an individual stands."

International Dictionary of Medicine and Biology; John Wiley and Sons, Inc., copyright 1986. "The distal end of the lower limb."

Black's Medical Dictionary, 37th Edition; A.C. Black (Publishers) Limited, Copyright 1992; "Foot is that portion of the lower limb situated below the ankle joint."

Taber's Encyclopedic Medical Dictionary, Edition 18; F.A. Davis company, Copyright 1997; "Foot-determinate portion of the lower extremity. The bones of the foot include the tarsus, metatarsus and phalanges."

Single standard definition of the foot used in all anatomical text books, including 1. Gray's Anatomy, 35th Edition; Warwick and Williams, Copyright 1973, W.B. Saunders Company. 2. Cunningham's Textbook Anatomy, Ninth Edition; Copyright 1951, Oxford University Press. 3. Anatomy for Surgeons, Volume III, First Edition; Copyright 1958, Heber-Harper. 4. Clinically Oriented Anatomy, Second Edition; Copyright 1985, Williams and Wilkins. 5. Grants Method of Anatomy, Eleventh Edition; Copyright 1989, Williams and Wilkins. 6. Clinical Anatomy for Medical Students, Fifth Edition; Copyright 1995, Little Brown and Co. "The foot has 3 bony anatomical components: 1. the tarsus, (in which there are seven bones; talus, calcaneum, navicular cuboid, lateral cuneiform, intermediate cuneiform, and medial cuneiform); 2. the metatarsus, (in which there are five metatarsal bones); 3. the phalanges, (in which there are 5 bony units, the first digit has a proximal and distal phalanx, the 2nd, 3rd , 4th & 5th digits each have a proximal, intermediate and distal phalanx). Soft tissues, including muscle, fascia, tendons, which attach to these bones, as well as nerves and vessels complete the structure of the foot."

One commentator felt that the Achilles muscle was not part of the foot, but he felt the attachment of the tendon to the calcaneus would be considered a portion of the foot, but the tendon that is proximal to the foot is not part of the foot.

Another commentator felt "I think it is common medical knowledge that the foot includes the phalanges, metatarsals and encompassing soft tissues. This does not include the ankle joint, which includes the distal tibia and fibula."

Another commentator defined the foot as "The talus is the transitional bone. The upper surface of the talus belongs to the ankle and the lower surface of the talus belongs to the foot. The foot is coimposed of the hindfoot, midfoot and forefoot. The hindfoot ends in the center of the talus and everything from the point distally is considered the foot. Once you reach the most superior proximal aspect of the talus you are in the ankle."

The commentators were the President of Texas Orthopedic Association; Senior Associate Dean, Baylor College of Medicine; Chairman of Podiatry Issues Committee, Texas Orthopedic Association, and 24 individuals.

TSBPME response: The board disagrees with the commentators' conclusions. The definition of the foot, even among many different references, varies. Some definitions even discuss the weight bearing portion of the extremity, which includes those structures outlined by the TSBPME board's definition. Therefore, these weight bearing structures and any structures that affect their function are included within our definition. In addition, even Stedman's, International, and Webster's Medical Dictionaries cited by the commentators define the foot by addressing the function of the foot, and the function described in the definitions includes the function performed by the ankle. Therefore, the ankle is included in the definition of the foot provided by those three dictionaries.

Comment #3: Commentators felt that the training for podiatrists was not as good as orthopedists and that the podiatrist did not have the training that would cover procedures within the proposed definition of foot. One commentator felt podiatrists have no training in some of the areas that might be covered by the proposed definition. Another commentator stated podiatric training is limited to the anatomy of injuries and disuse of the foot, therefore, to permit the podiatric community to treat a portion of the body for which they do not have specific training would be a detriment to public health.

The commentators were President of Texas Orthopedic Association and eight individuals.

TSBPME response: The TSBPME does not agree, the review of course work in the schools' curriculum and of podiatric students' transcripts filed with the Board, show that podiatric education covers all areas of the body, as well as the particular areas concerned with the above proposed definition.

Comment #4: Commentators felt that there was a movement to redefine the foot to annex the ankle and leg into the scope of practice for podiatry and therefore, there was a potential danger to the public health and safety. One commentator was concerned that the proposed definition could extend privileges to the knee.

The commentators were President, Texas Orthopedic Association; Chairman of Podiatry Issues Committee, Texas Orthopedic Association and four individuals.

TSBPME Response: The proposed definition would not result in extension of the existing privileges for podiatric physicians and certainly was not meant to construe any representation of coverage around the knee. Podiatric physicians in the State are currently treating conditions that are covered in the proposed definition that include treatment of sprained ankles, treatment of posterior tibialis tendonitis, lateral ankle stabilization, primary ankle ligament repair, tarsal tunnel syndrome, tendo-Achilles lengthening, gastroc recession as pertained to treatment of flatfoot, distal tibia fractures and fibular fractures. All the above procedures are procedures for podiatrists, which receive credentialing from hospitals to perform after showing they are capable to perform those procedures in the State of Texas. There are existing checks and balances for the quality of care that is performed by any podiatric surgeon that performs those types of procedures. Regardless of how broadly the scope of practice defined in the law permits a surgeon to practice podiatric medicine, every surgeon, including a podiatrist, must demonstrate the ability to perform specific procedures before a hospital will issue credentials, Although this definition clarifies the extent to which a podiatrist may practice podiatry, no podiatrist will be permitted to perform a procedure unless the podiatrist has demonstrated to the hospital the specific ability to perform the procedure. As for procedures provided in the podiatrist's office, the Board's disciplinary process provides adequate checks and balances to protect the public. If a podiatrist places the public at risk by performing a procedure for which the podiatrist is not adequately trained, whether it is performed in a hospital or in an office suite, that podiatrist would be subject to disciplinary action by the Board. The board has not received consumer complaints regarding these types of procedures of any greater or abnormal proportion as compared to any other type of complaint. The TSBPME has a mechanism of handling complaints concerning the quality and care for the citizens of Texas. Many hospitals have professional activities committees. Many State associations have peer review committees, and the credentialing departments of hospitals have stringent requirements on all requested procedures and especially those that may require further experience and education. Historically, podiatrists have performed these procedures throughout the State of Texas, and the appropriate checks and balances are in place to protect the people as consumers of the State of Texas.

Comment #5: One commentator felt that there was an added cost to the State in allowing the proposed definition to pass and the types of procedures that would now be covered under that definition. He also felt like "An orthopedic surgeon who is highly qualified to treat maladies of the foot and ankle, does not require the work of an additional physician and many of the injuries of the ankle or above require some hospitalization."

Commentator: Chairman of Podiatry Issues Committee, Texas Orthopedic Association.

TSBPME response: For many hospitals there is a co-admission requirement for podiatric physicians or a medical clearance for a co-admitting admission in the hospital. Most insurance companies or reimbursement issues will allow one medical history and physical charge and would not allow two charges. Therefore, the podiatric admission would not create any type of charge to the State, as the co-admitting physician or anesthesiologist, and not the podiatrist, would be billing for that particular function. In some respects there may be less of a charge when a podiatrist is involved because an orthopedic surgeon has already charged the admitting fee prior to the surgical intervention, resulting in two fees - one by the orthopedic surgeon and one by the consulting physician.

Comment #6: Commentators felt there were different standards of care for foot problems, that the orthopedist who cares for the foot and ankle problems in this state is held to a different legal standard than the podiatric community, and that the podiatric community actively tries to distance itself from medical physicians' standard of care.

The commentators were the Chairman of Podiatry Issues Committee, Texas Orthopedic Association and one individual.

TSBPME response: The board is not aware of different standards of care in the podiatric and medical community. Many states have legislation that does not allow practitioners of different specialties to testify against one another. This would apply for an orthopedist testifying against a podiatrist, as well as a podiatrist testifying against an orthopedist. This rule does not create any different standard of care. Podiatric physicians, as well as medical doctors follow the allopathic branch of medicine in their educational process and are therefore, the same as far as standards of care.

Comment #7: Commentators felt that the recognition and initial treatment for diseases, such as chronic heart failure, liver disease, or communicable infections can be vital to the care of the patient and that most of this is not included in the training of the podiatrist.

The commentators were the Chairman of Podiatry Issues Committee, Texas Orthopedic Association and one individual.

TSBPME response: The above noted conditions are addressed in the curriculum for the training of the podiatric physicians. The addition of this rule has no effect on the need for podiatrists to be aware of the recognition or treatment of such diseases.

Comment #8: Commentators felt that the CPT codes, which are the codes utilized in billing for certain procedures is evidence of a separation between leg and foot. The commentator proposed that in the CPT code book there is a separate section entitled leg, tibia and fibula and ankle joint, which was separate from the section entitled foot and toes.

Commentator: There was one individual who submitted this comment.

TSBPME response: CPT codes are a method of separating procedures in the reimbursement process for third party payment. There are so many codes that sit under foot and toes it makes administrative sense to have a separate division. This is not to say that CPT codes in the Neurology section would not be applicable to both orthopedic surgeons and podiatric physicians in their treatment of the foot.

Comment #9: Commentators felt that the purpose of the proposed definition of the foot was to expand the scope of surgical services and treatment provided by the podiatrist. One commentator felt "there is a significant medical concern that the inclusion of the ankle by the podiatric board would allow surgical intervention of the ankle, inclusive of total ankle replacement, fusions and trauma." There is concern raised that a podiatrist in the U.S. does not have sufficient training to perform these or other complicated procedures.

The commentators were Chairman, Podiatry Issues Committee, Texas Orthopedic Association and 16 individuals.

TSBPME response: The podiatry practice act does not contain a definition for "foot". The proposed definition of the foot accurately reflects the present treatment and procedures for the ailments of the foot, which are currently being performed in the State of Texas by podiatric physicians. The proposed definition of the foot allows those procedures which research conducted by the board indicates podiatric physicians are properly trained and presently credentialed to perform in the State of Texas. While the board is only concerned about protecting the consumers of the State of Texas, it should be noted that the laws of other states include the ankle, and that the training throughout the United States does include ankle replacement, fusions and trauma.

Comment #10: Commentators felt that the efforts of the board to redefine the foot confuses the credentialing process.

Commentators: One individual.

TSBPME response: While the board appreciates the above noted comment, the credentialing process throughout the State of Texas has been very successful in identifying and credentialing those particular procedures that need additional competence and training. The credentialing process at all hospitals should continue as it has by requiring documentation of competency and experience for any procedures in treating the ailments of the foot. A podiatrist would not be any more likely, as a result of the addition of this definition, to perform procedures that require credentials, unless the podiatrist demonstrated the competence to do them.

Comment #11: Commentators felt that the foot and ankle are functionally interdependent and they felt that the definition of orthopedic surgery and classical anatomy of medical science that the foot and ankle are separate structures.

Commentator: Two individuals.

TSBPME response: While the above comment fits along the line of one definition of foot, it offers a slightly different approach from the other comments. However, the board feels the proposed definition of the foot allows those procedures which podiatric physicians are properly trained and presently credentialed to perform in the State of Texas.

Comment #12: The commentators felt that alteration of the definition of foot could leave loopholes, such as injuries suffered to the tibia or fibula that would not be included within the definition.

Commentator: One individual.

TSBPME response: The board feels that the proposed rule does not alter the definition of the foot and does not permit the podiatric physician to perform any new procedures that are not presently credentialed and available to perform currently. Any of these types of procedures that are clearly above the tibia/fibular articulation and does not affect the function of the foot would be deemed by this board to be outside the scope of the practice of podiatry.

Comment #13: Commentators felt the only reason for the definition proposal was one of remuneration. The commentators felt that there was no medical definition of the foot of which they were aware of, which included the ankle or tibia and fibula.

Commentators: Two individuals.

TSBPME response: The proposed definition is one of clarification and does not propose any medical or surgical treatment of the foot other than those currently being performed by podiatric physicians in the State of Texas. The definition provides guidance to podiatrists, clarifying the boundaries of the scope of practice. The public is better protected when the podiatrist has been notified of the boundaries of podiatric practice. The orthopedic community may have a vested financial interest in trying to limit who treats those structures that we have defined. However, it is this Board that is charged by the legislature with regulating the practice of podiatry.

Comment #14: Commentators were concerned that the proposed definition was done without any formal or informal consultation with the Texas Medical Association or Texas Orthopedic Association and wants a committee including them to research and discuss the proposed definition.

The commentators were President, Texas Medical Association and President, Texas Orthopedic Association.

TSBPME response: By examination of the comments that have been made and the understanding of the podiatric physicians curriculum, education and training it seems that this board of which some members are podiatrists, licensed and currently practicing in Texas, is the best to understand what the podiatric physician has been trained to perform. In addition, the board feels that the licensing board does not have an obligation to receive permission from the Texas Medical Association or the

Texas Orthopedic Association in regulating the practice of podiatric medicine on behalf of the consumers of the State of Texas. The TSBPME rightfully was created by the Texas Legislature to regulate the practice of podiatric medicine. However, the Board is always open for any comments or suggestions and encourages the Texas Medical Association and the Texas Orthopedic Association to meet with other podiatrists or groups of podiatrists or associations and to put forth independently or jointly their own resultant thoughts, conclusions, suggestions to this Board.

Comment #15: Commentators felt that the definition of foot adequately clarifies the training of many podiatric surgeons. The commentators especially felt that the new practitioner with additional extensive postgraduate training in trauma and reconstruction of the ankle, the ability to clearly market what the podiatrist does.

Commentator: One individual.

TSBPME response: The board agrees. To the extent that a podiatrist has received the necessary training, that podiatrist is qualified to perform procedures to those structures included in the definition of "foot", as proposed.

Comment #16: Some commentators felt that podiatrists were the best group to define what the structure of the foot was. He felt that podiatrists are named as "foot specialists" and, therefore, they as a group are most qualified to define what the structure of "foot" is.

Commentator: One individual.

TSBPME response: The board agrees.

Comment #17: Commentator felt that there might be confusion on exactly what the education of a Doctor of Podiatric Medicine is. The commentator described the education as the typical DPM completes a four-year undergraduate degree and has entrance prerequisites, similar, if not identical to those who attend medical school, osteopathic, medical or dental school. This is followed by four years of podiatric medical school. The first two years of podiatric medical school education has the same basic sciences as all other allopathic/osteopathic medical schools. There is sometimes a misconception that somehow podiatry students take only foot basic sciences. The basic sciences are the same as the other schools of medicine and often have the same instructors. These are comprehensive courses and not limited. For example, podiatry students complete the anatomical dissection of the entire human cadaver, learn the physiology of all organ systems and study the pathological basis of diseases that affect the entire body. The podiatric student's transcripts mirror those of other physicians. The last two years include instruction and rotation through many of the same clinical specialties as general medicine. Additionally, during the last two years the podiatry student begins to concentrate on foot, ankle and leg, much as a dental student focuses on the head and neck. Following graduation most DPMs then perform postgraduate residencies in hospitals. Although these are diverse, surgical residencies are one to three years in duration.

Commentator: One individual.

TSBPME response: The board agrees.

Comment #18: One commentator was concerned that to have an invisible line as the definition of foot may cause harm to consumers.

One of the commentators felt that it would be harmful to the State residences to prevent podiatrists from treating their patients functionally and that it would not make sense to stop repairing a ruptured tendon or ligament that attaches to the foot when it reaches some mystical line. In addition, he felt that many procedures are used in combination when addressing many foot deformities. He used an example that many flatfeet are caused by or created by a contracted Achilles tendon (equines deformity of the foot) and that not lengthening the structure when surgically repairing a symptomatic flatfoot would not only be harmful to the patient, but may be considered malpractice. He felt that even the orthopedist recognized the functional foot concept. He related that their subspecialty group is named the American Association of Orthopedic foot and ankle surgeons, not just foot surgeons. He felt that they understand, as podiatrists do, the close interdependency of the foot and ankle.

Another commentator commented that in nearly twenty years of practice he has successfully treated hundreds, perhaps thousands of patients with rearfoot and ankle pathology. He had repaired and set ankle fractures and sprains. He has also repaired flatfoot and cavus foot, as well as lengthened the Achilles and transferred ankle tendons. He related that patients continue to come to him for these problems and were referred by satisfied friends and family physicians. He relates he has never had a complaint lodged against him regarding those treatments. He related that in podiatric medical school he was taught the foot and leg as a functional unit and throughout his training he was taught to treat the entire weight bearing portion of the lower extremity. He also relates that like all physicians he has had to update his skills often to reflect the current state of podiatric medical knowledge. These have included the use of lasers, reading MRI's, performing various internal fixation implant procedures, as well as utilizing arthroscopes, endoscopes and many other techniques.

Commentators: Two individuals.

TSBPME response: The board agrees.

Comment #19: One commentator felt that the credentials committees in the hospitals do an excellent job in protecting the consumers.

One of the commentators through his experience of sitting on the credentials committee in his hospital felt that everyone understands the true scope of practice by all doctors within the hospitals not defined by the state law, but by the training, expertise, ability and their credentials. For example, he related that many cardiologists are not allowed to do invasive cardiac procedures in his hospital without the documentation of adequate expertise. He also felt that the proposed definition to include all those podiatric physicians that are capable of performing procedures does not allow every podiatrist to do those more advanced procedures. He felt the limiting factor in the marketplace for all doctors (medical, orthopedic and podiatrists) is the credentialing that is performed at the hospital or surgical center.

Another commentator felt that this is not a license for a podiatrist to practice outside the scope of their competence. It is merely a clear definition of the foot and its governing structures in the State of Texas and other states throughout the U.S. Physicians are licensed to treat all physical conditions, anatomical regions and disease. In other words, all licensed M.D.'s have a license to perform foot surgery, heart surgery, deliver babies, medically manage diabetes, treat mental illness, such as schizophrenia and perform cataract surgery. However, no one physician has the capability of doing all of these. Physicians, with the desire to

first do no harm, limit the conditions they treat and procedures they perform based on their level of competence. In addition, hospitals limit the privileges to the competence of the individual physician. This is based on training and experience and not their medical license. This is also true for podiatrists.

Commentators: Two individuals.

TSBPME response: The board agrees.

Comment #20: One commentator felt that the practice act for a podiatrist presently covers more than treating the foot. The commentator described his observation as Practice Act does not state that DPM's may treat the foot, instead the Act states that DPM's may treat any "disease, disorder, physical injury, deformity or ailment" of the human foot. Such disorders include the failure of the foot to function properly. In order to remedy the problem so that the foot does function properly it is often necessary to treat other parts of the body (in other words, tendons that attach to the foot, the ankle, etc.). Therefore, you may want to consider addressing a scope of practice issue via rule, which would read something like this: "A Texas licensed Podiatrist may utilize any system or method to treat any disease, disorder, physical injury, deformity or ailment of the human foot. Such disorders include the failure of the foot to function properly, as the lower extremity of the leg, which may be caused by trauma to the soft tissues, (muscles, nerves, vascular structure, tendons, ligaments, or any other anatomical structures) which insert into or attach to the foot or other anatomical structures in articulation with the talus. Appropriate procedures, when medically necessary to treat any disease of the foot and/or its function, include the use of a prescription and nonprescription drugs; surgical or nonsurgical treatments of anatomical structures that affect the function of the foot, such as the ankle and soft tissue, which insert into the foot; the surgical removal of skin, soft tissue and bone from parts of the body other than the foot; medical histories and physicals; and hyperbaric oxygen therapy".

Commentator: Legal counsel, Texas Podiatric Medical Association.

TSBPME response: While the board realizes there are different ways to describe the present function and present existence of the podiatric physician in their care and treatment of the people of the State of Texas, we felt defining the foot, which had not been done previously in regard to the present practice of podiatry was in the best interest of the citizens of Texas.

Changes to the proposed rule are that in both places where the language appears, "tibia, fibula in articulation with the talus" is changed to read "tibia and fibula in their articulation with the talus."

Changes to the proposed rule reflect non-substantive variations from the proposed amendments. The board's legal counsel has advised that the changes to the proposed rule affect no new persons, entities, or subjects other than those given notice and that compliance with the adopted sections will be less burdensome than under the proposed sections and that the changes to the published proposed rule clarify the intent of the proposed rule. Accordingly, republication of the adopted sections as proposed amendments is not required.

The amendment is adopted under the Tex. Occup. Code §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the law of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the law regulating the practice of podiatry.

The adopted amendment implements Texas Occupations Code, §202.151.

§375.1. Definitions.

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

(1) Board--The Texas State Board of Podiatric Medical Examiners.

(2) Foot--The foot is the tibia and fibula in their articulation with the talus, and all bones to the toes, inclusive of all soft tissues (muscles, nerves, vascular structures, tendons, ligaments and any other anatomical structures) that insert into the tibia and fibula in their articulation with the talus and all bones to the toes.

(3) Medical Records--Any records, reports, notes, charts, x-rays, or statements pertaining to the history, diagnosis, evaluation, treatment or prognosis of the patient including copes of medical records of other health care practitioners contained in the records of the podiatric physician to whom a request for release of records has been made.

(4) Office--In the singular, includes the plural.

(5) Public communication--Any written, printed, visual, or oral statement or other communication made or distributed, or intended for distribution, to a member of the general public or the general public at large.

(6) Solicitation--A private communication to a person concerning the performance of a podiatric service for such person.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 12, 2001.

TRD-200101453
Janie Alonzo
Staff Services Officer I
Texas State Board of Podiatric Medical Examiners
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Proposal publication date: December 1, 2000
For further information, please call: (512) 305-7000

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CHAPTER 377. PROCEDURES GOVERNING GRIEVANCES, HEARINGS, AND APPEALS

22 TAC §§377.1 - 377.3, 377.5 - 377.7, 377.10, 377.14, 377.15, 377.20 - 377.22, 377.24, 377.27, 377.31 - 377.38, 377.41, 377.45

The Texas State Board of Podiatric Medical Examiners adopts amendments to §§377.1-377.3, 377.5-377.7, 377.10, 377.14-377.15, 377.20-377.22, 377.24, 377.27, 377.31-377.38, 377.41 and 377.45 concerning Procedures Governing Grievances, Hearings, and Appeals without changes to the proposed text as published in the September 22, 2000, issue of the *Texas Register* (25 TexReg 9351). The text will not be republished.

The amendments are being adopted in accordance with the Texas Government Code §2001.039 regarding agency review of rules (formerly 1997 General Appropriations Act, Article IX,

Section 167), requiring all agencies to review their rules. These amendments clarify the rules, change terminology to conform with the statutes and with usual practice, and replace references to hearing officer with ALJ; 377.15 changes the filing deadline for amendments from 3 to 7 days to comply with SOAH rules. The rules are amended throughout to comply with or defer to the APA or the SOAH rules for consistency and to avoid cumbersome hearings plagued by conflicting procedures. The rule regarding the taking of certain discovery tools addressed in 377.34 is amended to avoid the use of litigation tools for proceedings in which such tools would only serve to create undue delay and cost to the parties.

No comments were received regarding the proposed amendments.

The amendments are adopted under the Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the law of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the law regulating the practice of podiatry.

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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22 TAC §§377.4, 377.13, 377.17, 377.18, 377.23, 377.25, 377.26, 377.28 - 377.30, 377.39, 377.40, 377.42 - 377.44, 377.46, 377.47

The Texas State Board of Podiatric Medical Examiners adopts the repeal of §§377.4, 377.13, 377.17-377.18, 377.23, 377.25-377.26, 377.28-377.30, 377.39-377.40, 377.42-377.44 and 377.46-377.47 concerning Procedures Governing Grievances, Hearings, and Appeals without changes to the proposal as published in the September 22, 2000, issue of the *Texas Register* (25 TexReg 9354). The text will not be republished.

The repeal is being adopted in accordance with the Texas Government Code §2001.039 regarding review of rules (formerly 1997 General Appropriations Act, Article IX, Section 167), requiring all agencies to review their rules. The rules refer to "hearing officers," whereas the Administrative Procedure Act refers to Administrative Law Judge. Therefore some of the rules are obsolete. Some rules merely restate statutory law, sometimes inaccurately, or conflict with SOAH rules. Other rules depart from the usual practice in contested case hearings. Therefore, the purpose for which these rules originally were adopted no longer exists.

No comments were received regarding the repeal of these rules.

The repeals are adopted under the Occupations Code §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the law of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the law regulating the practice of podiatry.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 378. CONTINUING EDUCATION

22 TAC §378.1

The Texas State Board of Podiatric Medical Examiners adopts amendments to §378.1 concerning Continuing Education Required with changes to the proposed text that was published in the December 1, 2000, issue of the *Texas Register* (25 TexReg 11841). Changes to the proposed rule reflect non-substantive variations from the proposed amendments. The board's legal counsel has advised that the changes to the proposed rule affect no new persons, entities, or subjects other than those given notice and that compliance with the adopted sections will be less burdensome than under the proposed sections and that the changes to the published proposed rule clarify the intent of the proposed rule. Accordingly, the text will be republished.

The rule amendments to §378.1 no longer require licensees to report their CME hours to the board every two years. Instead, the rule amendments require the licensee to maintain proof of the CME hours completed and to certify upon submitting the annual renewal form the number of hours of CME taken to date for that reporting period and that the licensee is in compliance with the CME requirements. Throughout the year, the board will randomly select to audit a few podiatrists who have renewed their podiatric license. Licensees who violate the CME rules may be assessed a penalty.

The rule amendments that delete the requirement that the licensee report to the board every two years regarding CME are adopted because the board lacks the staffing resources and lacks the budget, in terms of supplies and postage, to verify the CME hours reported by all licensees and to prosecute or resolve every incorrect or late CME report that is received. The board has determined that the incentive for licensees to meet the CME requirement is preserved in the rule as a result of the random auditing that the board will perform as well as the penalties assessed for failure to comply.

The substantive CME requirements have been expanded to provide guidance to licensees by specifying what activities qualify for CME credit and how must CME credit will be assigned to various activities. Podiatry-related activities receive more credit

than do medical-related activities that are not podiatry-specific because it is important for podiatrists to remain informed in the area of medicine in which they practice. Activities sponsored by the entities identified in the rule are accepted as qualifying CME events based on the quality of education that is consistently provided at such events. Those activities address the various areas of podiatry that applicants for a podiatry license are required to have studied in podiatry school and in which licensees must remain proficient and current to practice podiatry in a manner that is consistent with the public health and welfare.

The changes to the proposed rule that are adopted are as follows:

in §378.1(a), changed "their" to "the";

in §378.1(b), in the first sentence change "Hours of CME obtained by a licensee shall receive 100% credit" to read "A licensee shall receive 100% credit for each hour of training...";

in §378.1(c), the full terminology for the acronyms CPR and ACLS is provided before each respective acronym. "Cardiopulmonary Resuscitation" is inserted before "CPR" and "Advanced Cardiac Life Support" is inserted before "ACLS";

in §378.1(d), "on a one-time basis" is changed to, "with credit for the article being provided only once, regardless of the number of times or the number of journals in which the article is published";

in §378.1(e), changed subsection (e) to read as follows: "If the podiatric physician attends and speaks at the same lecture, CME credit may be received only for attending the lecture.";

in §378.1(f), in the first sentence changed "Hours of CME credit obtained by a licensee shall receive 50%" to read, "A licensee shall receive 50% credit for each hour of training...";

in §378.1(g), the third sentence is changed to read: "The year in which the 30-hour credit requirement must be completed after the original license is issued is every odd-numbered year if the original license was issued in an odd-numbered year and is every even-numbered year if the original license was issued in an even-numbered year.";

in §378.1(h), changed the first and second "their" to "the licensee's";

in §378.1(i), changed "them" to "the licensee". Change the last "their" to "the";

in §378.1(j), changed "their" to "the" and the capitalization of "Administrative Penalty" is removed;

in §378.1(l), capitalization of "Education" is removed.

No comments were received in response to the proposed rule amendments.

The amendments are adopted under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the law of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the law regulating the practice of podiatry. This rule is also authorized by and affects Texas Occupations Code §202.305 which directs the board to establish continuing education requirements for licensees.

The adopted amendments implement Texas Occupations Code, §202.305.

§378.1. Continuing Education Required.

(a) Each person licensed to practice podiatric medicine in the State of Texas is required to have 30 hours of continuing education every two years for the renewal of the license to practice podiatric medicine. Two hours of the required 30 hours of annual continuing education (CME) may be a course, class, seminar, or workshop in Ethics. It shall be the responsibility of the podiatric physician to ensure that all CME hours being claimed to satisfy the 30 hour bi-annual requirement meet the standards for CME as set by the Board. One hour of CME is defined as a typical fifty-minute classroom instructional session or its equivalent. Practice management, home study and self-study programs will not be given CME credit hours.

(b) A licensee shall receive 100% credit for each hour of training (one hour of training equals one hour of CME) for podiatric medical meetings and training sponsored by APMA, APMA affiliated organizations, TPMA, state, county or regional podiatric medical association podiatric medical meetings, university sponsored podiatric medical meetings, hospital podiatric medical meetings or hospital podiatric medical grand rounds, medical meetings sponsored by the Foot & Ankle Society or the orthopedic community relating to foot care, and others at the discretion of the Board.

(c) Cardiopulmonary Resuscitation (CPR) certification is eligible for up to three hours of CME credit and Advanced Cardiac Life Support (ACLS) certification for up to six hours of CME credit (credit can only be obtained for one, not both).

(d) If a podiatric physician has an article published (not just submitted) in a peer review journal, (s)he may receive one hour of CME credit for the article, with credit for the article being provided only once, regardless of the number of times or the number of journals in which the article is published.

(e) If a podiatric physician attends and speaks at the same lecture, CME credit may be received only for attending the lecture.

(f) A licensee shall receive 50% credit for each hour of training (one hour of training equals one half hour of CME) for non-podiatric medical sponsored meetings that are relative to podiatric medicine. The yardstick used to determine whether the training is "relative" to podiatric medicine is; "will the training enhance the knowledge and abilities of the podiatric physician in terms of improved quality and delivery of patient care?" Fifty percent credit shall also be assigned to hospital grand rounds, hospital CME programs, corporate sponsored meetings, and meetings sponsored by the American Medical Association, the orthopedic community, the American Diabetes Association, the Nursing Association, the Physical Therapy Association, and others at the discretion of the Board.

(g) These hours of continuing education must be obtained in the 24-month period immediately preceding the year for which the license was issued. The two-year period will begin on September 1 and end on August 31 two years later. The year in which the 30-hour credit requirement must be completed after the original license is issued is every odd-numbered year if the original license was issued in an odd-numbered year and is every even-numbered year if the original license was issued in an even-numbered year. A licensee who completes more than the required 30 hours during the preceding CME period may carry forward a maximum of 10 hours for the next CME period.

(h) Documentation of CME courses shall be made available to the Board upon request, but should not be sent to the Board via facsimile, or mailed with the annual license renewal form. Each licensee shall maintain the licensee's CME records at the licensee's practice location for four years, evidencing completion of the CME programs completed by the licensee. The Board shall conduct random checks of licensee CME documentation to ensure compliance with this rule.

(i) A small percentage of podiatric physicians who renew their licenses will be required to produce proof of completion of the CME hours they affirmed obtaining on their annual license renewal notice. The licensees to be reviewed will be chosen randomly out of the pool of annual license renewal forms. Once a licensee has been randomly chosen for the CME audit, he/she will receive a letter requiring the licensee to submit to the Board proof of the hours claimed on the annual renewal form. Original documents will not be required; copies of certificates and forms will be sufficient.

(j) If the licensee does not comply with the request for CME documentation within 30 days of receipt of the letter, or if the licensee is unable to provide proof of the hours claimed on the annual renewal form, the licensee will be investigated by the Board. If the investigation reveals that the requirement was not met, the licensee may be disciplined. The penalty for non-compliance with the bi-annual CME requirement shall be a letter of reprimand and a minimum $2500 administrative penalty per violation up to the maximum allowed by law.

(k) The Board may assess the continuing education needs of a licensee and require the licensee to attend continuing education courses specified by the Board.

(l) Continuing education obtained as a part of a disciplinary action is not acceptable credit towards the total of 30 hours required every two years.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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22 TAC §378.4

The Texas State Board of Podiatric Medical Examiners adopts the repeal of §378.4, regarding continuing medical education ("CME") requirements, as it was published in the September 22, 2000, issue of *Texas Register* (25 TexReg 9356).

The rule amendments to §378.1 which no longer require licensees to report their CME hours to the board every two years, makes §378.4 unnecessary because §378.4 concerns the reporting of CME hours to the board.

No comments were received in response to the proposed rule repeal.

The repeal is adopted under the Texas Occupations Code, §202.151, which provides the Board with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the law of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry, and the enforcement of the law regulating the practice of podiatry. The repeal is also authorized by and affects Texas Occupations Code §202.305 which directs the board to establish continuing education requirements for licensees.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

CHAPTER 50. ACTION ON APPLICATIONS AND OTHER AUTHORIZATIONS

The Texas Natural Resource Conservation Commission (commission) adopts the amendments to §50.39, Motion for Reconsideration, and §50.139, Motion to Overturn Executive Director's Decision, *with changes* to the proposed text as published in the September 22, 2000 issue of the *Texas Register* (25 TexReg 9414).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

On January 12, 2000, the commission adopted amendments to its procedural rules to implement Senate Bill (SB) 211, including amendments (see the January 28, 2000 issue of the *Texas Register* (25 TexReg 593)) to §50.39, Motion for Reconsideration and §50.139, Motion to Overturn Executive Director's Decision. These amendments were intended to mirror the provisions of SB 211, which amended Texas Government Code, §2001.142, to provide that a party is presumed to have been notified of a decision or order in a contested case on the third day after notice is mailed by first class mail. Prior to SB 211, the Texas Government Code provided that the date of notification was presumed to be the date on which the notice of the decision was mailed. Likewise, prior to the amendments to §50.39 and §50.139, the time for filing a motion for reconsideration or motion to overturn of an uncontested permit ran from the time of mailing to the applicant. Since adoption of these amendments to §50.39 and §50.139, the time for filing a motion for reconsideration or motion to overturn runs from the time of written notification to the applicant, with a presumption that a person is notified on the third day after the date of mailing of the executive director's decision. Thus, while SB 211 did not specifically require changes in procedures for uncontested matters, in the interest of consistency, the commission changed its procedures to give movants additional time to file motions for reconsideration and motions to overturn.

Since adoption, however, staff have recognized that the rules as written may on occasion result in uncertainty concerning when the time period for filing begins to run. For the convenience of the applicant, staff in some cases hand-delivered or faxed early notice of the executive director's decision. The intent of the rule is for the time for filing a motion for reconsideration or motion

to overturn to begin from the date notice of the executive director's action is mailed. Since an early copy furnished to the applicant might be construed to constitute "notice in writing," thereby resulting in confusion regarding a movant's time for filing, the commission adopts certain changes to make the beginning date more certain in all cases.

The adopted rules as proposed provided that motions for reconsideration and motions to overturn must be filed no later than 23 days after the agency mails notice of the signed permit, approval, or other action of the executive director and set forth the circumstances under which the public interest counsel and timely commenters would receive notice of the action. For purposes of simplicity and clarity, the rules as adopted now provide that notice of the action is to be mailed to the applicant and persons on any required mailing list for the action. Related rules on extension of time limits and disposition of motions would also be changed with this adoption. Additionally, a change is adopted to clarify that in some situations, agency staff, rather than the chief clerk, mail notice of a signed permit or other executive director action. These changes should benefit both applicants and potential protestants. Applicants should benefit because, where time is of the essence, the practice of faxing and hand-delivering copies of signed permits and other approvals can resume. Persons opposing the issuance of permits or approvals will benefit because the deadline for filing a motion for reconsideration or motion to overturn will allow a full 20 days for filing these motions, taking into account three days from mailing to receipt of notification.

SECTION BY SECTION DISCUSSION

Section 50.39, relating to Motion for Reconsideration, which applies to certain applications declared administratively complete before September 1, 1999, is adopted to be amended to specify that the deadline for filing a motion for reconsideration runs from the date the agency mails notice of a signed permit, approval, or other executive director's action. In addition, to cover the time from mailing to the time of notification, it is adopted that the deadline for filing be changed so that it is 23 days after notice of the signed permit or other action of the executive director is mailed to the applicant and persons on any required mailing list. This change is reflected in adopted amendments to §50.39(b). Two other changes are adopted for §50.39(b). A change is adopted to reflect that in some situations agency staff, rather than chief clerk, may mail notice of a signed permit or other executive director action. Another change is adopted to mirror a revised provision in §50.139(b) that provides that, if timely comments are received in response to any required prior notice of an application, notice of an executive director action will be mailed to public interest counsel and timely commenters, as well as the applicant. Corresponding changes are adopted to §50.39(d) and §50.39(e) to reflect the adopted changes to the deadline for filing of motions for reconsideration.

Section 50.139, relating to Motion to Overturn Executive Director's Decision, which applies to certain applications declared administratively complete on or after September 1, 1999, is adopted to be amended to mirror the adopted changes to §50.39. That is, changes are adopted to specify that the deadline for filing a motion to overturn runs from the date the agency mails notice of a signed permit, approval, or other executive director's action to the applicant and persons on any required mailing list. The adopted rule will also allow for 23 days from the date of mailing of notice of the signed permit or other executive director action. This change is reflected in §50.139(b). Two other changes are adopted for §50.139(b). A change is adopted to reflect that in some situations, agency staff, rather than the chief clerk, may mail notice of a signed permit or other executive director action. Another change is adopted to reflect that the obligation to mail notice of the executive director's action to the public interest counsel and commenters is triggered by the receipt of timely comments, in response to any required prior notice of an application. Corresponding changes are adopted to §50.139(e) and §50.139(f) to reflect the adopted changes to the deadline for filing motions to overturn.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. This rulemaking does not meet the definition of "major environmental rule" because it is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. Instead, this rulemaking is procedural in nature and sets time frames for the filing of a motion for reconsideration or motion to overturn of a signed permit, approval or other action of the executive director.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these rules pursuant to Texas Government Code, §2007.043. The specific purpose of the rulemaking is to provide that motions for reconsideration and motions to overturn must be filed no later than 23 days after the date the agency mails notice of a signed permit, approval, or other action of the executive director to the applicant and persons on any required mailing list. They are procedural rule changes only and do not affect private real property. Therefore, these rules will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the rulemaking and found that the amendments are neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP) nor do they affect any action or authorization identified in the Coastal Coordination Act Implementation Rules, §505.11. This rulemaking concerns only the procedural rules of the commission and is therefore not subject to the CMP.

HEARING AND COMMENTERS

A public hearing was held on October 17, 2000. No one attended the hearing. The comment period closed on October 23, 2000. No comments were received.

SUBCHAPTER C. ACTION BY EXECUTIVE DIRECTOR

30 TAC §50.39

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103 and §5.105, which establish the commission's general authority to adopt rules and to set policy by rule; and Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice.

§50.39. Motion for Reconsideration.

(a) The applicant, public interest counsel or other person may file with the chief clerk a motion for reconsideration of the executive director's action on an application.

(b) A motion for reconsideration must be filed no later than 23 days after the date the agency mails notice of the signed permit, approval, or other action of the executive director to the applicant and persons on any required mailing list for the action.

(c) An action by the executive director under this subchapter is not affected by a motion for reconsideration filed under this section unless expressly ordered by the commission.

(d) With the agreement of the parties or on their own motion, the commission or the general counsel may, by written order, extend the period of time for filing motions for reconsideration and for taking action on the motions so long as the period for taking action is not extended beyond 90 days after the date the agency mails notice of the signed permit, approval, or other written notice of the executive director's action.

(e) Disposition of motion.

(1) Unless an extension of time is granted, if a motion for reconsideration is not acted on by the commission within 45 days after the date the agency mails notice of the signed permit, approval, or other action of the executive director, the motion is denied.

(2) In the event of an extension, the motion for reconsideration is overruled by operation of law on the date fixed by the order, or in the absence of a fixed date, 90 days after the date the agency mails notice of the signed permit, approval, or other action of the executive director.

(f) Section 80.271 of this title (relating to Motion for Rehearing) and Texas Government Code, §2001.146, regarding motions for rehearing in contested cases do not apply when a motion for reconsideration is denied by commission action or under subsection (e) of this section and no motions for rehearing shall be filed. If applicable, the commission decision may be subject to judicial review under Texas Water Code, §5.351, or Texas Health and Safety Code, §§361.321, 382.032, or 401.341.

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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Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
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Proposal publication date: September 22, 2000
For further information, please call: (512) 239-6087

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SUBCHAPTER G. ACTION BY THE EXECUTIVE DIRECTOR

30 TAC §50.139

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code (TWC), §5.103 and §5.105, which establish the commission's general authority to adopt rules and to set policy by rule; and Texas Government Code, §2001.004, which requires state agencies to adopt rules of practice.

§50.139. Motion to Overturn Executive Director's Decision.

(a) The applicant, public interest counsel or other person may file with the chief clerk a motion to overturn of the executive director's action on an application or water quality management plan (WQMP) update certification. Wherever other commission rules refer to a "motion for reconsideration", that term should be considered interchangeable with the term "motion to overturn executive director's decision."

(b) A motion to overturn must be filed no later than 23 days after the date the agency mails notice of the signed permit, approval, or other action of the executive director to the applicant and persons on any required mailing list for the action.

(c) A motion to overturn must be filed no later than 20 days after the date persons who timely commented on the WQMP update are notified of the response to comments and the certified WQMP update. A person is presumed to have been notified on the third day after the date the notice of the executive director's action is mailed by first class mail.

(d) An action by the executive director under this subchapter is not affected by a motion to overturn filed under this section unless expressly ordered by the commission.

(e) With the agreement of the parties or on their own motion, the commission of the general counsel may, by written order, extend the period of time for filing motions to overturn and for taking action on the motions so long as the period for taking action is not extended beyond 90 days after the date the agency mails notice of the signed permit, approval, or other action of the executive director.

(f) Disposition of motion.

(1) Unless an extension of time is granted, if a motion to overturn is not acted on by the commission within 45 days after the date the agency mails notice of the signed permit, approval, or other action of the executive director, the motion is denied.

(2) In the event of an extension, the motion to overturn is overruled by operation of law on the date fixed by the order, or in the absence of a fixed date, 90 days after the date the agency mails notice of the signed permit, approval, or other action of the executive director.

(g) When a motion to overturn is denied under subsection (f) of this section, a motion for rehearing does not need to be filed as a prerequisite for appeal. Section 80.272 of this title (relating to Motion for Rehearing) and Texas Government Code, §2001.146, regarding motions for rehearing in contested cases do not apply when a motion to overturn is denied. If applicable, the commission decision may be subject to judicial review under Texas Water Code, §5.351, or Texas Health and Safety Code, §§361.321, 382.032, or 401.341.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Texas Natural Resource Conservation Commission
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CHAPTER 106. PERMITS BY RULE
SUBCHAPTER A. GENERAL REQUIREMENTS

30 TAC §106.4

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §106.4, Requirements for Permitting by Rule. Section 106.4 is adopted *without changes* to the proposed text as published in the October 20, 2000 issue of the *Texas Register* (25 TexReg 10445) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

On December 6, 2000 the commission adopted rules, which were published in the January 12, 2001 issue of the *Texas Register* (26 TexReg 283), that established a system of allocation and trading of emission allowances for nitrogen oxides (NO_x) in the Houston/Galveston (HGA) nonattainment area. An allowance is equal to one ton of NO_x emissions and facilities are required to obtain a sufficient number of allowances that are equal to or exceed its actual emissions for a calendar year. The purpose of this system is to limit emissions of NO_x from individual facilities in HGA so that a regional maximum, or cap, of emissions is not exceeded. The NO_x emission limitations apply to existing and new stationary facilities. Individual facilities may buy or sell allowances, but the total number of allowances in the HGA region may not exceed the predetermined cap.

This adoption supplements the emission cap and trade program (26 TexReg 283), by specifying that facilities or groups of facilities using authorizations under Chapter 106, Permits by Rule, will be required to obtain NO_x emission allowances prior to operation if the facilities being authorized are subject to the cap and trade program.

SECTION BY SECTION DISCUSSION

This adoption adds a new paragraph, §106.4(a)(8), stating that a facility or group of facilities must obtain allowances prior to operation if the facility or group of facilities is subject to the NO_x emission cap and trade program (26 TexReg 283). This adoption does not extend the applicability of the cap and trade program but clarifies that the program would also be applicable to certain facilities authorized under Chapter 106.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225. The commission determined that this amendment to Chapter 106 does not meet the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225. "Major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission adopts this amendment to achieve administrative consistency with amendments to Chapter 101 adopted on December 6, 2000 (26 TexReg 283). In the Chapter 101 rulemaking, the commission requires facilities which have the design capacity to emit ten tons or more of NO_x per year in HGA to hold allowances equal to, or greater than their actual NO_x emissions under a cap and trade program. This adopted amendment to Chapter 106 clarifies that an applicant subject to Chapter 101, Subchapter H, Division 3, must obtain allowances prior to operation. The amendment does not expand the applicability of the cap and trade program. The amendment to Chapter 106 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; therefore, this amended section does not constitute a major environmental rule. In addition, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1.) exceed a standard set by federal law, unless the rule is specifically required by state law; 2.) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3.) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4.) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking is not subject to the regulatory analysis provisions of §2001.0225(b), because the rule does not meet any of the four applicability requirements. Specifically, the emission banking and trading requirements within this rulemaking are an element of the control strategy for the HGA SIP which is necessary in order for HGA to meet the ozone national ambient air quality standard (NAAQS) set by the United States Environmental Protection Agency (EPA) under the Federal Clean Air Act (FCAA), §109 (42 United States Code (USC), §7409). Additional elements of this control strategy were adopted by the commission on December 6, 2000. These rules do not exceed an express standard set by federal law since they implement requirements of the FCAA. Provisions of 42 USC, §7410, require states to adopt a state implementation plan (SIP) which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While §7410 does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not

free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The commission bases these actions on the presumption that the legislature understands this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. It is a rule of statutory interpretation that the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The commission performed photochemical grid modeling which predicts that NO_x emission reductions, such as those required by these rules, will result in reductions in ozone formation in the HGA ozone nonattainment area. This rulemaking does not exceed an express requirement of state law. This rulemaking is intended to obtain NO_x emission reductions which will result in reductions in ozone formation in the HGA ozone nonattainment area and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, and 382.017, as well as under 42 USC, §7410(a)(2)(A).

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the rules are subject to Texas Government Code, Chapter 2007. The following is a summary of that analysis. This amendment is adopted as part of a strategy to reduce and permanently cap emissions of NO_x to a level which would allow the HGA nonattainment area to attain the NAAQS for ozone. Promulgation and enforcement of the amendment will not burden private real property. The amendment does not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the allowances that are the subject of this amendment are not property rights. Consequently, the amendment does not meet the definition of a takings under Texas Government Code, §2007.002(5). Although the amendment does not directly prevent a nuisance or prevent an immediate threat to life or property, it does prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under the USC, §7410. Specifically, the emission limitations within this adoption were developed in order to meet the ozone NAAQS set by the EPA under the USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under the USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rulemaking is to implement a NO_x strategy which is necessary for the HGA area to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to this rule is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, this revision will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined the rulemaking relates to an action or actions subject to the Texas Coastal Management Plan (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resource Code, §§33.201 et seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 30 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined the amendment is consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas, and the policy in 31 TAC §501.14(q), which requires the commission protect air quality in coastal areas. The amendment states that applicants for permits by rule for new or modified facilities in HGA must comply with Chapter 101, Subchapter H, Division 3. The amendment does not authorize any new NO_x air emissions.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The amendment to §106.4, is not considered an applicable requirement under 30 TAC Chapter 122, thus this change would not require a revision to an affected facility's federal operating permit.

HEARING AND COMMENTERS

The commission held a public hearing in Houston on November 16, 2000. No comments were received at the hearing, but the commission received written comments from the EPA and the Sierra Club Houston Regional Group (Sierra-Houston) during the public comment period which closed on November 20, 2000. The EPA requested clarifications on several points of the proposal, and Sierra-Houston opposed the proposal.

ANALYSIS OF TESTIMONY

The EPA commented that the commission should clarify the application and definition of "facility." The definition of "facility" in §116.10(4) should be consistent with the intended use of the same term in proposed §106.4(a)(8). The EPA questioned whether the term was intended to mean that only the emission point that was authorized under the permit by rule would be required to obtain allowances or would all emission points of the same industrial grouping on contiguous or adjacent property, under common ownership or control, be required to obtain allowances.

The rules were not revised based on this comment. The intent of proposed §106.4(a)(8) is to notify the owner(s) seeking to authorize a facility or group of facilities under a permit by rule that if those facilities are subject to the cap and trade program, sufficient allowances will need to be obtained equal to or greater than the total actual NO_x emissions from all facilities subject to Chapter 117 at the site. All facilities at a site that are subject to Chapter 117 and that collectively have a design capacity of ten tons of NO_x emissions per year or greater will be required to obtain allowances. The term "facility" is defined in TCAA, §382.003(6).

Sierra-Houston commented that the proposed amendments in Chapters 101, 106, and 116 should have been part of the Houston SIP proposal that went through public hearings in September 2000. Sierra-Houston stated that very few people would know about the proposals because there was no publicity surrounding them, and that the proposals are far reaching.

The rules were not revised based on this comment. This amendment is directly related to the NO_x cap and trade program, but could not be proposed and adopted on the same schedule. One of the affected sections in this adoption was open under another rulemaking related to the implementation of SB 766 from the 1999 session of the Texas Legislature when the cap and trade rules were proposed. The SB 766 implementation and the cap and trade rules were proceeding under fixed but different schedules due to statutory and federal deadlines. Under the Administrative Procedures Act (APA), the commission must wait until a section undergoing amendment is completed and effective before that section may be opened again for amendment. This rulemaking was proposed and published consistent with the APA requirements.

Sierra-Houston commented that the emission cap and trade program will result in no emission reductions in plants close to poor and minority neighborhoods.

The rules were not revised based on this comment. The effect of implementing the NO_x cap and trade program will be an overall NO_x reduction of approximately 90% from stationary facilities in the HGA nonattainment area. Facilities subject to the cap and trade program will be required to reduce actual emissions to a level equal to or lower than their individual cap, or purchase allowances from another facility participating under the cap and trade program. This trading will result in a zero net effect on the level of the cap, and will not result in increased emissions based on the location of the facility.

Sierra-Houston opposed the cap and trade program in general and stated that requiring emission reductions at all facilities will result in the greatest reduction of ozone. Sierra-Houston also stated that many emission controls will not be required until 2005, which will reduce the chances of the HGA area obtaining the ozone standard by 2007.

The rules were not revised based on this comment. The overall NO_x cap was set at an annual level believed necessary for stationary facilities in order for the HGA nonattainment area to reach attainment by 2007. Thus, compliance with the cap will achieve the necessary reduction from the stationary source category. For facilities not wishing to make reductions to meet their individual cap, additional allowances will need to be obtained from another facility or facilities. Because these purchased allowances will be obtained from a facility participating in the cap and trade program, this results in an equal reduction from the seller. There is no net increase in the number of allowances. In addition, the cap is being initially set at historical emission levels and will reduce over time with the final reduction taking place in 2007. Based on the existing SIP, the reductions necessary from stationary facilities need to be in full effect by 2007 and not 2005 to demonstrate attainment.

STATUTORY AUTHORITY

The amendment is adopted under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.05196, which authorizes the commission to adopt permits by rule for types of facilities which will not make a significant contribution of air contaminants to the atmosphere; and USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

The Texas Natural Resource Conservation Commission (commission) adopts amendments to §116.111, General Application; §116.115, General and Special Conditions; §116.610, Applicability; §116.615, General Conditions; §116.711, Flexible Permit

Application; and §116.715, General and Special Conditions. The commission also adopts new §116.176, Use of Mass Cap Allowances for Offsets. Sections 116.111 and 116.115 are adopted *with changes* to the proposed text as published in the October 20, 2000 issue of the *Texas Register* (25 TexReg 10449). Sections 116.176, 116.610, 116.615, 116.711, and 116.715 are adopted *without changes* and will not be republished. These amended and new sections will be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

On December 6, 2000 the commission adopted rules, which were published in the January 12, 2001 issue of the *Texas Register* (26 TexReg 283), that establishes a system of allocation and trading of emission allowances for nitrogen oxides (NO_x) in the Houston/Galveston (HGA) nonattainment area. An allowance is equal to one ton of NO_x emissions and facilities are required to obtain a sufficient number of allowances equal to or exceeding its emissions for a calendar year. The purpose of this system is to limit emissions of NO_x from individual facilities in HGA so that a regional maximum, or cap, of emissions is not exceeded. The NO_x emission limitations apply to existing and new stationary facilities. Individual facilities may buy or sell allowances, but the total number of allowances in the HGA region may not exceed the predetermined cap.

This adoption requires that applicants for permits authorized under 30 TAC Chapter 116 in the HGA area acknowledge, in the permit application, the requirement to obtain allowances prior to operation. This adoption also requires that the applicant, prior to commencing operations, identify a source of allowances.

SECTION BY SECTION DISCUSSION

The new §116.111(a)(2)(L) requires permit applicants under Chapter 116, Subchapter B, Division 1, Permit Application, to acknowledge they must obtain allowances to operate. The commission has deleted the reference to the effective date (March 21, 1999) in §116.111(b)(1) because that date is no longer correct.

The new §116.115(b)(2)(C)(iii) adds language to the general conditions of New Source Review (NSR) permits, specifying that facilities, groups of facilities, or accounts subject to Chapter 101, Subchapter H, Division 3, concerning Mass Emissions Cap and Trade Program (26 TexReg 283), must identify the source or sources of allowances to be used for compliance. The commission has amended §116.115(c)(2)(A)(ii) to state the correct title of Chapter 106 as Permits by Rule.

The new §116.176 allows permit applicants for facilities subject to Chapter 101, Subchapter H, Division 3, that are required to submit NO_x offsets in accordance with §116.150, New Major Source or Major Modification in Ozone Nonattainment Areas, to use allowances to meet the correlating portion of the emission offsets.

The new §116.610(a)(6) requires permit applicants under Chapter 116, Subchapter F, Standard Permits, to acknowledge they must obtain allowances to operate.

The new §116.615(5)(C) adds language to the general conditions of standard permits specifying that facilities, groups of facilities or accounts subject to Chapter 101, Subchapter H, Division 3, must identify the source or sources of allowances to be used for compliance.

The new §116.711(12) requires permit applicants under Chapter 116, Subchapter G, Flexible Permits, to acknowledge that they must obtain allowances to operate.

The new §116.715(c)(3)(C) adds language to the general conditions of flexible permits specifying that facilities, groups of facilities, or accounts subject to Chapter 101, Subchapter H, Division 3, must identify the source or sources of allowances to be used for compliance.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225. The commission determined that these amendments to Chapter 116 do not meet the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225. "Major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The commission adopts these amendments to achieve administrative consistency with amendments to Chapter 101, adopted on December 6, 2000 (26 TexReg 283). The Chapter 101 amendments require facilities or groups of facilities in the HGA area, which have a collective design capacity to emit NO_x in amounts greater than or equal to ten tons per year, to hold sufficient allowances equal to or greater than their actual NO_x emissions under a cap and trade program. These amendments require a permit applicant subject to Chapter 101, Subchapter H, Division 3, to acknowledge that they are required to obtain allowances to comply with the cap and trade program to operate and that they must identify a source or sources of allowances prior to operation. In addition, the amendments to Chapter 116 allow applicants of new major sources and major modifications to use allowances for the correlating portion of any offsets required under §116.150, New Major Source or Major Modification in Ozone Nonattainment Areas. These adopted sections state that applicants of new or modified facilities in HGA are to comply with Chapter 101, Subchapter H, Division 3. These adopted sections do not expand the cap and trade program for the HGA area. The amendments to Chapter 116 do not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state; therefore, these amended and new sections do not constitute a major environmental rule. In addition, Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1.) exceed a standard set by federal law, unless the rule is specifically required by state law; 2.) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3.) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4.) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking is not subject to the regulatory analysis provisions of §2001.0225(b), because the adopted rules do not meet any of the four applicability requirements. Specifically, the emission banking and trading requirements within this rulemaking are an element of the control strategy for the HGA SIP which is necessary in order for HGA to meet the ozone national ambient air quality standard (NAAQS) set by the EPA under the Federal Clean Air Act (FCAA), §109 (42 United States Code

(USC), §7409). Additional elements of this control strategy were adopted by the commission on December 6, 2000. These rules do not exceed an express standard set by federal law since they implement requirements of the FCAA. Provisions of 42 USC, §7410, require states to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While §7410 does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning Chapter 85, Air Pollution Prevention and Control). It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislative Session, 1999. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The commission bases these actions on the presumption that the legislature understands this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. It is a rule of statutory interpretation that the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The commission performed photochemical grid modeling which predicts that NO_x emission reductions, such as those required by these rules, will result in reductions in ozone formation in the HGA ozone nonattainment area. This rulemaking does not exceed an express requirement of state law. This rulemaking is intended to obtain NO_x emission reductions which will result in reductions in ozone formation in the HGA ozone nonattainment area and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, and 382.017, as well as under 42 USC, §7410(a)(2)(A).

TAKINGS IMPACT ASSESSMENT

The commission evaluated this rulemaking action and performed an analysis of whether the rules are subject to Texas Government Code, Chapter 2007. The following is a summary of that analysis. These amendments are adopted as part of a strategy to reduce and permanently cap emissions of NO_x to a level which would allow the HGA nonattainment area to attain the NAAQS for ozone. Promulgation and enforcement of the rules will not burden private real property. The amendments do not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Additionally, the allowances that are the subject of these rules are not property rights. Consequently, these amendments do not meet the definition of a takings under Texas Government Code, §2007.002(5). Although the rule revisions do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under the USC, §7410. Specifically, the emission limitations within this adoption were developed in order to meet the ozone NAAQS set by the EPA under the USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under the USC, §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the rulemaking is to implement a NO_x strategy which is necessary for the HGA area to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to these rules is that of an action reasonably taken to fulfill an obligation mandated by federal law. Therefore, these revisions do not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined the adopted rulemaking relates to an action or actions subject to the Texas Coastal Management Plan (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resource Code, §§33.201 et seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 30 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined the rules are consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas, and the policy in 31 TAC §501.14(q), which requires the commission protect air quality in coastal areas. The amendments state that applicants for permits of new or modified facilities in HGA must comply with Chapter 101, Subchapter H, Division 3. These rules do not authorize any new NO_x air emissions.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

The amendments to §§116.111, 116.115, 116.610, 116.615, 116.711, and 116.715 are not considered applicable requirements under 30 TAC Chapter 122, thus these changes do not require revisions to the affected facilities' operating permit. The new §116.176 is considered an applicable requirement under 30 TAC Chapter 122, thus owners or operators subject to the Federal Operating Permits Program must, consistent with the revision process in Chapter 122, revise their operating permit to include the new §116.176 requirements for each emission unit affected by the revisions to §116.176 at their site.

HEARING AND COMMENTERS

The commission held a public hearing in Houston on November 16, 2000. No comments were received at the hearing, but the commission received written comments from the EPA and the Sierra Club Houston Regional Group (Sierra-Houston) during the public comment period which closed on November 20, 2000. The EPA requested clarifications on several points of the proposal, and Sierra- Houston opposed the proposal.

ANALYSIS OF TESTIMONY

The EPA commented that the commission should clarify the application and definition of "facility." The definition of "facility" in §116.10(4) should be consistent with the intended use of the same term in proposed §106.4(a)(8). The EPA questioned whether the term was intended to mean that only the emission point that was authorized under the permit by rule would be required to obtain allowances or would all emission points of the same industrial grouping on contiguous or adjacent property, under common ownership or control, be required to obtain allowances.

The rules were not revised based on this comment. The intent of proposed §106.4(a)(8) is to notify the owner(s) seeking to authorize a facility or group of facilities under a permit by rule that if those facilities are subject to the cap and trade program, sufficient allowances will need to be obtained equal to or greater than the total actual NO_x emissions from all facilities subject to Chapter 117 at the site. All facilities at a site that are subject to Chapter 117 and that collectively have a design capacity of ten tons of NO_x emissions per year or greater will be required to obtain allowances. The term "facility" is defined in TCAA, §382.003(6).

The EPA made the identical comment about the use of the term "facility" in the proposed §116.111(a)(2)(L), §116.115(b)(2)(C)(iii), §116.610(a)(6), §116.615(6)(C), §116.711(12), and §116.715(c)(3)(C). The use of the term "facility" in these sections should be clarified to mean that a facility includes all emission points in the same industrial classification on contiguous or adjacent property and under common ownership or control.

The rules were not revised based on this comment. The industrial classification is relevant to the cap and trade program only if that classification includes facilities subject to Chapter 117. The intent of this rulemaking is to ensure that facilities authorized by Chapter 116 have sufficient allowances to operate. A facility or group of facilities at a site becomes subject to the cap and trade program if they are subject to Chapter 117 and collectively have a design capacity of ten tons of NO_x emissions per year or greater. Any additional facilities authorized at that site will also be subject. The term "facility" is defined in TCAA, §382.003(6).

The EPA commented that the commission should clarify the intent of §116.176. The section allows the use of allowances required to comply with the emission cap and trade program in 30 TAC Chapter 101, Subchapter H, Division 3 to meet the correlating portion of emission offset requirements needed to comply with §116.150, New Major Source or Major Modification in Ozone Nonattainment Area. The EPA stated that the use of emission reduction credits (ERCs) is appropriate to meet offsets as ERCs are surplus and permanent. Allowances are renewed every year and are therefore not appropriate for use as offsets.

The rules were not revised based on this comment. The FCAA requires that offsets be provided and that those offsets provide a net air quality benefit. The adopted cap and trade rules set the cap at a level necessary for stationary facilities as part of a comprehensive SIP for the HGA nonattainment area to reach attainment by 2007. Because no new or modified facility, subject to the NO_x requirements of Chapter 117 and which is located at a site where such a facility or group of facilities has a collective design capacity of ten tons per year or more, will be allocated new allowances, any allowance they use will be 'surplus' from another facility participating under the cap. The net effect will be a zero sum gain on the number of allowances in the cap. This reflects the 'correlating portion' of the offset requirement. Because all new and modified facilities (as described above) will be required to obtain allowances from a facility already participating in the cap, it is ensured that NO_x emissions will be reduced to levels necessary for attainment. Even though further reduction will not be necessary since the cap has been set at a level to reach attainment, the rules will still require that an additional 30% of offsets be retired for compliance with the FCAA. This reduction will be an added benefit to the environment and will reduce emissions even beyond those levels necessary.

Sierra-Houston commented that the proposed amendments in Chapters 101, 106, and 116 should have been part of the HGA SIP proposal that went through public hearings in September 2000. Sierra- Houston stated that very few people would know about the proposals because there was no publicity surrounding them, and that the proposals are far reaching.

The rules were not revised based on this comment. This amendment is directly related to the NO_x cap and trade program, but could not be proposed and adopted on the same schedule. One

of the affected sections in this adoption was open under another rulemaking related to the implementation of SB 766 from the 1999 session of the Texas Legislature when the cap and trade rules were proposed. The SB 766 implementation and the cap and trade rules were proceeding under fixed but different schedules due to statutory and federal deadlines. Under the Administrative Procedures Act (APA), the commission must wait until a section undergoing amendment is completed and effective before that section may be opened again for amendment. This rulemaking was proposed and published consistent with the APA requirements.

Sierra-Houston stated that the emission cap and trade program will result in no emission reductions in plants close to poor and minority neighborhoods.

The rules were not revised based on this comment. The effect of implementing the NO_x cap and trade program will be an overall NO_x reduction of approximately 90% from stationary facilities in the HGA nonattainment area. Facilities subject to the cap and trade program will be required to reduce actual emissions to a level equal to or lower than their individual cap, or purchase allowances from another facility participating under the cap and trade program. This trading will result in a net zero effect on the level of the cap, and will not result in increased emissions based on the location of the specific facility.

Sierra-Houston opposed the cap and trade program in general and stated that requiring emission reductions at all facilities will result in the greatest reduction of ozone. Sierra-Houston stated that many emission controls will not be required until 2005, which will reduce the chances of the HGA area obtaining the ozone standard by 2007.

The rules were not revised based on this comment. The overall NO_x cap was set at an annual level believed necessary for stationary facilities in order for the HGA nonattainment area to reach attainment by 2007. Thus, compliance with the cap will achieve the necessary reduction from the stationary source category. For facilities not wishing to make reductions to meet their individual cap, additional allowances will need to be obtained from another facility or facilities. Because these purchased allowances will be obtained from a facility participating in the cap and trade program, this results in an equal reduction from the seller. There is no net increase in the number of allowances. In addition, the cap is being initially set at historical emission levels and will reduce over time with the final reduction taking place in 2007. Based on the existing SIP, the reductions necessary from stationary facilities need to be in full effect by 2007 and not 2005 to demonstrate attainment.

SUBCHAPTER B. NEW SOURCE REVIEW PERMITS

DIVISION 1. PERMIT APPLICATION

30 TAC §116.111, §116.115

STATUTORY AUTHORITY

The amendments are adopted under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA; §382.051, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits issued under Chapter 382; and USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

§116.111. General Application.

(a) In order to be granted a permit, amendment, or special permit amendment, the application must include:

(1) a completed Form PI-1 General Application signed by an authorized representative of the applicant. All additional support information specified on the form must be provided before the application is complete;

(2) information which demonstrates that all of the following are met.

(A) Protection of public health and welfare.

(i) The emissions from the proposed facility will comply with all rules and regulations of the commission and with the intent of the TCAA, including protection of the health and physical property of the people.

(ii) For issuance of a permit for construction or modification of any facility within 3,000 feet of an elementary, junior high/middle, or senior high school, the commission shall consider any possible adverse short-term or long-term side effects that an air contaminant or nuisance odor from the facility may have on the individuals attending the school(s).

(B) Measurement of emissions. The proposed facility will have provisions for measuring the emission of significant air contaminants as determined by the executive director. This may include the installation of sampling ports on exhaust stacks and construction of sampling platforms in accordance with guidelines in the "Texas Natural Resource Conservation Commission (TNRCC) Sampling Procedures Manual."

(C) Best available control technology (BACT). The proposed facility will utilize BACT, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions from the facility.

(D) New Source Performance Standards (NSPS). The emissions from the proposed facility will meet the requirements of any applicable NSPS as listed under Title 40 Code of Federal Regulations (CFR) Part 60, promulgated by the EPA under FCAA, §111, as amended.

(E) National Emission Standards for Hazardous Air Pollutants (NESHAP). The emissions from the proposed facility will meet the requirements of any applicable NESHAP, as listed under 40 CFR Part 61, promulgated by EPA under FCAA, §112, as amended.

(F) NESHAP for source categories. The emissions from the proposed facility will meet the requirements of any applicable maximum achievable control technology standard as listed under 40 CFR Part 63, promulgated by the EPA under FCAA, §112 or as listed under Chapter 113, Subchapter C of this title (relating to National Emissions Standards for Hazardous Air Pollutants for Source Categories (FCAA §112, (40 CFR 63)).

(G) Performance demonstration. The proposed facility will achieve the performance specified in the permit application. The applicant may be required to submit additional engineering data after

a permit has been issued in order to demonstrate further that the proposed facility will achieve the performance specified in the permit application. In addition, dispersion modeling, monitoring, or stack testing may be required.

(H) Nonattainment review. If the proposed facility is located in a nonattainment area, it shall comply with all applicable requirements in this chapter concerning nonattainment review.

(I) Prevention of Significant Deterioration (PSD) review. If the proposed facility is located in an attainment area, it shall comply with all applicable requirements in this chapter concerning PSD review.

(J) Air dispersion modeling. Computerized air dispersion modeling may be required by the executive director to determine air quality impacts from a proposed new facility or source modification.

(K) Hazardous air pollutants. Affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) for hazardous air pollutants shall comply with all applicable requirements under Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)).

(L) Mass cap and trade allowances. If subject to Chapter 101, Subchapter H, Division 3, of this title (relating to Mass Emissions Cap and Trade Program), the proposed facility, group of facilities, or account must obtain allowances to operate.

(b) In order to be granted a permit, amendment, or special permit amendment, the owner or operator must comply with the following notice requirements.

(1) Applications declared administratively complete before September 1, 1999, are subject to the requirements of Chapter 116, Subchapter B, Division 3 (relating to Public Notification and Comment Procedures).

(2) Applications declared administratively complete on or after September 1, 1999, are subject to the requirements of Chapter 39 of this title (relating to Public Notice) and Chapter 55 of this title (relating to Request for Reconsideration and Contested Case Hearings; Public Comment). Upon request by the owner or operator of a facility which previously has received a permit or special permit from the commission, the executive director or designated representative may exempt the relocation of such facility from the provisions in Chapter 39 of this title if there is no indication that the operation of the facility at the proposed new location will significantly affect ambient air quality and no indication that operation of the facility at the proposed new location will cause a condition of air pollution.

§116.115. General and Special Conditions.

(a) General and special conditions. Permits, special permits, standard permits, and special exemptions may contain general and special conditions.

(b) General conditions. Holders of permits, special permits, standard permits, and special exemptions shall comply with the following:

(1) the general conditions contained in the permit document if issued or amended prior to August 16, 1994; or

(2) the following general conditions if the permit or amendment is issued or amended on or after August 16, 1994, regardless of whether they are specifically stated within the permit document.

(A) Voiding of permit. A permit or permit amendment under this chapter is automatically void if the permit holder does one of the following:

(i) fails to begin construction within 18 months of date of issuance. The executive director may grant a one-time 18-month extension to the date to begin construction;

(ii) discontinues construction for more than 18 consecutive months prior to completion; or

(iii) fails to complete construction within a reasonable time.

(B) Report of construction progress. The permit holder shall report start of construction, construction interruptions exceeding 45 days, and completion of construction. The report shall be given to the appropriate regional office of the commission not later than 15 working days after occurrence of the event.

(C) Start-up notification.

(i) The permit holder shall notify the appropriate air program regional office of the commission prior to the commencement of operations of the facilities authorized by the permit. The notification must be made in such a manner as to allow representative of the commission to be present at the commencement of operations.

(ii) The permit holder shall provide a separate notification for the commencement of operations for each unit of phased construction, which may involve a series of units commencing operations at different times.

(iii) Prior to operation of the facilities authorized by the permit, the permit holder shall identify to the Office of Permitting, Remediation, and Registration the source or sources of allowances to be utilized for compliance with Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(D) Sampling requirements.

(i) If sampling is required, the permit holder shall contact the commission's Office of Compliance and Enforcement prior to sampling to obtain the proper data forms and procedures.

(ii) All sampling and testing procedures must be approved by the executive director and coordinated with the regional representatives of the commission.

(iii) The permit holder is also responsible for providing sampling facilities and conducting the sampling operations or contracting with an independent sampling consultant.

(E) Equivalency of methods. The permit holder must demonstrate or otherwise justify the equivalency of emission control methods, sampling or other emission testing methods, and monitoring methods proposed as alternatives to methods indicated in the conditions of the permit. Alternative methods shall be applied for in writing and must be reviewed and approved by the executive director prior to their use in fulfilling any requirements of the permit.

(F) Recordkeeping. The permit holder shall:

(i) maintain a copy of the permit along with records containing the information and data sufficient to demonstrate compliance with the permit, including production records and operating hours;

(ii) keep all required records in a file at the plant site. If, however, the facility normally operates unattended, records shall be maintained at the nearest staffed location within Texas specified in the application;

(iii) make the records available at the request of personnel from the commission or any air pollution control program having jurisdiction;

(iv) comply with any additional recordkeeping requirements specified in special conditions attached to the permit; and

(v) retain information in the file for at least two years following the date that the information or data is obtained.

(G) Maximum allowable emission rates. The total emissions of air contaminants from any of the sources of emissions must not exceed the values stated on the table attached to the permit entitled "Emission Sources--Maximum Allowable Emission Rates."

(H) Maintenance of emission control. The permitted facilities shall not be operated unless all air pollution emission capture and abatement equipment is maintained in good working order and operating properly during normal facility operations. The permit holder shall provide notification for upsets and maintenance in accordance with §101.6 and §101.7 of this title (relating to Upset Reporting and Recordkeeping Requirements; and Maintenance, Startup and Shutdown Reporting, Recordkeeping, and Operational Requirements).

(I) Compliance with rules.

(i) Acceptance of a permit by an applicant constitutes an acknowledgment and agreement that the permit holder will comply with all rules, regulations, and orders of the commission issued in conformity with the TCAA and the conditions precedent to the granting of the permit.

(ii) If more than one state or federal rule or regulation or permit condition are applicable, the most stringent limit or condition shall govern and be the standard by which compliance shall be demonstrated.

(iii) Acceptance includes consent to the entrance of commission employees and agents into the permitted premises at reasonable times to investigate conditions relating to the emission or concentration of air contaminants, including compliance with the permit.

(c) Special conditions. The holders of permits, special permits, standard permits, and special exemptions shall comply with all special conditions contained in the permit document.

(1) Special conditions may be attached to a permit that are more restrictive than the requirements of Title 30 of the Texas Administrative Code.

(2) Special condition for written approval.

(A) The executive director may require as a special condition that the permit holder obtain written approval before constructing a source under:

(i) a standard permit under Subchapter F of this chapter (relating to Standard Permits); or

(ii) an exemption under Chapter 106 of this title (relating to Permits by Rule).

(B) Such written approval may be required if the executive director specifically finds that an increase of a particular pollutant could either:

(i) result in a significant impact on the air environment; or

(ii) cause the facility to become subject to review under:

(I) Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)); or

(II) the provisions in §116.150 and §116.151 of this title (relating to Nonattainment Review) and §§116.160 - 116.163 of this title (relating to Prevention of Significant Deterioration 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 March 9, 2001.

TRD-200101431
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: March 29, 2001
Proposal publication date: October 20, 2000
For further information, please call: (512) 239-0348

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DIVISION 7. EMISSION REDUCTIONS: OFFSETS

30 TAC §116.176

STATUTORY AUTHORITY

The new section is adopted under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA; and USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

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. STANDARD PERMITS

30 TAC §116.610, §116.615

STATUTORY AUTHORITY

The amendments are adopted under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the

authority to adopt rules consistent with the policy and purposes of the TCAA; and USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

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. FLEXIBLE PERMITS

30 TAC §116.711, §116.715

STATUTORY AUTHORITY

The amendments are adopted under the Texas Health and Safety Code, TCAA, §382.011, which authorizes the commission to control the quality of the state's air; §382.012, which authorizes the commission to develop a plan for control of the state's air; §382.017, which provides the commission the authority to adopt rules consistent with the policy and purposes of the TCAA; and USC, §7410(a)(2)(A), which requires SIPs to include enforceable emission limitations and other control measures or techniques, including economic incentives such as fees, marketable permits, and auction of emission rights.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 328. WASTE MINIMIZATION AND RECYCLING
SUBCHAPTER F. MANAGEMENT OF USED OR SCRAP TIRES

30 TAC §328.71

The Texas Natural Resource Conservation Commission (commission) adopts an amendment to §328.71, Closure Cost Estimate for Financial Assurance. The commission adopts this revision to Chapter 328, Waste Minimization and Recycling; Subchapter F, Closure Cost Estimate for Financial Assurance, in order to complete cross-references regarding financial assurance requirements for scrap tire sites. Section 328.71 is adopted *without changes* as published in the December 1, 2000 issue of the *Texas Register* (25 TexReg 11887) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULE

The cross-references in Chapter 328 to §37.3001 and §37.3011 need to be replaced by a reference to Chapter 37, Subchapter M, Financial Assurance Requirements for Scrap Tire Sites.

On February 24, 2000, the Chapter 37 financial assurance rule consolidation package was adopted. This package attempted to correct a cross-reference concerning financial assurance requirements for waste tire sites in Chapter 330. However, the Chapter 330 waste tire subchapters were being repealed and placed into Chapter 328 during the time that Chapter 37 was processed. Changes to Chapter 328 were not made because the Chapter 37 project team did not conceptualize opening Chapter 328. The cross-reference correction is needed to direct entities that manage used or scrap tires to the location of the financial assurance requirements.

SECTION BY SECTION DISCUSSION

The rule amends cross-references in §328.71(g) by deleting the specific previous cross-references to §37.3001 and §37.3011 and adding the appropriate cross-reference to Chapter 37, Subchapter M, Financial Assurance Requirements for Scrap Tire Sites, to specify all sections. These sections include: §37.3001, Applicability; §37.3003, Definitions; §37.3011, Financial Assurance Requirements; §37.3021, Financial Assurance Mechanisms; and §37.3031, Submission of Documents.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Government Code. Although the intent of the amendment is to protect the environment or reduce risks to human health from environmental exposure, the rulemaking does not have an adverse material impact because the amendment corrects a cross-reference and does not change regulatory requirements, and therefore does not meet the definition of a "major environmental rule." Furthermore, the rulemaking does not meet any of the four applicability requirements listed in §2001.0225(a). No comments on the regulatory impact analysis determination were received.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rulemaking and performed an assessment of whether the amendment constitutes a taking under Texas Government Code, Chapter 2007. The following is a summary of that evaluation and assessment. The specific purpose of the adopted amendment is to clarify the location of rules relating to financial assurance for scrap tire facilities. Entities that manage used scrap tires will benefit from knowing the appropriate location for information relating to the financial assurance requirements.

Adoption and enforcement of the amendment is neither a statutory nor a constitutional taking of private real property. Specifically, the adopted rule does not affect a landowner's rights in private real property because the rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which otherwise exist in the absence of the regulations.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission 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 Texas Coastal Management Program (CMP), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation rules, 31 TAC §505.11. Therefore, the amendment is not subject to the CMP.

HEARING AND COMMENTERS

No public hearing was held for this rulemaking. The preamble to the proposed rule that was published in the December 1, 2000 issue of the *Texas Register* (25 TexReg 11887) incorrectly stated that comments must be received by December 18, 2000, when it should have stated by January 2, 2001. For this reason, an extension of the deadline for written comments was published in the January 19, 2001 issue of the *Texas Register* (26 TexReg 839). The public comment period was extended for an additional 14 days and closed on February 2, 2001. No comments were received during the initial or extended comment period.

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103 and §5.105, which provide the commission with the authority to adopt any rules necessary to carry out its powers and duties under the laws of this state. The amendment is also adopted under the Texas Health and Safety Code (THSC), §361.011, which provides the commission with the authority to adopt rules and to establish standards of operation for the management of solid waste; and THSC, §361.085, which provides the commission with the authority to require financial demonstrations for permitted solid waste and hazardous waste facilities. In addition, THSC, §361.112, provides the commission with the authority to adopt by rule application forms and procedures for the registration and permitting process (of which financial assurance is a part) for the storage, transportation, and disposal of used or scrap tires. The commission may not register or issue a permit to a facility required to provide evidence of financial responsibility unless the facility has complied with this financial assurance requirement.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 9, 2001.

TRD-200101429
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: March 29, 2001
Proposal publication date: December 1, 2000
For further information, please call: (512) 239-0348

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 16. COMMERCIAL DRIVERS LICENSE

SUBCHAPTER B. APPLICATION REQUIREMENTS AND EXAMINATIONS

37 TAC §16.44, §16.47

The Texas Department of Public Safety adopts amendments to §16.44 and §16.47, concerning Commercial Driver's License (CDL), without changes to the proposed text as published in the December 8, 2000, issue of the *Texas Register* (25 TexReg 12154) and will not republish them.

The justification for the sections will be improved knowledge of hazardous materials information by CDL operators carrying this type of cargo.

Language is added and deleted in §16.44(e) and §16.47(d) because federal statute allows for the waiver of the hazardous materials examination for Commercial Driver License (CDL) applicants holding a valid out of state CDL provided this examination was taken within the immediate two years preceding the date of application in Texas. Federal and state statute does not allow for this when renewing a Texas CDL. In order to be consistent in applying the hazardous materials knowledge examination requirement, the amendment to §16.44(e) and §16.47(d) requires all CDL applicants to be processed in the same manner and requires that the hazardous materials knowledge examination must be taken and passed in order to retain this endorsement.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §521.005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 8, 2001.

TRD-200101411
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: March 28, 2001
Proposal publication date: December 8, 2000
For further information, please call: (512) 424-2135

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SUBCHAPTER C. CHANGE OF LICENSE STATUS, RENEWALS, SURRENDER OF LICENSE, FEES

37 TAC §16.72

The Texas Department of Public Safety adopts amendments to §16.72, concerning Commercial Driver's License (CDL) Renewals, without changes to the proposed text as published in the December 8, 2000, issue of the *Texas Register* (25 TexReg 12155) and will not be republished.

The justification for this section will be compliance with both federal and state statutes and improved knowledge of hazardous materials information by CDL operators carrying this type of cargo.

The department determined that the rule was in conflict with both federal and state statutes by allowing for the renewal of a Commercial Driver License (CDL) with a hazardous materials endorsement without reexamination if the addition of the hazardous materials endorsement had occurred within the past two years immediately preceding the date of renewal. Amendments to subsections (a) and (b) delete language, which was in conflict with federal and state statutes and will require a CDL applicant for renewal to take and pass the hazardous materials knowledge examination in order to retain that endorsement.

No comments were received regarding adoption of the amendments.

The amendment is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Transportation Code, §521.005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 8, 2001.

TRD-200101410
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: March 28, 2001
Proposal publication date: December 8, 2000
For further information, please call: (512) 424-2135

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

SUBCHAPTER H. QUALITY OF LIFE

40 TAC §19.702

The Texas Department of Human Services (DHS) adopts an amendment to §19.702 without changes to the proposed text published in the January 26, 2001 issue of the *Texas Register* (26 TexReg 942). The text will not be republished. DHS is simultaneously filing a related adoption in Chapter 92 in this issue of the *Texas Register*.

Justification for the amendment is to recognize credentialing bodies for activity directors and include the Consortium for Therapeutic Recreation/Activities Certification, Inc.

DHS received no comments regarding adoption of the amendment.

The amendment is adopted under the Health and Safety Code, Chapter 242, which authorizes the department to license and regulate nursing facilities.

The amendment implements the Health and Safety Code, §242.001- 242.268.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 6, 2001.

TRD-200101349
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: April 1, 2001
Proposal publication date: January 26, 2001
For further information, please call: (512) 438-3108

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CHAPTER 92. LICENSING STANDARDS FOR ASSISTED LIVING FACILITIES

SUBCHAPTER C. STANDARDS FOR LICENSURE

40 TAC §92.53

The Texas Department of Human Services (DHS) adopts an amendment to §92.53 without changes to the proposed text published in the January 26, 2001 issue of the *Texas Register* (26 TexReg 943). The text will not be republished. DHS is simultaneously filing a related adoption in Chapter 19 in this issue of the *Texas Register*.

Justification for the amendment is to recognize credentialing bodies for activity directors and include the Consortium for Therapeutic Recreation/Activities Certification, Inc.

DHS received no comments regarding adoption of the amendment.

The amendment is adopted under the Health and Safety Code, Chapter 247, which authorizes the department to license assisted living facilities.

The amendment implements the Health and Safety Code, Chapter 247.001-247.066.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on March 6, 2001.

TRD-200101351

Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: April 1, 2001
Proposal publication date: January 26, 2001
For further information, please call: (512) 438-3108

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TEXAS DEPARTMENT OF INSURANCE

Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Board of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the board adopts the proposal. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the Board of Insurance adopts the proposal. The Administrative Procedure Act, the Government Code, Chapters 2001 and 2002, does not apply to board action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104.)

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

Texas Department of Insurance

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Proposed Action on Rules

The Commissioner of Insurance, at a public hearing under Docket No. 2484 scheduled for April 26, 2001 at 9:30 a.m., in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, will consider a proposal made in a staff petition. Staff's petition seeks amendment of the Texas Automobile Rules and Rating Manual (the Manual), to adopt new and/or adjusted 2001 model Private Passenger Automobile Physical Damage Rating Symbols and revised identification information. Staff's petition (Ref. No. A-0301-03-I), was filed on March 8, 2001.

The new and/or adjusted symbols for the Manual's Symbols and Identification Section reflect data compiled on damageability, repairability, and other relevant loss factors for the listed 2001 model vehicles.

A copy of the petition, including an exhibit with the full text of the proposed amendments to the Manual is available for review in the office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas. For further information or to request copies of the petition, please contact Angie Arizpe at (512) 463-6326; refer to (Ref. No. A-0301-03-I).

Comments on the proposed changes must be submitted in writing within 30 days after publication of the proposal in the Texas Register, to the Office of the Chief Clerk, Texas Department of Insurance, P. O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of comments is to be submitted to Marilyn Hamilton, Associate Commissioner, Property & Casualty Program, Texas Department of Insurance, P. O. Box 149104, MC 104-PC, Austin, Texas 78714-9104.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Government Code, Chapter 2001 (Administrative Procedure Act).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

TRD-200101419
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: March 9, 2001

Final Action on Rules

ADOPTION OF NEW AND/OR ADJUSTED 1999, 2000, AND 2001 MODEL PRIVATE PASSENGER AUTOMOBILE PHYSICAL DAMAGE RATING SYMBOLS FOR THE TEXAS AUTOMOBILE RULES AND RATING MANUAL

The Commissioner of Insurance, at a public hearing under Docket No. 2481 held at 9:00 a.m., March 7, 2001 in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas adopted amendments proposed by Staff to the Texas Automobile Rules and Rating Manual (the Manual). The amendments consist of new and/or adjusted 1999, 2000, and 2001 model Private Passenger Automobile Physical Damage Rating Symbols and revised identification information. Staff's petition (Ref. No. A-0101-01-I) was published in the February 2, 2001, issue of the *Texas Register* (26 TexReg 1179).

The new and/or adjusted symbols for the Manual's Symbols and Identification Section reflect data compiled on damageability, repairability, and other relevant loss factors for the 1999, 2000, and 2001 model year of the listed vehicles.

The amendments as adopted by the Commissioner of Insurance are shown in exhibits on file with the Chief Clerk under Ref. No. A-0101-01-I, which are incorporated by reference into Commissioner's Order No. 01-0213.

The Commissioner of Insurance has jurisdiction over this matter pursuant to the Insurance Code Articles 5.10, 5.96, 5.98, and 5.101.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Government Code, Chapter 2001) (Administrative Procedure Act).

Consistent with the Insurance Code, Article 5.96(h), the Department will notify all insurers writing automobile insurance of this adoption by letter summarizing the commissioner's action.

This agency hereby certifies that the amendments as adopted have been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

IT IS THEREFORE THE ORDER of the Commissioner of Insurance that the Manual is amended as described herein, and the amendments are adopted to become effective on the 60th day after publication of the notification of the Commissioner's action in the *Texas Register*.

TRD-200101492

Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: March 13, 2001

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REVIEW OF AGENCY RULES

This Section contains notices of state agency rules review as directed by Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review*, which invite public comment to specified rules; and (3) notices of *readoption*, which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the ***Texas Administrative Code*** on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the ***Texas Register*** office.

Proposed Rule Reviews

Texas Department of Mental Health and Mental Retardation

Title 25, Part 2

The Texas Department of Mental Health and Mental Retardation (department) will review Texas Administrative Code, Title 25, Part 2, Chapter 402, Subchapter E, concerning preadmission screening and annual resident review (PASARR), in accordance with the requirements of the Texas Government Code, §2001.039.

The department believes that the reasons for initially adopting the subchapter continue to exist. The department anticipates proposing revisions to the existing language later in State Fiscal Year 2001 and is publishing this notice of review as a precaution should the new subchapter not be adopted before September 1, 2001.

Interested persons are invited to submit written comments concerning the review of this subchapter to Linda Logan, Director, Policy Development, Texas Department of Mental Health and Mental Retardation, by mail to P.O. Box 12668, Austin, Texas 78711, or by fax to (512) 206-4750, within 30 days of publication of this notice.

TRD-200101516
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Filed: March 14, 2001

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The Texas Department of Mental Health and Mental Retardation (department) will review Texas Administrative Code Title 25, Part 2, Chapter 405, Subchapter J, concerning surrogate decision-making for community-based ICF/MR and ICF/MR/RC facilities, in accordance with the requirements of the Texas Government Code, §2001.039.

The department believes that the reasons for initially adopting the subchapter continue to exist. An extensive review of the subchapter will be undertaken during State Fiscal Year 2002. The department will propose new sections at that time if the department determines that revisions are necessary.

Interested persons are invited to submit written comments concerning the review of this subchapter to Linda Logan, Director, Policy Development, Texas Department of Mental Health and Mental Retardation, by mail to P.O. Box 12668, Austin, Texas 78711, or by fax to (512) 206-4750, within 30 days of publication of this notice.

TRD-200101515
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Filed: March 14, 2001

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The Texas Department of Mental Health and Mental Retardation (department) will review Texas Administrative Code, Title 25, Part 2, Chapter 409, Subchapter B, concerning adverse actions, and Subchapter C, concerning fraud and abuse and recovery of benefits, in accordance with the requirements of the Texas Government Code, §2001.039.

The department believes that the reasons for initially adopting the two subchapters continue to exist. An extensive review of the two subchapters will be undertaken during State Fiscal Year 2002. The department will propose new sections at that time if the department determines that revisions are necessary.

Interested persons are invited to submit written comments concerning the review of these subchapters to Linda Logan, Director, Policy Development, Texas Department of Mental Health and Mental Retardation, by mail to P.O. Box 12668, Austin, Texas 78711, or by fax to (512) 206-4750, within 30 days of publication of this notice.

TRD-200101518
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Filed: March 14, 2001

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Texas Natural Resource Conservation Commission

Title 30, Part 1

The Texas Natural Resource Conservation Commission (commission) files this notice of intention to review and proposes the readoption of Chapter 332, Composting. This review of Chapter 332 is proposed in accordance with the requirements of Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9 - 10.13, 76th Legislature, 1999, which require state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist.

CHAPTER SUMMARY

Chapter 332 provides general composting information and establishes general requirements for operations which are exempt from the commission's notification, registration, or permitting requirements. In addition, Chapter 332 provides regulatory requirements for those facilities which do require notification, registration, or a permit. More specifically, Chapter 332 includes requirements regarding notice, operation, forms, applications, reporting, application preparation, processing, records, and location standards. Chapter 332 also provides information and requirements for source-separated recycling, household hazardous waste collection, and end-product standards.

PRELIMINARY ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a preliminary review and determined that the reasons for the rules in Chapter 332 continue to exist. The rules are needed to establish regulations that will divert organic materials from the typical municipal solid waste stream. The rules are also needed to promote the beneficial reuse of those materials while maintaining standards for human health and safety and environmental protection.

PUBLIC COMMENT

This proposal is limited to the review in accordance with the requirements of Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9 - 10.13, 76th Legislature, 1999. The commission invites public comment on whether the reasons for the rules in Chapter 332 continue to exist. Comments may be submitted to Patricia Durón, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239- 4808. All comments should reference Rule Log Number 2000-006-332-WS. Comments must be received in writing by 5:00 p.m., April 11, 2001. For further information or questions concerning this proposal, please contact Debi Dyer, Policy and Regulations Division, at (512) 239-3972.

TRD-200101452
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: March 12, 2001

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The Texas Natural Resource Conservation Commission (commission) files this notice of intention to review and proposes the concurrent repeal of Chapter 343, Oil and Hazardous Substances, which is published in the Proposed Rules section of this issue of the *Texas Register*. The review of Chapter 343 is proposed in accordance with the requirements of Texas Government Code, §2001.039; and the General Appropriations Act, Article IX, §9-10.13, 76th Legislature, 1999, which require state agencies to review and consider for readoption each of their rules every four years. A review must include an assessment of whether the reasons for the rules continue to exist.

CHAPTER SUMMARY

Chapter 343 was adopted by the Texas Department of Water Resources (predecessor agency of the commission) with an effective date of February 17, 1978, to implement the Texas Oil and Hazardous Substances Spill Prevention and Control Act of 1977, codified as Texas Water Code, Chapter 26, Subchapter G. Chapter 343 provides procedures for immediate and necessary control, containment, removal, and disposal of oil or hazardous substances spills or discharges occurring within coastal lands or waters in the state. In 1983, the 68th Legislature amended the provisions of the Texas Oil and Hazardous Substances Spill Prevention and Control Act of 1977 and redesignated the act as the Texas Hazardous Substances Spill Prevention and Control Act. No changes were made to Chapter 343 as a result of the amendments.

Chapter 327, Spill Prevention and Control, was adopted by the commission on April 24, 1996, to implement applicable provisions of the Texas Hazardous Substances Spill Prevention and Control Act. At the time of its adoption, Chapter 327 incorporated the rules in Chapter 343 and updated them to conform with the Texas Hazardous Substances Spill Prevention and Control Act which superseded the Texas Oil and Hazardous Substances Spill Prevention and Control Act of 1977.

PRELIMINARY ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a preliminary review of the rules under Chapter 343 and determined that the 1983 amendment of the Texas Oil and Hazardous Substances Spill Prevention and Control Act of 1977 and its redesignation as the Texas Hazardous Substances Spill Prevention and Control Act made the original 1977 act obsolete. Therefore, the reasons for the rules in Chapter 343 do not continue to exist, and the commission is concurrently proposing the repeal of Chapter 343. The rules in Chapter 327 now implement applicable provisions of the Texas Hazardous Substances Spill Prevention and Control Act and include the rules in Chapter 343, updated to conform with the amended act.

PUBLIC COMMENT

The commission invites public comment on whether reasons for the rules in Chapter 343 continue to exist. Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 2001-011-343-WS. Comments must be received by 5:00 p.m., April 23, 2001. For further information or questions concerning this proposal, please contact Hector Mendieta, Policy and Regulations Division, (512) 239-6694.

TRD-200101444
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: March 9, 2001

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Railroad Commission of Texas

Title 16, Part 1

The Railroad Commission of Texas (Commission) files this notice of intention to review §3.11, relating to inclination and directional surveys. This review and consideration is being conducted in accordance with Tex. Gov't Code §2001.039.

The Commission is concurrently proposing amendments to this rule. As required by Tex. Gov't Code §2001.039, the Commission will accept comments regarding whether the reason for readopting the rule with the proposed amendments continues to exist.

Any questions pertaining to this notice of intention to review or the proposed amendments should be directed to Mark Helmueller, Hearings Examiner, Office of General Counsel, Railroad Commission of Texas, P. O. Box 12967, Austin, Texas 78711-2967 or via electronic mail at mark.helmueller@rrc.state.tx.us. Comments are due no later than 5 p.m. on the 30th day after publication in the *Texas Register*.

Issued in Austin, Texas, on March 6, 2001.

TRD-200101412
Mary Ross McDonald
Deputy General Counsel, Office of General Counsel
Railroad Commission of Texas
Filed: March 8, 2001

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Adopted Rule Review

Texas Natural Resource Conservation Commission

Title 30, Part 1

The Texas Natural Resource Conservation Commission (commission) files this notice of intention to review and proposes the readoption of Chapter 330, Subchapters A-L, Municipal Solid Waste. This review of Chapter 330, Subchapters A-L, is proposed in accordance with the requirements of Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9 - 10.13, 76th Legislature, 1999, which require state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist. Subchapters M-V, Y, and Z of Chapter 330 were previously reviewed and readopted by the commission on August 11, 1999, under Rule Log Number 1998-056-330-WS and will not be included in this review. The commission does not currently have a Subchapter W or X in Chapter 330.

CHAPTER SUMMARY

Chapter 330 implements state and federal statutory requirements and federal regulatory requirements for the management of municipal solid waste so as to protect public health and the environment. Subchapter A concerns General Information; Subchapter B concerns Municipal Solid Waste Storage; Subchapter C concerns Municipal Solid Waste Collection and Transportation; Subchapter D concerns Classification of Municipal Solid Waste Facilities; Subchapter E concerns Permit Procedures; Subchapter F concerns Operational Standards for Solid Waste Land Disposal Sites; Subchapter G concerns Operational Standards for Solid Waste Processing and Experimental Sites; Subchapter H concerns Groundwater Protection Design and Operation; Subchapter I concerns Groundwater Monitoring and Corrective Action; Subchapter J concerns Closure and Post-Closure; Subchapter K concerns Closure, Post-Closure, and Corrective Action; and Subchapter L concerns Location Restrictions.

PRELIMINARY ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission conducted a preliminary review and determined that the reasons for the rules in Chapter 330 continue to exist. The rules are needed to comply with state and federal statutory requirements and federal regulatory requirements. The state Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361, assigns responsibility to the commission for the management of municipal solid waste and authorizes the commission to adopt rules consistent with the Act and establish minimum standards of operation for the management and control of solid waste under the Act. The federal Solid Waste Disposal Act, as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), directed the states to implement permit programs or other systems of prior approval to assure that each solid waste management facility which may receive hazardous household waste or conditionally-exempt hazardous waste from small quantity generators is protective of human health and the environment, incorporating criteria to be developed by the United States Environmental Protection Agency (EPA). Additionally, HSWA directed the EPA to evaluate the state permit programs to determine if they had adequately implemented the EPA criteria, and in any state which did not adopt an adequate program the EPA was to use its statutory authority to enforce the criteria. The EPA developed the criteria and promulgated them in 40 Code of Federal Regulations Part 258, Criteria for Municipal Solid Waste Landfills, addressing a variety of standards including location restrictions, groundwater monitoring, corrective action requirements, and financial assurance. These requirements were incorporated into Chapter 330, which was evaluated by the EPA and found to be adequate. Therefore, a need continues to exist to maintain a state regulatory program that meets the state statutory requirements and the federal adequacy standards.

The commission's review of Chapter 330 has also revealed the need for a number of changes, which the commission intends to propose in another rulemaking in the future.

PUBLIC COMMENT

This proposal is limited to the review in accordance with the requirements of Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9 - 10.13, 76th Legislature, 1999. The commission invites public comment on whether the reasons for the rules in Chapter 330 continue to exist. Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 1998-060-330-WS. Comments must be received in writing by 5:00 p.m., January 2, 2001. For further information or questions concerning this proposal, please contact Hector H. Mendieta, Policy and Regulations Division, at (512) 239-6694.

TRD-200101443
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: March 9, 2001

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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.

Figure: 4 TAC §20.22(a)

Pest Mgmt Zone	Planting Dates	Destruction deadline	Destruction Method (also see footnotes)
1	Feb. 1 - March 31	September 1	shred and plow a,b
2 - Area 1	No dates set	September 15	shred and plow a,b
2 - Area 2	No dates set	September 15	shred and plow a,b
2 - Area 3	No dates set	September 25	shred and plow a,b
2 - Area 4	No dates set	October 1	shred and plow a
3 - Area 1	March 5 - May 15	October 1	shred and plow a,b
3 - Area 2	March 5 - May 15	October 15	shred and plow a,b
4	No dates set	October 10	shred and plow a,b
5	No dates set	October 20	shred and/or plow a,c
6	No dates set	October 31	shred and/or plow a,c
7	March 20 - May 31	November 30	shred and/or plow a,c
8	March 20 - May 31	November 30	shred and/or plow a,c
9	No dates set	[March 15] **April 1**	shred and plow b,d
10	No dates set	February 1	shred and plow b,d

a/ Alternative destruction methods are allowed (see paragraph (b)).

b/ Destruction shall be performed in a manner to prohibit the presence of live cotton plants.

c/ Destruction shall periodically be performed to prevent presence of fruiting structures.

d/ Soil shall be tilled to a depth of 2 or more inches in Zone 9, and to a depth of 6 or more inches in Zone 10.

Figure: 16 TAC §9.52(g)

LP-GAS TRAINING AND CONTINUING EDUCATION COURSES

Course Number	Course Hours	AFT	Course Title	Cat. E Mgmt.	Cat. I Mgmt.	Port. Cyl. Filling	Motor & Mobile Fuel	Delivery Truck	Service & Installation	Appliance Service & Installation
Previous Railroad Commission Courses Taught Between September 1, 1997, and January 1, 2001, Which Count Towards Continuing Education Credit Only										
P64	64		Category E Management-Level Course	x	x	x	x	x	x	x
P101	4		Basic Characteristics, DOT Cylinders and Cylinder Filling	x	x	x	x			
P102	4		Basic Characteristics and ASME Containers	x	x	x	x			
P103	4		Propane Delivery Truck Operations and Safety	x				x		
P104	4		Bulk Plant Operations and Safety	x						
P106	4		Exterior Piping and Distribution Systems	x					x	
P107	4		Interior Piping	x					x	
P108	4		Residential Systems Safety Inspection	x					x	
P109	4		Appliance Installation	x					x	x
P112	4		Appliance Troubleshooting	x					x	x
P113	4		Appliance Service Persons Overview	x					x	x
P114	4		Preseason Heating System Startup	x					x	x
P118	4		RV Technician Training	x						
Railroad Commission Training and Continuing Education Courses Available After September 1, 1997										
P109A	8		Appliance Installation	x					x	x

Course Number	Course Hours	AFT	Course Title	Cat. E Mgmt.	Cat. I Mgmt.	Port. Cyl. Filling	Motor & Mobile Fuel	Delivery Truck	Service & Installation	Appliance Service & Installation
P113A	8		Appliance Service Persons Overview	x					x	x
P115	24		GAS Check (3 days)	x					x	
P116	16		GAS Check (2 days)	x					x	
P117	8		GAS Check (self study)	x					x	
P119	5 - 8		Train the Trainer	x	x					
P120	8		Bulk Plant Management	x						
P121	8		Propane Distribution Systems (replaces P106 and P107)	x					x	
P122	8		Residential Systems Safety Inspection--Appliances and Exterior (replaces P108)	x					x	x
P1.1	8		Introduction to Propane	x	x	x	x	x	x	x
P2.1	8	x	Operating a Dispenser (replaces P101 and P102)	x	x	x	x			
P2.3	8	x	Driving/Operating a Cargo Tank Motor Vehicle (replaces P103)	x				x		
P3.5	8		Identifying the Functions and Operation Characteristics of Controls (replaces P112)	x					x	x
P80	80		Category E Management-Level Course	x	x	x	x	x	x	x
P16	16		Category I Management-Level Course	x	x	x	x			
Other Courses Which Count Towards Continuing Education Credit Only If Taken On or At Any Time After September 1, 1997										
NPGA's Certified Employee Training Program										
CETP 1	8		Basic Principles and Practices	x	x	x	x	x	x	x
CETP 2	8		Propane Delivery	x				x		

Course Number	Course Hours	A F T	Course Title	Cat. E Mgmt.	Cat. I Mgmt.	Port. Cyl. Filling	Motor & Mobile Fuel	Delivery Truck	Service & Installation	Appliance Service & Installation
CETP 3	8		Plant Operations	x						
CETP 4	8		Distribution Systems Operations	x					x	
CETP 5	8		Transfer System Operations	x						
CETP 6	8		Appliance Installation	x					x	x
CETP 7	8		Appliance Service	x					x	x
CETP 8	8		Large Industrial/Commercial	x					x	
Railroad Commission Computer-Based Instruction										
C1	4		Fundamentals of Propane	x	x	x	x	x	x	x
C2	4		Delivery Vehicles	x				x		
C3	4		Customer Systems	x					x	x
C4	3		Hazardous Materials	x				x		
C5	5		Dispenser Operations	x		x	x			

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.

Office of the Attorney General

Texas Health and Safety Code and the Texas Water Code Settlement Notice

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Water Code. Before the State may settle a judicial enforcement action under the Water Code, 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 Code.

Case Title and Court: State of Texas v. Scrap Tire Recycling, Inc., et al., Case No. 99-03509, 353 rd District Court of Travis County, Texas

Nature of Defendant's Operations: Defendant Scrap Tire Recycling, Inc. operates a scrap tire storage facility and as in the business of procuring used tires and segregating scrap tires from good used tires. Scrap tires are shredded and disposed of off-site. The State of Texas seeks to recover a past administrative penalty of $7,920, civil penalties for alleged new violations, attorney fees, and injunctive relief.

Proposed Agreed Final Judgment: The judgment requires the Defendant Scrap Tire Recycling, Inc. to pay a prior administrative penalty of $7,920, a civil penalty of $100,000, and attorney fees of $12,500. The $7,920 administrative penalty will be paid in monthly installments over eighteen months. The civil penalty consists of a deferred penalty of $75,000 and a current judgment for $25,000. The deferred amount will be satisfied if Defendant completes all other required obligations of the judgment. The judgment for $25,000 in civil penalty and $12,500 will not be subject to execution for two years. The judgment resolves a dispute about whether there is a current scrap tire storage registration on the site by terminating any storage registration or applications on the site.

The injunctive provisions of the judgment prohibit Scrap Tire Recycling, Inc. from taking any tire materials onto its scrap tire storage site and require that all tire materials be shredded and removed from the site by August 31, 2002. There are interim deadlines for shredding and removing portions of the tire materials on site. If the interim deadlines are not met, the final deadline to complete shredding and removing the tire materials from the storage site will occur earlier.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement should be directed to Anthony W. Benedict, Assistant Attorney General, Office of the Texas Attorney General, P. O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911. Written comments must be received within 30 days of publication of this notice to be considered.

For information regarding this publication, please call A.G. Younger at (512) 463-2110.

TRD-200101504
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: March 14, 2001

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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. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. Requests for federal consistency review were received for the following projects(s) during the period of February 2, 2001, through February 22, 2001. The public comment period for these projects will close at 5:00 p.m. on March 26, 2001.

FEDERAL AGENCY ACTIONS

Applicant: Jefferson County; Location: The project site is located on the west shoreline of Pleasure Island, along the Sabine-Neches Waterway, in Jefferson County, Texas. The project can be located on the U.S.G.S. Quadrangle maps entitled: Port Arthur North and Port Arthur South, Texas-Louisiana. Approximate UTM Coordinates: Zone 15; Easting: 408000; Northing: 3297000. CCC Project No.: 01-0067-F1; Description of Proposed Action: The applicant proposes to conduct shoreline stabilization activities along approximately 3.9 miles of eroded shoreline on Pleasure Island. There are existing shoreline protection structures scattered along this stretch of Pleasure Island, including concrete slabs, concrete riprap, and jetty stone revetments. However, many of these structures have failed, resulting in significant erosion. Type of Application: This application is being evaluated under Section 10 of the Rivers and Harbors Act of 1899.

Applicant: Ballard Exploration Company, Inc.; Location: The project site is located in the Taylor Bayou Outfall Canal approximately 4.5 miles southwest of Port Arthur, Jefferson County, Texas. The proposed Howell Well No. 001 location is approximately 125 feet from the eastside of the shoreline, Latitude 30 degrees 40' 28.210" N and Longitude 86 degrees 18' 15.233" W (X=3,580,630.00' Y=764,850.00'). The project can be located on the U.S.G.S. quadrangle map entitled: Big Hill Bayou, Texas. Approximate UTM Coordinates: Zone 15; Easting 402200; Northing: 3301780. CCC Project No.: 01-0058-F1; Description of Proposed Action: The applicant proposes to install, operate, and maintain structures and equipment necessary for oil and gas drilling, production, and transportation activities. Such activities include installation of typical marine barges and keyways, shell and gravel pads, production structures with attendant facilities, and flowlines. Type of Application: This application is being evaluated under Section 10 of the Rivers and Harbors Act of 1899.

Pursuant to §306(d)(1) 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. Diane P. Garcia, Council Secretary, Coastal Coordination Council, 1700 North Congress Avenue, Room 617, Austin, Texas 78701-1495, or diane.garcia@glo.state.tx.us. Comments should be sent to Ms. Garcia at the above address or by fax at 512/475-0680.

TRD-200101524
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: March 14, 2001

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Comptroller of Public Accounts

Notice of Award

Pursuant to Chapters 403 and 404, Texas Government Code, and Chapter 63, Texas Education Code, the Comptroller of Public Accounts (Comptroller) announces this notice of contract award.

The Comptroller's Request for Proposals (RFP) related to these contract awards was published in the May 12, 2000, issue of the *Texas Register* (25 TexReg 4370).

The contractors will provide investment management services for the Treasury Division of the Comptroller as described in the Comptroller's RFP.

There were sixteen contracts awarded and fully executed as of the submission of the original notice of award to the Texas Register on February 21, 2001. In that notice, the Comptroller stated that there might be other awards to be announced at one or more later dates. This is a notice of an additional contract awarded and fully executed as of the submission of this notice to the Texas Register on March 14, 2001. In the original notice and this notice, the estimated maximum fees are based on estimated initial funding.

A contract is awarded to Biscayne Advisors, Inc., 2711 N. Haskell, Suite 2070, Dallas, Texas 75204. The product is Large Cap Core. The total amount of fees under the contract are based on the value of assets invested; the estimated maximum payments for the first 12 months are $100,000. The contract is effective from February 27, 2001 through December 31, 2002.

TRD-200101521
Pamela Ponder
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: March 14, 2001

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Office of Consumer Credit Commissioner

Notice of Rate Bracket Adjustment

The Consumer Credit Commissioner of Texas has ascertained the following brackets and ceilings by use of the formula and method described in Tex. Fin. Code §341.203.[1]

The amounts of brackets in Tex. Fin. Code §342.201(a) are changed to $1,500.00 and $12,500.00, respectively.

The ceiling amount in Tex. Fin. Code §342.251 is changed to $500.00.

The amounts of the brackets in Tex. Fin. Code §345.055 are changed to $2,500.00 and $5,000.00, respectively.

The amounts of the bracket in Tex. Fin. Code §345.103 is changed to $2,500.00.

The ceiling amount of Tex. Fin. Code §371.158 is changed to $12,500.00.

The amounts of the brackets in Tex. Fin. Code §371.159 are changed to $150.00, $500.00, and $1,500.00, respectively.

The above dollar amounts of the brackets and ceilings shall govern all applicable credit transactions and loans made on or after July 1, 2001, and extending through June 30, 2002.

[1]Computation method: The Reference Base Index (the Index for December 1967) = 101.6. The December 2000 Index = 508.5. The percentage of change is 500.49%. This equates to an increase of 500% after disregarding the percentage of change in excess of multiples of 10%.

TRD-200101503
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: March 14, 2001

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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 Sections 303.003 and 303.009, Tex. Fin. Code.

The weekly ceiling as prescribed by Sections 303.003 and 303.009 for the period of 03/19/01 - 03/25/01 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by Sections 303.003 and 303.09 for the period of 03/19/01 - 03/25/01 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-200101502
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: March 14, 2001

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Texas Department of Criminal Justice

Notice to Bidders - 696-FD-1-B022

The Texas Department of Criminal Justice invites bids for the construction of Perimeter Road Improvements at Rosharon, Texas. The project consists of reconstruction of Base Bid - Existing perimeter road - (1) approximately 5,820 square yards of 3" Hot Mix Asphalt placed on 10" Flex base on 8" Lime Stabilized Sub-grade, and (2) approximately 210 square yards of 7" Reinforced Concrete Pavement on 10" Flex Base on 8" Lime Stabilized sub-grade.(Alternate Bid Item) -B.O.Q. Parking Lot, approximately 3250 Square yards of 2" Hot Mix Asphalt placed on 6" Flex Base. at the existing Darrington Unit, Route 3, Box 59, Rosharon, Texas 77583. The work includes civil, mechanical, plumbing, structural and concrete as further shown in the Contract Documents prepared by : Teague Nall and Perkins,Inc.

The successful bidder will be required to meet the following requirements and submit evidence within five days after receiving notice of intent to award from the Owner:

A. Contractor must have worked in his trade for five consecutive years and have completed at least three projects of a dollar value and complexity equal to or greater than the proposed project.

B. Contractor must be bondable and insurable at the levels required.

C. Must provide references from at least three similar projects.

All Bid Proposals must be accompanied by a Bid Bond in the amount of 5.0% of greatest amount bid. Performance and Payment Bonds in the amount of 100% of the contract amount will be required upon award of a contract. The Owner reserves the right to reject any or all bids, and to waive any informality or irregularity.

Bid Documents can be purchased from the Architect/Engineer at a cost of $30.00 (Thirty Dollars and no cent, non-refundable) per set, inclusive of mailing/delivery costs, or they may be viewed at various plan rooms. Payment checks for documents should be made payable to the Architect/Engineer : Teague Nall and Perkins, Inc., 1100 Macon Street, Attn: Tom Rutledge or Gary Teague, Fort Worth, Texas 76102 - 3531; Phone: (817) 336-5773; Fax: (817) 336-2813.

A Pre-Bid conference will be held at 10:30 AM on April 10, 2001, at the Darrington Unit, Rosharon, Texas, followed by a site-visit. ATTENDANCE IS MANDATORY.

Bids will be publicly opened and read at 2:00 PM on April 24, 2001, in the Contracts Branch Conference Room at Two Financial Plaza, Suite 525, Huntsville, Texas 77340.

The Texas Department of Criminal Justice requires the Contractor to make a good faith effort to include Historically Underutilized Businesses (HUB's) in at least 57.2 % of the total value of this construction contract award. Attention is called to the fact that not less than the minimum wage rates prescribed in the Special Conditions must be paid on these projects.

TRD-200101414
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Filed: March 8, 2001

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Deep East Texas Local Workforce Development Board, Inc.

Public Hearing Notice

The Deep East Texas Local Workforce Development Board, Inc. announces they will hold a Public Hearing on Child Care Policies and the modification of the strategic plan for providing workforce development services authorized by the Workforce Investment Act and Texas HB 1863. The hearing will be held March 27, 2001 10:00 a.m. to noon at the Board's meeting room at 1316-C South John Redditt, Lufkin, Texas

Inquiries can be made to:

Charlene Meadows, Interim Executive Director,

Deep East Texas Local Workforce Development Board, Inc.

1318 S. John Redditt Drive

Lufkin, Texas 75904

(409) 639-8898

FAX: (409) 633-7491

Email: charlene.meadows@twc.state.tx.us

TRD-200101505
Charlene Meadows
Interim Executive Director
Deep East Texas Workforce Development Board, Inc.
Filed: March 14, 2001

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Texas Education Agency

Request for Applications Concerning Open-Enrollment Charter Guidelines and Application

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-01-005 from eligible entities to operate open-enrollment charter schools. Eligible entities include public institutions of higher education, private or independent institutions of higher education, organizations exempt from taxation under the Internal Revenue Code of 1986 (26 United States Code, §501(c)(3)), or governmental entities. Each prospective applicant is requested to send notice in writing of its intent to submit an application. The notice of intent must be sent to the Division of Charter Schools, Room 6-124, TEA, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701-1494. Failure to notify TEA of intent to apply does not disqualify an applicant from submitting an application for an open-enrollment charter.

Description. The purpose of an open-enrollment charter is to provide an alternative avenue for restructuring schools. An open-enrollment

charter offers flexibility and choice for educators, parents, and students. An approved open-enrollment charter school may be located in a facility of a commercial or nonprofit entity or in a school district facility. If the open-enrollment charter school is to be located in a school district facility, it must be operated under the terms established by the board of trustees or governing body of the school district in an agreement governing the relationship between the school and the district.

An open-enrollment charter school will provide instruction to students at one or more elementary or secondary grade levels as provided by the charter. It is governed under the specifications of the charter and retains authority to operate for the term of the charter contingent on satisfactory student performance as defined by the state accountability system. An open-enrollment charter school does not have the authority to impose taxes.

An open-enrollment charter school is subject to federal laws and certain state laws governing public schools, including laws and rules relating to a criminal offense, requirements relating to the Public Education Information Management System (PEIMS), criminal history records, high school graduation, special education programs, bilingual education, prekindergarten programs, extracurricular activities, health and safety provisions, and public school accountability. An open-enrollment charter school is immune from liability to the same extent as a school district, and its employees and volunteers are immune from liability to the same extent as school district employees and volunteers. An employee of an open-enrollment charter school who qualifies for membership in the Teacher Retirement System of Texas shall be covered under the system to the same extent a qualified employee of a school district is covered.

Project Amount. For each student enrolled in an open-enrollment charter school, Texas Education Code (TEC), §12.106(b), requires the commissioner of education to distribute to the school an amount equal to the following: the amount provided for the student under the specific Foundation School Program for which the school is chartered, plus the transportation allotment for which the student would be entitled; less an amount equal to the sum of the school's tuition receipts under TEC, §12.107, plus the school's distribution from the Available School Fund. An open-enrollment charter school is entitled to receive local funds from the school district in which a student attending the school resides and may not charge tuition to a student. An open-enrollment charter shall not discriminate in admission policy on the basis of sex, national origin, ethnicity, religion, disability, academic or athletic ability, or the district the child would otherwise attend. An open-enrollment charter school may deny admission to a student with a criminal record or documented discipline problems.

Selection Criteria. A complete description of selection criteria is included in the RFA.

The State Board of Education (SBOE) may approve open-enrollment charter schools as provided in TEC, §12.101, and §12.1011. TEC, §12.1011(a)(1), authorizes the SBOE to grant charters for open-enrollment charter schools that adopt an express policy providing for the admission of students eligible for a public education grant under TEC, Chapter 29, Subchapter G. Additionally, TEC, §12.1011(a)(2), authorizes the SBOE to grant an unspecified number of charters for open-enrollment charter schools for which at least 75% of the prospective student population, as specified in the proposed charter, will be students who have dropped out of school or are at risk of dropping out of school as defined by TEC, §29.081. The SBOE has approved 193 charter schools to date. There is no cap on the number of 75% rule charters that can be granted to serve at-risk populations. There are currently no standard open-enrollment charters available.

An application for an open-enrollment charter must state whether it is being submitted for consideration under TEC, §12.1011(a)(1), or TEC, §12.1011(a)(2). Applications submitted under TEC, §12.1011(a)(1), will be considered separately from those submitted under TEC, §12.1011(a)(2). The SBOE may approve applicants to ensure representation of urban, suburban, and rural communities; various instructional settings; innovative programs; diverse student populations and geographic regions; and various eligible entities. The SBOE will consider Statements of Impact from any school district whose enrollment is likely to be affected by the open-enrollment charter school. The SBOE may also consider the history of the sponsoring entity and the credentials and background of its board members.

Requesting the Application. An application must be submitted under SBOE guidelines to be considered. A complete copy of the publication "Open-Enrollment Charter Guidelines and Application" (RFA #701-01-005), which includes an application and procedures, may be obtained by writing the: Division of Charter Schools, Room 6-124, TEA, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701-1494, or by calling (512) 463-9575.

Deadline for Receipt of Applications. An application must be received by the Document Control Center, Room 6-108, TEA, 1701 North Congress Avenue, Austin, Texas 78701-1494, by 5:00 p.m. (Central Time), Tuesday, June 5, 2001, to be eligible for consideration

Further Information. For clarifying information about the open-enrollment charter school application, contact Mary Perry, Division of Charter Schools, TEA, (512) 463-9575, or by e-mail at mperry@tea.state.tx.us.

TRD-200101523
Criss Cloudt
Associate Commissioner, Accountability Reporting and Research
Texas Education Agency
Filed: March 14, 2001

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Request for Applications for English Literacy and Civics Education, 2001-2004

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-01-015 for federal Adult Education and Family Literacy Act (AEFLA) funds to provide English literacy and civics education programs. According to the provisions of the Workforce Investment Act of 1998, §203(5), eligible providers are: local educational agencies; community-based organizations of demonstrated effectiveness; volunteer literacy organizations of demonstrated effectiveness; institutions of higher education; public or private nonprofit agencies; libraries; public housing authorities; nonprofit institutions that are not described previously that have the ability to provide literacy services to adults and families; or a consortium of agencies, organizations, institutions, libraries, or authorities described previously. For-profit entities are not eligible providers.

Description. English Literacy and Civics education programs emphasize contextualized instruction on the rights and responsibilities of citizenship, naturalization procedures, civic participation, and U.S. History and government to help students acquire the skills and knowledge to become active and informed parents, workers, and community members. This initiative is not intended simply to expand English literacy services, but to provide immigrants and other limited English proficient (LEP) populations an integrated program of services that incorporates English literacy and civics education services.

Eligible providers apply directly to TEA for federal EL Civics funds for at least two of the three following program components: (1) EL

Civics program implementation; (2) EL Civics enrichment; and (3) EL Civics Intergenerational services. Providers may not apply for a single component. All EL Civics applications are submitted on TEA Standard Application System (SAS) forms (SAS #A317) provided in the RFA. The state plan and State Board of Education (SBOE) rules require applicants to have at least one year of experience in providing adult education and literacy services proposed in the application. Eligible providers are encouraged to maximize the fiscal resources available for EL Civics services to undereducated immigrants and other LEP populations to avoid unproductive duplication of services and excessive administrative costs by forming cooperatives and using fiscal agents as authorized by federal regulations and SBOE rules. Collaboration with other mutually supportive programs within the community will be a necessary prerequisite for funding. Applicants that are not public education entities must submit indicators of financial stability with the application to TEA. All nonprofit organizations, including open-enrollment charter schools, are required to submit proof of nonprofit status. Other conditions for submittal of applications and funding are contained in the RFA.

Dates of Project. The English Literacy and Civics project will be implemented during the 2001-2002 school year(s). Applicants should plan for a starting date of no earlier than July 1, 2001, and an ending date of no later than June 30, 2002.

Project Amount. Funding will be provided for approximately 20 projects. Each project will receive a maximum of $100,000 for the 2001-2002 school year. Project funding in the second year will be based on satisfactory progress of the first-year objectives and activities and on general budget approval by the SBOE and the commissioner of education and appropriations by the U.S. Congress. This project is funded 100% from federal funds ($2,080,859): Consolidated Appropriations Act, §1000(a)(4), P.L. 106-113.

Selection Criteria. Applications will be selected based on total points awarded. Applicants must achieve an overall score of 70 and address each requirement as specified in the RFA satisfactorily to be considered for funding. Priority will be placed on applications recruiting and serving the most educationally disadvantaged immigrants and other LEP populations, providing services beyond the scope of naturalization and that include comprehensive, integrated civic participation. The TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA and are most advantageous to the project.

The TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. A complete copy of RFA #701-01-015 may be obtained by writing the: Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 N. Congress Avenue, Austin, Texas 78701; by calling (512) 463-9304; by faxing (512) 463-9811; or by e-mailing dcc@tmail.tea.state.tx.us. Please refer to the RFA number and title in your request. Provide your name, complete mailing address, and phone number including area code. The announcement letter and complete RFA will also be posted on the TEA website at http://www.tea.state.tx.us/grant/announcements/grants2.cgi for viewing and downloading.

Further Information. For clarifying information about the RFA, contact Dr. Sheila Rosenberg, Division of Adult and Community Education, TEA, (512) 463-9294.

Deadline for Receipt of Applications. Applications must be received in the Document Control Center of the TEA by 5:00 p.m. (Central Time), Thursday, May 31, 2001, to be considered for funding.

TRD-200101522
Criss Cloudt
Associate Commissioner, Accountability Reporting and Research
Texas Education Agency
Filed: March 14, 2001

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Texas General Land Office

Correction of Error

The Texas General Land Office proposed an amendment to §15.11. The rule appeared in the February 23, 2001, issue of the *Texas Register* (25 TexReg 1661).

Due to agency error, on page 1662, §15.11(a)(12) should read: "Nueces County".

Subparagraphs (A) thru (D) remain the same.

New paragraph 13 should read: "(13) Village of Surfside Beach (adopted December 12, 2000)."

TRD-200101514

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Texas Department of Health

Notice of Amendment to the Radioactive Material License of Waste Control Specialists, LLC

Notice is hereby given by the Texas Department of Health (department), Bureau of Radiation Control that it has amended Radioactive Material License Number L04971 issued to Waste Control Specialists, LLC (WCS) located in Andrews County, Texas, one mile North of State Highway 176, 250 feet East of the Texas/New Mexico State Line; 30 miles West of Andrews, Texas.

The issuance of amendment number13 authorizes the use of the Commodore SL2 unit to treat mixed waste using solvated electron technology.

The department has determined that the amendment of the license, 25 Texas Administrative Code (TAC) Chapter 289, and the documentation submitted by the licensee provide reasonable assurance that the licensee's radioactive waste facility is sited, designed, operated, and will be decommissioned and closed in accordance with the requirements of 25 TAC Chapter 289; the amendment of the license will not be inimical to the health and safety of the public or the environment; and the activity represented by the amendment of the license will not have a significant effect on the human environment.

This notice affords the opportunity for a public hearing upon written request within 30 days of the date of publication of this notice by a person affected as required by Texas Health and Safety Code §401.116 and as set out in 25 TAC §289.205(f). A "person affected" is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located; or (b) doing business or has a legal interest in land in the county or adjacent county.

A person affected may request a hearing by writing Mr. Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control, 1100 West 49th Street, Austin, Texas 78756-3189. Any request for a hearing must contain the name and address of the person who considers himself

affected by this action, identify the subject license, specify the reasons why the person considers himself affected, and state the relief sought. If the person is represented by an agent, the name and address of the agent must be stated. Should no request for a public hearing be timely filed, the agency action will be final.

A public hearing, if requested, shall be conducted in accordance with the provisions of Texas Health and Safety Code, §401.114, the Administrative Procedure Act (Chapter 2001, Texas Government Code), the formal hearing procedures of the department (25 Texas Administrative Code §1.21. et seq.) and the procedures of the State Office of Administrative Hearings (1 Texas Administrative Code Chapter 155).

A copy of the license amendment and supporting materials are available for public inspection and copying at the office of the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, 8:00 a.m. to 5:00 p.m. Monday-Friday (except holidays). Information relative to inspection and copying the documents may be obtained by contacting Chrissie Toungate, Custodian of Records, Bureau of Radiation Control.

TRD-200101459
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: March 12, 2001

♦ ♦ ♦

Notice of Amendment to the Texas Schedule of Controlled Substances

On March 5, 2001, Charles E. Bell, M.D., Executive Deputy Commissioner, Texas Department of Health, signed an order amending the Texas Schedule of Controlled Substances, placing Dihydroetorphine into Schedule II. This amendment supercedes the prior notification of placement of Dihydroetorphine into Schedule II.

The Deputy Administrator of the Drug Enforcement Administration (DEA) has issued a final rule which places the substance Dihydroetorphine into Schedule II of the Federal Controlled Substances Act (CSA). Dihydroetorphine is an opiate-like substance with potent analgesic effects, and is currently controlled under Schedule II of the CSA as a thebaine derivative. Dihydroetorphine is not marketed or used medically in the United States. This action was based on the following:

(1) Dihydroetorphine has been added to Schedule I of the Single Convention on Narcotic Drugs, 1961;

(2) as a signatory Member to the 1961 Convention, the United States is obligated to control Dihydroetorphine under national drug control legislation (i.e., the CSA).

Pursuant to §481.034(g), as amended by the 75th legislature, of the Texas Controlled Substances Act, Chapter 481, Health and Safety Code, at least 31 days have expired since notice of the above referenced action was published in the *Federal Register*, and in my capacity as Executive Deputy Commissioner of the Texas Department of Health, I, Charles E. Bell, M.D., do hereby order that the substance Dihydroetorphine be added to Schedule II of the Texas Controlled Substances Act. Schedule II of said Act is hereby amended to read as follows:

SCHEDULE II

Schedule II consists of:

Schedule II substances, vegetable origin or chemical synthesis

the following substances, however produced, except those narcotic drugs listed in other schedules:

(1) Opium and opiate, and a salt, compound, derivative, or preparation of opium or opiate, other than thebaine-derived butorphanol, naloxone and its salts, naltrexone and its salts, and nalmefene and its salts, but including:

(1-1) Codeine;

(1-2) Dihydroetorphine; *

(1-3) Ethylmorphine;

(1-4) Etorphine hydrochloride;

(1-5) Granulated opium;

(1-6) Hydrocodone;

(1-7) Hydromorphone;

(1-8) Metopon;

(1-9) Morphine;

(1-10) Opium extracts;

(1-11) Opium fluid extracts;

(1-12) Oxycodone;

(1-13) Oxymorphone;

(1-14) Powdered opium;

(1-15) Raw opium;

(1-16) Thebaine; and,

(1-17) Tincture of opium;

(2) a salt, compound, isomer, derivative, or preparation of a substance that is chemically equivalent or identical to a substance described by Paragraph (1) of Schedule II substances, vegetable origin or chemical synthesis, other than the isoquinoline alkaloids of opium;

(3) Opium poppy and poppy straw;

(4) Cocaine, including:

(4-1) its salts, its optical, position, and geometric isomers, and the salts of those isomers; and

(4-2) coca leaves and a salt, compound, derivative, or preparation of coca leaves that is chemically equivalent or identical to a substance described by this paragraph, other than decocainized coca leaves or extractions of coca leaves that do not contain cocaine or ecgonine; and

(5) Concentrate of poppy straw, meaning the crude extract of poppy straw in liquid, solid, or powder form that contains the phenanthrene alkaloids of the opium poppy;

Opiates

***

Schedule II stimulants

***

Schedule II depressants

***

Schedule II hallucinogenic substances

***

Schedule II precursors

***

Changes to the schedules are designated by an asterisk (*)

Done in Austin, Texas this 5th day of March, 2001 in witness whereof I hereunto set my hand and seal of office.

Charles E. Bell, M. D., Executive Deputy Commissioner

TRD-200101466
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: March 12, 2001

♦ ♦ ♦

Notice of Emergency Cease and Desist and Impoundment Order Issued to Siemens Medical Systems

Notice is hereby given that the Bureau of Radiation Control (bureau) ordered Siemens Medical Systems (licensee-L02601, expired) of Grand Prairie to immediately cease and desist use of any radioactive material. The order also requires the licensee to immediately impound the radioactive material in place, or transfer the radioactive material for storage or disposal to a licensee authorized to possess radioactive material. The bureau determined that continued unauthorized possession and/or use of the radioactive material without a valid license constitutes an immediate threat to public health and safety, and the existence of an emergency.

A copy of all relevant material is available for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200101465
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: March 12, 2001

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Notice of Emergency Cease and Desist and Impoundment Order on Bandy & Associates, Inc.

Notice is hereby given that the Bureau of Radiation Control (bureau) ordered Bandy & Associates, Inc. (licensee-L04296, expired) of Houston to immediately cease and desist use of any radioactive material. The order also requires the licensee to immediately impound the radioactive material in place, or transfer the radioactive material for storage or disposal to a licensee authorized to possess radioactive material. The bureau determined that continued unauthorized possession and/or use of the radioactive material without a valid license constitutes an immediate threat to public health and safety, and the existence of an emergency.

A copy of all relevant material is available for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200101463
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: March 12, 2001

♦ ♦ ♦

Notice of Emergency Cease and Desist and Impoundment Order on Robco Production Logging, Inc.

Notice is hereby given that the Bureau of Radiation Control (bureau) ordered Robco Production Logging, Inc. (licensee-L04925, expired) of Snyder to immediately cease and desist use of any radioactive material. The order also requires the licensee to immediately impound the radioactive material in place, or transfer the radioactive material for storage or disposal to a licensee authorized to possess radioactive material. The bureau determined that continued unauthorized possession and/or use of the radioactive material without a valid license constitutes an immediate threat to public health and safety, and the existence of an emergency.

A copy of all relevant material is available for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200101464
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: March 12, 2001

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Notice of Intent to Revoke Certificates of Registration

Pursuant to 25 Texas Administrative Code §289.205, the Bureau of Radiation Control (bureau), Texas Department of Health (department), filed complaints against the following registrants: Arthur W. Coleman, D.D.S. & Associates, Houston, R24360; M. Jerome Holmes, D.D.S., Humble, R21971; Scott Summerlin, D.D.S., Irving, R19962; Highpoint Dental, Inc., Dallas, R16323; McAllen Primary Care Associates, McAllen, R25204; William P. King, M.D., P.A., Corpus Christi, R17043; Richard L. Becker, D.O., Garland, R15937; X-Ray Diagnostics, Inc., El Paso, R20762.

The complaints allege that these registrants have failed to pay required annual fees. The department intends to revoke the certificates of registration; order the registrants to cease and desist use of radiation machine(s); order the registrants to divest themselves of such equipment; and order the registrants to present evidence satisfactory to the bureau that they have complied with the orders and the provisions of the Texas Health and Safety Code, Chapter 401. If the fee is paid within 30 days of the date of each complaint, the department will not issue an order.

This notice affords the opportunity to the registrants for a hearing to show cause why the certificates of registration should not be revoked. A written request for a hearing must be received by the bureau within 30 days from the date of service of the complaint to be valid. Such written request must be filed with Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), 1100 West 49th Street, Austin, Texas 78756-3189. Should no request for a public hearing be timely filed or if the fee is not paid, the certificates of registration will be revoked at the end of the 30-day period of notice.

A copy of all relevant material is available for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200101461
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: March 12, 2001

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Notice of Intent to Revoke Radioactive Material Licenses

Pursuant to 25 Texas Administrative Code §289.205, the Bureau of Radiation Control (bureau), Texas Department of Health (department), filed complaints against the following licensees: Exell, Incorporated, Beaumont, G01969; ETI Services, Inc., Katy, G02030; Lone Star Oncology Consultants, Austin, G02032.

The complaints allege that these licensees have failed to pay required annual fees. The department intends to revoke the radioactive material licenses; order the licensees to cease and desist use of such radioactive materials; order the licensees to divest themselves of the radioactive material; and order the licensees to present evidence satisfactory to the bureau that they have complied with the orders and the provisions of the Texas Health and Safety Code, Chapter 401. If the fee is paid within 30 days of the date of each complaint, the department will not issue an order.

This notice affords the opportunity to the licensees for a hearing to show cause why the radioactive material licenses should not be revoked. A written request for a hearing must be received by the bureau within 30 days from the date of service of the complaint to be valid. Such written request must be filed with Richard A. Ratliff, P.E., Chief, Bureau of Radiation Control (Director, Radiation Control Program), 1100 West 49th Street, Austin, Texas 78756-3189. Should no request for a public hearing be timely filed or if the fee is not paid, the radioactive material licenses will be revoked at the end of the 30-day period of notice.

A copy of all relevant material is available for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200101460
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: March 12, 2001

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Notice of Preliminary Report for Assessment of Administrative Penalties and Notice of Violation Issued to CYVON Imaging, Inc., DBA Community Diagnostics

Notice is hereby given that the Bureau of Radiation Control (bureau), Texas Department of Health (department), issued a notice of violation and proposal to assess an administrative penalty to CYVON Imaging, Inc., doing business as Community Diagnostics (registrant-M00702) of Dallas. A total penalty of $12,000 is proposed to be assessed to the registrant for alleged violations of 25 Texas Administrative Code §289.230.

A copy of all relevant material is available for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200101462
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: March 12, 2001

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Notice of Revocation of the Radioactive Material License of El Paso Inspection, Inc.

The Texas Department of Health, having duly filed complaints pursuant to 25 Texas Administrative Code §289.205, has revoked the following radioactive material license: El Paso Inspection, Inc., Sunland, New Mexico, L04599, February 15, 2001.

A copy of all relevant material is available for public inspection at the Bureau of Radiation Control, Texas Department of Health, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200101458
Susan K. Steeg
General Counsel
Texas Department of Health
Filed: March 12, 2001

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Texas State Affordable Housing Corporation

Notice of Public Hearing

MULTIFAMILY HOUSING REVENUE BONDS (VISION HOUSING INITIATIVE DEVELOPMENT) SERIES 2001

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on April 23, 2001 at Noon, at the Harvey Avenue Baptist Church, 1257 East Harvey Avenue, Fort Worth, Texas, 76104, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in the aggregate amount not to exceed $57,000,000, the proceeds of which will be loaned to Vision Housing Initiative (I), L.L.C., an Internal Revenue Code Section 501(c)(3) corporation, to finance the acquisition and rehabilitation of six separate multifamily housing projects (collectively, the "Projects") located in the cities of Fort Worth, Houston and Pasadena, Texas. The public hearing, which is the subject of this notice, will concern the multifamily housing projects described as follows: Parkside Apartments, 170 units, 3101 Sappington Place, Fort Worth, Texas 76116 and Huntington Place, 184 units, 4900 N. Bryant Irvin, Fort Worth, Texas 76116. The Projects will be owned by Vision Housing Initiative (I), L.L.C.

All interested parties are invited to attend such public hearing to express their views with respect to the Project and the issuance of the Bonds. Questions or request for additional information may be direct to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda Houchin David, ADA Responsible Employee, at 1-888-638-3555, ext.417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda Houchin David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.com.

TRD-200101511

Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: March 14, 2001

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Notice of Public Hearing

MULTIFAMILY HOUSING REVENUE BONDS (VISION HOUSING INITIATIVE DEVELOPMENT) SERIES 2001

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on April 24, 2001 at Noon, at the Cullen Missionary Baptist Church, 13233 Cullen Boulevard, Houston, Texas, 77047, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in the aggregate amount not to exceed $57,000,000, the proceeds of which will be loaned to Vision Housing Initiative (I), L.L.C., an Internal Revenue Code Section 501(c)(3) corporation, to finance the acquisition and rehabilitation of six separate multifamily housing projects (collectively, the "Projects") located in the cities of Fort Worth, Houston and Pasadena, Texas. The public hearing, which is the subject of this notice, will concern the multifamily housing projects described as follows: Kingsgate Village Apartments, 312 units, 7298 Kings Gate Circle, Houston, Texas 77074; Westfield Apartments, 424 units, 14405 Rio Bonito, Houston, Texas 77083 and Bennington Square Apartments, 313 units, 6300 W. Bellfort, Houston, Texas 77033. The Projects will be owned by Vision Housing Initiative (I), L.L.C.

All interested parties are invited to attend such public hearing to express their views with respect to the Project and the issuance of the Bonds. Questions or request for additional information may be direct to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda Houchin David, ADA Responsible Employee, at 1-888-638-3555, ext.417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda Houchin David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.com.

TRD-200101512
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: March 14, 2001

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Notice of Public Hearing

MULTIFAMILY HOUSING REVENUE BONDS (VISION HOUSING INITIATIVE DEVELOPMENT) SERIES 2001

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") on April 25, 2001 at Noon, at the Grace Congregational Church, 207 South Main Street, Pasadena, Texas, 77506, with respect to an issue of multifamily housing revenue bonds (the "Bonds") to be issued by the Issuer in one or more series in the aggregate amount not to exceed $57,000,000, the proceeds of which will be loaned to Vision Housing Initiative (I), L.L.C., an Internal Revenue Code Section 501(c)(3) corporation, to finance the acquisition and rehabilitation of six separate multifamily housing projects (collectively, the "Projects") located in the cities of Fort Worth, Houston and Pasadena, Texas. The public hearing, which is the subject of this notice, will concern the Vista del Sol Apartments containing 264 units, located at 701 South Avenue, Pasadena, Texas 77503. The Projects will be owned by Vision Housing Initiative (I), L.L.C.

All interested parties are invited to attend such public hearing to express their views with respect to the Project and the issuance of the Bonds. Questions or request for additional information may be direct to Daniel C. Owen at the Texas State Affordable Housing Corporation, 1715 West 35th Street, Austin, Texas 78703; 1-888-638-3555 ext. 404.

Persons who intend to appear at the hearing and express their views are invited to contact Daniel C. Owen in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Daniel C. Owen prior to the date scheduled for the hearing.

Individuals who require auxiliary aids in order to attend this meeting should contact Glenda Houchin David, ADA Responsible Employee, at 1-888-638-3555, ext.417 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals who require child care to be provided at this meeting should contact Glenda Houchin David at 1-888-638-3555, ext. 417, at least five days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to Daniel Owen at dowen@tsahc.com.

TRD-200101513
Daniel C. Owen
Vice President
Texas State Affordable Housing Corporation
Filed: March 14, 2001

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Houston-Galveston Area Council

Request for Information

The Houston-Galveston Area Council (H-GAC) solicits a qualified organization to provide an Interactive Voice Response (IVR) or similar system for The Worksource - Gulf Coast Careers. The Gulf Coast workforce system serves businesses and residents in the 13-county Gulf Coast region of Southwest Texas, which includes the City of Houston at its core. The contiguous counties that make up the region include Austin, Brazoria, Chambers, Colorado, Fort Bend, Galveston, Harris, Liberty, Matagorda, Montgomery, Walker, Waller and Wharton. Prospective proposers may obtain a copy of the Request for Information by contacting Carol Kimmick at 713.993.4522 or by sending email to ckimmick@hgac.cog.tx.us. The Request for Information may also be downloaded at http://www.gulfcoastcareers.org. Responses are due at H-GAC offices by 12:00 noon on Friday, March 23, 2001. Late responses will not be accepted. There will be no exceptions.

TRD-200101487
Jack Steele
Executive Director
Houston-Galveston Area Council
Filed: March 12, 2001

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Request for Proposals

Houston-Galveston Area Council of Governments (H-GAC) seeks sealed proposals for the procurement of printed materials for Workforce System funded by H-GAC. Part 1 includes brochures, mailers, folders and information sheets. Part 2 includes business cards, letterhead, envelopes, and labels. Online ordering system capability desired. Proposal Specifications are numbered: RFP-0301. The deadline for submitting proposals will be Friday March 23, 2001 at 5:00 p.m. CST. The RFP can be obtained by calling buyer Greg Cruthirds at (713) 993-4591 or access web site www.hgac.cog.tx.us

TRD-200101488
Jack Steele
Executive Director
Houston-Galveston Area Council
Filed: March 12, 2001

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Texas Department of Human Services

Family Violence Program Announcement of Availability of Funds

The Texas Department of Human Services (DHS) Family Violence Program announces the availability of funds not to exceed $1,300,000 to provide nonresidential services which promote self sufficiency and independence for domestic violence victims, pursuant to the Family Violence Prevention and Services Act, US Department of Health and Human Services.

Funds will be awarded on a competitive basis to eligible nonprofit applicants who best demonstrate the ability to efficiently deliver services to domestic violence victims in Texas, as outlined in the Request for Proposals. Each proposal will be reviewed and rated by a committee on a scale of 100 points. It is intended that a minimum of one proposal will be selected from each of the 11 DHS regions; however, awards will be made only to those proposals receiving a score of 85 points or above. Awards for the initial contracts will be funded at a maximum of $100,000 each. Based on performance and availability of federal funds, the department intends to renew the contracts with maximum funding levels for Year 2 of $75,000, and Year 3 of $50,000.

Historically Underutilized Businesses, Minority Businesses and Women's Enterprises and Small Businesses who qualify are encouraged to apply. Additional eligibility qualifications are outlined in the Request for Proposals.

Applicant agencies currently operating under contract with DHS to provide family violence services may not apply for funds under this announcement for the purpose of funding **existing** services. Such applicant agencies must propose to initiate new, expanded, and/or innovative services which meet an unmet need as specified in the Request for Proposals.

The initial contract period for this announcement is September 1, 2001 to August 31, 2002. All proposals must be received at DHS by 5:00 p.m. C.S.T. on **May 4, 2001**.

The Request for Proposal described in this announcement may be obtained through the DHS web site at http://www.dhs.state.tx.us/providers/business/index.html, or by contacting Karen Parker, Family Violence Program Coordinator, Texas Department of Human Services, PO Box 149030, Mail Code W-230, Austin, Texas 78714-0930 through written request, email to karen.parker@dhs.state.tx.us, fax (512) 438-5538, or phone (512) 438- 2239.

TRD-200101490
Paul Leche
General Counsel
Texas Department of Human Services
Filed: March 13, 2001

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Texas Department of Insurance

Insurer Services

Application for incorporation in the State of Texas by HOMESITE LLOYD'S OF TEXAS, a domestic lloyds company. The home office is in Austin, Texas.

Application to change the name of WISCONSIN NATIONAL LIFE INSURANCE COMPANY to HUMANADENTAL INSURANCE COMPANY, a foreign life company. The home office is in De Pere, Wisconsin.

Any objections must be filed with the Texas Department of Insurance, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200101510
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: March 14, 2001

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Notice of Public Hearing

The Commissioner of Insurance, at a public hearing under Docket No. 2484 scheduled for April 26, 2001 at 9:30 a.m., in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, will consider a proposal made in a staff petition. Staff's petition seeks amendment of the Texas Automobile Rules and Rating Manual (the Manual), to adopt new and/or adjusted 2001 model Private Passenger Automobile Physical Damage Rating Symbols and revised identification information. Staff's petition (Ref. No. A-0301-03-I), was filed on March 8, 2001.

The new and/or adjusted symbols for the Manual's Symbols and Identification Section reflect data compiled on damageability, repairability, and other relevant loss factors for the listed 2001 model vehicles.

A copy of the petition, including an exhibit with the full text of the proposed amendments to the Manual is available for review in the office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas. For further information or to request copies of the petition, please contact Angie Arizpe at (512) 463-6326; refer to (Ref. No. A-0301-03-I).

Comments on the proposed changes must be submitted in writing within 30 days after publication of the proposal in the Texas Register, to the Office of the Chief Clerk, Texas Department of Insurance, P. O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of comments is to be submitted to Marilyn Hamilton, Associate Commissioner, Property & Casualty Program, Texas Department of Insurance, P. O. Box 149104, MC 104-PC, Austin, Texas 78714-9104.

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Government Code, Chapter 2001 (Administrative Procedure Act).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

TRD-200101420
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: March 9, 2001

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for incorporation in Texas of Global Benefit Solutions, Inc., a domestic third party administrator. The home office is Austin, Texas.

Application for admission to Texas of New England Benefit Companies, a foreign third party administrator. The home office is Warwick, Rhode Island.

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-200101506
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: March 14, 2001

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Texas Natural Resource Conservation Commission

Enforcement Orders

An agreed order was entered regarding THE NEW JATS CORPORATION DBA GRAHAM FOOD MARKET AND LAUNDRYMAT, Docket No. 1999-0445-PST-E on February 24, 2001 assessing $8,750 in administrative penalties with $7,750 deferred.

Information concerning any aspect of this order may be obtained by contacting REBECCA PETTY, Staff Attorney at (512)239-1738, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF BRENHAM, Docket No. 2000-0483- MSW-E on February 24, 2001 assessing $1,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting BILL DAVIS, Enforcement Coordinator at (512)239-6793, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding 7HC CORPORATION, Docket No. 2000-0878- AIR-E on February 24, 2001 assessing $3,000 in administrative penalties with $600 deferred.

Information concerning any aspect of this order may be obtained by contacting STACEY YOUNG, Enforcement Coordinator at (512)239-1899, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CHEVRON U.S.A., INCORPORATED, Docket No. 2000-0745-AIR-E on February 24, 2001 assessing $102,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting STACEY YOUNG, Enforcement Coordinator at (512)239-1899, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CROSS TIMBERS OPERATING COMPANY, Docket No. 2000-0751-AIR-E on February 24, 2001 assessing $3,750 in administrative penalties with $750 deferred.

Information concerning any aspect of this order may be obtained by contacting TONI TOLIVER, SEP Coordinator at (512)239-6122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding FORMOSA HYDROCARBONS COMPANY, INC., Docket No. 2000-0816-AIR-E on February 24, 2001 assessing $5,500 in administrative penalties with $1,100 deferred.

Information concerning any aspect of this order may be obtained by contacting GARY MCDONALD, Enforcement Coordinator at (361)825-3122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MURMER, INCORPORATED, Docket No. 2000-0692-IHW-E on February 24, 2001 assessing $5,500 in administrative penalties with $1,100 deferred.

Information concerning any aspect of this order may be obtained by contacting CATHERINE SHERMAN, Enforcement Coordinator at (713)767-3624, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding EDDIE LEE COPES, Docket No. 1999-1408- OSS-E on February 24, 2001 assessing $2,188 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting VICTOR SIMONDS, Staff Attorney at (512)239-6201, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An default order was entered regarding CHARLES R. MCKINNEY DBA MCKINNEY'S SHELL STATION, Docket No. 2000-0124-PST-E on February 24, 2001 assessing $6,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting VICTOR SIMONDS, Staff Attorney at (512)239-6201, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding BOBBY D. HAMILTON DBA TEXAS GULF CONSTRUCTION COMPANY, Docket No. 1999-1338-OSI-E on February 24, 2001 assessing $875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting REBECCA PETTY, Staff Attorney at (512)239-1738, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding ALLEN WATTS DBA LAGO VISTA UTILITY, Docket No. 1998-1105-PWS-E on February 24, 2001 assessing $3,906 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting VICTOR SIMONDS, Staff Attorney at (512)239-6201, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MOSCOW WATER SUPPLY CORPORATION, Docket No. 2000-0092-MLM-E on February 24, 2001 assessing $7,663 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting TONI TOLIVER, SEP Coordinator at (512)239-6122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF PLAINVIEW, Docket No. 2000- 0893-MSW-E on February 24, 2001 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting SUSAN JOHNSON, Enforcement Coordinator at (512)239-2555, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF PERRYTON, Docket No. 2000-0926- MSW-E on February 24, 2001 assessing $900 in administrative penalties with $180 deferred.

Information concerning any aspect of this order may be obtained by contacting KENT HEATH, Enforcement Coordinator at (512)239-4575, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding T REX CONSULTING, INC., Docket No. 2000-0649-MSW-E on February 24, 2001 assessing $3,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting JAYME BROWN, Enforcement Coordinator at (512)239-1683, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF ALICE, Docket No. 2000-0500- MSW-E on February 24, 2001 assessing $1,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting TONI TOLIVER, SEP Coordinator at (512)239-6122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ALBERT H. KORENEK DBA COUNTRY OAKS ARBOR MHP, Docket No. 2000-0723-MWD-E on February 24, 2001 assessing $900 in administrative penalties with $180 deferred.

Information concerning any aspect of this order may be obtained by contacting ERIKA FAIR, Enforcement Coordinator at (512)239-6673, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF GRAND SALINE, Docket No. 2000- 0682-MWD-E on February 24, 2001 assessing $1,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting TERRY MURPHY, Enforcement Coordinator at (512)239-5025, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding RICHEY ROAD MUD, Docket No. 2000-0404- MWD-E on February 24, 2001 assessing $3,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting TONI TOLIVER, SEP Coordinator at (512)239-6122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding FORT BEND COUNTY WCID NO. 2, Docket No. 2000-1006-MWD-E on February 24, 2001 assessing $7,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting JOHN MEAD, Enforcement Coordinator at (512)239-6010, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF CORPUS CHRISTI, Docket No. 2000-0301-MWD-E on February 24, 2001 assessing $31,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting TONI TOLIVER, SEP Coordinator at (512)239-6122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding NAMU CORPORATION DBA QUICK STOP, Docket No. 2000-0581-PST-E on February 24, 2001 assessing $3,500 in administrative penalties with $700 deferred.

Information concerning any aspect of this order may be obtained by contacting THOMAS GREIMEL, Enforcement Coordinator at (512)239-5690, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MR. TADDESE FEREDE DBA MOBIL #12- QDO, Docket No. 2000-0909-PST-E on February 24, 2001 assessing $6,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting WENDY COOPER, Enforcement Coordinator at (817)588-5867, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MINH-HUNG LAM DBA MATHIS COUNTRY MARKET AND INNPAC ASSOCIATES, L.L.C., Docket No. 2000-0561-PST-E on February 24, 2001 assessing $8,500 in administrative penalties with $1,700 deferred.

Information concerning any aspect of this order may be obtained by contacting AUDRA BAUMGARTNER, Enforcement Coordinator at (361)825-3312, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF CANTON, Docket No. 2000-0700- PST-E on February 24, 2001 assessing $9,000 in administrative penalties with $1,800 deferred.

Information concerning any aspect of this order may be obtained by contacting TONI TOLIVER, SEP Coordinator at (512)239-6122, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF LAWN, Docket No. 2000-0727-PWS- E on February 24, 2001 assessing $313 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting KARA DUDASH, Enforcement Coordinator at (915)698-9674, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding TOWN & COUNTRY FOOD STORES, INC., Docket No. 2000-0946-PWS-E on February 24, 2001 assessing $100 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting GARY SHIPP, Enforcement Coordinator at (806)796-7092, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding FLAMINGO LAKES LOT OWNERS ASSOCIATION DBA FLAMINGO LAKES WATER SYSTEM, Docket No. 2000-1096- PWS-E on February 24, 2001 assessing $313 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting GARY SHIPP, Enforcement Coordinator at (806)796-7092, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CITY OF BIG SANDY, Docket No. 2000-0966- PWS-E on February 24, 2001 assessing $313 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting SANDY VANCLEAVE, Enforcement Coordinator at (512)239-0667, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding HAROLD BRICE DBA AMISTAD WATER SYSTEM, Docket No. 1999-0987-PWS-E on February 24, 2001 assessing $2,813 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting VICTOR SIMONDS, Staff Attorney at (512)239-6201, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding DANNY VISCONTI DBA DFW AUTO SALES, Docket No. 1999-1227-AIR-E on February 24, 2001 assessing $500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting REBECCA PETTY, Staff Attorney at (512)239-3400, Texas Natural Resource Conservation Commission, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200101383
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: March 7, 2001

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Notice of Public Comment and Hearing

The Texas Natural Resource Conservation Commission (commission or TNRCC), under Title 30 TAC Chapter 122 (30 TAC Chapter 122), is providing an opportunity for public comment and a notice and comment hearing (hearing), if one is requested, in order to receive testimony concerning the draft Compliance Assurance Monitoring (CAM) General Operating Permit (GOP) No. 2 and the Periodic Monitoring GOP No. 2.

The Operating Permit Program under 30 TAC Chapter 122 provides a compliance and enforcement tool by codifying all applicable air regulatory requirements for a specific site (major sources, and non-major sources as designated by the United States Environmental Protection Agency) into an operating permit. The CAM and periodic monitoring are types of monitoring required by 30 TAC Chapter 122 for various emission units. Draft CAM GOP No. 2 and draft Periodic Monitoring GOP No. 2 contain monitoring options that are designed to satisfy 30 TAC Chapter 122. Permit holders will be able to use these monitoring options to comply with 30 TAC Chapter 122 CAM and periodic monitoring requirements. If use of a monitoring option is approved by the executive director, the monitoring option will be codified in the permit or enforceable GOP application for the site.

For emission units affected, draft CAM GOP No. 2 and draft Periodic Monitoring GOP No. 2 contain monitoring options for emission limitations and standards regulating the following source categories: storage tanks (Title 40 Code of Federal Regulations (CFR) Part 60, Subpart K, Ka and Kb; Title 40 CFR Part 61, Subpart Y; 30 TAC §§115.112 - 115.119; 30 TAC §111.111(a)(4)(A)); loading/unloading (40 CFR 60, Subpart XX; 40 CFR 61, Subpart B; 30 TAC §111.111(a)(4)(A), 30 TAC §§115.211 - 115.219 and 30 TAC §§115.541 - 115.549); organic solvents (degreasing) (30 TAC §111.111(a)(4)(A) and 30 TAC §§115.412 - 115.419); vent gas (30 TAC §111.111(a)(4)(A) and 30 TAC §§115.121 - 115.129); water separators (30 TAC §111.111(a)(4)(A) and 30 TAC §§115.131 - 115.139); gas sweetening (30 TAC §111.111(a)(4)(A) and 30 TAC §112.7).

Draft CAM GOP No. 2 and draft Periodic Monitoring GOP No. 2 are subject to the procedural requirements of 30 TAC Chapter 122, which include a 30-day public comment period with an opportunity to request a hearing. Any person who may be affected by the emission of air pollutants from emission units that may be authorized to operate under draft CAM GOP No. 2 or draft Periodic Monitoring GOP No. 2 is entitled to request, in writing, a hearing on the relevant draft GOP during the 30-day public notice comment period. If requesting a hearing, please indicate the draft GOP for which the hearing is requested.

If requested, a hearing will be held in Austin on April 27, 2001, in Building F, Room 2210, at 2:00 p.m., at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not occur during the hearing; however, a TNRCC staff member will be available to discuss the draft GOPs 30 minutes prior to the hearing and will also answer questions after the hearing.

Copies of the draft GOPs may be obtained from the commission's Web Site at *http://www.tnrcc.state.tx.us/permitting/airperm/index.html#oppermits* or by contacting the Texas Natural Resource Conservation Commission, Office of Permitting, Remediation and Registration, Air Permits Division at (512) 239-1334. Comments or hearing requests may be mailed to Mr. Bruce McFarland, Texas Natural Resource Conservation Commission, Office of Permitting, Remediation and Registration, Air Permits Division, MC 163, P.O. Box 13087, Austin, Texas 78711- 3087 or faxed to (512) 239-1070. All comments or hearing requests should reference draft CAM GOP No. 2 or Periodic Monitoring GOP No. 2, as appropriate. Comments must be received by 5:00 p.m., April 23, 2001. To inquire about the submittal of comments, to find out if a hearing will be held, or for further information, contact Mr. Bruce McFarland with the Office of Permitting, Remediation and Registration, Air Permits Division, at (512) 239-1132.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4900. Persons with hearing impairment may call 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

TRD-200101501
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: March 13, 2001

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Notice of Revised Water District Applications

The Texas Natural Resource Conservation Commission (TNRCC) will conduct a hearing on a petition for dissolution of Harris County Municipal Utility District No. 324 (District) The petition was signed by Robert M. Allen, managing partner of Yaupon Ranch, L.L.C., a Texas Limited Liability Company, being the owner of a majority of the property located within the District (Petitioner). The TNRCC will conduct this hearing under the authority of Chapters 49 and 54 of the Texas Water Code, 30 Texas Administrative Code Chapter 293 and the procedural rules of the TNRCC. The TNRCC will conduct the hearing at: 9:30 a.m., Wednesday, May 2, 2001 Building E, Room 201S 12100 Park 35 Circle Austin, Texas . On June 3, 1987, the Texas Water Commission created the District. It operates under Texas Water Code Chapters 49 and 54 as a municipal utility district. The Petitioner states the dissolution is desirable since an adjacent district has expressed a willingness to annex the Petitioner's land and provide it with utility service. The petition states the District: (1) has performed none of the functions for which it was created for five consecutive years proceeding the date of the petition, (2) is financially dormant, and (3) has no outstanding bonded indebtedness. Certified copies of the Annual Financial Dormancy and Filing Affidavits for the years 1994 through 1996 and evidence on nonfiling for 1997 and 1998 are on file. An affidavit from the State Comptroller of Public Accounts has been included in the petition, certifying that the District has no bonded indebtedness. If the request for dissolution is approved, the District's assets, if any, will escheat to the State of Texas and will be administered by the State Comptroller of Public Accounts and disposed of in the manner provided by Chapter 74, Property Code.

The TNRCC may grant a contested case hearing on this application if a written hearing request is filed within 30 days after the newspaper publication of this notice. The Executive Director may approve the application unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the applicant and the TNRCC Internal Control Number; (3) the statement "I/we request a contested case hearing"; and (4) a brief description of how you would be affected by the granting of the request in a way not common to the general public. You may also submit your proposed adjustments to the application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TNRCC Office of the Chief Clerk at the address provided in the information section below. If a hearing request is filed, the Executive Director will not 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 contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court.

Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087. For information concerning hearing process, contact the Public Interest Counsel, MC 103, the same address. For additional information, individual members of the general public may contact the Office of Public Assistance, at 1-800-687-4040. General information regarding the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

TRD-200101381

LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: March 7, 2001

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Notice of Revised Water District Applications

The Texas Natural Resource Conservation Commission (TNRCC) will conduct a hearing on a petition for dissolution of Harris County Municipal Utility District No. 324 (District) The petition was signed by Robert M. Allen, managing partner of Yaupon Ranch, L.L.C., a Texas Limited Liability Company, being the owner of a majority of the property located within the District (Petitioner). The TNRCC will conduct this hearing under the authority of Chapters 49 and 54 of the Texas Water Code, 30 Texas Administrative Code Chapter 293 and the procedural rules of the TNRCC. The TNRCC will conduct the hearing at: 9:30 a.m., Wednesday, May 9 , 2001 Building E, Room 201S 12100 Park 35 Circle Austin, Texas . On June 3, 1987, the Texas Water Commission created the District. It operates under Texas Water Code Chapters 49 and 54 as a municipal utility district. The Petitioner states the dissolution is desirable since an adjacent district has expressed a willingness to annex the Petitioner's land and provide it with utility service. The petition states the District: (1) has performed none of the functions for which it was created for five consecutive years proceeding the date of the petition, (2) is financially dormant, and (3) has no outstanding bonded indebtedness. Certified copies of the Annual Financial Dormancy and Filing Affidavits for the years 1994 through 1996 and evidence on nonfiling for 1997 and 1998 are on file. An affidavit from the State Comptroller of Public Accounts has been included in the petition, certifying that the District has no bonded indebtedness. If the request for dissolution is approved, the District's assets, if any, will escheat to the State of Texas and will be administered by the State Comptroller of Public Accounts and disposed of in the manner provided by Chapter 74, Property Code.

The TNRCC may grant a contested case hearing on this application if a written hearing request is filed within 30 days after the newspaper publication of this notice. The Executive Director may approve the application unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the applicant and the TNRCC Internal Control Number; (3) the statement "I/we request a contested case hearing"; and (4) a brief description of how you would be affected by the granting of the request in a way not common to the general public. You may also submit your proposed adjustments to the application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TNRCC Office of the Chief Clerk at the address provided in the information section below. If a hearing request is filed, the Executive Director will not 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 contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court.

Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087. For information concerning hearing process, contact the Public Interest Counsel, MC 103, the same address. For additional information, individual members of the general public may contact the Office of Public Assistance, at 1-800-687-4040. General information regarding the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

TRD-200101491
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: March 13, 2001

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Notice of Water Rights Applications

LLOYD E. AND BETTY LEIFESTE,1294 Bandera Highway, Kerrville, Texas, 78028, applicants, seek an amendment to Certificate of Adjudication No. 12-3775 pursuant to §11.122, Texas Water Code, and Texas Natural Resource Conservation Commission Rules 30 TAC § 295.1, et seq. Lloyd E. and Betty Leifeste, have acquired a portion of Certificate of Adjudication No. 12-3775 which authorizes owners to divert and use not to exceed 577.66 acre-feet of water per annum from the Little River, tributary of the Brazos River, Brazos River Basin, Milam County, for irrigation of 276.03 acres of land out of 540.17 acres out of a 581.604 acre-tract and a 187.401 acre-tract. The aforesaid acreage for irrigation is located in the Leander Harl Survey, Abstract No. 194, the James Montgomery Survey, Abstract No. 259, and the W. D. Thompson Survey, Abstract No. 363 in Milam County, Texas. The authorized diversion rate is 2.42 cfs (1090 gpm) and has a time priority of April 10, 1960. Lloyd E. and Betty Leifeste seek to amend Certificate of Adjudication No. 3775 by adding 264.14 acres of land for irrigation to the aforesaid 276.03 acres being a total of 540.17 acres located in the Leander Harl Survey, Abstract No. 194, the James Montgomery Survey, Abstract No. 259, the W. D. Thompson Survey, Abstract No. 363, and the A. G. Perry Survey, Abstract No. 44. The additional acreage for irrigation is located nearby and connected to a portion of the existing irrigated land by an easement for water transportation; and immediately adjacent to another portion of the existing irrigated land. Applicants also seek to divert and use not to exceed an additional 500 acre-feet of water per annum at a maximum combined rate of 6.3 cfs (2830 gpm) to irrigate the aforesaid 540.17 acres and to add two diversion points to anywhere on the applicant's property between Latitude 30.864° N, Longitude 96.800° W and Latitude 30.855° N, Longitude 96.804° W adjoining the Little River in Milam County, Texas.

STONEBRIAR COUNTRY CLUB JOINT VENTURE, 5050 Country Club Drive, Frisco, Texas 75304, applicant seeks a permit pursuant to §§11.121 and 11.042 of the Texas Water Code, and Texas Natural Resource Conservation Commission Rules 30 TAC §§ 295.1, et seq. The Executive Director recommends that mailed and published public notice of the application be given pursuant to 30 TAC §295.151 to all the water rights owners in the Trinity River Basin. Pursuant to a compliance agreement with the Texas Natural Resource Conservation Commission (TNRCC) dated January 15, 2000, Stonebriar Country Club Joint Venture, applicant, seeks authorization to maintain three (3) existing on-channel reservoirs (Lakes 2, 3 and 4) located on an unnamed tributary of Stewart Creek, tributary of Elm Fork Trinity River, tributary of the Trinity River, Trinity River Basin and impound therein a combined total of 31.68 acre-feet of contract water and/or reclaimed water. These on-channel reservoirs are designed to pass-through state water which the applicant is not authorized to impound. Applicant further seeks to use the bed and banks of the unnamed tributary of Stewart Creek to convey private water from an off- channel reservoir (Lake No. 1) through Lake No. 2 and Lake No. 3 to Lake No. 4 for reservoir operating level maintenance and irrigation. A maximum of 405 acre-feet of private water per annum, consisting of a combination of treatment plant effluent from the City of Colony (or another municipality) and discharged directly into Lake No. 1 and raw water contracted from the City of Dallas, will be diverted from the perimeter of Lake No. 4 at a maximum rate of 4.46 cfs (2,000gpm), for irrigation of 336 acres out an 836 acre tract in the W.A. Bridges Survey, Abstract 113, 18.3 miles southeast of Denton in Denton County, Texas. Ownership of the property to be irrigated is evidenced by documents filed in Volume 1926, page 118 of the official deed records of Denton County. The center points on the dams at Stonebriar are located from the southwest corner of the aforesaid survey as follows: 1. Off-Channel Reservoir 1 - N 78.80°E, 2,245 feet, Latitude 33.09°N, Longitude 96.85°W, 2. Station 1+46 on Reservoir 2 - N 23.52°E, 2,077 feet, Latitude 33.085°N, Longitude 96.846°W, 3. Station 0+38 on Reservoir 3- N 63.41°E, 1,671 feet, Latitude 33.094°N, Longitude 96.848°W, 4. Station 0+98 on Reservoir 4 - N 28.072°E, 1,038 feet, Latitude 33.094°N, Longitude 96.850°W. No appropriation or diversion of state water is being requested by this application. Applicant has indicated that all reservoirs will be maintained at operating level using either contract water from the City of Dallas or wastewater treatment plant effluent from the City of Colony or another municipality. State water to which the applicant is not entitled will be passed downstream. The permit, if issued, will be valid only as long as the contracts with the City of Dallas and/or the City of Colony's, (or another municipal), wastewater treatment plant are in effect.

Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below by March 14, 2001. A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application.

The TNRCC may grant a contested case hearing on this application if a written hearing request is filed by March 14, 2001. The Executive Director can consider an approval of the application unless a written request for a contested case hearing is filed by March 14, 2001. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" (4) a brief and specific description of how you would be affected by the application in a way not common to the general public; and (5) the location and distance of your property relative to the proposed activity. You may also submit any proposed conditions to the requested amendment which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TNRCC Office of the Chief Clerk at the address provided in the information section below. If a hearing request is filed, the Executive Director will not issue the requested amendment and may forward the application and hearing request to the TNRCC Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TNRCC, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103 at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

TRD-200101382
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: March 7, 2001

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Public Notice

In accordance with Texas Health and Safety Code, §361.1855, the executive director of the Texas Natural Resource Conservation Commission (TNRCC) has issued a public notice of the determination of proposed non- residential future land use for the Hall Street State Superfund Site, located at the northeast corner of the intersection of California Avenue and 20th Street, Dickinson, Galveston County.

Future land use determination will subsequently impact the remedial investigation and remedial action for the site. Consequently, the TNRCC will hold a public meeting to obtain comments on the proposed future land use and take comments on the facility before completing the remedial investigation and evaluating remedial actions for the site. The public meeting will be held in the Council Chambers of Dickinson City Hall, located at 2716 Main Street, Dickinson, Texas on Thursday, April 26, 2001, at 7:00 p.m. This public meeting will not be a contested case hearing under the Administrative Procedure Act (Texas Government Code, Chapter 2001). After the subject meeting is held and future land use has been determined, a human health risk assessment, ecological risk assessment, and a feasibility study, or similar study, will be performed to evaluate various remedial action proposals. The TNRCC will then propose a selected remedy and hold another public meeting pursuant to Texas Health and Safety Code, §361.187.

The Hall Street Site was proposed in the July 25, 1986 issue of the *Texas Register* (11 TexReg 3421) for listing on the state Superfund registry.

During the late 1950s, the site was used for the unpermitted disposal of wastes. Investigations to determine the nature and extent of contamination were performed from June 1995 through August 2000. Arsenic and dibenzo(a,h)anthracene were detected at levels exceeding safe levels for soil exposure; however, the contamination is within the fenced area of the site, and exposure is unlikely.

Several metals, volatile organic compounds, and semivolatile organic compounds were detected exceeding the acceptable risk levels for soil leaching to groundwater, which have the potential to leach from the soil to groundwater. These compounds are not directly a risk to human health.

Contaminants in shallow groundwater include 1,4-dichlorobenzene, 4-chloroaniline, benzene, chlorobenzene, 1,2-dichlorobenzene, and lead.

The most recent use of the site was for non-residential purposes; therefore, the TNRCC is proposing a non- residential (industrial) future land use determination for consideration in implementing the human health risk, ecological risk assessment, and feasibility study.

All persons desiring to make comments may do so prior to or at the public meeting. All comments submitted prior to the public meeting should be sent to Mr. Dan Switek, TNRCC Remediation Division, MC-143, P.O. Box 13087, Austin, Texas 78711-3087. A portion of the public records for this site are available for public review during regular business hours at the Mares Memorial Library, 4324 Highway 3, Dickinson, Texas, or at the TNRCC Records Management Center, Building D, 12100 North Interstate Highway 35, Austin, Texas 78753, (512) 239-2920 or (800) 633-9363. Copying of file information is subject to payment of a fee. For further information, please call (800) 633-9363 or (512) 239-2141.

TRD-200101421
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: March 9, 2001

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Public Utility Commission of Texas

Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On March 6, 2001, ARBROS Communications Licensing Company Texas, L.L.C. 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 60432. Applicant intends to transfer majority ownership and control of Comm South Companies, Inc. to ARBROS Communications, Inc.

The Application: Application of ARBROS Communications Licensing Company Texas, L.L.C. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 23788.

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 Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326 no later than March 28, 2001. You may contact the commission's Customer Protection Division at (512) 936-7120. Hearing and speech- impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7003. All correspondence should refer to Docket Number 23788.

TRD-200101447
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 9, 2001

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Notice of Application for Waiver to Requirements in P.U.C. Substantive Rule §25.236

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on February 27, 2001, for waiver of certain requirements of P.U.C. Substantive Rule §25.236, Recovery of Fuel Costs.

Docket Title and Number: Application of Central Power and Light Company (CPL) to Defer Fuel Reconciliation Filing Schedule Contained in P.U.C. Substantive Rule §25.236(b). Docket Number 23743.

The Application: Pursuant to P.U.C. Substantive Rule §25.3, CPL seeks a good cause waiver of the standard filing schedule for fuel reconciliations contained in P.U.C. Substantive Rule §25.236(b). The rule provides 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 not later than six months after the end of the period to be reconciled. In accordance with the current rule schedule, CPL asserts it must file a fuel reconciliation no later than December 31, 2001 for the three-year reconciliation period ending June 30, 2001. CPL seeks a good cause waiver to file a single fuel reconciliation for a forty-two month reconciliation period ending December 31, 2001. CPL requests that the commission find good cause to waive the standard filing schedule and authorize CPL to defer its next fuel reconciliation filing until its final fuel reconciliation filing made pursuant to §39.202(c) of the Public Utility Regulatory Act.

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 Public Utility Commission Customer Protection Division at (512) 936-7120. Hearing and speech- impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All comments should reference Docket Number 23743.

TRD-200101494
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 13, 2001

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Notice of Application for Waiver to Requirements in P.U.C. Substantive Rule §25.381

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on March 5, 2001, for waiver of certain requirements of P.U.C. Substantive Rule §25.381, Capacity Auctions.

Docket Title and Number: Application of Southwestern Public Service Company (SPS) for Good Cause Exception to P.U.C. Substantive Rule §25. 381(e)(3). Docket Number 23786.

The Application: Pursuant to P.U.C. Substantive Rule §25.3, SPS requests the commission to grant it a good cause waiver to the filing requirements of P.U.C. Substantive Rule §25.381(e)(3) in light of pending legislation in Texas and New Mexico that would directly impact SPS. SPS states that there is now pending in Texas and New Mexico, legislation amending restructuring laws that would significantly effect SPS's ability to file a plan for its capacity entitlement auction in Texas. SPS seeks to delay the filing of its Capacity Entitlement Auction Plan until the end of the current Texas legislative session.

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 Public Utility Commission Customer Protection Division at (512) 936-7120. Hearing and speech- impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All comments should reference Docket Number 23786.

TRD-200101496
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 13, 2001

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Notice of Application for Waiver to Requirements in P.U.C. Substantive Rule §26.25

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on February 28, 2001, for waiver of certain requirements of P.U.C. Substantive Rule §26.25, Issuance and Format of Bills.

Docket Title and Number: Application of Southwestern Bell Telephone Company (SWBT) for Temporary Waiver Regarding Certain Provisions of the Bill Formatting Requirements in P.U.C. Substantive Rule §26.25. Docket Number 23754.

The Application: Pursuant to P.U.C. Substantive Rule §26.3, SWBT seeks a good cause waiver from February 15, 2001 to August 15, 2001 to complete all the programming changes required to implement the new bill format and to bring its bills into full compliance with P.U.C. Substantive Rule §26.25. In an attachment to the application, SWBT provides a timeline to describe the numerous meetings SWBT has had with commission staff since October 1999, in a joint effort to ensure that SWBT's bills comply with P.U.C. Substantive Rule §26.25. SWBT states that it was not able to complete all the changes that SWBT felt, based upon discussions with and feedback from staff on September 22, 2000, would bring its bills into compliance by February 15, 2001. SWBT states it will be able to complete those changes by April 15, 2001.

Based on staff's further requests of October 4, November 9, November 14, 2000, February 1, February 8, and February 15,2001, SWBT is making additional changes. SWBT states that it is expeditiously working to complete staff's suggestions as soon as possible, however, SWBT will not be able to complete all the programming changes until August 15, 2001.

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 Public Utility Commission Customer Protection Division at (512) 936-7120. Hearing and speech- impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All comments should reference Docket Number 23754.

TRD-200101495
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 13, 2001

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Notice of Application to Amend Certificate of Convenience

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application, filed on February 6, 2001, to amend a certificate of convenience pursuant to P.U.C. Substantive Rule §26.101(b)(4). A summary of the application follows.

Docket Style and Number: Application of Southwestern Bell Telephone Company (Bell) to amend a certificate of convenience and necessity within Dallas County, Texas. Docket Number 23657.

The Application: Bell seeks to realign central office boundaries to transfer approximately 40 acres from the Grand Prairie central office to the Mid Cities central office serving area in the Grand Prairie zone of the Dallas Metropolitan exchange. The area to be transferred from the Grand Prairie central office to the Mid Cities central office is currently vacant, but will be under development in the near future. Bell has identified that this realignment will allow service to be provided more efficiently and economically. No customers exist today in this area; therefore, there is no impact to customers, no change to calling scopes and no change to exchange rates. No other utility is affected by this application. Pursuant to P.U.C. Substantive Rule §26.101(b)(4), the presiding officer must enter a final order in this docket within one year of the filing of the application.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P. O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 or (888) 782-8477. Hearing and speech- impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989.

TRD-200101446
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 9, 2001

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Notice of Schedule Change for Public Hearing

The public hearing currently scheduled for April 13, 2001 in Project Number 23157, *PUC Rulemaking Proceeding to Revise PUC Transmission Rules Consistent with the New ERCOT Market Design*, is rescheduled to avoid conflict with observance of Good Friday. The new date for the public hearing on this rulemaking under Government Code §2001.029 is Monday, April 16, 2001 beginning at 9:30 a.m. in the Commissioners' Hearing Room located on the seventh floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701.

Questions concerning Project Number 23157 may be referred to Jan Bargen, Policy Development Division, (512) 936-7243. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200101485
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 12, 2001

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Public Notice of Amendment to Interconnection Agreement

On March 5, 2001, Southwestern Bell Telephone Company and ATS Telecommunications Systems, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 23784. 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 ten 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 23784. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 6, 2001, 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, P.O. Box 13326, Austin, Texas 78711-3326. You may call the commission's Customer Protection Division 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 23784.

TRD-200101481
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 12, 2001

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Public Notice of Amendment to Interconnection Agreement

On March 5, 2001, Southwestern Bell Telephone Company and Paetec Communications, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 23785. 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 ten 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 23785. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 6, 2001, 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, P.O. Box 13326, Austin, Texas 78711-3326. You may call the commission's Customer Protection Division 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 23785.

TRD-200101482
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 12, 2001

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Public Notice of Amendment to Interconnection Agreement

On March 7, 2001, Southwestern Bell Telephone Company and Covad Communications Company, collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 23803. 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 ten 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 23803. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 6, 2001, 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, P.O. Box 13326, Austin, Texas 78711-3326. You may call the commission's Customer Protection Division 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 23803.

TRD-200101484
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 12, 2001

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Public Notice of Amendment to Interconnection Agreement

On March 12, 2001, Southwestern Bell Telephone Company and Nextel of Texas, Inc., collectively referred to as applicants, filed a joint application for approval of amendment to an existing interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 23817. 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 ten 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 23817. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 11, 2001, 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, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech- impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 23817.

TRD-200101500
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 13, 2001

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Public Notice of Interconnection Agreement

On March 7, 2001, United Telephone Company of Texas, Inc., doing business as Sprint, Central Telephone Company of Texas doing business as Sprint (collectively, Sprint), and New Connects, Inc., collectively referred to as applicants, filed a joint application for approval of interconnection agreement under §252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 23795. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing ten 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 23795. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 6, 2001, 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, P.O. Box 13326, Austin, Texas 78711-3326. You may call the commission's Customer Protection Division 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 23795.

TRD-200101483
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 12, 2001

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Public Notice of Interconnection Agreement

On March 9, 2001, ClearSource, Inc. and Verizon Southwest, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 23809. The joint application and the underlying interconnection agreement is available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing ten 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 23809. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 11, 2001, 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, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech- impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 23809.

TRD-200101497
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 13, 2001

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Public Notice of Interconnection Agreement

On March 9, 2001, Trinity Valley Services, Inc. and Verizon Southwest, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 23810. The joint application and the underlying interconnection agreement is available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing ten 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 23810. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 11, 2001, 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, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech- impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 23810.

TRD-200101498
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 13, 2001

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Public Notice of Interconnection Agreement

On March 9, 2001, GCEC Technologies and Verizon Southwest, collectively referred to as applicants, filed a joint application for approval of interconnection agreement under Section 252(i) of the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapters 52 and 60 (Vernon 1998 & Supplement 2001) (PURA). The joint application has been designated Docket Number 23811. The joint application and the underlying interconnection agreement is available for public inspection at the commission's offices in Austin, Texas.

The commission must act to approve the interconnection agreement within 35 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing ten 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 23811. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by April 11, 2001, 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, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Customer Protection Division at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech- impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 23811.

TRD-200101499
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 13, 2001

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Public Notice of Joint Pre-Hearing Conference and Workshop

The Public Utility Commission of Texas will conduct a pre-hearing conference on Monday, March 26, 2001, from 9:30 a.m. to noon in the Commissioners' Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, to discuss:

1. Whether proposed Substantive Rule §25.476, relating to Labeling of Electricity with Respect to Fuel Mix and Environmental Impact, as published in the *Texas Register* on February 2, 2001 at 26 TexReg 1051, should be re- published with language that specifically allows entities other than power generation companies to issue certificates for generation assets they own; and

2. the interrelation of the proposed rule with Section 14 of the Electric Reliability Council of Texas (ERCOT) protocols.

This conference will be part of the record in Project Number 22816, *Rulemaking Proceeding to Develop Standards for the Labeling of Electricity with Respect to Fuel Mix and Emissions*, and Docket Number 23802, *Proceeding to Consider Section 14 of the ERCOT Protocols (Severed from Docket Number 22320)*.

The commission will request that a court reporter attend this pre-hearing conference. Please be advised, however, that unless one or more of the parties contact Kennedy Reporting and indicate that they wish to purchase a transcript, that request will be cancelled and the proceeding may not be transcribed by a court reporter.

Background material, as well as a copy of the proposed rule that was published in the *Texas Register* on February 2, 2001, may be found on the Internet web site for Project Number 22816, at http://www.puc.state.tx.us/rules/rulemake/22816/22816.cfm.

Questions concerning this pre-hearing conference/workshop or this notice should be referred to David Hurlbut, Policy Development Division, at (512) 936-7216. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200101493
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: March 13, 2001

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Supreme Court of Texas

Supreme Court Rules Advisory Committee Meeting

Pursuant to Supreme Court of Texas Misc. Docket Order No. 99-9167, the Supreme Court Rules Advisory Committee publishes notice of the following meeting open to the public. The Supreme Court Rules Advisory Committee will meet **March 30, 2001 at 9:00 a.m. and March 31, 2001 at 8:30 a.m. at the State Bar Building, Room 101, 1414 Colorado, Austin Texas, 78701**

The agenda for the meeting includes: (1) call to order; (2) discussion relating to previous advisory committee proposals submitted to the Supreme Court, including discussion of the status of proposals submitted to the Supreme Court relating to changes in the Texas Rules of Civil Procedure, Texas Rules of Appellate Procedure, and the Texas Parental Notification Rules; (3) reports related to proposals to amend, change, or modify the Texas Rules of Civil Procedure relating to discovery disclosures in family law cases, the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure relating to issues involving the finality of judgments; Rules 701 and 702, Texas Rules of Evidence, the Texas Rules of Civil Procedure relating to the grounds for and the method of disqualifying and recusing judges, and the Texas Rules of Civil Procedure relating to the service of citation and process; and (4) other business, including review of public comments or other proposals to amend, change, or modify the rules and procedures for the courts of the state of Texas.

Additional information related to this meeting may be obtained from Chris Griesel, Rules Attorney, at (512) 463-6645 or by e-mail at chris.griesel@courts.state.tx.us .Comments on any rule change proposal, including a rule proposal made at this meeting, may be submitted to: Rules Attorney, Supreme Court of Texas, P.O. Box 12248, Austin , Texas 78711 or by email to chris.griesel@courts.state.tx.us .

Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services or others who may need additional assistance are requested contact Chris Griesel at (512) 463-6645 at least two (2) working days before the meeting so that the appropriate arrangements may be made.

TRD-200101520
John Adams
Clerk
Supreme Court of Texas
Filed: March 14, 2001

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University of Houston

Request for Proposal

In compliance with Chapter 2254, Texas Government Code, the University of Houston furnishes this notice of request for proposals. The University of Houston, by and through its Mathematics Education Initiative, seeks to produce video programs to bolster the teaching of MOVE IT Math in the schools. These videos will be designed to support and enhance teacher use of the MOVE IT Math program in elementary and middle schools. The videos' intent will be to unlock the wonder of mathematics and mathematics teaching for both teacher and student.

To produce and coordinate the production of videos to support the teaching of MOVE IT Math. Activities to include but not be limited to the following: Provide technical assistance to MEI in order to re-package existing videos into segments with accompanying written support materials for on-going teacher training. Research, develop, and provide feedback to MEI regarding the evaluation process for examining outcomes with existing videos. Assist with meeting objectives and project criteria, ensuring technical support, and assisting with on-going development of project goals. Assist with the design analysis and review process for providing MEI elementary and middle schools with tools for contributing to the next series of videos. Provide consultation to MEI on the process and procedures for script design of 30+minute videos for teacher training. Provide consultation and technical assistance to MEI on distribution channels and processes for increased project implementation. Act as the lead in organizing MEI production meetings, scheduling, community interviews, and other staff supported endeavors. Conduct key interviews in association with MEI within various school settings to promote MEI and enhance the image of the university. Develop and prepare on-going project status reports.

RFP evaluative criteria are: (i) Demonstrated competence in creating and producing 30+ videos (with voice, music, graphics and animated graphics), (ii) Demonstrated skills in pre-productions, post-productions, graphic design, and audio sweetening, (iii) Demonstrated skill in working with elementary and middle school students and personnel, (iv) Extensive working knowledge of the MOVE IT Math program, (v) A minimum of 10 years in the video-technology field and (vi) Resume/work vitae of individual who will conduct the video production. All Intellectual property rights connected with the end product subject to this RFP will belong to the University of Houston.

Proposals for Consultant Services will be received before 8:30 a.m., April 12, 2001 and submitted to: Paul Shoecraft Lynne Shoecraft University of Houston, Mathematics Education Initiative Farish Hall, RM 466A Telephone: 713-743-5097 or 713 743-5098

TRD-200101486
Dennis P. Duffy
General Counsel
University of Houston
Filed: March 12, 2001

♦ ♦ ♦

How to Use the Texas Register

Information Available: The 13 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following a 30-day public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Open Meetings - notices of open meetings.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 26 (2001) is cited as follows: 26 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "26 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 26 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For subscription information, see the back cover or call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC)*** is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15:

1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 19, April 13, July 13, and October 12, 2001). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).

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